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STATUTORY INSTRUMENTS

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**2006 No. 2326**

**DEFENCE**

**The Criminal Justice and Public Order Act 1994  
(Application to the Armed Forces) Order 2006**

|                               |         |                            |
|-------------------------------|---------|----------------------------|
| <i>Made</i>                   | - - - - | <i>24th August 2006</i>    |
| <i>Laid before Parliament</i> |         | <i>4th September 2006</i>  |
| <i>Coming into force</i>      | - -     | <i>26th September 2006</i> |

The Secretary of State makes the following Order in exercise of the powers conferred by section 39(1) of the Criminal Justice and Public Order Act 1994 (1):

**Citation, commencement and interpretation**

1.—(1) This Order may be cited as the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2006, and shall come into force on 26th September 2006.

(2) In this Order “the Act” means the Criminal Justice and Public Order Act 1994 and “the 1997 Order” means the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces ) Order 1997(2).

**Amendment of the 1997 Order**

2.—(1) Article 2(2)(e) of the 1997 Order is revoked.

(2) In the Schedule to the 1997 Order the modification made in column 2 to section 35(1) of the Act shall be substituted with ‘for the words ‘legal representative’ there shall be substituted the words ‘legal adviser’’, and in column 1 the reference to section 35(6) of the Act shall be omitted.

**Application of the Act**

3.—(1) The provisions of the Act which are specified in column 1 of Schedule 1 to this Order shall apply to the proceedings to which this Order applies, subject to the modifications specified in column 2 of that Schedule.

(2) This Order applies—

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(1) 1994 c. 33; sections 34 and 36 to 38 were amended by the Youth Justice and Criminal Evidence Act 1999 (c.23), section 58.  
(2) S.I. 1997 No. 16

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- (a) to proceedings whereby a charge is summarily tried under Part II of the Naval Discipline Act 1957<sup>(3)</sup>;
- (b) to proceedings before a court-martial constituted under the Army Act 1955<sup>(4)</sup>;
- (c) to proceedings before a court-martial constituted under the Air Force Act 1955<sup>(5)</sup>;
- (d) to proceedings before a court-martial constituted under the Naval Discipline Act 1957;
- (e) to proceedings before the Courts-Martial Appeal Court;
- (f) to proceedings before a Standing Civilian Court;

and it applies wherever the proceedings take place.

(3) Schedule 2 to this Order sets out sections 34 to 38 of the Act as modified by the 1997 Order and the provisions of this order, as they apply to the proceedings listed at article 3(2).

24th August 2006

*Tom Watson*  
Parliamentary Under Secretary of State  
Ministry of Defence

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<sup>(3)</sup> 1957 c. 53  
<sup>(4)</sup> 1955 c. 18  
<sup>(5)</sup> 1955 c. 19

SCHEDULE 1

Article 3(1)

APPLICATION AND MODIFICATION OF THE ACT

| <i>Column 1</i>                    | <i>Column 2</i>   |
|------------------------------------|---|
| <i>Provisions applied</i>          | <i>Modifications</i>  |
| Sections 34(2A), 36(4A) and 37(3A) | In sections 34(2A), 36(4A) and 37(3A) the word ‘solicitor’ shall be substituted with the words ‘legal adviser.’   |
| Section 38(1)                      | In section 38(1) after the words ‘In sections 34, 35, 36 and 37 of this Act—’ there shall be inserted the words<br><br>‘ “legal adviser” means (a) a person who has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990; (b) an advocate or solicitor in Scotland; (c) a member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland; or (d) a person having in any of the Channel Islands, the Isle of Man, a Commonwealth country or British overseas territory rights and duties similar to those of a barrister or solicitor in England and subject to punishment or disability for a breach of professional rules.’ |
| Subsection (2)                     |   |
| Subsection (2A)                    | In section 38(2A) after the words ‘a police station; or ’ there shall be inserted the words ‘(aa) any building or part of the building, any structure, or any room (whether on land or on a ship) which is used by a service policeman for the performance of his duties; or’   |
| Subsections (3),(5) and (6).       |   |

SCHEDULE 2

Article 3(3)

“Inferences from accused’s silence

**34. Effect of accused’s failure to mention facts when questioned or charged**

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—

- (a) on being questioned under caution by a service policeman trying to discover whether or by whom the offence had been committed, or during the taking of evidence as a preliminary to the trial of the offence by court-martial, failed to mention any fact relied on in his defence in those proceedings; or
- (b) on being charged by a service policeman with the offence or officially informed by a service policeman that he might be prosecuted for it, failed to mention any such fact,

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being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies—

- (a) ..
- (b) ..
- (c) the court, in determining whether there is a case to answer; and
- (d) the court, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

(2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a legal adviser prior to being questioned, charged or informed as mentioned in subsection (1) above.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) ..

(5) This section does not—

- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
- (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the coming into force of the 1997 Order.

