

EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (MISCELLANEOUS AMENDMENTS) REGULATIONS 2019

2019 No. 967

1. Introduction

- 1.1 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 These Regulations amend statutory instruments made under the Armed Forces Act 2006 (“the AFA 2006”) relating to service offences and proceedings for service offences. They enable the Director of Service Prosecutions (“DSP”) to serve charge sheets and provide additional methods for the service of charge sheets in particular cases. They also allow sentences for service offences to be referred to the Court Martial Appeal Court for review if the service offence relates to criminal conduct in the past which corresponds to one of a number of repealed sexual offences. Lastly, the Regulations make minor consequential changes to reflect recent legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is to the whole of the United Kingdom, the Isle of Man and the British overseas territories except Gibraltar.
- 4.2 The territorial application of this instrument is worldwide as it amends statutory instruments relating to service offences and proceedings for such offences: those offences apply to service personnel and civilians subject to service discipline wherever they are and proceedings for such offences can take place anywhere in the world.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 This instrument amends statutory instruments made under the AFA 2006 relating to service offences and proceedings for service offences.

- 6.2 Regulations 2 to 7 amend the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (S.I. 2009/2055), which set out procedures relating to investigation, charge and mode of trial under Part 5 of the AFA 2006. The amendments allow the DSP to serve charge sheets in certain cases, to reflect the DSP's new power to bring charges under section 121(1A) of the AFA 2006 (section 121(1A) was added by the Armed Forces Act 2016 ("AFA 2016")). In addition, they provide additional means to serve charge sheets on former service personnel or civilians formerly subject to service discipline (currently they must be served by hand by the commanding officer). The amendments allow the commanding officer (or the DSP if the DSP is bringing the charge) to serve charge sheets in such cases by post or by leaving them at a last known address. In addition, consequential amendments are made, and transitional arrangements put in place, to take account of changes to Part 5 of the AFA 2006 by sections 3 to 5 of the Armed Forces Act 2016.
- 6.3 Regulation 8 amends the Armed Forces (Review of Court Martial Sentences) Order 2009 (S.I. 2009/1168). The Order specifies cases in which the sentence for a service offence relating to criminal conduct may be referred by the Attorney General for review by the Court Martial Appeal Court (this is done under section 273 of the AFA 2006). Services offences for criminal conduct apply to any act that is a criminal offence in England and Wales (or would be if it took place there): the relevant offences are section 42 of the AFA 2006 and its predecessors in the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. The cases specified by the Order are described by a list of the relevant corresponding criminal offences. Regulation 8 adds four repealed sexual offences to that list (service offences may still be charged for conduct corresponding to the repealed offences if that conduct pre-dates the repeal).
- 6.4 Regulation 9 amends the Armed Forces (Prescribed Air Navigation Order Offences) Order 2009 (S.I. 2009/1094). This Order specifies offences relating to civil aircraft (such as endangering the safety of an aircraft or drunkenness) in order to make the same conduct in relation to a military aircraft a service offence under section 49 of the AFA 2006. The amendments update references in the Order to aviation offences that are no longer in force to equivalent offences under the Air Navigation Order 2016 (S.I. 2016/765).

7. Policy background

What is being done and why?

- 7.1 The amendments to S.I. 2009/2055 change the procedure for serving charge sheets (as well as making technical amendments relating to sections 3 to 5 of the AFA 2016). The changes are being made principally to enable the DSP to serve charge sheets in certain cases because the DSP will have the power to charge as a result of amendments to the AFA 2006 by the AFA 2016. Additional methods of serving charge sheets by post or leaving it at an address are also provided to bring the procedure for serving charge sheets more closely into line with the procedure that applies in the civilian criminal justice system.
- 7.2 The amendments to S.I. 2009/1168 expand the scope of the scheme for referrals by the Attorney General of unduly lenient sentences to the Court Martial Appeal Court. The scope of that regime is being expanded to include service offences for criminal conduct corresponding to one of four sexual offences repealed by the Sexual Offences Act 2003. This is being done to bring the scheme into line with the scheme for

referrals of unduly lenient sentences that applies in the civilian criminal justice system (the Court Martial may still have to deal with this type of case if allegations are made regarding conduct pre-dating the repeal of the relevant sexual offences).

- 7.3 The amendments to S.I. 2009/1094 are minor updates to take account of changes in other legislation concerning aviation and do not change the effect of the Order.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 No consolidation is planned as these are the first amendments to the statutory instruments concerned and do not make substantial changes.

10. Consultation outcome

- 10.1 This instrument has been the subject of informal consultation with the office of the Attorney General, the office of the Judge Advocate General, the Service Prosecuting Authority, the Military Court Service, the Service police forces and the Services themselves to ensure that the policy goals have been achieved and that the provisions of the instrument will work in practice.

11. Guidance

- 11.1 Guidance on investigation and charging under Service law is contained in the Manual of Service Law, which provides guidance and supplementary information to armed forces personnel on the single system of Service law established under the AFA 2006. The first volume of the Manual is intended for COs and those who administer the Service justice system; it covers the Service justice system generally and includes a wide range of matters such as jurisdiction, arrest, custody, investigation, charging and mode of trial, summary hearing, review and appeal. The Manual of Service Law will be updated to provide commanding officers with guidance on the the procedure for bringing and serving a charge. The Manual of Service Law is available to the public at the following address: <https://www.gov.uk/government/collections/manual-of-service-law-msl>

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the SI relates to investigations and discipline in the armed forces and there is no impact on business, charities or voluntary bodies.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is a quinquennial review of the AFA 2006. The AFA 2006 (which provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice) must be kept in force by an annual continuation order (the most recent order is SI 2019/561). In addition, the AFA 2006 has required a further Act of Parliament at least every 5 years to keep it in force. The last such Act was the Armed Forces Act 2016. The provisions of the AFA 2006, including Part 5 which provides for the referral and charging of service offences, are subject to review as part of work to prepare for the next 5-yearly Act which must be passed before the end of 2021. The content of these regulations will be kept under review to ensure the provisions remain relevant to the armed forces.

15. Contact

- 15.1 Tracy Sexton at the Ministry of Defence, telephone: 0207 218 0564 or email: tracy.sexton743@mod.gov.uk. is the point of contact regarding this instrument.
- 15.2 David Howarth at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Tobias Ellwood MP, Minister for Defence People and Veterans can confirm that this Explanatory Memorandum meets the required standard.