



Secondary Legislation of the *Armed Forces Act 2006*: An Update

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The *Armed Forces Act 2006* received Royal Assent on 8 November 2006. Secondary legislation for this Act is, however, 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.

Over the last two years several of those Statutory Instruments have been laid in the House, including those related to the creation of the post of Service Complaints Commissioner. Detail on those Statutory Instruments is set out in Library Standard Note SN/IA/4342, *Secondary Legislation of the Armed Forces Act 2006*, 15 January 2008.

The majority of secondary legislation has been laid in 2009 with the intention that the new system of Service law will come into force on 31 October 2009. This note examines those Statutory Instruments which have been recently laid that will be subject to the approval of Parliament. A full list of the secondary legislation to the AFA06, published to date, is available in section three. Should you require any information on those Statutory Instruments not covered in this note then please contact the International Affairs and Defence Section.

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1 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 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 are subject to the affirmative resolution procedure.¹

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.² 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.³ 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.

Several pieces of secondary legislation relating to this Act were laid in 2007. Those Statutory Instruments which were subject to the approval of Parliament are examined in the following Library briefing:

- Standard Note SN/IA/4342, *Secondary Legislation of the Armed Forces Act 2006*, 15 January 2008.

However, the majority of secondary legislation has been laid in 2009 with the intention that the new system of Service law will come into force on 31 October 2009. The new system had been expected to come into force in January 2009. Commenting on the delay the Parliamentary Under Secretary of State for Defence, Kevan Jones, stated:

The transitional provisions that will provide the essential bridge between the three Service Discipline Acts and the Armed Forces Act 2006 have proved more difficult and complex than was envisaged in our original planning. The main reason for this is because the provisions contained in the older legislation have all been amended, often piecemeal, over a period of several decades. The result is a complex web of legislation that applies, sometimes in different ways, to each of the armed forces.

The legislation will be brought into effect in October 2009.⁴

2 Secondary legislation Subject to the Affirmative Resolution Procedure

The following section examines those Statutory Instruments that have been published during the course of 2009 and 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.

¹ 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.

² 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>

³ 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.

⁴ HC Deb 7 October 2008, c8-9WS

2.1 Draft Armed Forces (Enlistment) Regulations 2009

Background

Enlistment is the process by which a person joins the regular forces when not commissioned. Currently, a person joining the Army, Royal Marines or RAF must take an oath of allegiance (or affirm his/her allegiance) to the Sovereign. Currently members of the Royal Navy “enter service” and do not have to swear such an oath. The validity of a person’s enlistment is also attested by a recruiting officer who acts as a witness to the truthfulness of a recruit’s declarations on the enlistment form. No person under the age of 16 may be enlisted into the Armed Forces, while an individual under the age of 18 must have written consent from a person with parental responsibility.

A person joins the Armed Forces for a specified period of Regular service and potentially a subsequent period in the Reserves.⁵ A recruit’s enlistment may be subject to a final approval process in order to take into account any significant changes in circumstances since his/her offer to enlist was originally accepted.

AFA06

Sections 328-331 of the AFA06 give power to the Defence Council to make regulations, exercisable through secondary legislation, in relation to various aspects of enlistment and service including the process of enlistment, the terms and conditions of enlistment and service, forfeiture of service and discharge from the Regular forces and transfer to the Reserve. Specifically Section 328 provides the power to make regulations regarding the appointment and duties of recruiting officers; the consent to enlistment for a person under 18; the rights to discharge and the creation of an offence of false enlistment and the maximum punishment that can be awarded for such an offence if tried in either the military system or the civil courts.⁶

Section 328 largely replicates provisions that already exist in armed forces legislation, both primary and secondary. Much of that existing secondary legislation has been made in the past by way of Defence Council regulations that are generally made administratively and not subject to any parliamentary procedure. However in drafting the AFA06 the MOD decided:

Regulations made under section 328 should be subject to parliamentary scrutiny. This is because the Services have no employment contracts and it is recognised that enlistment is of sufficient importance to warrant Parliamentary scrutiny of what is involved.

Making the regulations on enlistment by statutory instrument ensures not only that they are properly scrutinised, but also that they are published and that servicemen may easily ascertain their rights and obligations.⁷

Secondary Legislation Provisions

This SI sets out in detail those regulations provided for under section 328 of AFA06. Specifically it sets out:

- who may be appointed as a recruiting officer for the purposes of enlistment (**clause 3**)

⁵ Regular army personnel are subject to a period of ‘reserve liability’ upon leaving HM Forces dependant upon their length of service in the Regular forces.

⁶ False answer on enlistment is an offence under military law.

⁷ *Explanatory Memorandum to the Armed Forces (Enlistment) Regulations 2009*, para 4

- Sixteen as the minimum age for enlistment (**clause 4**)
- The requirement for an individual under the age of 18 to enlist only with the written consent of a person who has parental responsibility for that individual (as defined by **clause 5 (2)** of this SI).
- The procedures for enlistment including the express obligation on a recruiting officer to ensure that an individual has understood the terms on which he/she wishes to enlist; that any false answer to a question on enlistment constitutes an offence; and that the individual is fit to be enlisted (**clause 7**). That enlistment paper must then be approved by another recruiting officer (the 'approving officer') who, under **Clause 8**, has the power to determine on any grounds that he/she sees fit, that the individual's enlistment is invalid.
- An individual who has enlisted in the Regular Forces, or a person with parental responsibility if the individual was under the age of 18 at the time, may apply to the Defence Council for a determination that his/her enlistment is invalid (**clause 9**). However, this must be done within three months. The Defence Council may determine on any grounds that they see fit, that the enlistment is invalid.
- Any enlistment which is invalid will result in an individual being discharged as soon as possible and without any liability for reserve service (**clause 10**).
- Knowingly providing false answers on enlistment is an offence and is subject, on conviction by a civilian court of summary jurisdiction to a fine not exceeding level 1 on the standard scale, or on conviction by military Court Martial to any punishment, with the exception of imprisonment, that is available to the Court (these are specified in section 164 of AFA06) (**clause 12**).
- Significantly, as a result of this legislation the duty to make a declaration of truth on an enlistment form and to swear an oath, or affirm allegiance to the Sovereign will be extended to Royal Navy recruits (**clause 11 of the Schedule**)

The Joint Committee on Statutory Instruments considered this SI in its fifteenth report of 29 May 2009. It was not considered to merit the special attention of the House.

