



## Secondary Legislation of the *Armed Forces Act 2006*

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The *Armed Forces Act 2006* received Royal Assent on 8 November 2006. However, secondary legislation for this Act is expected to be extensive, with approximately 65 clauses in the Act conferring powers on the Secretary of State for Defence and the Defence Council to make orders, regulations or rules, exercisable by Statutory Instrument. An estimated 15 pieces of that secondary legislation will be subject to the affirmative resolution procedure.

It is intended that implementation of all the provisions setting out the new system of Service law will be completed by 1 January 2009.

Due to the extensive nature of the secondary legislation, this note will only examine those Statutory Instruments subject to the approval of Parliament. It will not examine every instrument published under this Act. However, a list of statutory instruments published, to date, is set out in section G. Should you require any information on those statutory instruments not covered in this note then please contact ext. 3852.

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## A. Background

The *Armed Forces Act 2006* (AFA06) received Royal Assent on 8 November 2006. The main provisions of the Act are set out in the following Library material, which should be used for background on each piece of secondary legislation:

- Research Paper RP05/86, *The Armed Forces Bill*, 7 December 2005
- Standard Note SN/IA/4025, *Amendments to the Armed Forces Bill*, 22 September 2006
- Standard Note SN/IA/4180, *Armed Forces Bill: Lords Amendments in Committee and Report Stage*, 3 November 2006
- Standard Note, SN/IA/4182, *Armed Forces Bill: Lords Amendments at Third Reading*, 7 November 2006.

The secondary legislation for this Act, which will set down the detailed provisions of various aspects of the Service disciplinary system, is expected to be extensive. There are approximately 65 clauses in the Act which confer powers upon either the Secretary of State for Defence or the Defence Council to make additional orders, rules or regulations which will be exercisable by Statutory Instrument. Approximately 15 of those Statutory Instruments will be subject to the affirmative resolution procedure.<sup>1</sup>

It is intended that implementation of all the provisions setting out the new system of Service law will be completed by 1 January 2009.

Appendix One of the Twenty Third Report of the Lords Select Committee on Delegated Powers and Regulatory Reform, published in June 2006, sets out those clauses in the AFA06, as established at the time, which provide for secondary legislation.<sup>2</sup> However, it should be noted that the numbering of clauses differs between this memorandum and the final version of the AFA06, and that new clauses conferring powers to make secondary legislation were also introduced into the Act after the formulation of this list.<sup>3</sup> Nonetheless it is a useful guide to most of the secondary legislation that will be required in order to bring the Act into full effect.

The following information examines those Statutory Instruments that have been published to date that will require Parliamentary approval under the affirmative resolution procedure. To aid Parliamentary examination of the secondary legislation, the Joint Committee on Statutory Instruments will also consider each Order. However, the Committee will not examine the merits of the secondary legislation, rather whether the Minister's powers in each case are being carried out in accordance with the parent Act.

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<sup>1</sup> Statutory Instruments subject to the Affirmative Resolution Procedure are laid in draft and must receive the approval of both Houses before they can come into force. It is worth noting that statutory instruments cannot be amended or adapted by either House unless the parent Act makes that provision.

<sup>2</sup> A copy of this report (HL 217, Session 2005-06) is available online at:  
<http://pubs1.tso.parliament.uk/pa/ld200506/ldselect/lddelreg/217/217.pdf>

<sup>3</sup> For example, clause 338 on the role of the Service Complaints Commissioner was introduced into the Act during the Committee Stage of the Bill in the House of Lords.

## **B. *Armed Forces (Alignment of Service Discipline Acts) Order 2007***

In order to ensure a smooth transition from the existing system of Service discipline to the new military justice system envisaged under the AFA06, the Government indicated during the Lords Committee Stage of the Bill its intention to identify those areas where early change could be feasibly implemented so as to align the two systems more closely.

To this end several amendments relating to Schedule 16 were moved by the Government in Committee; while a new clause (clause 381) was also introduced into the Act which made provision for the Government to continue identifying further opportunities for alignment and confer on the Secretary of State the power to introduce Orders (by way of Statutory Instrument) in order to give those changes effect. In particular those steps that would bring benefits to the efficiency and fairness of the military justice system were identified as a priority.

The *Armed Forces (Alignment of Service Discipline Acts) Order 2007*, which was laid in draft on 14 May 2007, is one such Order. In summary the Order will remove the current restriction from the existing SDA (section 209 of the *Army Act 1955* and the *Air Force Act 1955*, and section 118 of the NDA57) on the number of civilians who may sit as lay members of a court martial, when the accused is a civilian.