(7) ..

### **35. Effect of accused's silence at trial**

(1) At the trial of any person...for an offence, subsections (2) and (3) below apply unless—

- (a) The accused's guilt is not in issue; or
- (b) It appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal adviser informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

- (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
- (b) the court in the exercise of its general discretion excuses him from answering it.

(6) ..

(7) This section applies only if the time when the court begins to receive evidence in the proceedings falls after the coming into force of the 1997 Order.

### **36. Effect of accused's failure or refusal to account for objects, substances or marks**

(1) Where—

- (a) a person is arrested by a service policeman, and there is —
  - (i) on his person; or
  - (ii) in or on his clothing or footwear; or
  - (iii) otherwise in his possession; or
  - (iv) in any place in which he is at the time of his arrest,any object, substance or mark, or there is any mark on any such object; and
- (b) that or another service policeman investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the service policeman; and
- (c) the service policeman informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and
- (d) the person fails or refuses to do so,  
then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

- (a) ..
- (b) ..
- (c) the court, in determining whether there is a case to answer; and
- (d) the court, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a mark or substance thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the service policeman when making the request mentioned in subsection (1) (c) above what the effect of this section would be if he failed or refused to comply with the request.

(4A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a legal adviser prior to the request being made.

(5) ..

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

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(7) This section does not apply in relation to a failure or refusal which occurred before the coming into force of the 1997 Order.

(8) ..

### **37. Effect of accused's failure or refusal to account for presence at a particular place**

(1) Where—

- (a) a person arrested by a service policeman was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
- (b) that or another service policeman investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
- (c) the service policeman informs the person that he so believes, and requests him to account for that presence; and
- (d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

- (a) ..
- (b) ..
- (c) the court, in determining whether there is a case to answer; and
- (d) the court, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the service policeman when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(3A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) do not apply if he had not been allowed an opportunity to consult a legal adviser prior to the request being made.

(4) ..

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure or refusal which occurred before the coming into force of the 1997 Order.

(7) ..

### **38. Interpretation and savings for sections 34, 35, 36 and 37**

(1) In sections 34, 35, 36 and 37 of this Act—

“court” in relation to any proceedings whereby a charge is tried summarily shall include any person or body trying the charge;

“legal adviser” means—

- (a) a person who has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990;
- (b) an advocate or solicitor in Scotland;

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- (c) a member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland; or
- (d) a person having in any of the Channel Islands, the Isle of Man, a Commonwealth country or British overseas territory rights and duties similar to those of a barrister or solicitor in England and subject to punishment or disability for a breach of professional rules.

“the 1997 Order” means the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces ) Order 1997 ([SI 1997/16](#));

“place” includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever;

“service policeman” means a member of the Royal Navy Regulating Branch, the Royal Marines Police, the Royal Military Police, the Royal Air Force Police or the staff of the Royal Air Force Provost Marshal.

(2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(2A) In each of sections 34(2A), 36(4A) and 37(3A) “authorised place of detention” means —

- (a) a police station; or
- (aa) any building or part of the building, any structure, or any room (whether on land or on a ship) which is used by a service policeman for the performance of his duties; or
- (b) any other place prescribed for the purposes of that provision by order made by the Secretary of State;

and the power to make an order under this subsection shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) A person shall not have a case to answer or be convicted of an offence solely on an inference drawn from such failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) ..

(5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.”

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

The Criminal Justice and Public Order Act 1994 at sections 34 to 37 (with interpretative provisions at section 38), introduced measures which allow a court to draw such inferences as appear proper from the failure or refusal of an accused person to provide information in defined circumstances.

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The Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997, applies those provisions, with modifications, to the proceedings set out in article 3(2).

The 1994 Act has been amended by the Youth Justice and Criminal Evidence Act 1999, so as to prohibit the drawing of inferences from an accused's silence if he has not been allowed an opportunity to consult a solicitor in circumstances where sections 34, 36 and 37 would otherwise apply. This Order applies those new provisions, with appropriate modifications, to the Armed Forces.

The relevant provisions of the 1994 Act have the following effect:

Section 34 applies when an accused fails to mention facts when questioned under caution or when he is charged.

Section 35 makes provision for the effect of an accused's silence at trial.

Section 36 applies when an accused is arrested and fails or refuses to account for objects, substances or marks (either on his person or clothing or footwear, or in the place where he is arrested, or otherwise in his possession).

Section 37 applies when an accused is arrested and fails or refuses to account for his presence at a particular place.

Section 38 is an interpretation and savings provision which relates to sections 34 to 37.

The Schedule 2 to this Order, which is for ease of reference and information purposes only, incorporates amendments to sections 34 to 38 of the 1994 Act made by the Youth Justice and Criminal Evidence Act 1999, and reflects those provisions as modified by the 1997 Order and this Order, as they apply to the proceedings in article 3(2).