Regulations relating to the terms and conditions of enlistment, forfeiture of service and discharge and transfer to the reserve are set out in separate secondary legislation: SI 2009/831, 2009/832, 2009/833, 2009/1089, 2009/1090 and 2009/1091.

2.2 Draft Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009

Note: Laid on 19 May 2009, the latest version of this Statutory Instrument supersedes the draft laid before Parliament on 5 May 2009.

AFA06 Background

Part 5 of AFA06 sets out the duties of a Commanding Officer with respect to the investigation of alleged Service offences and the subsequent involvement, or otherwise of the Service police and the referral of charges to the Director of Service Prosecutions. It also provides for the powers of the CO and the Director of Service Prosecutions in determining whether a charge should be brought, and if so for what offence.

Specifically, the AFA06 introduced a more stringent regime governing the investigation of alleged offences which meant that charges in relation to serious offences such as murder or treason (these offences are listed in Schedule 2 of AFA06) could no longer be dealt with by a CO, thereby removing their power to dismiss charges in relation to offences which they could not deal with summarily. Section 113 obliges a CO to inform the Service police of any allegations in relation to such offences as soon as is practicable. Section 114 also requires a CO to report allegations relating to certain circumstances directly to the Service police. Those circumstances are to be set down in secondary legislation. According to the explanatory notes that accompanied the original bill “this is to ensure that where there is some particular sensitivity attached to an allegation, it is subject to examination by the independent Service police”.⁸

Following the investigation of an offence by the police, be it Service, UK or overseas police; any case where there is considered to be sufficient evidence to charge a person with a Schedule 2 offence, or an offence which falls within prescribed circumstances, must be referred directly to the Director of Service Prosecutions and not to the CO, as is the case at present (Section 116). Other cases must be referred back to the CO. Under subsection 4 the Service police can propose not to refer cases directly to the DSP, but in so doing must consult the DSP before the case is referred back to the CO. The effect of these clauses is to limit the role of the CO in relation to the most serious offences. Effectively these clauses will take away the right of the CO to dismiss any allegations in relation to charges, such as murder, which he/she would have been unable to deal with summarily in any case. The Trooper Williams case, which is referred to in [Library Research Paper RP05/75](#), has been a case in point.

In line with existing regulations governing the role of the Service Prosecuting Authorities, the DSP has the power to amend or substitute a charge or charges; bring additional charges in respect to the case; or discontinue proceedings in those cases allocated for trial by Court Martial (Section 125) or for trial by the SCC where that court has jurisdiction (Section 126).

Part 5 Secondary Legislation

Clause 3 sets out the prescribed circumstances as provided for by section 114 of the AFA06 which a CO must ensure the Service police are aware of in addition to Schedule 2 offences. Such circumstances include:

- harassment and assault committed by a person subject to Service law (either as a principal offender or as a secondary party), against another person subject to Service law
- assault causing serious injury to a Serviceman/woman by a superior officer or rate during the course of their duties
- the death of any individual or serious injury to an individual who is not a member of the Regular or Reserve forces; or is under the age of 18 and undergoing phase 1 or 2 training; or is an officer or officer cadet undergoing phase 1 training or is in Service custody (a “relevant person” while on premises occupied or controlled for the purposes of HM forces or in any vehicle, ship or aircraft being used for the same purpose (a “relevant place”).

⁸ *Armed Forces Bill: Explanatory Notes*, EN-94, Session 2005-06, p.45

- The death of an individual who has at any time been held in Service custody and there are reasonable grounds to believe that misconduct by a person subject to Service law or a civilian subject to service discipline may have caused or contributed to that death, is also set down as a prescribed circumstance.⁹

Clause 5 relates to the referral of a case from the Service police directly to the DSP where there is sufficient evidence to charge a person with a Service offence under these prescribed circumstances. Under clause 5 (c) the possibility of bringing charges against an individual where they had a duty of care to a “relevant person” in a “relevant place” and failed to prevent an assault inflicting serious injury, or death is also explicitly set out.

Clauses 7-10 set out the requirements for the provision of documents in connection with cases referred either to the DSP or back to the CO; while **Part 3** of the SI relates to the process of bringing, amending and substituting a charge by either a CO or the DSP and **Part 4** relates to the provision of information prior to proceeding to trial.

Clause 16 provides for a CO to delegate the functions provided to them under part 5 of AFA06 to a subordinate commander, where appropriate. This individual must be under the CO’s command and not below the rank of naval lieutenant, military or marine captain or flight lieutenant.

The regulations set down in this SI which relate to the referral of prescribed cases from the Service police directly to the DSP, and the delegation of functions by a CO, will come into force immediately upon passage of this legislation. All other provisions in this SI will come into force on 31 October 2009.

