

## **ARMED FORCES ACT 2006**

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### **EXPLANATORY NOTES**

#### **COMMENTARY**

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

#### **Part 3 – Powers of Arrest, Search and Entry**

##### *Chapter 1 – Arrest etc*

157. This chapter defines the power of arrest in relation to service offences and sets out who can be arrested, and who can arrest in relation to service offences. It also provides for a power to search upon arrest and makes further provision permitting the person exercising this power to seize and retain any items found during the search. For the most part, these powers are to be exercised by the service police.

#### **Powers of arrest**

##### *Section 67: Power of arrest for service offence*

158. This section sets out the powers of arrest when it is reasonably suspected that a service offence has been, or is being, committed. It describes who may be arrested and who can exercise the power of arrest. The person making the arrest, or who orders someone else to arrest on his behalf, must reasonably suspect the person to be arrested of being engaged in committing or having committed a service offence. A service policeman may arrest any persons subject to service law, irrespective of rank or rate, and civilians subject to service discipline.
159. Officers, warrant officers or NCOs who are not service policemen may arrest persons of inferior rank or rate who are subject to service law, and officers may arrest civilians subject to service discipline. Officers may also arrest other officers of any rank if they are engaged in a mutiny.
160. Persons who are not service policemen but who are lawfully exercising authority on behalf of a provost officer may arrest persons subject to service law and civilians subject to service discipline. In the maritime environment persons on the staff of the officer of the day (duty officer) may arrest members of a ship's company or embarked force.

##### *Section 68: Section 67: supplementary*

161. This section makes supplementary provisions relating to the powers of arrest. Subsection (2) ensures that section 67(3) will apply to former members of HM Forces. Such a person will be treated for the purposes of section 67(3) as being of the rank or rate which they held when last a member of the forces. Subsection (3) ensures that section 67(4) will apply to a person who is no longer a civilian subject to service discipline but who is suspected of having committed an offence while a civilian subject to service discipline. Subsection (4) ensures that it is a service policeman who must arrest a person in respect of an offence where the consent of the Attorney General is necessary under section 61 to charge the person with that offence.

***Section 69: Power of arrest in anticipation of commission of service offence***

162. This section provides a service policeman with the power to arrest a person he reasonably suspects of being about to commit a service offence.

**Search on arrest**

***Section 70: Search by service policeman upon arrest***

163. This section permits a service policeman to search an arrested person who he has reasonable grounds to believe may present a danger to himself or others or who may be concealing anything which might help him escape or (in the case of an arrest under section 67 or 69) which might be evidence relating to a service offence.

***Section 71: Search by other persons upon arrest***

164. This section allows a person (other than a service policeman) who is exercising a power of arrest to search an arrested person who he has reasonable grounds to believe may present a danger to himself or others.
165. It further allows a person other than a service policeman to search an arrested person for anything that the arrested person might use to help him escape or which might be evidence relating to an offence on the direction of the arrested person's CO. The CO can only direct such a search if the assistance of a service policeman or civilian policeman cannot be obtained, and the CO has reasonable grounds to believe that if the search is delayed the arrested person would escape or conceal or damage evidence.

***Section 72: Sections 70 and 71: supplementary***

166. This section provides that a person exercising a power to search under section 70(2) or 71(4) may search an arrested person only to the extent reasonably required to discover anything which might help him escape from custody or which might be evidence relating to a service offence. The search powers may not be used to require an arrested person to remove any clothing in public other than outer clothing, but the search of the person's mouth is allowed.

***Section 73: Seizure and retention after search upon arrest***

167. This section sets out when persons exercising a power of search may seize and retain things they find. Persons who search an arrested person on the grounds that he presents a danger to himself or others and retain things they reasonably believe the person searched may use to injure him or others.
168. Persons who exercise a power to search on the grounds that the arrested person may be concealing anything which might help him to escape or which might be evidence relating to an offence may seize and retain things they have reasonable grounds to believe might be used by the arrested person to escape from custody, or which are evidence of an offence or which have been obtained in consequence of the commission of an offence, unless those items are subject to legal privilege.

***Section 74: Power to make provision conferring power to search premises at which person arrested***

169. This section enables the Secretary of State to make by statutory instrument subject to annulment an order providing for the power to enter and search premises equivalent to the provision of section 32 of PACE.

## ***Chapter 2 – Stop and Search***

170. This chapter sets out the powers available to stop and search persons and vehicles (which includes ships and aircraft for the purposes of this chapter). The powers available to service policemen are closely based on those available to constables under PACE.

### ***Section 75: Power of service policeman to stop and search persons, vehicles etc***

171. This section gives a service policeman the power to stop certain persons and vehicles in a place permitted by section 78 to search for specified things such as stolen goods or controlled drugs. The policeman may detain a person for this purpose and seize any of the specified things if he finds them. A list of definitions of words used is presented at section 77.

