

## **ARMED FORCES ACT 2006**

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### **EXPLANATORY NOTES**

#### **COMMENTARY**

##### *First Group of Parts – Discipline*

##### **Part 13 – Discipline: Miscellaneous and Supplementary**

##### *Chapter 1 – Testing for Alcohol and Drugs*

592. These sections authorise testing for drugs and alcohol to be carried out in specified circumstances on persons who are subject to service law, and, in some cases, on civilians subject to service discipline. The results of such tests are not admissible as evidence in proceedings for a service offence. These sections do not limit the statutory powers to test for alcohol and or drugs under PACE or the Road Traffic Act 1988; nor do they affect the admissibility of evidence obtained under those statutes in any proceedings.

##### *Section 305: Testing for drugs*

593. Subsection (1) enables a drug testing officer to require a person subject to service law to provide a sample of his urine to test for controlled drugs. This creates a statutory power to underpin the operation of a random drug testing programme under which all members of HM Forces, regardless of rank or rate, are subject to periodic random testing. There is no requirement for a person to be suspected of drug misuse before a urine sample can be demanded.

594. Subsection (2) provides that the power may not be exercised in connection with the investigation of an offence or of an incident giving rise to the power in section 306, nor where the drug testing officer (or his CO) is the CO of the person to be tested.

595. Subsection (3) makes it an offence to fail to comply with a requirement to provide a urine sample under this section.

##### *Section 306: Testing for alcohol and drugs after a serious incident*

596. This section provides a power to require a person who is subject to service law, or a civilian who is subject to service discipline, to provide a sample for alcohol or drugs testing where there has been a serious incident and where, in the opinion of the person exercising the power, the person to be tested may have caused or contributed to it. This power enables evidence of drug or alcohol consumption to be obtained in order to assist a service inquiry (section 343) to determine whether such consumption or use might have been a factor in the incident. “Drug” and “sample” are defined in section 307.

597. Subsection (1) specifies that an incident falls within this section if in the opinion of the officer it resulted in, or created a risk of, death or serious injury, or of serious damage to property.

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

598. Subsection (3) specifies that the power is exercisable by the CO of the person to be tested, and subsection (6) provides that the Defence Council may make regulations providing for its exercise to be delegated.
599. Subsection (4) provides that it is an offence for a person to fail to comply with a requirement imposed under this section without reasonable excuse.

***Section 307: Definitions etc for purposes of section 306***

600. This section defines certain expressions used in section 306. Subsection (2) defines “drug” to mean either a controlled drug (within the meaning of the Misuse of Drugs Act 1971) or any other drug specified by the Secretary of State.
601. Subsection (3) provides that “sample” means a sample of urine or breath where it is required to test for alcohol; that it means a sample of urine where it is required to test for drugs; and that, in either case, it includes any other sample specified by the Secretary of State by order.
602. Subsections (4) and (5) provide that the Secretary of State may not specify an invasive sample, such as blood or semen, under subsection (3), and that the person being tested must consent to the taking of any sample so specified by the Secretary of State.

***Section 308: Sections 305 and 306: supplementary***

603. This section authorises the Defence Council to make regulations governing the obtaining and analysis of samples under this Chapter. It provides that such regulations may deal with a number of procedural matters such as the number of times a person may be required to provide a sample, the procedures employed to analyse samples, and the training and qualifications of those persons carrying out such analysis.

***Chapter 2 – Contempt of Court***

604. This Chapter enables service courts to deal with misbehaviour at court or in relation to proceedings before those courts. Such misbehaviour is otherwise known in civilian courts as contempt of court. In all cases the powers are exercised by the judge advocate.
605. The judge advocate’s powers are broadly the same as those of a magistrate in England and Wales under the Magistrates’ Courts Act 1980 and the Contempt of Court Act 1981. Existing powers under the SDAs are replaced with a single set of rules regardless of the rank or rate of the offender. In the UK, these powers may be exercised against any person; outside the UK they may be exercised only against persons subject to service law or civilians subject to service discipline.
606. If an offender is subject to service law, or a civilian subject to service discipline, the judge advocate may commit him to service custody. This punishment may be carried out at any service custody premises, including the MCTC. It is not a sentence of service detention, and so it will be administered by the MCTC in their remand wing where officers and civilians subject to service law may be held prior to their trial by the Court Martial.
607. Civilians who are not subject to service discipline under the Act may not be committed to service custody, but may instead be fined up to a maximum of level 4 on the standard scale (currently £2,500).
608. The powers provided in this Chapter are intended to deal with misbehaviour in the face of the court. Other acts that constitute contempt of court but which fall outside these powers may be referred to a civilian court under section 311.