This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.¹⁰

2.3 Draft *Armed Forces (Court Martial) Rules 2009*

At present each Service has its own Courts Martial Rules (SI 2007/3442, SI 2007/3443 and SI 2007/3444) which will be revoked upon repeal of the SDA and the full implementation of AFA06. Various sections of AFA06 allow the Secretary of State to make, through secondary legislation, further provisions relating to the administration, constitution, conduct and proceedings of the standing Court Martial, including rules of evidence and powers to bring persons before the court (sections 155, 157 (4), 158, 163 and 286 (4)). Sections 125 (3) and 165 also allow for further provisions to be set down where an individual has elected trial by Court Martial.

AFA06 Background

- **Standing Court Martial**

The creation of a unified court martial system and the establishment of a single standing Court Martial which may sit anywhere within or outside of the UK, was one of the key proposals in the AFA06. The creation of a permanent court was intended to remove the

⁹ Schedule 15 of AFA06 provides for the Secretary of State, through secondary legislation, or the Defence Council to designate civilians considered to fall within the scope of Service discipline, including potentially private security contractors.

¹⁰ At the time of publication of this briefing note, the report of the Committee was still awaited.

existing need to convene courts martial on an *ad hoc* basis under the existing Service Discipline Acts and remove the different types of courts martial that are currently available.¹¹ The intention was to also bring the administration and proceedings of the court as closely into line with the civilian system as feasibly possible. For example under section 155 of AFA06 proceedings before the Court Martial will be presided over by a Judge Advocate, who shall be specified by or on behalf of the Judge Advocate General, and lay members who will be specified by or on behalf of the court administration officer. In most proceedings the required minimum number of lay members will be three in recognition of the fact that the majority of cases that are dealt with by the Court Martial would equate to those heard in a Magistrates Court in England and Wales where the Bench is comprised of three lay members. However, for more serious offences, exceptions will apply which will be set down in secondary legislation.

- **Right of Election**

The right to elect trial by Court Martial was made universal for Service personnel under AFA06. However, in such cases the Court is restricted to the maximum punishment that a Commanding officer could have awarded if the offence had been dealt with summarily.

- **Sentencing**

Under the primary legislation, and in line with existing provisions, the Judge Advocate will continue to have responsibility for rulings and directions on questions of law, procedure and practice but will not have the power to vote on the finding of the court, or any sentence passed by it which is determined by a majority of the members of the court (except in those circumstances when he sits alone). This latter point differs from the civilian system where the judge presiding over the proceedings passes sentence. The Judge Advocate will, however, consider an appropriate sentence along with the other members of the court and will have the casting vote if there is an equality of votes on sentencing. These provisions ensure that, as in the Crown Court, the Judge Advocate is not involved in the 'verdict' but that his expertise in sentencing matters is given due weight; while the military expertise of the lay members is intended to reflect the unique nature of Service life.

- **Trial of Civilians**

As examined in Library Standard Note [SN/IA/3432](#) the *Armed Forces (Alignment of Service Discipline Acts) Order 2007* has already made provision under AFA06 that 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.¹²

- **Appeal from the Service Civilian Court**

Also under primary legislation, and in line with current regulations, the right of appeal from the Service Civilian Court to the Court Martial remains (clause 285, AFA06), although the

¹¹ More information on the different types of courts martial is available in Library Research Paper RP05/75, *Background to the Forthcoming Armed Forces Bill*, 11 November 2005

¹² This order sought 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'" (Explanatory Memorandum to *The Armed Forces (Alignment of Service Discipline Acts) Order 2007*)

timeframe for doing so has been altered to an initial period of 28 days. It is the responsibility of the Court Martial to re-hear the charge and/or sentence, and proceedings are conducted in line with those for a trial by Court Martial and sentencing as set down by AFA06. As is the case at present, the Court Martial will only be able to pass a sentence that the SCC would have originally had the power to pass in respect of the offence concerned.

- ***Criminal Justice Act 2003***

Another aim of the AFA06 was to incorporate, with modifications, the provisions of the *Criminal Justice Act 2003*, with regard to both general sentencing principles and more specifically the provisions relating to the imprisonment of adults, custodial sentences for young offenders and mandatory sentences for certain offences. Of note, the CJA03 introduced a key change to suspended sentences of imprisonment. In effect, a court may suspend such a sentence for between six months and two years, on condition that the offender undertakes certain obligations or activities in the community, which are chosen by the court from a list of those available under the generic community sentence. If the offender fails to comply with these requirements, the suspended sentence may be activated. Further offences committed during the period of suspension will also count as a breach. The CJA03 also provides for the courts to review an offender's progress under a suspended sentence and to amend any of the requirements based on the offender's progress. Sections 200-206 of the AFA06 deal specifically with suspended sentences awarded by the Service courts. They modify the provisions of the CJA03 so that a Service court can award a suspended sentence, including a community requirement but, unlike a civil court, a Service court can also make one without such requirements. They also modify the provisions of the CJA03 so that a suspended sentence order can be activated if the offender fails to comply with the requirements of the order, commits a civil offence during the period of that order, or if he/she commits any other Service offence during that period.

Secondary Legislation Provisions

The provisions in this Statutory Instrument are extensive and as far as practicable are modelled on Crown Court practice as regulated by the consolidated *Criminal Procedure Rules 2005*. The following summarises the main points of this legislation:

Part 2 sets out the provisions for the service of documents on the different individuals involved in Court Martial proceedings, including the individual to whom the proceedings relate, the Director of Service Prosecutions, the Court Administration Officer and any other individuals such as witnesses.

Part 3 deals with the general administrative provisions relating to court proceedings including the listing and notification of proceedings (**clauses 17 and 18**), the record of proceedings (**clause 23**) and the circumstances in which a Judge Advocate must terminate proceedings (**clause 25**). Under subsections 6-8 of this clause the termination of proceedings does not, however, preclude further proceedings relating to the same charges being undertaken at a later date.

