EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIMINAL EVIDENCE ACT (1984)

(ARMED FORCES) (AMENDMENT) ORDER

2012 No. 2505

1. This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009 (the "2009 Order") (as amended by the Police and Criminal Evidence Act 1984 (Armed Forces) (Amendment) Order 2011 (the "2011 Order")). The amendments increase by one year the time limits which apply under that Order to the retention of fingerprints, DNA samples and impressions of footwear taken by the Service police in the course of the investigation of Service offences.

2.2 The amendments provide that any such material taken from a person on or after 31 October 2009 may only be retained for up to four years from the date on which it was taken, unless during that period the person is convicted. For material taken before 31 October 2009, the four-year period runs from that date.

2.3 The purpose of these amendments is to allow the Service police to retain such material until the provisions in Chapter 1 of Part 1 of the Protection of Freedoms Act 2012 are commenced and longer term provision can then be made in respect of retention of such material by the Service police based on the limits which will apply to the civilian police under the 2012 Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 As explained in paragraph 7.2 below, the time limit which applies under the 2009 Order (as amended by the 2011 Order) to the retention of fingerprints, samples and footwear impressions taken after commencement of that Order is three years from the date on which the material was taken. For material taken before commencement of that Order, the time limit is

three years from commencement. The 2009 Order came into force on 31 October 2009. The 2011 Order, which amended the 2009 Order by increasing from two years to three years the time limits which apply under the 2009 Order to the retention of fingerprints, samples and footwear impressions, came into force on 30 October 2011. This instrument comes into force on 30 October 2012. As the time limits which apply under the 2009 Order will not run out for any material taken before or after commencement of that Order until 31 October 2012, there is no need in this instrument to deal with material in respect of which the time limit in the 2009 Order has expired.

4. Legislative Context

4.1 Part 5 of the Police and Criminal Evidence Act 1984 (the "1984 Act") is primarily concerned with the questioning and treatment of persons by the civilian police. However, section 113 of the 1984 Act (as amended by the Armed Forces Act 2006) empowers the Secretary of State to make, in relation to the investigation of offences under Armed Forces legislation, provision which is equivalent to Part 5 (subject to modifications). The Secretary of State may do so by order in relation to the investigation of Service offences, persons arrested and charged with Service offences, persons in Service custody and persons convicted of Service offences.

4.2 The 2009 Order was made in exercise of these powers. It makes provision with respect to matters including the taking of fingerprints, samples (including intimate samples), and impressions of footwear and the destruction of such material. The 2011 Order was also made in exercise of the powers conferred by section 113 of the 1984 Act. It amended the 2009 Order by increasing from two years to three years the time limits which apply under that Order to the retention of fingerprints, samples and impressions of footwear.

5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom, the Isle of Man and British overseas territories and applies to persons subject to Service law wherever they are in the world. It also applies to "civilians subject to service discipline", which means persons who are not subject to Service law but who satisfy the requirements of any paragraph of Part 1 of Schedule 15 to the Armed Forces Act 2006.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 In 2008, the European Court of Human Rights held in the case of S and Marper v UK that section 64 of the 1984 Act was in breach of article 8 of the European Convention on Human Rights. The Court objected to the fact that section 64 provides for the indefinite retention of fingerprints and DNA samples without conviction. Before the Government was able to make long-term provision in response to the Marper judgment it was necessary on 31 October 2009 to bring into force powers for the Service police in respect of the retention of such material, as an essential part of the new, comprehensive system of Service law under the Armed Forces Act 2006 (the 2006 Act also came into force on that date).

7.2 Article 15 of the 2009 Order (as amended by the 2011 Order) follows section 64 but provides that fingerprints and DNA samples taken after commencement of the Order from a person in connection with the investigation of a Service offence may only be held for up to three years from when they are taken, unless within that period the person is convicted of the Service offence. Under paragraph 17 of Schedule 2 to that Order (as amended by the 2011 Order), where fingerprints or samples were taken before commencement of the Order, the three-year period runs from that date. The aim of these provisions was to make interim provision which would be compliant with the Convention and would allow the Service police to retain material until Part 5 of the 1984 Act was amended and a further Armed Forces order produced to make generally equivalent provision in respect of the Service police.

7.3 Part 5 of the 1984 Act is to be amended by the provisions in Chapter 1 of Part 1 of the Protection of Freedoms Act 2012, which received Royal Assent on 1 May 2012. When Chapter 1 of Part 1 of the 2012 Act comes into force, the Ministry of Defence will lay a further order to make the periods for which the Service police may retain material generally equivalent to those which apply to the civilian police under the 2012 Act. However, the provisions in Chapter 1 of Part 1 of the 2012 Act are unlikely to be commenced before mid-

2013 and, from 31 October 2012, the Service police will have to begin destroying material held for more than the three year limit specified in the 2009 Order.

7.4 This instrument amends the 2009 Order to allow material taken on or after 31 October 2009 to be retained for up to four years from the date on which it was taken, unless during that period the person is convicted. For material taken before 31 October 2009, the four-year period runs from that date.

7.5 This increase is an interim measure to allow the Service police to retain material until Chapter 1 of Part 1 of the Protection of Freedoms Act 2012 is commenced and a further Armed Forces order produced to make the periods for which the Service police may retain material generally equivalent to those which apply to the civilian police under the 2012 Act.

7.6 The 2011 Order, which came into force on 30 October 2011, amended the 2009 Order by increasing from two years to three years the time limits which apply under the 2009 Order to the retention of fingerprints, samples and impressions of footwear. That increase was an interim measure to allow the Service police to retain material for what was considered to be a sufficient period of time for the Protection of Freedoms Bill, which was then before Parliament, to come into force and a further Armed Forces order to be produced to make the periods for which the Service police could retain material generally equivalent to those which would apply to the civilian police under the new Act.

8. Consultation outcome

8.1 The 2009 Order was the subject of rigorous consultation with the Services and the Service police. This instrument has been the subject of further consultation with the Services and the Service police.

9. Guidance

9.1 The Service Police Code of Practice, issued by the Secretary of State under Section 113(3) of the 1984 Act, provides guidance and supplementary information to Armed Forces personnel (including the Service police) regarding the retention of fingerprints, DNA samples and impressions of footwear taken by the Service police in the course of the investigation of Service offences. The provisions of the 2009 Order and of this Code are designed to ensure

that fingerprints, samples and impressions of footwear are taken, used and retained only when justified and necessary for preventing, detecting or investigating crime.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 This instrument will be kept under close review in response to the work of the Home Office towards bringing into force the changes made to the Police and Criminal Evidence Act 1984 by the Protection of Freedoms Act 2012.

13. Contact

13.1 Tracy Sexton at the Ministry of Defence, telephone 0207 218 0564 or email CLS-Sec1@mod.uk, can answer any queries regarding the instrument.