

EXPLANATORY MEMORANDUM TO
THE ARMED FORCES (ALIGNMENT OF SERVICE DISCIPLINE ACTS)
(No. 2) ORDER 2008 No. Draft

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 This instrument amends selected provisions of the current Service Discipline Acts (the SDAs, the collective name for the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957) so that they align with the effect of comparable provisions in the Armed Forces Act 2006 (AFA 06).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative context**
 - 4.1 The Director of Service Prosecutions (DSP) was appointed in March 2008 and was due to assume his statutory powers under AFA 06 s.364 on 1 January 2009. The full implementation of AFA 06 has subsequently been delayed until October 2009 with the effect that the DSP will be precluded from undertaking his statutory duties under AFA 06 until then. The provisions of the SDAs will continue in force until AFA 06 is implemented.
 - 4.2 At present each of the Services has a prosecuting authority appointed by Her Majesty under provisions in the SDAs. These provisions currently require the prosecuting authorities to be officers of the relevant Service. The MoD wishes to amend these provisions so that the prosecuting authorities need not be officers of any Service. This will accord with the provisions governing the appointment of the DSP under the AFA 06. The amendments to the SDAs will allow Her Majesty to appoint the DSP as prosecuting authority for each Service until he assumes his powers under the AFA 06.
 - 4.3 The order is made under s.381 of AFA 06, which provides for the repeal or amendment of any of the provisions of the SDAs for the purpose of reducing or eliminating any differences between their effects now and the effects of AFA 06 on full implementation.
5. **Territorial extent and application**
 - 5.1 This instrument extends to all of the United Kingdom. It will amend the SDAs which apply to those who are subject to military law, air force law or naval discipline, wherever they are throughout the world.

6. European Convention on Human Rights

6.1 The Under Secretary of State has made the following statement regarding Human Rights:

In my view, the provisions of the Armed Forces (Alignment of Service Discipline Acts) (No 2) Order 2008 are compatible with the Convention rights.

7. Policy Background

7.1 This order amends various sections of the SDAs governing who may be appointed as a prosecuting authority in order to align them to AFA 06 provisions governing who may be appointed as the DSP.

7.2 Once the amendments to the SDAs are made Her Majesty will be invited to appoint the DSP as the single Service prosecuting authority for each Service with effect from the 1 January 2009 – the date upon which the DSP was to have assumed full statutory powers under the AFA 06 until implementation of that Act was delayed. In policy terms these measures are both useful to the Service discipline system and will help to ensure a seamless transition to the position as it will be in October 2009.

8. Consultation outcome

8.1 In deciding whether to bring forward these amendments the MoD consulted with colleagues in the Attorney General's department, the DSP and the Service legal branches. The consultations were conducted over a period of weeks on an informal basis.

8.2 The 12 week consultation period was not adhered to as this is a local, specialised issue that is not a matter of wider public interest. As the DSP was to have assumed full powers under the AFA 06 on the 1 January 2009 (and this is a means of providing him with similar powers under the SDAs at that time), the MoD considered that the Parliamentary approval of provisions in the AFA 06 and subsequent open competition to select a DSP meant that further consultation on this matter was not required.

9. Guidance

9.1 The DSP has been working closely with the Services to establish the Service Prosecuting Authority and so is well known to all Service prosecutors and the Judge Advocate General. When the DSP is appointed as the prosecuting authority for each of the Services this information will be promulgated to all affected parties, but wider publicity or guidance will not be required.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 In bringing forward this legislation the MoD aims to provide for the DSP to assume as many powers as possible that are similar to those he will have as the DSP in October 2009. Additionally the appointment of the DSP to the posts of the prosecuting authorities will make the transition to the new Service Prosecuting Authority as seamless as possible in the circumstances of delayed implementation of AFA06.

12.2 Upon full implementation of the AFA 06 in October 2009 the provisions in the SDAs that are the subject of amendment will be repealed.

13. Contact

13.1 Mr Nick Shaw at the Ministry of Defence, telephone 020 7218 0564 or email nick.shaw460@mod.uk, is the point of contact regarding this instrument.