Under **clause 21** the oaths and affirmations taken at a Court Martial are to be the same as those in sections 1-3 and 6 of the *Oaths Act 1978*, as modified by Schedule One of this Statutory Instrument to reflect the nature of the court. **Clause 26** obliges the Judge Advocate to ensure that proceedings are conducted in such a way as to be comparable to the proceedings of a Crown Court, or in the absence of that determination, conducted in the interests of justice.

Part 4 sets down provisions for the constitution of the court. As outlined above the intention is to bring Court Martial practice as closely into line with the civilian system as feasibly possible. In the majority of proceedings, therefore, the minimum number of lay members of a Court Martial will be three. However, under this Statutory Instrument provisions are also made for a minimum of five lay members of the court where the proceedings relate to the most serious of offences (what are referred to in AFA06 as ‘Schedule 2’ offences – see above) or the offence could incur a sentence of more than 7 years imprisonment (or 7 years detention if under the age of 18) (**clause 29**) to reflect the fact that such offences would not be heard by a Magistrates court within the civilian system, unlike the majority of offences which generally come before a Court Martial.

This SI also makes provisions for the Judge Advocate to sit alone in certain circumstances (**clause 27**), including during preliminary proceedings, during sentencing proceedings when the offender is a civilian (as defined by Part 1 of Schedule 3, AFA06), or when sentencing an ex-servicemen (under Part 2, Schedule 3, AFA06) who has been tried by a court where all lay members have been civilians, or would have been if the individual had not pleaded guilty. The inability of the Judge Advocate to sentence an individual (except where he sits alone) that is set out in the primary legislation is reiterated in **clause 28**.

Provision is also made for the Judge Advocate to direct that up to two additional lay members be added to the court (**clause 30**) on the basis of expected duration and location of proceedings. According to the AFA06 explanatory memorandum, the intention of this clause is to “help to avoid trials collapsing if a lay member dropped out for some reason”.¹³

The persons who are ineligible for membership of the Court Martial (with the exception of the Judge Advocate), in certain circumstances, are set out in **clause 32**. In addition, for proceedings where *every* person to whom those proceedings relate, is of or below the rank of Warrant Officer, the number of lay members of the Court Martial that may be Warrant officers is two. If *any* person to whom those proceedings relate is an officer then every lay member must be an officer qualified for membership of the Court martial as set out in the primary legislation (section 156-157) (**clause 31**).

As outlined above, changes have already been made under AFA06 that allow for all lay members of a Court Martial to be civilians where the accused is also a civilian. **Clause 33** of this SI sets out which civilians are qualified for membership of the court.

Clause 34 sets out those provisions determining which lay member (military only) may be appointed President of the Board.

As in the civilian system, any party to the proceedings (except with respect to sentencing) may object to any lay member of the court, on any reasonable grounds. The Judge Advocate shall rule on any objection and if the objection is upheld the lay member is discharged (**clause 35**).

Part 5 makes provisions for who may be a legal representative at court (**clause 39**) and the rights of a parent or legal guardian where the person to whom the proceedings relate is under the age of 18, is not subject to Service law and has not appointed legal representation (**clause 40**).

¹³ *Armed Forces Act 2006, Explanatory Notes*, para 319

Part 6 sets down provisions for applying section 111 of AFA06, whereby a Judge Advocate can direct the arrest of a defendant before the conclusion of Court Martial proceedings, to the arrest or issuing of a warrant for arrest of an individual prior to arraignment by the court.

Part 7 relates to the service of advance documentation on a defendant, their legal representative and the Court Administration Officer, and specifically when that information must include notice that a defendant could become subject to an activation order.

The provisions of **Part 8** relate to preliminary hearings, including the listing of proceedings (**clauses 45 and 46**); the ability to conduct preliminary proceedings in the absence of the defendant (**clause 47**); and the powers of a Judge Advocate to make orders or rulings on admissibility of evidence, the joining or severance of charges and any other questions of law, practice or procedure relating to the case (**clause 49**). The Court Martial Appeal Court (CMAC) has jurisdiction to hear an appeal against any order or ruling made in preliminary proceedings, but only with the leave of the appeal court. Related proceedings may not commence until that appeal has been either determined or abandoned (**clause 50**).

Under **Part 9** the court has the power to try multiple charges if they are included in the same charge sheet (**clause 51**); direct that charges be divided between two or more charge sheets and where two or more defendants are charged together, to charge those defendants separately (**clauses 52 and 53**). **Clause 51** also allows the Director of Service Prosecutions to consolidate charge sheets provided that the new charge sheet is served immediately on the court administration officer and each defendant. **Clause 54** also allows for the Judge Advocate to amend charges. As a consequence of the exercise of these powers the Judge Advocate may give any direction necessary within the interests of justice, including the adjournment of proceedings (**clause 55**).

Part 10 sets down provisions for the arraignment of defendants and the opportunity for defendants to change their pleas.

Part 11 makes provision for the attendance of witnesses at court, including the notification of witnesses and the powers of the Judge Advocate to issue or withdraw a witness summons, either on application (**clauses 63 and 66**) or by his own volition (**clause 65**), and the power to secure the attendance of a witness at court through the issue of an arrest warrant (**clause 68**). However, an arrest warrant may only be issued to the Service police if the individual in question is either subject to service law or is a civilian subject to service discipline.