### ***Section 76: Stop and search by persons other than service policemen***

172. This section provides for others to have similar powers where a service policeman is not available and the authorising officer has reasonable grounds to suspect that a criminal conduct offence would be committed, or that a person who has committed such an offence would avoid apprehension, if the powers authorised could not be exercised before it would be possible to have the assistance of a service or UK civilian policeman.
173. The range of persons who may be searched is narrower than that available to service policemen. It is limited (at subsection (2)) to persons subject to service law and civilians subject to service discipline whose CO (in either case) is the authorising officer, plus persons who fall outside that category but are reasonably believed to fall within it.
174. Subsections (3) to (5) make clear that orders may only be for the search of a particular person or vehicle, and may only be given and conducted when the ordering or authorising officer and the person searching have reasonable grounds to suspect that the circumstances at section 75(2) exist. The authorisation may permit the detention of a person or vehicle for the purposes of the search, and seizure by the searcher of the same articles which a service policeman may seize under subsection (1)(b) and (c).

### ***Section 78: Places in which powers under sections 75 and 76 may be exercised***

175. This section describes the places where powers under sections 75 and 76 may be exercised. These include places to which the public has access, and premises used for official purposes by HM Forces excluding service living accommodation.

### ***Section 79: Sections 75 and 76: limitation on searching persons or vehicles in certain gardens etc***

176. This section sets out limitations in respect of the search of persons in certain gardens or on certain other land. These limitations apply equally to service policemen and others authorised to stop and search by virtue of sections 75 or 76. In relation to dwellings or service living accommodation, subsections (1) and (2) set out that a person may only be searched there if the authorising officer or service policeman has reasonable grounds to suspect he neither dwells there nor is there with permission from a person who does. Subsections (3) and (4) apply the same approach to the search of vehicles.

### ***Section 80: Searches under sections 75 and 76: supplementary***

177. This section sets out the safeguards with regard to the conduct of the search. It provides the person may only be detained for the purpose of the search for such time as is reasonably required to permit the search to be carried out. It also places certain limitations on the search of outer garments.

***Section 81: Power to make further provision about searches under sections 75 and 76***

178. This section permits the Secretary of State to make further provision analogous to that in certain sections of PACE dealing with search.

***Section 82: Application of Chapter to ships and aircraft***

179. This section provides that the provisions above which apply to vehicles will also apply to ships and aircraft in the same way.

***Chapter 3 – Powers of Entry, Search and Seizure***

180. This chapter gives powers to judge advocates (and, in limited circumstances, to COs) to authorise the entry, normally by service police, into certain premises, the search of such premises and the seizure and retention of anything in relation to which the search was authorised. The provisions are based on powers in PACE and largely re-enact those in the Armed Forces Act 2001.

**Entry for purposes of obtaining evidence etc**

***Section 83: Power of judge advocate to authorise entry and search***

181. This section is based on section 8 of PACE. It is limited to relevant residential premises and does not apply to other premises occupied by the services. This is because COs and the service police need no statutory power to enter those other areas. A statutory power is only necessary where the occupier would otherwise be entitled to refuse admission.
182. Subsection (1) enables judge advocates, subject to being satisfied on certain matters, to issue warrants authorising the entry and search of relevant residential premises on the application of a service policeman. A warrant cannot be issued for items which are subject to legal privilege, excluded material or special procedure material (which are defined in section 84).
183. Subsection (2) sets out further conditions that must also be met for a warrant to be issued.
184. Subsection (3) authorises a service policeman to seize and retain anything for which the search was authorised.

***Section 84: Section 83: definitions***

185. This section defines relevant terms used in section 83.
186. The terms “items subject to legal privilege”, “excluded material” and “special procedure material” have the meanings given in PACE. Examples of excluded material include personal records (such as medical records and journalists’ materials), if held in confidence. An example of special procedure material is journalists’ material not held in confidence.

***Section 85: Section 83: Power to make supplementary provision***

187. This section enables the Secretary of State by order to make provision for the use of live television links (or similar arrangements) for hearing an application for a warrant, where for example a judge advocate might not be readily available as the applicant is overseas.
188. The Secretary of State may also make provisions equivalent to sections 15 and 16 of PACE. These sections include safeguards relating to the issue and execution of warrants; for example, searches under a warrant must usually be made at a reasonable hour and the policeman intending to search must identify himself to the occupier. The

order may make modifications to PACE provisions to ensure that the provisions work effectively within the service system.

***Section 86: Power to make provision as to access to excluded material etc***

189. This section enables the Secretary of State by order to establish procedures to enable service policemen investigating a service offence to apply to a judge advocate for a warrant for access to excluded or special procedure material that is held in any relevant residential premises.

