

ARMED FORCES ACT 2006

EXPLANATORY NOTES

THIRD GROUP OF PARTS – GENERAL

Part 18 – Commanding Officer and Other Persons With Functions under Act

Officers

Section 360: Meaning of “commanding officer”

734. This section provides the Defence Council with the power to make regulations defining who the CO of another person is for the purposes of any provision of the Act. These regulations are not made by statutory instrument as they are administrative documents. They will allow the Defence Council to provide for matters such as the rank a CO must hold if he is to hear a charge against another officer of a particular rank.

Section 361: Meaning of “higher authority”

735. This section defines higher authority in relation to a CO for the purposes of the Act as anyone superior to the CO in his disciplinary chain of command. Hence, when a CO requires higher authority approval to award particular punishments at a summary hearing it is clear from whom he must seek this approval.

Section 362: Judge Advocates

736. This section provides that for the purposes of this Act references to “judge advocate” mean the Judge Advocate General, those people who have been appointed to the office of judge advocate under the provisions of the Courts-Martial (Appeals) Act 1951 or a High Court judge. This latter category will allow the Judge Advocate General to select High Court judges for certain trials when particular expertise is required.

Court officials

Section 363: Court administration officer

737. This section creates the post of the court administration officer for the Court Martial, the SCC and the SAC. This officer is responsible for administrative matters such as listing cases and notifying witnesses of hearings in respect of proceedings before the three Service courts.
738. To establish his independence from the chain of command, the power to appoint the court administration officer is vested in the Defence Council.

Service Prosecuting Authority

Section 364: Director of Service Prosecutions

739. This section provides for the appointment of the DSP and the legal qualifications required for appointment. There is no requirement that the DSP be a member of HM Forces.

Section 365: Prosecuting officers

740. This section enables the DSP to appoint officers to be prosecuting officers, and provides for the legal qualifications required for appointment. A prosecuting officer can exercise any of the DSP's functions unless the DSP directs otherwise.

Section 366: Service Complaints Commissioner

741. This section provides for there to be a Service Complaints Commissioner, appointed by the Secretary of State (The Commissioners functions are provided for in sections 338 and 339). The section also provides that the Commissioner must not be a member of Armed Forces or the civil service, shall be subject to terms of appointment and will not have Crown status.

Part 19 – Supplementary

Chapter 1 – Application of Act

Persons subject to service law

Section 367: Persons subject to service law: regular and reserve forces

742. This section provides for when members of the armed forces are “subject to service law”. The test whether a person is “subject to service law” is a key one for most of the provisions of the Act. For example the various disciplinary offences under Part 1 of the Act are defined so that they relate to conduct of persons “subject to service law” (Some provisions of the Act also relate , and a few only relate, to “civilians subject to service discipline”: that term is defined by section 370 and Schedule 15).
743. All members of the armed forces are in the “regular forces” or the “reserve forces” (These expressions are defined in section 374). Under this section all members of the regular forces are subject to service law at all times. Member of the reserve forces are, broadly speaking, subject to service law only when carrying out training or duties or when “called out” for service under the legislation relating to the Reserve Forces (the Reserve Forces Acts 1980 and 1996).

Section 368: References to members of the regular forces

744. This section makes further provision about who, for the purposes of this Act, is a member of the regular forces. Members of the regular forces generally have an obligation to join the reserve forces after they leave the regulars. Some of them have a further commitment, after being in the reserves, under which they may be “recalled to service”. This section provides that, where such a person is recalled to service, he again becomes a member of the regular forces. In such a case he becomes a member of the regular forces from acceptance back into service until he is released or discharged. As a member of the regular forces he is (by virtue of section 367) subject to service law at all times.
745. This section also deals further with the position of officers. Officers who have been granted permanent commissions normally retain them for life. However, unless he has been recalled to regular service under this section, an officer is only to be regarded as being a member of the regular forces if he is on the “active list”. An officer is “on

the active list” only if he comes within a description provided in Queen’s Regulations, Royal Warrant or an order under section 2 of the Air Force (Constitution) Act 1917.

Section 369: Members of British overseas territories’ forces serving with UK forces

746. This section provides that when a member of a British overseas territory force undertakes any duty or training with a regular or reserve force he becomes subject to service law as if he were a member of that force of an equivalent rank or rate (subsections (1) and (2)). The section also empowers the Secretary of State to make orders (by statutory instrument) that modify any of the Act’s provisions with respect to members of a British overseas territory force who fall or have fallen within the provisions of this section (subsection (3)).

Civilians subject to service discipline

Section 370: Civilians subject to service discipline

747. This section defines a “civilian subject to service discipline” as a person who is not subject to service law and who satisfies the requirements of any paragraph of Part 1 of Schedule 15. It also gives effect to Part 2 of that Schedule, which makes further provision in relation to the requirements in Part 1.