Part 12 seeks to apply to the Court Martial the provisions that operate in the civilian court system with respect to evidence. The clauses in **Chapter 1** are general provisions that apply sections of chapter 80 of the *Criminal Justice Act 1967* relating to rules of evidence, oral testimony on oath, proof by written statement or formal admission and the use of documents to refresh memory. **Chapter 2** applies procedural provisions relating to evidence of bad character as currently set down in chapter 44 of the *Criminal Justice Act 2003*; while **chapter 3** applies procedural provisions relating to hearsay evidence as set down in the CJA03.

Chapter 4 of Part 12 sets down specific provisions relating to evidence of service matters, including evidence of enlistment, evidence of service and evidence as provided by service records, Defence Council documents and HM forces standing or routine orders. These specific regulations are the equivalent of provisions that are made under section 372 of AFA06 for proceedings before the civil courts.

Chapter 5 sets down provisions for the admissibility of expert evidence in a Court Martial; while chapter 6 applies special measures directions to the Court Martial as currently set down in chapter 23 of the *Youth Justice and Criminal Evidence Act 1999* including the power of the Judge Advocate to direct that evidence may be given in private or via a camera link.

The clauses in **Part 13** set out the procedures to be followed at trial and mirror those which apply within the Crown Court, including the examination of witnesses, summing up, and the deliberation and announcement of findings.

As outlined above the Judge Advocate and the lay members of the Court jointly consider an appropriate sentence. **Part 14** relates to sentencing proceedings and reflects the unique nature of this relationship between the Judge Advocate and the court, in contrast to the civilian system. **Clause 117** specifically sets down the role of the Judge Advocate and the President of the Board (who is one of the lay members and therefore of military rank) in the pronouncement of sentence. Under this clause the Judge Advocate will provide the reasons for a sentence while the President of the Board will pronounce the sentence to be handed down and, with the leave of the Judge Advocate, explain the consequences of that sentence on the Service to which the accused belongs and the likely effects on his/her own military career. Where the Judge Advocate is sitting alone or the lay members are all civilians the Judge Advocate will pronounce the sentence. **Clauses 113 and 114** relate to pre-sentencing and the provision of relevant information such as previous convictions, time spent in custody and any mitigating circumstances such as the offenders age and service record.

Part 15 provides for the power of the court to vary a sentence within a period of 56 days, unless an appeal or an application for leave to appeal against that sentence has been determined (**clause 118**). It also sets down provisions for the Judge Advocate to hold variation proceedings in the absence of the lay members of the court (**clause 120**) and for lay members to attend variation proceedings via live link (**clause 121**). Such circumstances are considered necessary when the operational effectiveness of HM forces may be adversely affected by the attendance in court of one or all of the lay members from the original proceedings.

As outlined above appeals from the Service Civilian Court are heard by the Court Martial. **Part 16** sets down a number of provisions relating to the procedural aspects of such proceedings. Specifically **clauses 126 and 127** provide for extending the initial period in which an appeal may be made and the procedures for appealing 'out of time'; while **clause 128** determines how the general rules set down in this overall SI are to be applied in the case of an appeal proceeding and **clause 129** makes provision for the court to abandon an appeal.

Part 17 deals with activation proceedings for suspended sentences of Service detention passed in relation to an earlier offence when a new offence has been committed during the operational period of that suspended sentence (see above for AFA06 background). Clause 135 of this Part provides the power for the Judge Advocate to issue a warrant for the offender's arrest. However, that warrant is not to be issued to the Service police unless the individual is subject to service law or is a civilian subject to Service discipline.

The clauses of **part 18** deal with ancillary proceedings relating to the breaching of overseas community orders, including the issuing of a summons or arrest warrant and any amendment of requirements set down in that order (**chapter 1**); the review of Service compensation

Orders,¹⁴ applying for time to pay a financial penalty, the remission of fines and the consideration, variation or revocation of a service restraining order (**chapter 2**). **Clause 151** also sets down the powers to certify an individual for contempt of court.

Under section 158 AFA06, the Court Martial must sit in open court subject to any provisions made in the Court Martial Rules. **Part 19** of this SI sets down those restrictions on public access and the reporting of Court Martial proceedings. Significantly this part sets out the power of a Judge Advocate to order that proceedings are held in private (in camera), including on the basis that such proceedings may otherwise be abandoned for fear of information useful to the enemy being disclosed or national security being endangered. Under **clause 154** appeals against such an order can be made to the Court Martial Appeal Court.

As outlined above the right to elect trial by court martial was made universal under AFA06 and that the powers of sentencing of the court are capped. The provisions of **part 20** are intended to supplement section 165 of AFA06 which deals with sentencing powers where trial by Court Martial has been elected. Specifically they make provision for the way in which a court is to pass sentence for multiple relevant offences where the CO would have passed a single sentence, and the powers of the Court Martial Appeal Court in such instances.

This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.¹⁵

2.4 Draft Court Martial (Prosecution Appeals) Order 2009

Note: Laid on 2 June 2009, the latest version of this Statutory Instrument supersedes the draft laid before Parliament on 8 May 2009.

This SI provides for prosecution appeals to the Court Martial Appeal Court from rulings made in Court Martial trials and specifically for the procedure to be followed in such appeals.¹⁶ It also makes provision for offences for the contravention of reporting restrictions. The Order replaces and revokes two previous Statutory Instruments (2006/1786 and 2006/1788) which contained broadly similar provisions, in order to align those provisions with the language of the AFA06, and specifically the establishment of a standing Court Martial and the creation of a single Director of Service Prosecutions. It also incorporates changes to prosecution appeals that were introduced in the civilian system as a result of part 9 of the CJA03, as part of efforts to more closely align the military justice system with that of the civilian courts.