***Section 309: Offences of misbehaviour in court etc***

- 609. Subsection (1) specifies the misbehaviour that constitutes the offence. This includes disruptive behaviour in court, failure of a party or witness to assist the court, and intimidation of witnesses or court members.
- 610. Subsections (2) and (3) specify the punishments which may be awarded (summarily) by the judge advocate.
- 611. Subsection (4) provides that the court may revoke an order committing the offender to service custody and, if he is already in custody, to discharge him. This allows the judge advocate to bring a punishment under this section to an end if the offender gives an appropriate apology.
- 612. Subsection (5) specifies the service courts that have jurisdiction under this section.

***Section 310: Power to detain before dealing with section 309 offence***

- 613. Subsection (1) gives the court power to order that an offender under section 309 should be taken into service custody and detained there until the court rises.
- 614. Subsections (2) and (3) provide that if the court considers that it should not exercise its powers under section 309 without a further hearing, then in certain circumstances the offender may be detained for a further period, provided that his total period of detention does not exceed 48 hours in total.
- 615. Subsection (4) specifies criteria, one or more of which must be met if a person is to be held in service custody after the court rises.

***Section 311: Certification to civil courts***

- 616. Subsection (1) provides that this section applies where a person does an act in relation to proceedings before a qualifying service court which would constitute contempt of court if the court were a civilian court with power to commit for contempt. This could include act which amounts to an offence under section 309, if the court chooses not to deal with the matter itself – because of the seriousness of the offence, for example.
- 617. In the above circumstances the service court may refer (“certify” is the term used in the Act) the offence to any civilian court which has power to commit for contempt, or, if the offence took place outside the UK, to the High Court. That civilian court may then inquire into the matter and deal with the offender under its own normal procedures. The Divisional Court of the Queen’s Bench Division, in the High Court, has a supervisory jurisdiction over inferior courts and in practice most serious forms of contempt will be referred to that court.
- 618. The power is similar to that provided for a number of other inferior courts and tribunals, for example the Data Protection Tribunal (section 6 of the Data Protection Act 1998).

***Section 311: Decisions of court under section 309: making and effect***

- 619. Subsection (1) provides that the rules relating to findings by the Court Martial and the SAC do not apply to this Chapter. Subsection (2) provides that the powers under sections 309 and 311 are to be exercised by the judge advocate alone.
- 620. Subsections (3) and (4) provide that the court may direct that a committal to service custody under section 309 shall take effect from the end of any period of service detention.
- 621. The section also provides that although committal to service custody is not service detention, certain of the rules relating to service detention can be applied in respect of such custody.

### ***Chapter 3 – Arrest and Detention by Civil Authorities***

#### **Arrest for service offences**

##### ***Section 313: Arrest by civilian police under warrant of judge advocate***

622. This section permits judge advocates to issue warrants to the civilian police forces of the UK or any British overseas territory for the arrest of persons reasonably suspected of having committed service offences. There is an obligation on those making an arrest under such a warrant to transfer the arrested person into service custody as soon as practicable. Further rules as to the practice and procedure which are to apply when arrest warrants are issued under this section may be made by the Secretary of State by statutory instrument.

#### **Arrest etc for desertion or absence without leave**

##### ***Section 314: Arrest by civilian police of deserters and absentees without leave***

623. This section permits the civilian police in the UK or a British overseas territory to arrest a suspected absentee without a warrant. It also provides authority for an “authorised person” in the UK, the Isle of Man or a British overseas territory to issue an arrest warrant in certain circumstances. An authorised person is a person who is empowered in the civilian system to issue arrest warrants, e.g. a Crown Court judge or magistrate in England and Wales. A person who is arrested pursuant to these provisions must be brought before a court of summary jurisdiction.

##### ***Section 315: Deserters and absentees without leave surrendering to civilian police***

624. This section provides that a person who surrenders himself as being a deserter or absent without leave to a police officer of a UK or British overseas territory police force must be taken to a police station. The person in charge of the police station (or a person authorised by him) must consider the case and if it appears to him that the person who has surrendered is subject to service law and illegally absent, he may arrange for him to be (a) delivered into service custody, (b) brought before a court, or (c) released with conditions as to his reporting at a future time and place (this last course is equivalent to being granted police bail in England and Wales).

