

**EXPLANATORY MEMORANDUM TO
THE ARMED FORCES (CUSTODY WITHOUT CHARGE)**

REGULATIONS 2009 No. 1097

AND

THE ARMED FORCES (CUSTODY PROCEEDINGS)

RULES 2009 No. 1098

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 instruments

2.1 The Regulations are made under section 104 of the Armed Forces Act 2006 (“the Act”) and provide for the delegation of a commanding officer’s functions under sections 98 to 102 in relation to custody without charge of a person subject to Service law or a civilian subject to service discipline.

2.2 The Rules are made under section 112 of the Act and make provision for hearings and reviews of the continued custody of a person. The Rules supplement provisions in the Act that set out when a judge advocate may authorise a person to be held in Service custody or impose conditions on a person released from custody; when he may order the arrest of a person during the course of a trial; when a commanding officer may order the arrest of a person whom he reasonably suspects would fail to attend a hearing, commit an offence, interfere with witness, or otherwise obstruct justice; and when a person subject to a hospital order with restriction can be transferred to Service custody.

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

3.1 An order under section 380 of the Act has been made which modifies the enabling powers for these instruments to enable transitional provisions to be made.

4. Legislative context

4.1 The instruments supplement provisions in Part 4 of the Act and together they largely replicate existing provisions in the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 which are themselves based upon provisions on pre and post charge custody that operate in the civilian system (see for example sections 75 to 75M of the Army Act 1955). The instruments provide for a pre and post charge service custody regime that is compliant with Article 5 of the European Convention on Human Rights.

4.2 The Regulations are made under section 104 of the Act and supplement provisions in sections 98 to 103 of the Act. The Rules are made under section 112 of the Act and supplement sections 101, 105, 107, 108, 110, 111 and 171 relating to persons in service custody.

5. Territorial extent and application

5.1 These instruments extend to the United Kingdom, the Isle of Man and British overseas territories and apply to persons subject to Service law and civilians subject to Service discipline wherever they are in the world.

6. European Convention on Human Rights

6.1 As the instruments are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy Background

7.1 With regard to the first instrument, when a person is placed in custody, that person's commanding officer must be notified of the fact and the grounds for keeping that person in custody without charge; once notified, the commanding officer must determine whether there are grounds to authorise continued custody. Time limits are applied to an authorisation of continued custody without charge and there are limited circumstances in which a review of continuing custody may be postponed. Custody without charge may be further extended by a judge advocate. The person being kept in custody is entitled to legal representation at the hearing of such an application.

7.2 The functions that the commanding officer has in relation to custody, for example the power to authorise custody, may be delegated. This might be necessary because some of the commanding officer's functions may need to be performed urgently when he is unavailable. The suspect in custody before charge must be informed of the reasons for his detention and given an opportunity to make representations regarding his custody. Written records relating to the custody are to be kept and a copy given to the arrested person on release.

7.3 With regard to the second instrument, there are circumstances when a person's custody, continued custody or the conditions with which a person may be required to comply when released from custody, must be determined in proceedings before a judge advocate. These Rules are based on those applied by the civilian courts when hearing applications relating to warrants for further detention and bail. The Rules deal with detailed procedural matters.

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 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 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 who administer the Service justice system, includes a chapter on custody. The Manual of Service Law will be available in time to allow Service personnel to be trained ahead of full implementation of the Act and will subsequently be available to the general public on the internet. Guidance will be promulgated to judge advocates through the Judge Advocate General's practice memoranda.

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 The Armed Forces Act 2006 is subject to a requirement for renewal each year by Order in Council (approved in draft by both Houses of Parliament) and renewal by Act of Parliament every five years. In response to these requirements the Act will be subject to continuing monitoring and a general review will be conducted in order to provide for the Act of Parliament which will be required in 2011.

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 these instruments.