Naval Chaplains

Section 371: Naval chaplains

748. This section enables provision to be made for Naval Chaplains. Naval chaplains are unique in that they have no rank and are commissioned simply as a “chaplain” rather than as an officer within a chaplains’ branch. This section enables the Secretary of State to make regulations (by statutory instrument) which apply any of the provisions of the Act which apply to officers generally, to naval chaplains in particular. The regulations may determine the rank a chaplain is to be considered as holding in those circumstances where a provision affects an officer differently depending on his rank.

Chapter 2 – Other Supplementary Provisions

Section 372: Evidence in proceedings before civilian courts

749. This section gives the Secretary of State power to make provision in regulations made by statutory instrument with respect to evidence in proceedings for an offence created by or under this Act before a civilian court in the UK, the Isle of Man or a British overseas territory. It replaces provisions contained in the SDAs dealing with the admissibility of certain service documents as evidence. The purpose of such provisions is to establish what may be accepted as evidence without further proof. For example, if a question arose as to whether a person had given false answers on enlistment, the regulations could provide that an enlistment document purporting to be signed by the person in question shall be evidence of the answers to questions that he gave on enlistment.

Section 373: Orders, regulations and rules

750. This section provides that where the Act creates any power for the Secretary of State to make orders, regulations or rules, these are to be made by statutory instrument and in most cases will be subject to Parliamentary scrutiny. In certain specified cases those statutory instruments are to be laid in draft and have to be approved by both Houses of Parliament before coming into effect (the “affirmative resolution” procedure); whereas all others will come into effect on a prescribed date but may be annulled by a subsequent decision of either House (the “negative resolution” procedure). Two types of statutory instrument are not subject to Parliamentary scrutiny, namely a commencement order

and an Order in Council extending the Act to the Channel Islands or modifying it in relation to the Isle of Man or the British overseas territories. In addition, an Order in Council renewing the Act or the SDAs under section 382 is not itself subject to Parliamentary approval, but cannot be made unless each House has approved it in draft.

751. The section also provides that where the Defence Council is empowered to make regulations by statutory instrument, the provisions of the Statutory Instruments Act 1946 (which provides only for the Sovereign and Ministers of the Crown to make statutory instruments) are extended to the Defence Council for these purposes, thereby treating the Defence Council as if it were a Minister of the Crown.

Chapter 3 – Interpretation

Section 375: Definitions relating to police forces

752. This section contains definitions relating to service, civilian and overseas police forces. One change to be noted is that the “Royal Navy Regulating Branch” has been renamed the “Royal Navy Police”, in order to make it clearer that this is a police force.

Section 376: “Conviction”, “sentence” etc in relation to summary hearings and the SAC

753. This section provides for certain expressions used in the Act, which would normally be used only in relation to the Court Martial and the SCC, to be read as including the corresponding terms in relation to summary hearings and the SAC. For example, a finding by a CO that the charge is proved is to be treated for the purposes of the Act as a “conviction”.
754. Subsection (5) also modifies the expression “in open court”. In the case of a summary hearing, which is not open to the public, this means in the presence of the offender.

Chapter 4 – Final Provisions

Section 378: Minor and consequential amendments and repeals

755. This section introduces Schedules 16 and 17. Schedule 16 sets out the minor and consequential amendments to other Acts that are required as a consequence of the provisions of this Act; whilst Schedule 17 sets out the repeals and revocations in other Acts and subordinate legislation that are required as a consequence of this Act. Legislation about the armed forces is referred to in very many other Acts and pieces of subordinate legislation and these now require up-dating so that, for example, they refer to the “Armed Forces Act 2006” rather than the individual SDAs.

Section 379: Power to make further amendments and repeals

756. This section gives the Secretary of State the power to make orders (by statutory instrument) to amend or repeal any primary legislation passed before or in the same session as this Act or to amend or revoke any secondary legislation made before this Act is passed, for the purposes of giving full effect to the Act or to make provision consequential to it. The references to primary and secondary legislation include Acts of the Scottish Parliament or Northern Ireland legislation and subordinate legislation passed under such Acts or legislation.
757. In respect of the devolved administrations this power will only be used in connection with devolved matters specifically for the reserved purpose of defence, and any such amendments or repeals or revocations will be subject to consultation with those legislatures. An order under this section may not be made unless approved in draft by both Houses of Parliament (section 373(3)).