In order to bring the existing system into line with the provisions of the AFA06,<sup>4</sup> the amendments introduced by this Order will permit a court administration officer to select an all civilian lay membership of a court martial, when the accused is a civilian. As the Judge Advocate who presides over a court martial is also a civilian judge, effectively this change will mean that court martial trials of civilians will no longer have any military representation on them.

Although the AFA06 contains provisions allowing for rules providing for an all civilian lay membership of the Court Martial, this Order seeks an early implementation of these changes so as to meet the requirements of the 2006 ECHR judgement in the case of *Martin v. UK*. In that judgement the ECHR concluded that the “determination of a charge against a civilian by a military tribunal would only be compatible with Article 6 of the European Convention on Human Rights in ‘very exceptional circumstances’”.<sup>5</sup>

During the remaining stages of the *Armed Forces Bill* in the House of Commons on 7 November 2006 the Secretary of State for Defence had acknowledged the need for the MOD to assess its position in light of this judgement. He stated:

On 24 October, the European Court of Human Rights gave its judgment in the case of Martin. We need to be clear what it decided. The case was about the son of a service man who was tried by court martial in 1995 for the murder of a civilian in Germany. The court martial was subject to the same objections as were found to exist in the Findlay case in 1996, and which were remedied by the Armed Forces Act of 1996. It

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<sup>4</sup> The constitution of a court martial will be set down in accordance with section 155, subject to any provisions established by Court Martial rules under section 163.

<sup>5</sup> Explanatory Memorandum to *The Armed Forces (Alignment of Service Discipline Acts) Order 2007*

is no surprise that the European Court also decided in Martin that the court martial was not compliant.

The European Court did not decide that courts martial should not try civilians, or that they should not try civilian juveniles. But it did state the important principle that a military jurisdiction should only be exercised over civilians if there are "compelling reasons". In the Martin case there was the possibility of civilian trial in the UK, because the charge was murder. The court did not decide whether there had been "compelling reasons" for court martial trial. It did not need to, because as I have said, it decided the case on the basis that the court martial at that time was not compliant. The court did not go into what they thought would be compelling reasons.

We are looking carefully at the judgment in Martin. We will consider carefully the need for compelling reasons and will seek to ensure that, where court martial trial is adopted, there are compelling reasons for doing so. We shall also consider further the make-up of the court martial in cases involving civilians. There are a number of issues here. We have to ensure that, so far as possible, we have a uniform and consistent system available for all civilians who come within the scope of the Bill. We also need to take into account the need for a court martial to be able to sit abroad.

The Bill contains a wide power to decide the membership of the court martial in special cases. We were already considering what the membership should be in civilian cases. Hon. Members can be assured that in every respect, we will do what we think this judgment requires.

Finally, hon. Members will appreciate that the judgment in the case of Martin has potential implications not only for the court martial under the Bill, but also for courts martial convened under the Service Discipline Acts. If, following careful deliberation, we conclude that the judgment requires our current procedures to be modified, we will be able to do so using the alignment powers provided by clause 381.<sup>6</sup>

The ability to have all civilian panels at Court Martial is considered to remedy this problem.

The Joint Committee on Statutory Instruments considered this Order on 23 May 2007 and determined that it did not require the special attention of the House.<sup>7</sup> The Order was subsequently considered by the Second Delegated Legislation Committee of the House of Commons on 13 June 2007<sup>8</sup> and in the House of Lords on 20 June.<sup>9</sup>

The Order came into force on 28 June 2007 (SI.1859, 2007).

Detailed provisions for the trial of civilians at Court Martial were made by further secondary legislation in early 2008 (SI. 3442, SI.3443 and SI.3444). However, in order ensure maximum fairness to civilian accused before the introduction of this legislation on 1 January 2008, as an interim measure the MOD laid statutory instrument SI.2397 in August 2007 which amended the *Courts-Martial (Army) Rules 1997* so as to allow for civilians to be appointed as members of a court martial.

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<sup>6</sup> HC Deb 7 November 2006, c809-810

<sup>7</sup> Joint Committee on Statutory Instruments, *Eighteenth Report*, HC82-xviii, Session 2006-07

<sup>8</sup> The transcript of that meeting is available online at:

<http://pubs1.tso.parliament.uk/pa/cm200607/cmgeneral/deleg2/070613/70613s01.htm>

<sup>9</sup> <http://pubs1.tso.parliament.uk/pa/ld200607/ldhansrd/text/70620-0014.htm#07062071000004>

### **C. *Armed Forces (Service Police Amendments) Order 2007***

The *Armed Forces (Service Police Amendments) Order 2007* was laid in draft on 16 May 2007. Made under the powers conferred by section 379, the Order simply provides for amendments to be made to other primary and secondary legislation which make reference to the Royal Navy Regulating Branch, so as to reflect the change of name to the 'Royal Navy Police'. The affected legislation is set out in the Schedule to the Order.