Of note is **clause 9** which amends provisions of the *Court Martial (Appeals) Act 1968* so as to provide a right of appeal to the Supreme Court against any decision of the Court Martial Appeal Court in relation to an appeal that is made to the CMAC under this Order (as opposed to the House of Lords as provided for in SI 2006/1788). This provision reflects the

¹⁴ These were introduced in AFA06 to replace the punishment of stoppages of pay with respect to service personnel and compensation orders which could be imposed on civilians at court martial or the Service Civilian Court. In practice they are used to provide compensation when an offence results in personal injury, loss or damage.

¹⁵ At the time of publication of this briefing note, the report of the Committee was still awaited.

¹⁶ The right to apply for leave to appeal by an individual convicted at Court Martial over a finding, sentence (where it is not fixed by law) or both, exists within the primary legislation. Section 273, AFA06 also gives the Attorney General powers, equivalent to those which he already holds in respect of sentences passed by the Crown Court, to refer a case involving a criminal conduct offence to the CMAC, if he considers that the sentence passed by the Court Martial in respect of a given offence is unduly lenient.

decision to introduce a Supreme Court for the UK which will assume the jurisdiction of the current Appellate Committee of the House of Lords from October 2009. The procedure for doing so is subsequently set out in **clause 29**.

This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.¹⁷

2.5 Draft Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009

Note: Laid on 1 June 2009, the latest version of this Statutory Instrument supersedes the draft laid before Parliament on 5 May 2009.

AFA06 Background

Part 3 of AFA06 defines the powers of arrest in relation to Service offences and the powers of search, seizure and retention of property in the course of investigation of offences. For the most part those powers set down in AFA06 are exercised by the Service police, although provision is made in certain areas for the powers to be exercised by other persons subject to Service law, such as a Commanding officer.

The stop and search, search and seizure powers of the Service police are closely based upon those available to the civil police under chapter 60 of the *Police and Criminal Evidence Act 1984* (PACE) and are provisions which re-enact powers already established in the *Armed Forces Act 2001*.

Various sections of Part 3 of AFA06 confer the right on the Secretary of State to make supplementary provisions in each of these areas.

It is highly recommended that Section I B 3 of Library Research Paper RP05/86, [The Armed Forces Bill](#) is referred to for background on the primary legislative provisions.

Secondary Legislation Provisions

In summary this SI brings within a single comprehensive Order all of the supplementary arrangements provided for in Part 3 of AFA06 in relation to stop and search, search, seizure and retention of property and as outlined above are equivalent, subject to modifications, to the provisions of PACE. Specifically this Order:

Addresses the powers of Service policemen and of those acting on the orders or with the authority of a station commander. It sets out the safeguards that must be complied with and, in particular, addresses the review by judge advocates of seizures in the course of searches authorised by commanding officers and the right of persons having an interest in seized property to apply for its return.

According to the MOD's Explanatory Memorandum "it is considered important that Service personnel and others affected by such searches should have substantially similar legal safeguards to those enjoyed by persons affected by equivalent searches conducted by the UK civilian police" in the course of a criminal investigation.

¹⁷ At the time of publication of this briefing note, the report of the Committee was still awaited.

- **Entry and Search**

Clause 3 of Part 2 makes provision for the information that a Service policemen must provide to an individual whom he proposes to search under section 75 of AFA06, or leave in relation to the search of an unattended vehicle; while **clause 4** sets out what record of that search must subsequently be made. Clause 5 extends the provisions set down in those clauses to searches conducted by authorised individuals other than the Service police under section 76 AFA06.

Under section 86 AFA06 procedures enabling the Service police investigating a service offence to apply to a Judge Advocate for a warrant to access excluded or special procedure material (defined in sections 11 and 14 of PACE) that is held in any relevant premises are set down.¹⁸ **Clause 6 and Schedule 1** specify the details of those procedures; while clause 7 enables a Service policemen to make an application, either under Schedule 1 of this Order or under section 83 of AFA06, to a Judge Advocate via live link for the issuing of a entry and search warrant.

Clauses 8, 9 and 10 set down a number of safeguards relating to the issuing of warrants for entry and search under either Schedule 1 or section 83 AFA06. These provisions, with modifications to reflect the Service environment, are equivalent to sections 15 and 16 of PACE.

Clause 11 which introduces Schedule 2 sets down the oath or affirmation to be administered to a Service policeman when required to answer questions before a Judge Advocate in relation to the application of a search warrant.

Clause 12, equivalent to section 32 of PACE, makes provision for the Service police to enter and search, without a warrant, any relevant premises or vehicle in which an individual was immediately before he was arrested. **Clause 13**, equivalent to section 18 of PACE, extends those provisions to the premises occupied by an individual who has already been arrested.

- **Seizure and Retention**

Part 3 is equivalent, with modifications, to sections 19-21 and 22(1) and (4) of PACE and set down the general powers of seizure of the Service police from premises that have been searched (**clause 14**), seizure in relation to computerised information (**clause 15**) and the rights of access and copying of an individual to seized property, provided that such access or copying would not prejudice any criminal investigation or subsequent proceedings (**clause 16**). **Clause 17** sets down the general powers of retention.

