

EXPLANATORY MEMORANDUM TO
THE MINISTRY OF DEFENCE POLICE (CONDUCT AND APPEALS TRIBUNALS)
(AMENDMENT) REGULATIONS 2018

2018 No. 1119

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to enable disciplinary proceedings to be taken against former members of the Ministry of Defence police ("former officers"). The instrument applies the disciplinary procedures for MDP officers to former officers, including the appeals procedures. It also corrects errors.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Instrument corrects errors in the Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) (Amendment) Regulations 2017 [S.I. 2017/84] that was reported in the 26th Report of the 2016/2017 session for requiring elucidation and for defective drafting as well as errors in the Ministry of Defence Appeals Tribunals Regulations 2009 and the Ministry of Defence Police (Conduct etc) Regulations 2015.
- 3.2 Due to the number of corrections made by this Instrument, it has been agreed with the S.I. Registrar that the free issue procedure should apply in this case.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Section 3A of the Ministry of Defence Police Act 1987 confers a power on the Secretary of State to make provision for disciplinary procedures to be established for MDP officers. There is a similar power to make provision for appeals to a police appeals tribunal under section 4A of that Act from decisions made under the disciplinary procedures. These sections were amended by Schedule 7 of the Policing and Crime Act 2017 so that provision could be made for the disciplinary procedures to apply to former MDP officers, and for former officers to have a consequent right of appeals to police appeals tribunals.

7. Policy background

What is being done and why?

- 7.1 A public perception that officers who have committed serious wrongdoing can avoid accountability through resignation or retirement has caused damage to public confidence. Currently, where a complaint or allegation about the conduct of an MDP officer comes to light after that officer has left the MDP, no action can be taken. Similarly, where an officer retires or resigns during an investigation or after proceedings have been started nothing further can be done under the disciplinary procedures.
- 7.2 The purpose of these Regulations is to strengthen accountability where the allegation amounts to gross misconduct, the most serious cases of wrongdoing. They enable an allegation to be investigated and for a former officer to be referred to a disciplinary hearing. A determination as to whether the allegation amounted to gross misconduct can be made, as well as the decision as to whether the person would have been dismissed from the MDP had they still been an MDP officer. This information forms part of the former officer's police record and will be placed on the Police National Database.
- 7.3 The Regulations cover cases where the allegation comes to light before an officer leaves the MDP as well as cases where it comes to light after they have left.
- 7.4 Where an allegation comes to light more than 12 months after someone left the MDP, there must be an investigation under external procedures before the regulations will apply to such a former officer – also known as a condition C person. External procedures are procedures that have been agreed between the Secretary of State for Defence with the Director General of the Independent Office for Police Conduct (“DG”), the Police Investigations and Review Commissioner for Scotland (“PIRC”) and the Police Ombudsman for Northern Ireland (“PONI”) that that apply Part 2 and Schedule 3 of the Police Reform Act 2002 in England and Wales and the equivalent statutory procedures in Scotland and Northern Ireland.
- 7.5 In addition, the DG must determine whether it would be in the public interest to take disciplinary action against a condition C person before the matter can be referred to a disciplinary hearing. This is known as a condition C special determination. This applies to cases investigated by the PIRC or PONI as well as cases investigated by the DG.
- 7.6 The criteria for a condition C special determination are set out in the modified procedures. The DG must determine whether the taking of disciplinary proceeding would be reasonable and proportionate having regard to: - the seriousness of the

alleged gross misconduct; the impact of the allegation on public confidence in the police and; the public interest.

- 7.7 Before making such a determination, the DG will give notification to the complainant, any interested person and the former MDP officer. Persons notified may provide a written statement and any document that they wish the DG to consider. The DG may consult any person they think fit. Where a case was investigated under external procedures with PIRC, the DG must consult PIRC. If the investigation was carried out under procedures agreed with the PONI, the DG must consult the PONI. The DG may also consider any other relevant evidence.
- 7.8 The purpose of the special determination is to allow the DG to consider, where an allegation is received more than 12 months after the person left the MDP, whether it is reasonable and proportionate for disciplinary proceedings to be brought against a person. The intent here is that only the most serious and exceptional cases would then be referred to disciplinary proceedings based on that key test linked to the seriousness, impact on public confidence and public interest. This mechanism ensures adequate accountability and safeguards to allow former MDP officers to be appropriately held to account in a manner that is proportionate and targeted on the most serious matters.
- 7.9 Where there is no case to answer for gross misconduct, the report of an investigation will state whether there may nevertheless be a breach of the Standards of Professional Behaviour. Where the former officer falls within the definition of a Condition C person and disciplinary proceedings cannot be brought, the report should indicate whether there has been a breach of the Standards of Professional Behaviour and whether that breach was so serious that the person would have been dismissed if they were still serving. This is to ensure that the investigations which do not lead to a hearing reach a clear conclusion as to whether there may have been a breach of the Standards of Professional Behaviour which would mean that if the MDP officer was still serving there would be a case to answer and the matter would be referred to disciplinary proceedings.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There are no plans for consolidation.

10. Consultation outcome

- 10.1 These Regulations have not been subject to public consultation. The changes made for former MDP officers follow those already made by the Home Office for former police officers in England & Wales. Whilst also not subject to public consultation, the Home Office consulted the Police Advisory Board of England and Wales before making those changes.

11. Guidance

- 11.1 The MOD Police will update its non-statutory guidance on the disciplinary procedures to reflect the changes made in line with the statutory guidance issued by the Home Office.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because it has no impact on business.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 It is not considered necessary for the operation of this legislation to be reviewed. The Ministry of Defence mirrors the changes made by the Home Office to its disciplinary procedures.

15. Contact

- 15.1 Karen Feather at the Ministry of Defence Telephone: 020 7807 8245 or email: karen.feather384@mod.gov.uk can answer any queries regarding the instrument.
- 15.2 Harvey Moore, Deputy Head, Directorate of Security and Resilience, at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Tobias Ellwood MP, Minister for Defence People and Veterans at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.