The Joint Committee on Statutory Instruments considered this Order on 23 May 2007 and determined that it did not require the special attention of the House.<sup>10</sup> The Order was subsequently considered by the Second Delegated Legislation Committee of the House of Commons on 13 June 2007<sup>11</sup> and in the House of Lords on 20 June.<sup>12</sup>

The Order came into force on 28 June 2007 (SI. 1861, 2007).

### **D. *Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2007***

The Service Discipline Acts, as they currently stand, are renewed and amended by primary legislation every five years when an Armed Forces Bill is presented to Parliament. The Bill proposes that the SDA continue, with any suggested or necessary amendments, for a further year. After this, further extensions of the SDA are obtained by an annual Order in Council, to be approved by Affirmative Resolution.<sup>13</sup> Orders in Council can continue for a maximum of five years, after which a new Armed Forces Act is required.

The same arrangements for renewal will operate under the AFA06 after the obligation for annual Orders in Council to be approved was re-instated in the Act during the Commons Committee stage.

The purpose of the *Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2007*, which was laid in draft on 10 May 2007, is to allow for the SDA and the AFA06 to continue in force for a further 12 months beyond 8 November 2007.

As implementation of the detailed provisions of the AFA06 is not expected to be completed until 1 January 2009, the continuation of the SDA remains necessary in the interim. As such, the SDA are included in this Order along with the AFA06. As implementation of the AFA06 goes forward, the related provisions of the SDA will be subsequently repealed.

The Joint Committee on Statutory Instruments considered this Order on 23 May 2007 and determined that it did not require the special attention of the House.<sup>14</sup> The Order was

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<sup>10</sup> Joint Committee on Statutory Instruments, *Eighteenth Report*, HC82-xviii, Session 2006-07

<sup>11</sup> transcript of that meeting is available online at:

<http://pubs1.tso.parliament.uk/pa/cm200607/cmgeneral/deleg2/070613/70613s01.htm>

<sup>12</sup> Hansard available at:

<http://pubs1.tso.parliament.uk/pa/ld200607/ldhansrd/text/70620-0013.htm#07062071000003>

<sup>13</sup> The *Naval Discipline Act* was brought into line with the *Army Act 1955* and the *Air Force Act 1955* in 1971.

<sup>14</sup> Joint Committee on Statutory Instruments, *Eighteenth Report*, HC82-xviii, Session 2006-07

subsequently considered by the Second Delegated Legislation Committee of the House of Commons on 13 June 2007<sup>15</sup> and in the House of Lords on 20 June.<sup>16</sup>

The Order was made on 25 July 2007 (SI.2123, 2007).

## **E. Service Complaints Procedures**

The main aim of the AFA06 with respect to service complaints was to make the process of redress quicker, more efficient, and more transparent. In order to do so the AFA06 introduced several measures including the establishment of Service Complaints Panels which would largely undertake the current work of the Service Boards with respect to complaints and to which cases incapable of being resolved by the chain of command, could be referred. During the Lords stages of the bill clauses were also introduced that would establish an independent Service Complaints Commissioner for the Armed Forces.<sup>17</sup>

Although the AFA06 set out the broad framework for the service complaints process, the specific rules and procedures governing that process are set down in secondary legislation. On 8 October 2007 the MOD laid two draft statutory instruments in the House which set out the detailed procedures for the new system of redress of individual grievances and the post of the Service Complaints Commissioner. Further details on procedures for making a complaint and the time limits for doing so are contained in one set of Defence Council Regulations which are not subject to this Act. A copy of those regulations is available in the House of Commons Library.<sup>18</sup>

Both instruments were debated in the House of Commons Third Delegated Legislation Committee on 30 November 2007 and the in House of Lords on 20 November 2007.

Both instruments (SI.3352 and 3353) subsequently came into force on 1 January 2008.

### **1. Armed Forces (Redress of Individual Grievances) Regulations 2007**

These regulations address two fundamental issues:

1. The types of complaint which are to be excluded from the scope of these regulations (conferred by section 334 (2) of the AFA06).
2. The composition and procedure of Service complaints panels (conferred by sections 336 (5) and 336 (6) of AFA06).