Part 4 of this SI makes additional powers of seizure provisions equivalent to those contained in Part 2 of the *Criminal Justice and Police Act 2001*. Those provisions relate to circumstances in which it is not reasonably practicable to establish at the time of a search of a premises or person which material can and cannot be seized. Material held electronically is considered to present particular difficulties in this respect. Essentially the clauses of part 4 extend the power to seize property for later sifting to those searches on either premises or individuals conducted by the Service police. The power to seize property for later sifting is not however extended to persons undertaking a search on the authority of a Commanding Officer. **Clause 22** requires that articles seized under this Part must be examined as soon as

¹⁸ Relevant premises are defined as service living accommodation, premises occupied as a residence by a person subject to service law, a civilian subject to service discipline, or by the person who is suspected of having committed the offence concerned (AFA06, S.86 (3))

reasonably practicable and property whose retention is not authorised must be returned as soon as possible; while **clause 23 and 24** extends those provisions to items subject to legal privilege or is excluded or special procedure material. However, under clause 25 seized property under any of these three previous clauses may be retained where there are reasonable grounds for believing that it is either the proceeds, or evidence, of an offence and that it is necessary to retain it to prevent its being concealed, lost, damaged, altered or destroyed.

Clause 28 does make provision for an individual with an interest in the property seized under a power set down in Armed Forces legislation to apply to a Judge Advocate for its return. However, this does not apply to items seized and retained by authorised individuals other than the Service police under sections 87 and 88 of AFA06, as such seizures are subject to automatic review by a Judge Advocate under section 89. The powers and duties of a Judge Advocate when conducting that review and in the subsequent return of any property are set down in **clause 34**.

Where an application is made under clause 28 stating that property is, or contains, property subject to legal privilege, is special procedure or excluded material, a duty to secure that property from being examined, copied or used, arises (**clauses 29 and 30**) unless specifically sanctioned by the applicant or at the direction of a Judge Advocate. A similar provision also applies to that property which would have been returned but for the fact that it would not be reasonably practicable to separate it from property which is being retained (**clause 31**).

The offences for which a Judge Advocate may issue a warrant authorising entry, search and seizure are set out in **clause 33** and **schedule 3** and include among others assisting an enemy, looting, desertion and obstructing operations.

This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.¹⁹

2.6 Draft Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2009

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.²⁰ 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. Under the AFA06 Orders in Council may extend these Acts but only until November 2011, after which primary legislation will once again be required.

¹⁹ At the time of publication of this briefing note, the report of the Committee was still awaited.

²⁰ The *Naval Discipline Act* was brought into line with the *Army Act 1955* and the *Air Force Act 1955* in 1971.

The purpose of the *Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2009*, which was laid in draft on 13 May 2009, is to allow for the SDA and the AFA06 to continue in force for a further 12 months until 8 November 2010.

As implementation of the detailed provisions of the AFA06 is not expected to be completed until 31 October 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.

This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.²¹

2.7 Draft Armed Forces Act 2006 (Consequential Amendments) Order 2009

Note: Laid on 2 June 2009, the latest version of this Statutory Instrument supersedes the draft laid before Parliament on 13 May 2009.

There are several Acts and pieces of subordinate legislation on the statute books that contain special provisions relating to the Armed Forces. Once the AFA06 comes into force a number of those provisions will no longer have relevance or application or may require amending due to changes in terminology. Therefore, the purpose of this SI is merely to amend, repeal or revoke certain parts of that legislation from 31 October 2009. Schedule 1 of this SI lists those pieces of legislation that will be affected.

As this SI amends, repeals or revokes other pieces of primary legislation, its approval by both Houses is required. This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.²²

2.8 Draft Armed Forces (Civilian Courts dealing with Service Offences) (Modification of the Criminal Justice Act 2003) Regulations 2009

Under section 271, Part 9 of AFA06 relating to sentencing does not apply where a civilian criminal court is dealing with a person convicted of a service offence. Under that section the Secretary of State may, through secondary legislation, modify any provision of Chapter 12 of the CJA2003 to make it applicable to a civilian court sentencing an offender for a Service offence.

This SI sets out precisely those modifications to the CJA 2003 and according to the explanatory memorandum is intended to:

Enable civilian courts to take account of Service specific factors and ensure that a person convicted of a Service offence is treated, in so far as is reasonably practicable, in a comparable manner with any other type of accused who is convicted by the civilian court [...] and any offender who is sentenced by his commanding officer or a Service Court for a Service offence.²³

²¹ At the time of publication of this briefing note, the report of the Committee was still awaited.

²² At the time of publication of this briefing note, the report of the Committee was still awaited.

²³ *Explanatory Memorandum to the Armed Forces (Civilian Courts dealing with Service Offences) (Modification of the Criminal Justice Act 2003) Regulations 2009*, paras 2 and 7

Specifically, this SI modifies sections 143 and 240 of the CJA 2003. Section 143 of CJA 2003 provides that when sentencing an offender, the civilian courts must treat the fact that an offender committed the offence whilst on bail, as an aggravating factor. Under the AFA06 an offender cannot be placed on bail. The closest Service equivalent is being released post-charge from Service custody. The modification of section 143 of the CJA 2003 will ensure that when a civilian court sentences an offender for a Service offence, it must also regard the fact that an offender committed the offence while charged with a Service offence and released from Service custody, as an aggravating factor.

Under section 240 of CJA 2003 when a civilian court sentences an offender to imprisonment, the court is required to direct that any time spent on remand in connection with that offence, or a related offence, is to count as time already served. The modification of section 240 will ensure that when a civilian court sentences an offender to imprisonment for a Service offence, the court is required to make any time spent in post charge custody, count as time already served.

It is expected that the occasions on which a civilian court will deal with an offender for a Service offence will be rare. However, one of the main aims of the AFA06 was to bring the system of military law more closely into line with the civilian system, where practicable, thereby allowing personnel to be treated equitably.

