

# **ARMED FORCES ACT 2001**

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## **EXPLANATORY NOTES**

### **THE ACT - COMMENTARY ON SECTIONS**

#### **Part 2 – Powers of Entry, Search and Seizure**

##### *Sections 2 to 16*

#### **The previous position and the new arrangements in outline**

15. Prior to this Act, the SDAs did not set out the powers, which might need to be exercised during the investigation of offences allegedly committed by members of the armed forces or other persons who are subject to the SDAs. Instead, those powers were exercised on the authority of the commanding officer under his inherent powers. The principal powers were those to stop and search members of the armed forces or of other persons subject to the SDAs, and those to enter and search their living accommodation. However, it has been recognised for some time that the scope of those powers was unclear and that it was desirable they should be clarified and put on a statutory footing. The aim was to ensure that both those who exercise those powers and those who are subject to them were clear about the limits of the powers and the safeguards which apply to the exercise of those powers.
16. The Act replaces those powers. Instead, the Service police are given statutory powers based on those available to the civilian police, although they will be modified to suit the needs of the Services. Each of the armed forces has a force of Service police, i.e. the Royal Navy Regulating Branch, the Royal Military Police, the Royal Air Force Police and the Royal Marines Police. They have many of the functions of civilian police but are members of the armed forces with no constabulary powers. This means Service police cannot exercise statutory powers conferred on constables; any powers they require must be specifically applied to them. Commanding officers are given, by Part 2, more limited versions of the powers of investigation given to the Service police.
17. One of the main provisions is about searching for evidence of suspected serious offences. The Service police will be able to apply for a warrant to search the living accommodation of persons subject to the SDAs for evidence of such offences. Judicial officers are to have the necessary powers to grant warrants. (Judicial officers are legally qualified persons appointed under the SDAs to deal with a range of matters arising under those Acts). This brings the Services broadly into line with the position in civilian life, where members of Home Department police forces have to obtain a warrant to search from a magistrate. It also provides greater certainty and, by providing that extra certainty and independent legal supervision of applications for permission to search, is intended to avoid the risk of a challenge to those searches succeeding under the European Convention on Human Rights.
18. A commanding officer retains a residual power to authorise searches of living accommodation of persons subject to the SDAs in exceptional circumstances, where, broadly speaking, he reasonably considers that a warrant cannot be obtained by a Service policeman or (in the United Kingdom) by a member of a Home Department

police force in time for the search to be effective. An example of where this power may be necessary is during operational deployments overseas. However, the exercise of this power will be subject to retrospective review by a judicial officer. There is more detail about these powers of search in paragraphs 33 and 34 below.

19. The Police and Criminal Evidence Act 1984 allows the Secretary of State to use subordinate legislation to apply a number of the civilian powers of investigation to the investigation of offences under the SDAs with appropriate modifications. Some of the changes outlined above fell outside this order-making power and, to that extent, primary legislation was required to provide a coherent system of investigation.

### ***Section 2: Powers to stop and search persons, vehicles, etc.***

20. This section gives the Service police the power to stop and search anyone reasonably believed to be subject to the SDAs, any vehicle driven by such a person and any Service vehicle in the charge of any person. The power may only be exercised if the Service policeman has reasonable grounds for suspecting that he will find stolen or prohibited articles (very broadly, offensive weapons, other than those possessed for Service reasons, and things which could be used for theft or similar offences), unlawfully obtained stores or controlled drugs. The section is based on section 1 of the Police and Criminal Evidence Act 1984. Like section 1 of the 1984 Act, it allows stop and search in public places. It also allows stop and search in places occupied or controlled by any of the armed forces, and this includes vessels, aircraft and hovercraft (section 2(1)(c) and the definition of “premises” in section 16). “Premises” include bases of any of those forces, except those parts which are defined (in section 15 of the Act) as service living accommodation.
21. With the increased employment by the armed forces of civilian contractors, it is not unusual for Service vehicles to be driven by civilians who are not subject to Service law. These drivers cannot be searched as they are not subject to the SDAs. However, the vehicles may be searched, if there are reasonable grounds for doing so. Although the driver is free to go, in practice the act of stopping and searching a Service vehicle may result in the driver being detained. The section allows for this detention.
22. The section also gives a Service policeman the power to seize any articles he finds if he reasonably suspects that they are stolen, prohibited, etc.