Section 380: Power to make transitional and transitory provision

758. Under this section the Secretary of State may make orders for transitional and transitory provisions in connection with bringing the Act into effect. The provisions may include ones saving provisions of repealed enactments, so that they are able to have a continuing effect in certain circumstances. A simple example of the sort of provision that may be needed would be to allow proceedings which have begun in accordance with procedures laid down in one of the current SDAs to continue on that basis after new procedures under the Act have been brought into force. The main provisions of this section are noted below.
759. Subsection (2) specifies some broad matters which may be provided for in orders under this section. These include provision for the continuation of proceedings that have begun before the commencement of the Act. Another provision specifically mentioned is for the punishments available for offences committed before commencement. Under the Act, for example, a Royal Navy CO will lose his power of summary dismissal. Under this section the Secretary of State will be able to provide by order about whether such a CO will retain that power in summary proceedings begun before the repeal of that power takes effect under the Act.
760. Orders under this section will also be able to give powers, functions and jurisdiction (subsection (3)). For example, the new SCC might be given jurisdiction over cases which immediately before commencement were within the jurisdiction of a Standing Civilian Court. Subsections (4) and (5) enable provisions of the Act and other enactments affected by it to apply on a transitional basis with specified modifications.
761. Subsection (6) deals with a particular transitional problem which arises from the fact that section 61 of the Criminal Justice and Court Services Act 2000 has been passed but has not yet been brought into force. That section, when brought into force, will reduce from 21 to 18 the minimum age at which an offender may be sentenced to imprisonment. The SDAs by contrast include provision for orders relating to imprisonment between the ages of 18 and 21. Section 208 of the Act reflects the minimum age of 18 and so does not deal with imprisonment between 18 and 21. If section 61 is still not in force on commencement of the relevant provisions of the Act, subsection (6) enables the power under subsection (4) to be used to provide for an alternative form of custodial sentence (e.g. by applying the SDA provisions with modifications).
762. Subsection (7) makes a safeguard as to the use of the powers in this section. It provides that an order under this section may not allow a more severe to be available for an offence than was available at the time the offence was committed.
763. [Section 382](#) provides for the expiry of the SDAs not later than the end of 2011. Subsection (9) of this section provides for savings under this section to be unaffected by that expiry date.

Section 381: Alignment of SDAs etc with this Act

764. This section provides the Secretary of State with a power to amend or repeal provisions of the various Acts listed in subsection (3) in order to bring the operation of the current law closer to the effect that will be achieved under this Act. Because orders made under this section will amend primary legislation the orders will be subject to the affirmative resolution procedure and so will receive full parliamentary scrutiny. The purpose of this power is to reduce the differences as far as practicable between current procedures and those that will be in place under this Act. This will help to make the transition from the current systems to the single new system smoother and more manageable for the Services.

Section 382: Duration of SDAs and this Act

765. The section maintains for this Act the same requirements for renewal which currently apply to the SDAs. The Act is subject to renewal each year by Order in Council. The order must be approved by Parliament in draft. But it may be renewed in this way for a maximum of five years. Renewal beyond that time will require an Act of Parliament.
766. This section also deals with the need to continue in force the SDAs until the Act is brought into force. To do this, it provides for the SDAs to be renewable annually by Order in Council. Again the approval of Parliament to the draft Orders is required, and renewal in this way is only permitted for a maximum of five years. As mentioned in the note on section 373, subsection (9) of that section allows provisions of the SDAs which have been saved under that section to continue in force despite the expiry provisions of this section.

Section 383: Commencement

767. This section provides for certain sections to come into effect on Royal Assent (when, that is, the Act becomes an Act). The sections are:
- Section 359, which creates a pardon for persons executed for particular offences committed between the 4th August 1914 and the 11th November 1918;
 - section 373, which provides how orders, regulations and rules under the Act are to be made;
 - section 382, which provides for the renewal and expiry of the SDAs and the Act (the repeal of section 1 of the Armed Forces Act 2001, which currently governs the renewal and repeal of the Service Discipline Acts, is accordingly repealed at the same time);
 - section 384, which provides for the Act to extend to the Channel Islands, the Isle of Man and the British overseas territories; and
 - section 386, which gives the Act its short title – the Armed Forces Act 2006.
768. The section also provides for the Secretary of State to bring into force the other provisions of the Act on days appointed by order. These commencement orders are statutory instruments but are not subject to parliamentary procedure.

Section 384: Extent to Channel Islands, Isle of Man and British overseas territories

769. The Act extends to (i.e. forms part of the law of) every part of the UK. This section provides for its extent outside the UK.
770. Subsection (1) enables the Act to be extended to the Channel Islands by Order in Council. If such an Order is made, it can modify the Act (so that the law of the Channel Islands is not the same as that of the UK).
771. Under subsection (2) the Act extends directly (i.e. without the need for an Order in Council) to the Isle of Man and the British overseas territories; but an Order in Council can be made in order to modify it in its application to any of those territories.
772. An Order in Council under this section is not subject to parliamentary approval: see section 373(4).

Section 385: Extent of applied enactments

773. Subsection (1) ensures that, where another enactment is applied by the Act or by subordinate legislation made under it, for this purpose the applied enactment extends to (i.e. forms part of the law of) every part of the UK, even if the original enactment extends only to part of the UK.

*These notes refer to the Armed Forces Act 2006 (c.52)
which received Royal Assent on 8 November 2006*

774. Subsection (2) similarly applies the rules in section 384 (which deals with the extent of the Act outside the UK) to any enactment applied by or under the Act.