##### ***Section 316: Proceedings before civilian court where person suspected of illegal absence***

625. This section details the duties of a summary court in the UK, the Isle of Man or a British overseas territory when a person admits to being illegally absent or where the court is in possession of evidence that he is illegally absent.
626. If the suspect is not in custody for some other cause (e.g. if he was arrested for assault and it then transpired that he was an illegally absent serviceman he might be in custody for the assault), and the required evidence exists, the court must either (a) arrange for the suspect to be delivered into service custody, or (b) release him subject to conditions in respect of his reappearance at a later time and place ((b) is equivalent to being bailed by a magistrates’ court in England and Wales). If the court decides that he should be delivered into service custody it may hold a person in custody pending his transfer into service custody where it is likely that such transfer will be subject to delay.
627. Where the court does not have evidence that the person is illegally absent he must be released (unless he is in custody for some other cause). A person who has been released under this provision may nevertheless subsequently be arrested, either pursuant to a warrant for his arrest or under section 67 (powers of arrest where a person is reasonably suspected of committing or having committed a service offence).

***Section 317: Warrant for the arrest of persons released under section 315(4)(c) or 316(3)(a)(ii)***

628. When a suspect is released from custody subject to conditions under section 315(4)(c) or section 316(3)(a)(ii) and he fails to meet those conditions, a warrant may be issued for his arrest. Such warrants may be issued by a judge advocate, and if the release was authorised by a civilian court, by a person authorised to issue warrants by that court. A person arrested pursuant to these provisions must be transferred to service custody as soon as practicable. This section also provides that the Secretary of State may make rules by statutory instrument which set out the practice and procedure with respect to the issue of arrest warrants by judge advocates under this section.

**Arrest of persons unlawfully at large**

***Section 318: Arrest by civilian police of persons unlawfully at large***

629. This section provides that a person who has been sentenced to service detention and is “unlawfully at large” (as defined by section 301) may be arrested by a member of the civilian police in the UK or a British overseas territory without a warrant and may be taken to wherever he is required to be detained. For example, a person sentenced to service detention and unlawfully at large in the UK could be arrested without a warrant and taken to the MCTC, which is where he would be required to serve his period of detention.

**Supplementary**

***Section 319: Certificates in connection with transfer to service custody etc***

630. This section allows the Secretary of State to make a provision requiring a certificate in respect of a person who having been apprehended by the civil authorities is either delivered into service custody or released by them. The Secretary of State may make regulations by statutory instrument that set out matters such as the details the certificates should record. For example, a record of whether the person was wearing uniform may be useful evidence as to whether he was absent without leave or had actually deserted.

***Section 320: Power to use reasonable force***

631. When an arrest is effected by a police officer he may use such force as is reasonable to apprehend the suspect.

***Chapter 4 – Powers of the Criminal Cases Review Commission***

***Section 321: Powers of the Criminal Cases Review Commission***

632. This section gives effect to Schedule 11, which confers powers on the Criminal Cases Review Commission in relation to convictions by service courts.

***Chapter 5 – Supplementary***

**Financial penalty enforcement orders**

***Section 322: Financial penalty enforcement orders***

633. This section permits the Secretary of State by way of secondary legislation to make provision to enable the Defence Council or authorised persons to make orders for the enforcement of financial penalties by prescribed courts in England and Wales, Scotland and Northern Ireland or the Isle of Man.
634. The regulations may in particular provide for the type of cases in which orders may be made; the form content and effect of such orders; and the functions of the

Defence Council in relation to such orders and their power to delegate such functions (subsection (2)).

635. Where the regulations make provision with respect to the effect of such orders, the regulations may provide that an outstanding sum is to be treated as if it had been a fine imposed by a specified court and for prescribed enforcement procedures to be or cease to be available on prescribed events (subsection (3)).
636. A “financial penalty” is defined as a fine or compensation order imposed by virtue of this Act (including such penalties ordered to be paid by a service parent or guardian under section 268), and a sum adjudged to be paid under section 236(3).