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<sup>15</sup> transcript of that meeting is available online at:

<http://pubs1.tso.parliament.uk/pa/cm200607/cmgeneral/deleg2/070613/70613s01.htm>

<sup>16</sup> <http://pubs1.tso.parliament.uk/pa/ld200607/ldhansrd/text/70620-0013.htm#07062071000003>

<sup>17</sup> In light of the conclusions of the Blake Review (March 2006), the MOD decided during the passage of the Bill that the remit of the external reviewer (introduced initially in the Bill to examine the fairness and effectiveness of the military complaints system and report annually to Ministers) would be widened. A Service Complaints Commissioner would thus be established to whom complaints could be made directly (by both service personnel and other individuals such as family members) and who would have the power to refer complaints to the chain of command and be informed of the progress and outcome of complaints. He/she would also have the statutory role of examining the fairness of the complaints system and report annually to Parliament.

<sup>18</sup> Please contact the International Affairs and Defence Section on ext. 3852 for a copy.

## Excluded Complaints

Matters for which an alternative, more appropriate or compulsory resolution mechanism already exists are excluded from the provisions of the AFA06. There are two generic types of complaint which will be excluded on this basis and are set out in Schedule 1 to these regulations: complaints which are already provided for by the appeals mechanism of the military justice system (Schedule 1 (1) (h) to (o) <sup>19</sup> and matters for which the MOD already provides an independent complaints procedure (Schedule 1 (1) (a) to (g) and (p) to (r)).<sup>20</sup>

However paragraph 2 of Schedule 1 confers the right of an individual to still make any complaint that would otherwise have been excluded on the basis of paragraph 1, if allegations of discrimination; harassment; bullying or dishonest, improper or biased behaviour (regulation 9) have been made in association with that complaint.

In addition, an individual may not make a Service complaint about a decision of the Defence Council, whether or not that decision had been delegated to a Service Complaint Panel (Regulation 4). In essence the Defence Council is the highest level of authority within this system. Under section 337 an officer who is dissatisfied with the decision of the Defence Council may request that his/her case be referred to HM The Queen. However, under this Act the number of issues which may be referred to the Sovereign has been limited.<sup>21</sup>

## Composition of Service Complaint Panels

Section 336 AFA06 sets down a number of generic provisions with regard to the composition of service complaint panels.<sup>22</sup> Sections 5-10 of this SI make additional provisions regarding the membership of a panel in certain circumstances:

- Service complaints panels to which complaints by or about an officer of, or above, the rank of Rear Admiral, Major General or Air Vice-Marshal have been made must include at least one member of at least the same rank as, or of equal rank to, the officer concerned (sections 5 and 6).
- Members of the Defence Council, the single Service Boards or any member of the Naval Chaplaincy Service, the Royal Army Chaplains Department or the Royal Air Force Chaplains Branch cannot be appointed to a Service complaints panel (section 7).
- Any person who is the subject of a complaint; has allegedly been involved in the matter which is the subject of the complaint; or has been involved in the investigation or consideration of a complaint must not subsequently be appointed to the panel considering that complaint (section 8).

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<sup>19</sup> For example, an appeal to the Summary Appeal Court or the Court Martial Appeal Court

<sup>20</sup> Such as the statutory disputes resolution procedure for pensions disputes

<sup>21</sup> Further information on this issue is available in Library Research Paper RP05/86, *The Armed Forces Bill*, 7 December 2005

<sup>22</sup> Including, for example, the requirement to have at least two members on the panel, one of whom must be a senior officer of or above the rank of Commodore, Brigadier or Air Commodore.

- o A service complaint panel shall include one independent member<sup>23</sup> in any case in which the complaint alleges discrimination;<sup>24</sup> bullying; harassment; dishonest, improper or biased behaviour; alleges the failure of the MOD to provide medical, dental or nursing care where it had a responsibility to do so; or concerns the exercise of a Service policeman's statutory powers (section 9 (1)).

With the inclusion of issues to be considered other than harassment and bullying, the scope of the regulations with respect to independent members goes further than originally envisaged when the bill was first introduced. However it was acknowledged at the time that the matters on which an independent member would sit on the panel could be broadened in secondary legislation.<sup>25</sup>

A service complaint panel will also include an independent member in cases where a previous complaint has been referred to the chain of command by the Service Complaints Commissioner (under Section 338) and subsequently not been allowed to proceed (section 9 (2)).<sup>26</sup>

Where a service complaint panel includes an independent member, that panel will subsequently consist of three members (section 10).