As this statutory instrument amends a piece of primary legislation its approval by both Houses of Parliament is required. This secondary legislation was considered by the Joint Committee on Statutory Instruments on 10 June 2009.²⁴

3 List of Published Statutory Instruments

With the exception of those draft statutory instruments examined above, the secondary legislation of the AFA06 which has been published, to date, is as follows. Copies of this legislation and their explanatory memorandum are available from the Office of Public Sector Information at: <http://www.opsi.gov.uk/stat.htm>

Affirmative Resolution SI:

- SI 2007/1859, *Armed Forces (Alignment of Service Discipline Acts) Order 2007*
- SI 2007/1861, *Armed Forces (Service Police Amendments) Order 2007*
- SI 2007/2123, *Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2007*
- SI 2007/3352, *The Armed Forces (Service Complaints Commissioner) Regulations 2007*
- SI 2007/3353, *The Armed Forces (Redress of Individual Grievances) Regulations 2007*
- SI 2008/1694, *Armed Forces (Alignment of Service Discipline Acts) Order 2008*

²⁴ At the time of publication of this briefing note, the report of the Committee was still awaited.

- SI 2008/1696, *Armed Forces (Service Complaints) (Consequential Amendments) Order 2008*
- SI 2008/1780 *Armed Forces Army, Air Force and Naval Discipline Acts (Continuation) Order 2008*
- SI 2008/3294 *Armed Forces (Alignment of Service Discipline Acts) (No.2) Order 2008*

Negative Resolution SI:

- SI 2007/1442, *Armed Forces Act 2006 (Commencement No.1) Order 2007*
- SI 2007/2397, *The Courts-Martial (Army) (Amendment) Rules 2007²⁵*
- SI 2007/2913, *Armed Forces Act (Commencement No.2) Order 2007*
- SI 2007/3442, *The Courts-Martial (Army) Rules 2007*
- SI 2007/3443, *The Courts-Martial (Royal Navy) Rules 2007*
- SI 2007/3444, *The Courts-Martial (Royal Air Force) Rules 2007*
- SI 2008/1650, *Armed Forces Act (Commencement No.3) Order 2008*
- SI 2008/1651, *Armed Forces (Service Inquiries) Regulations 2008*
- SI 2009/812, *Armed Forces (Commencement No.4) Order 2009*
- SI 2009/826, *Armed Forces (Naval Chaplains) Regulations 2009*
- SI 2009/831, *Armed Forces (Terms of Service) (Amendment) Regulations 2009*
- SI 2009/832, *Armed Forces (Discharge and Transfer to the Reserve Forces) Regulations 2009*
- SI 2009/833, *Armed Forces (Forfeiture of Service) Regulations 2009*
- SI 2009/835, *Armed Forces (Aliens) Regulations 2009*
- SI 2009/836, *Armed Forces (Civilians Subject to Service Discipline) Order 2009*
- SI 2009/988, *Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) order 2009*
- SI 2009/989, *Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009*
- SI 2009/990, *Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009*
- SI 2009/991, *Armed Forces (Conditional Release from Custody) Order 2009*
- SI 2009/992, *Court Martial Appeal Court (Bail) Order 2009*

²⁵ This SI was subsequently superseded by SI.3442, SI.3443 and SI.3444 as of 1 January 2008

- SI 2009/993, *Armed Forces (Proceedings) (Costs) Regulations 2009*
- SI 2009/994, *Criminal Justice Act 1988 (Application to Service Courts (Evidence) (Revocation) Order 2009*
- SI 2009/1028, *Criminal Justice and Immigration Act 2008 (Commencement No.8) Order 2009*
- SI 2009/1059, *Armed Forces Act 2006 (Transitional Provisions etc) Order 2009*
- SI 2009/1089, *Armed Forces (Terms of Service) (Amendment) (No.2) Regulations 2009*
- SI 2009/1090, *Armed Forces (Forfeiture of Service) (No.2) Regulations 2009*
- SI 2009/1091, *Armed Forces (Discharge and Transfer to the Reserve Forces) (No.2) Regulations 2009*
- SI 2009/1093, *Armed Forces (Service of Process in Maintenance Proceedings) Regulations 2009*
- SI 2009/1094, *Armed Forces (Prescribed Air Navigation Order offences) Order 2009*
- SI 2009/1096, *Service Custody and Service of Relevant Sentences Rules 2009*
- SI 2009/1097, *Armed Forces (Custody without Charge) Regulations 2009*
- SI 2009/1098, *Armed Forces (Custody Proceedings) Rules 2009*
- SI 2009/1107, *Armed Forces (Protection of Children of Service Families) Regulations 2009*
- SI 2009/1108, *Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009*
- SI 2009/1109, *Armed Forces (Forfeitures and Deductions) Regulations 2009*
- SI 2009/1110, *Armed Forces (Warrants of Arrest for Service Offences) Rules 2009*
- SI 2009/1112, *Armed Forces (Evidence in Proceedings Before Civilian Courts) Regulations 2009*
- SI 2009/1167, *Armed Forces Act 2006 (Commencement No.5) Order 2009*
- SI 2009/1168, *Armed Forces (Review of Court Martial Sentence) Order 2009*
- SI 2009/1169, *Armed Forces (Review of Court Martial Sentence) (Supplementary Provision) Regulations 2009*
- SI 2009/1209, *Armed Forces (Service Civilian Court) Rules 2009*
- SI 2009/1211, *Armed Forces (Summary Appeal Court) Rules 2009*
- SI 2009/1212, *Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009*

- SI 2009/1213, *Armed Forces (Unfitness to Stand Trial and Insanity) Regulations 2009*
- SI 2009/1214, *Armed Forces (Service Supervision and Punishment Orders) Regulations 2009*
- SI 2009/1215, *Armed Forces (Minor Punishments and Limitations on Power to Reduce in Rank) Regulations 2009*
- SI 2009/1216, *Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009*