### ***Section 3: Provisions relating to search under section 2***

23. This section sets out some additional provisions relating to the powers of search which may be exercised under section 2.
24. This section is based on section 2 of the Police and Criminal Evidence Act 1984, which mainly provides for safeguards against misuse of the power to stop and search. In particular, section 3 provides that a person or vehicle may only be detained under section 2 of this Act for a period reasonably needed to make a search; and that persons cannot be required to remove anything other than an outer coat, jacket or gloves in public if they are searched. It also allows the Secretary of State by regulations to make provision equivalent to that made by sections 2 and 3 of the 1984 Act. For example, one of the safeguards in section 2 of the 1984 Act is the duty of a policeman to inform the person whom he intends to search of his name, the object of the search and the grounds for the search.
25. As explained in paragraph 20 above, the power to search persons applies on board vessels, aircraft and hovercraft, as well as in other places. Section 3 provides that the power to search vehicles applies to these other forms of transport. It also provides that the rules on search under section 2 do not apply to premises used for custody, detention and imprisonment. These are subject to separate rules on search, made under other provisions of the SDAs.

***Section 4: Power of Commanding Officer in relation to stopping and searching of persons, vehicles etc.***

26. **Section 4** confers upon the commanding officer the powers of search which a Service policeman has under section 2. Commanding officers may only use these powers, or authorise someone under their command to use them, in limited circumstances. The powers of search under this section may only be used in relation to a person under the commanding officer's command, or a vehicle in the charge of such a person. Moreover, commanding officers will only be able to use these powers if they reasonably believe that a criminal offence will be committed or an offender will avoid arrest, and if it is not possible to act until the assistance of a Service policeman or a member of a UK civilian police force is obtained.

***Section 5: Power of judicial officer to authorise entry and search of certain premises***

27. This section gives judicial officers the power to issue warrants authorising the search of certain premises on application by a Service policeman investigating an offence under the SDAs. The powers are limited in that they can only be applied to premises used as living accommodation for Service purposes or to the homes of persons subject to the SDAs. The section also permits the Service police to seize and retain anything for which the search has been authorised. It is based on section 8 of the Police and Criminal Evidence Act 1984.
28. It may be noted that the provisions on powers of entry refer generally only to entry to accommodation. There is no reference to other areas under Service occupation. This is because commanding officers and Service police need no special statutory power to enter these other areas. They will only need the agreement of anyone who is entitled to refuse admission. This is expressly made clear in section 16(7).
29. The section sets out the requirements for the issue of a warrant. For example, there must be reasonable grounds for believing that a relevant offence has been committed and that certain conditions have been met, e.g. the purpose of the search would be seriously prejudiced if immediate entry cannot be secured upon arrival at the premises. The offences which are relevant are defined in section 5(2). They include the criminal offences for which a warrant may be obtained by civilian police, but also certain serious Service offences, such as assisting the enemy and looting. Evidence searched for must not include items subject to legal privilege, excluded material or special procedure material. Searches for excluded material and special procedure material are provided for in section 6.
30. The section allows the Secretary of State to make an order permitting the use of live television links (or similar arrangements) for hearing an application for a warrant. This is because of the possibility of the need for Service police to act in places where a judicial officer might not be on hand, most obviously in some places abroad. The section also provides for the making (by order) of provision equivalent to sections 15 and 16 of the Police and Criminal Evidence Act 1984. Those 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.

***Section 6: Special provisions as to access***

31. **Section 6** allows the Secretary of State to make orders to establish procedures that would enable Service policemen investigating an offence under the SDAs to apply to a judicial officer for a warrant for access to excluded or special procedure material that is held in any premises for which a search warrant is needed, i.e. premises used as living accommodation for service purposes or the homes of persons subject to the SDAs. The section corresponds to section 9 of the Police and Criminal Evidence Act 1984, and "excluded material" and "special procedure material" have the same definitions

(under section 16) as in the 1984 Act. As mentioned in paragraph 29 above, there is no power under section 5 to search for such material. Special procedures, including extra safeguards, apply under the 1984 Act to obtaining a warrant to search for such materials. Excluded material includes, for example, personal records, such as medical records, if held in confidence, and also journalist's materials if held in confidence. An example of special procedure material would be journalist's material not held in confidence.

32. The section allows the civilian procedure for applying for this type of warrant to be adapted for use in the Service discipline system, with modifications, to enable the application procedure to work effectively within that system. The section also allows for application procedures to include the use of live television links.

### ***Section 7: Power of commanding officer to authorise entry and search of certain premises***

33. **Section 7** gives commanding officers a limited power to authorise the search, without a warrant, of the living accommodation of persons under his command. The powers of search under this section may only be exercised where the conditions for obtaining a warrant under section 5 exist, but the commanding officer reasonably believes that it is likely that the time needed to obtain a warrant would result in the purpose of the search being frustrated or seriously prejudiced. The section also allows the person conducting the search to seize and retain any articles for which the search was authorised.
34. The section requires such a search to be carried out by a Service policeman, unless none is available and it is likely that the time necessary to obtain the assistance of a Service policeman would result in the purpose of the search being frustrated or seriously prejudiced. In cases where a commanding officer authorises someone other than a Service policeman to conduct a search, the section restricts the range of premises that may be searched. The sort of premises which a commanding officer may need to have searched when Service police are not available is likely to be shared, temporary accommodation which Service personnel use on operation or on exercise, whether in tents, buildings or on board ship. Search by Service personnel who are not Service police is specifically ruled out in the case of accommodation provided for the exclusive use of a person subject to the SDAs, or for such a person and his or her family, although they are unlikely, in any case, to be in places where Service police are unavailable. It is thought appropriate that such accommodation, which is closer to a private home, should only be subject to search by a Service policeman.