***Section 87: Power of CO to authorise entry and search by service policeman***

190. This section gives COs a limited power to authorise a service policeman to search relevant residential premises without a warrant. The power may only be exercised where the conditions for obtaining a warrant under section 83 exist and the CO has reasonable grounds for believing that it is likely that the time needed to get a warrant would result in the search being frustrated or seriously prejudiced.
191. Subsection (4) (as read with section 89) provides for the service policeman to seize and retain anything for which the search was authorised, subject to review by a judge advocate as soon as practicable.

***Section 88: Power of CO to authorise entry and search by other persons***

192. This section gives the CO a similar power to that in section 87, to authorise a member of HM Forces who is not a service policeman to conduct the search. This power can only be used to search service living accommodation. Such accommodation might include shared temporary accommodation on operations overseas or on exercise.

***Section 89: Review by judge advocate of certain searches under section 87 or 88***

193. This section requires that where any search authorised by a CO under section 87 or 88 has resulted in anything being seized and retained, a judge advocate must be asked to review the search, seizure and retention as soon as practicable.
194. The section enables the Secretary of State to make provision by order governing the powers of judge advocates in respect of these reviews.

**Entry for purposes of arrest etc**

***Section 90: Entry for purpose of arrest etc by a service policeman***

195. This section sets out the circumstances in which a service policeman can, without a warrant, enter and search service living accommodation or other premises occupied by persons subject to service law or civilians subject to service discipline (or reasonably believed to be such persons) to arrest a person he reasonably believes to be there at the time. The powers of entry and search extend to communal areas of premises in multiple occupation, such as barrack accommodation or blocks of flats.
196. Subsection (4) sets out additional powers for a service policeman to enter the same premises to save life or limb or prevent serious damage to property.
197. Subsection (5) limits the power of search to what is reasonably required for the purpose for which the power of entry is exercised.

***Section 91: Entry for purpose of arrest etc by other persons***

198. This section enables a CO to authorise a person subject to service law (other than a service policeman) to exercise the powers of entry for the purposes of arrest conferred by section 90 on a service policeman.

199. Subsection (3) provides that the CO must only give such authority if he has reasonable grounds for believing that waiting to get the assistance of a service or civilian policeman might result in the person to be arrested evading capture, concealing or destroying evidence or being a danger to himself or others, or result in discipline or morale being undermined.
200. This section also enables a CO to authorise a person subject to service law (other than a service policeman) to exercise the powers of entry mentioned at paragraph 196 above, but only in relation to certain premises and only if it is not practicable to get the assistance of a service policeman in time to prevent the harm occurring.
201. The functions of the CO under this section may be delegated by him in accordance with Regulations made by the Defence Council. This may, for example, allow a more junior officer to exercise the powers in an emergency in the absence of the CO.

### **Additional powers of entry, search and seizure**

#### ***Section 92: Power to make provision conferring powers of entry and search after arrest***

202. This section gives the Secretary of State power to make by order provision dealing with the entry and search of premises controlled by a person arrested under section 67 who is being held in service custody without being charged. The provision that may be made would be equivalent to that in section 18 of PACE, subject to such modifications as the Secretary of State thinks appropriate for the service context.

#### ***Section 93: Power to make provision conferring power of seizure etc***

203. This section gives the Secretary of State power to make provision by order dealing with seizure and the power to retain property seized. The provision that may be made is equivalent to that set out in sections 19 to 21 of PACE or section 22(1) to (4) of that Act, subject to such modifications the Secretary of State thinks appropriate for the service context.

### ***Chapter 4 – Supplementary***

#### ***Section 94: Property in possession of service police or CO***

204. This section enables the Secretary of State to make provision by regulations as to the disposal of property which has come into the possession of a service policeman or a CO in connection with an investigation into a service offence. It is anticipated that the regulations will reflect provisions in the Police Property Act 1897 (as amended) which gives magistrates a wide power to make orders for the disposal of property.
205. Regulations made under this section may enable a service court or judge advocate either to order the return of property to the person appearing to be the owner or, if the owner cannot be found, to order its disposal as they see fit. The regulations may also allow the CO to determine to whom the property is delivered.
206. Regulations may also establish time limits after which a decision on disposal by a service court or judge advocate could not be challenged in civil proceedings. Such limits may not be imposed where a decision on a disposal is made by a CO.

#### ***Section 95: Saving provision***

207. This section provides that the power of a CO or service policemen to enter and search service premises (other than service living accommodation) and service vehicles not in anybody's charge at the time are unaffected by the provisions in this Part of the Act.

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

***Section 97: Power to use reasonable force***

208. This section permits the use of reasonable force, if necessary in the exercise of powers authorised in Part 3 which relate to entry, search and seizure.