

EXPLANATORY MEMORANDUM TO
THE ARMED FORCES (TRANSITIONAL PROVISIONS etc) ORDER 2009

SI 2009 No. 1059

1. This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 The purpose of this instrument is to create transitional and transitory provisions that will apply when the Armed Forces Act 2006 (AFA 06) is fully commenced and when the Service Discipline Acts (SDAs) are repealed. This instrument therefore forms a bridge between the repealed legislation and AFA 06 by (a) making provisions that enable SDA proceedings to continue under AFA 06 and (b) modifying the terminology of AFA 06 so as to take account of the SDAs (for example so that most references in AFA 06 to Service offences are modified so as to include SDA offences).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 For most purposes this instrument shall come into force on 31st October 2009. However, for the purposes set out in article 3 of The Armed Forces 2006 (Commencement Order No 4) Order 2009 (SI 2009/812), which provides for the making of instruments under the Act and certain delegations and appointments, it shall come into force on the day after the day on which this instrument is made.
4. **Legislative context**
 - 4.1 Under section 380 of AFA 06, the Secretary of State may by order make transitional and transitory provisions in connection with bringing AFA 06 in effect.
 - 4.2 Particular transitional matters that may be dealt with in such orders are set out in s380(2). For example, s380(2)(a) allows provisions to be made enabling offences committed before AFA 06 is commenced, to be investigated, tried and punished after commencement. However, section 380(7) also prevents articles in this Order providing that a punishment may be imposed which is more severe than the punishment which was applicable when the offence was committed.
 - 4.2 Section 380(4) enables provisions to be made which will have a transitory effect until a particular enactment is brought into force. This is a necessary mechanism where the AFA 06 refers to an enactment which will not be brought into force until after AFA 06 is commenced (see for example AFA 06, s270 which refers to s151 of the Criminal Justice Act 2003) or is otherwise drafted on the basis that legislation not yet commenced will have been commenced.
5. **Territorial extent and application**
 - 5.1 This instrument extends to the United Kingdom, the Isle of Man and British overseas territories.
6. **European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The policy intent behind this instrument was the creation of provisions which would enable the three Services to transit from the three separate and distinct service discipline systems to the AFA 06 arrangements in a manner which will cause minimum disruption to the Services in the long term.

7.2 It would have been possible to save parts of the repealed legislation and allow the saved parts to continue to apply (for transitional purposes) as if they had not been repealed. However, it has been decided that wherever possible AFA 06 arrangements shall be adopted in relation to matters which are ongoing when AFA 06 is commenced. This reduces the need for the Services to operate after commencement under the SDA arrangements as well as the AFA 06 arrangements. As a result, the repealed legislation is generally only saved where to do otherwise might result in an unfairness to an accused, be much more complex in drafting terms, or would be difficult to apply in practice. For example, SDA punishments which are ongoing at commencement will continue (post commencement) as SDA punishments because to convert them to their AFA 06 equivalent would (in some cases) prove to be very difficult.

8. Consultation outcome

8.1 The majority of the transitional provisions are technical and are designed to ensure a smooth transit from the three current disciplinary systems to a single new system in a manner which reflects the principles underlying AFA 06. As a result, it has not generally been necessary to consult with external agencies and stakeholders about the arrangements that have been provided for in this instrument.

8.2 Where, however, the transitional provisions alter the effect of legislation which is controlled by other government departments, the relevant government department has been contacted and advised of the proposed arrangements. None of those Departments which have been contacted has objected to the transitional arrangement proposed.

8.3 The transitory provisions reflect corresponding provisions made by the Ministry of Justice in relation to civilian sentencing legislation.

9. Guidance

9.1 Guidance on certain parts of the transitional arrangements will be set out in the Manual of Service Law. This will provide basic guidance to Commanding Officers, those advising Commanding Officers and the Service Police on key aspects of the transitional arrangements.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Armed Forces Act 2006 is subject to a requirement for renewal each year by Order in Council (approved in draft by both Houses of Parliament) and renewal by Act of Parliament every five years. In response to these requirements the Act will be subject to continuing monitoring and a general review will be conducted in order to provide for the Act of Parliament which will be required in 2011.

13. Contact

13.1 Mr N Shaw at the Ministry of Defence, 0207 218 0564, email nick.shaw460@mod.uk can answer any queries regarding the instrument.