### ***Section 8: Review by judicial officer***

35. This section requires the seizure and retention of anything seized during a search authorised by a commanding officer without a warrant to be reviewed by a judicial officer. This review is a safeguard to ensure that searches without warrants are still subject to an appropriate level of judicial scrutiny.
36. The section enables the Secretary of State to make orders governing the powers and duties of judicial officers in respect of these reviews. An order under this power will be subject to the affirmative procedure and must be approved by both Houses of Parliament before being made (section 35).

### ***Section 9: Entry for purposes of arrest etc.***

37. **Section 9** provides that entry to and search of certain premises is permissible for the purposes and in the circumstances specified in the section. It is based on section 17 of the Police and Criminal Evidence Act 1984, but with a number of differences. An important one is that section 17 of the 1984 Act applies to a list of powers of arrest under various pieces of civilian legislation. Section 9 of this Act refers instead to the existing powers of arrest under the SDAs (which apply to any offence under those Acts).

38. The section authorises Service police to enter and search, without a warrant, premises used as living accommodation for Service purposes, and the homes of persons subject to the SDAs, to make arrests under any of the SDAs or to prevent death, serious injury or serious damage to property. If the purpose of the entry is to make an arrest, the Service policeman must have reasonable grounds for believing the person he wishes to arrest is on the premises. Service police may also enter and search, for the purposes of arrest, the residences of persons who are no longer in the Services but are still subject to Service law for the purposes of dealing with them for an offence committed whilst they were subject to Service law. The extent of any search under the section is restricted to searching for the person to be arrested. Thus the section does not, for example, give a power to look for evidence while effecting an arrest.
39. **Section 9** also allows a commanding officer to authorise a member of the forces, other than a Service policeman, to enter and search, without a warrant, the living accommodation (whether provided for Service purposes or otherwise) of a person under his command in order to arrest that person or to prevent death, serious injury or serious damage to property. (Powers of arrest are given by the SDAs to a wide range of Service personnel.) The commanding officer's authority to enter for the purposes of an arrest may only be given if the offence is one for which a search warrant could be issued under section 5 by a judicial officer. The commanding officer must have reasonable grounds for believing that waiting to obtain 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 being undermined.
40. The authority to enter for the purposes of saving life, preventing serious injury or preventing serious damage to property may only be given by the commanding officer if it is not practicable to obtain the assistance of a Service policeman in time to prevent the harm occurring.
41. The section also provides that regulations may be made by the Defence Council allowing commanding officers to delegate their powers. Such delegation could be used to allow a duty officer to authorise entry if, for example, an emergency arose in the commanding officer's absence.

### ***Section 10: Search upon arrest***

42. This section allows a person who makes an arrest under the SDAs, or a Service policeman, to search the person arrested if he has reasonable grounds for believing that that person may be a danger to himself or others. The section corresponds to subsections 32(1) and 32(2)(a) of the Police and Criminal Evidence Act 1984.
43. The section also allows a Service policeman to search a person if he has reasonable grounds for believing that that person may be concealing something which may assist him to escape or something which may be evidence of an offence. Searches must not go beyond what is reasonably necessary, and the section does not authorise the removal of any clothing in public other than an outer coat, jacket or gloves, but it does allow the search of a person's mouth. Anything found by a Service policeman during such a search may be seized and retained, other than an item subject to legal privilege, if the Service policeman has reasonable grounds for believing that it may be used by the person searched to assist him to escape, that it is evidence of an offence, or that it has been obtained as a result of committing an offence.
44. Where an arrest is made by a person other than a Service policeman, the commanding officer of the arrested person may order the person making the arrest to undertake a search. In that case the commanding officer must have reasonable grounds for believing that that person may be concealing something which may assist him to escape or something which may be evidence of an offence. A commanding officer may instead leave the decision to search to the discretion of the person making the arrest. Then, the person effecting the arrest may only undertake a search if he has reasonable grounds for believing that the person under arrest may be concealing anything which may assist

him to escape or anything which may be evidence of an offence. These searches are subject to the same limitations that apply to searches carried out by Service policemen.