Under section 11 the provisions of this statutory instrument cannot be applied retrospectively.

Schedule 2 of the regulations makes transitory provisions to apply the new system of redress to the existing sections of Service Discipline Acts which will remain in force until the relevant provisions of the AFA06 are brought into effect and the SDA are subsequently repealed.

## **2. Armed Forces (Service Complaints Commissioner) Regulations 2007**

The appointment of the Commissioner and the broad functions of that office are established under sections 338, 339 and 366 of AFA06.

Under section 338 the Commissioner has the power to refer allegations of certain types of wrongdoing against a member of the Armed Forces<sup>27</sup> to a relevant officer, usually the Commanding Officer of the person concerned. That officer then has an obligation to ascertain whether the individual concerned wishes to make a Service complaint, is aware of the procedures for doing so and the time limits.

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<sup>23</sup> Section 336 (7) sets out the definition of an independent member.

<sup>24</sup> Regulation 9 (3) of this statutory instrument defines discrimination.

<sup>25</sup> See p.54 of RP05/86

<sup>26</sup> For example, if the complaint had been made outside of the time limits set down by the Act (section 334 (6)) and in the Defence Council Regulations. Under section 334 (4) the complainant can apply for his/her case to be referred to another superior officer or the Defence Council if they are unhappy with the original decision of the CO. The Defence Council can then refer it to a service complaints panel.

<sup>27</sup> These complaints can be made directly to the Commissioner by either an individual in the Armed Forces or a member of the general public in relation to a member of the Armed Forces.



This statutory instrument specifies the types of allegation which, if referred by the Commissioner, impose these obligations. It also makes detailed provision for the Commissioner to be kept informed of the progress and outcome of a referred complaint.<sup>28</sup>

### **Types of Allegation**

The types of allegation that can be referred to the chain of command by the Commissioner include discrimination (defined by section 2 (2)), harassment, bullying and dishonest, improper or biased behavior (section 2 (1)).

### **Notification**

Following the referral of a prescribed allegation, section 3 of these regulations places an obligation on the relevant officer to notify the Commissioner, within 21 days, of the following:

- That the individual in question is aware the allegation has been referred.
- The individual has been made aware of the procedures for making a complaint and the time limits for doing so.
- Whether the individual in question wishes to make a complaint with regard to the referred allegation.
- That a service complaint in respect of the alleged wrong cannot be made because it has been made outside of the prescribed time limit.
- That a service complaint in respect of the alleged wrong cannot be made because it falls within the scope of Schedule 1 of the Redress of Individual Grievances Regulations.
- That a service complaint in respect of the alleged wrong has been withdrawn.
- That a service complaint has been referred to a superior officer or the Defence Council.
- Of a decision as to whether the service complaint is well-founded.
- Of a decision in relation to redress.

A new Joint Service Publication entitled *JSP 831 Redress of Individual Grievances: Service Complaints* which sets out these new arrangements and provides supplementary guidance to complainants and those responsible for handling service complaints has been published and is available on the British Army website at:

[http://www.army.mod.uk/linkedfiles/servingsoldier/termsofserv/discmillaw/jsp\\_831.doc](http://www.army.mod.uk/linkedfiles/servingsoldier/termsofserv/discmillaw/jsp_831.doc)

## **F. List of Published Statutory Instruments**

The statutory instruments under the AFA06 which have been published, to date, are as follows:

SI.1442, 2007 *Armed Forces Act 2006 (Commencement No. 1) Order 2007*

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<sup>28</sup> The Commissioner does not have, however, the statutory power to intervene in the handling of a complaint or its investigation.

SI.1859, 2007 *Armed Forces (Alignment of Service Discipline Acts) Order 2007*

SI.1861, 2007 *Armed Forces (Service Police Amendments) Order 2007*

SI.2123, 2007 *Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2007*

SI.2397, 2007 *The Courts-Martial (Army) (Amendment) Rules 2007<sup>29</sup>*

SI.3352, 2007 *The Armed Forces (Service Complaints Commissioner) Regulations 2007*

SI.3353, 2007 *The Armed Forces (Redress of Individual Grievances) Regulations 2007*

SI.3442, 2007 *The Courts-Martial (Army) Rules 2007*

SI.3443, 2007 *The Courts-Martial (Royal Navy) Rules 2007*

SI.3444, 2007 *The Courts-Martial (Royal Air Force) Rules 2007*

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<sup>29</sup> This SI was subsequently superseded by SI.3442, SI.3443 and SI.3444 as of 1 January 2008