### **Power to make provision in consequence of criminal justice enactments**

#### ***Section 323: Power to make provision in consequence of criminal justice enactments***

637. The broad purpose of this section is to enable statutory changes in the criminal justice system of England and Wales to be adapted and applied by subordinate legislation to the Services’ system of justice. The powers in this section are based on those in section 31 of the Armed Forces Act 2001.
638. Under this section the Secretary of State may by order make in relation to service policemen, service courts, persons subject to service law, civilians subject to service discipline and service law proceedings provision equivalent (subject to modifications) to:
- any enactment (called in the section a “criminal justice enactment”) passed after 1<sup>st</sup> January 2001 which amends the law of England and Wales relating to any “criminal justice matter”,
  - any other enactment about a criminal justice matter which is itself amended by a criminal justice enactment, and
  - any subordinate legislation made under either of the above types of enactment.
639. The Secretary of State is, for example, able to make for the armed forces provision equivalent to new criminal justice legislation and other legislation about criminal justice which has been altered by such new legislation.
640. A “criminal justice matter” is itself defined in section 324 (2). It covers such matters as police powers of investigation and detention, powers of arrest, custody, bail, evidence, procedure and court powers (including sentence). The Secretary of State may by order extend it to other criminal justice matters, but in such a case the order must be approved in draft by both Houses of Parliament.
641. The power to make equivalent provision is wide enough to allow the Secretary of State to amend existing legislation, but again in such a case the order must be approved in draft by both Houses of Parliament.

#### ***Section 324: Section 323: definitions***

642. This section contains a number of definitions for the purposes of section 323, including (as mentioned in the note on section 323) definitions of “criminal justice enactment” and “criminal justice matter”.

### **Other supplementary provisions**

#### ***Section 325: Evidential burden as respects excuses***

643. It is a general principle of English criminal law that it is for the prosecution to prove beyond all reasonable doubt that an accused person is guilty of an offence. However an

accused is sometimes subject to a burden in relation to the evidence, for example if he raises insanity as a defence. Statutes may expressly or impliedly impose such a burden on the accused. This section imposes such a burden on an accused if he raises a defence of lawful excuse or reasonable excuse. “Lawful excuse” is a defence, for example, to an offence of assisting an enemy under section 1 of the Act, and “reasonable excuse” is a defence, for example, to the offence of misconduct on operations (under section 2).

644. Under the criminal law of England and Wales there two main kinds of burden that could apply. One is a burden to prove something (which, in the case of an accused, would be on a balance of probabilities). The other burden is lower. It is not strictly one of proof, but only of bringing sufficient evidence to satisfy the judge (the judge advocate in the Court Martial) that there is an issue which should be left to those responsible for deciding the facts (such a jury or, in the case of the Court Martial, the panel of Service members). Section 323 provides that this lower burden applies to an accused in relation to a defence of lawful excuse or reasonable excuse.

***Section 326: Exclusion of enactments requiring consent of Attorney General or DPP***

645. This section makes it clear that proceedings under the Act for a service offence do not require the consent of the Attorney General or the Director of Public Prosecutions, even if proceedings for a corresponding civilian offence would require such consent. This does not affect section 61(2), which requires the consent of the Attorney General to the bringing of a charge once a time limit under any of sections 55 to 58 has expired.

***Section 327: Local probation boards***

646. **Section 327** inserts a provision into the Criminal Justice and Court Services Act 2000 (“the 2000 Act”) in substitution for a similar provision inserted into that Act by Schedule 16. The reason for this, and the effect of the inserted provision, is as follows.
647. **Paragraph 178** of Schedule 16 inserts a new section – section 5A – into the 2000 Act. This provision empowers the Secretary of State to make arrangements for local probation boards to provide the full range of their professional services in respect of persons who appear before service courts. Examples of these services would include the preparation of pre-sentence reports, and the supervision of offenders subject to an overseas community order.
648. It is intended that paragraph 178 of Schedule 16 should come into force as soon as is practicable. As a consequence, the section it inserts into the 2000 Act is necessarily an interim measure, containing references to the SDAs (which are to be repealed by the Act) and to courts constituted under those Acts.
649. **Section 327** is intended to come into force on the Act’s main commencement date, and sets out a new section 5A that is consistent with the rest of the Act, and is substituted for that inserted by Schedule 16. The amendment to the 2000 Act set out in this section is to the same effect as that inserted by Schedule 16.