45. The commanding officer may only authorise the search of a person if he has reasonable grounds for believing that it is likely that the person arrested would escape, or would conceal or destroy evidence, before the assistance of a Service or civilian policeman could be obtained.
46. This section also provides for the making, by order, of provisions equivalent to the powers under section 32 of the Police and Criminal Evidence Act 1984 to enter and search premises. The section also allows the Defence Council to make regulations in relation to the delegation of the commanding officer's powers.

***Section 11: Power to make provisions equivalent to that made by sections 18 to 22 of the Police and Criminal Evidence Act 1984***

47. **Section 11** allows the Secretary of State to make orders dealing with entry and search after arrest (equivalent to section 18 of the Police and Criminal Evidence Act 1984) and the seizure and retention of material found during those searches (equivalent to sections 19 to 22 of that Act). As with the civilian system, such searches will not require a search warrant, but the power only applies to the premises of persons being held in Service custody prior to any charge being made. The section allows the Secretary of State to include in the orders any modifications he thinks fit in the Service context.

***Section 12: Property in possession of service police or commanding officer***

48. This section allows the Secretary of State to make regulations dealing with the disposal of property which has been acquired by the Service police during the investigation of an offence. A number of Acts contain provision for the disposal of property which has come into the hands of the civilian police in such circumstances. Of these, section 1 of the Police (Property) Act 1897 gives magistrates a wide power to make orders for the disposal of property. Section 12 of this Act enables a regime for such disposals to be set up in relation to cases within the Services' disciplinary systems. In particular, regulations under section 12 may enable a Service court or judicial officer 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 commanding officer to determine to whom the property is delivered, and make provision for appeals against decisions. They may also establish time limits after which a decision on disposal by a Service court or judicial officer could not be challenged in civil proceedings. Similar provision applies under section 1(2) of the Police (Property) Act 1897. Such limits may not, however, be applied where a decision on disposal is made by a commanding officer. Any decision by the commanding officer is without prejudice to the right of an individual to challenge a decision before the courts.

***Section 13: Orders and codes of practice under section 113 of the Police and Criminal Evidence Act 1984.***

49. Section 113 of the Police and Criminal Evidence Act 1984 enables the Secretary of State to make orders applying, with modifications, the provisions of that Act which relate to the investigation of offences by civilian police to the investigations of offences under the SDAs. The section also requires the Secretary of State to issue codes of practice for persons who are concerned with the investigation of offences under the SDAs.
50. **Section 13** of this Act amends section 113 of the 1984 Act to take into account the provisions of this Act. It narrows the scope of the power under section 113 because the substantive provisions and order-making powers in Part 2 of this Act make the power in some respects unnecessary. Section 13 of this Act also requires additional codes of practice to be issued covering the exercise of the new powers under Part 2 of the Act.

***Section 14: Power to use reasonable force***

51. This section provides that reasonable force may be used by a person exercising the powers conferred by the previous sections, or any regulations made under them. It corresponds to section 117 of the Police and Criminal Evidence Act 1984.

***Section 15: Meaning of “service living accommodation”***

52. **Section 15** defines service living accommodation. The definition is important, because persons who may need to conduct a search in a particular case must be clear whether they need to apply for a warrant. The definition is complex because of the need to include all the different sorts of living accommodation in which the Services may find themselves in such a way that different powers may be related to some types of accommodation but not others. The first part of the definition refers to Service accommodation for the particular use of an individual or an individual and his or her family. This would cover a family quarter, but not a barrack dormitory.
53. However, on board ship, in barracks or on operations, accommodation may well be shared, for example in a room containing bunk beds, with lockers for personal effects sometimes in a separate area such as a corridor. Despite the communal nature of these arrangements, every person is considered to have a private living space of some sort. In both individual and shared accommodation a warrant under section 5 will generally be needed to search in connection with the investigation of an offence. The powers of commanding officers under section 7 to authorise searches other than by the Service police are only exercisable over shared Service accommodation.
54. The section excludes from this definition any area where a person is being held in custody, detention or imprisonment.

***Section 16: Part 2: Supplementary provisions***

55. Subsections (1)-(6) of section 16 define various phrases and words used in the preceding sections. Subsection (7) is designed to avoid any doubt about the effect of sections 2 to 15. Some of those sections give and define powers in relation to certain types of accommodation. They are not intended to affect the rights of Service police or of commanding officers to go into other places under Service control. Section 16 provides expressly that the earlier sections of Part 2 of the Act do not restrict the powers of Service police and commanding officers to enter and search any Service premises which are not Service living accommodation or to search any Service vehicle when it is not in the charge of a person. It also provides that those sections do not limit any powers of the commanding officer to enter and search Service living accommodation, or to stop and search persons or vehicles, for reasons unconnected with the investigation of offences, for example, for a health and safety inspection.