EXPLANATORY MEMORANDUM TO THE
POLICE AND CRIMINAL EVIDENCE ACT 1984 (ARMED FORCES) ORDER 2009
No. 1922

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 makes provision for members of the police forces of the Armed Forces which is equivalent, subject to modifications, to the provision for civilian police forces in Part 5 of the Police and Criminal Evidence Act 1984.

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

3.1 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. The Government is considering its response to this judgment; but new long-term provision on retention is not expected before 31 October 2009. This instrument is to come into force on that date as an essential part of the new, comprehensive system of Service law under the Armed Forces Act 2006. The 2006 Act also comes into force on that date.

3.2 Article 15 of this instrument follows section 64 but provides that fingerprints and DNA samples taken from a person in connection with the investigation of a service offence may be held only for a maximum period of two years from when they are taken, unless within that period the person is convicted of a Service offence. Under paragraph 17 of Schedule 2 to this instrument, where the fingerprints or sample have been taken before 31 October, the two year period will run from that date. The aim is to make interim provision which will be compliant with the Convention and allow the Service police to carry out their duties, but without prejudging the decision on long term provision.

4. Legislative context

4.1 Part 5 of the Police and Criminal Evidence Act 1984 is primarily concerned with the questioning and treatment of persons by the (civil) police. However, section 113 of the Act (as amended by the Armed Forces Act 2006) empowers the Secretary of State to make provision in relation to certain matters which are equivalent to Part 5 (subject to modifications). The Secretary of State may by order make provision 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.

5. Extent

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.

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 The Armed Forces Act 2006 replaces the three Service Discipline Acts (the Army Act 1955, the Air Force Act 1955, and the Naval Discipline Act 1957) and creates a common disciplinary framework for all three Armed Forces. This includes the creation of common Service offences and a common court structure to try persons charged with such offences. The Act also deals with powers of arrest, search, entry and seizure, as well as provisions in relation to keeping persons in Service custody.

7.2 This order, in broad terms, makes provision with respect to the questioning and treatment of persons by the Service police. It covers, for example, such issues as: the conduct of searches of detained persons (including intimate searches, x-rays and ultrasounds); the right of a person to have someone informed when arrested and held in custody, and his right to consult with a legal adviser; the taking of fingerprints and impressions of footwear; the taking of samples (including intimate samples); the destruction of fingerprints and samples; and the photographing of suspects. The order also deals with the power of Service policemen to use reasonable force.

8. Consultation outcome

8.1 A memorandum about consultation on the Armed Forces Act 2006 primary legislation was submitted in written evidence to the Select Committee on the Armed Forces Bill and published on 9 May 2006 in its Special Report of Session 2005-06 (HC 828-II, page Ev 136). This memorandum explained how stakeholder consultation had been carried out and listed the individuals and organisations consulted. The individual instruments under the 2006 Act have been the subject of rigorous consultation with relevant stakeholders (such as the Services, the Service police, the Judge Advocate General and the Military Court Service) over a period of many months, to ensure that the policy goals have been achieved and that the provisions of each instrument will work in practice.

9. Guidance

9.1 A new Manual of Service Law will provide guidance and supplementary information to Armed Forces personnel (including the Service Police) on the single system of Service law established under the Armed Forces Act 2006. The first volume of three within the manual, which is intended for commanding officers and those administering the Service justice system, includes chapters on Arrest and Search and on Custody. A training version of the Manual has been produced in time to allow Service personnel (including the Service Police) to be trained ahead of full

implementation of the 2006 Act on 31 October 2009. It will subsequently be available to the general public on the internet.

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 and review

12.1 This instrument will be reviewed in light of any changes to the Police and Criminal Evidence Act 1984.

13. Contact

13.1 Mr Nick Shaw at the Ministry of Defence, telephone 020 7218 0564 or email nick.shaw460@mod.uk, is the point of contact regarding this instrument.