

EXPLANATORY MEMORANDUM TO

THE ARMED FORCES ACT 2006 (AMENDMENT OF SCHEDULE 2) ORDER 2017

2017 No. [0000]

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 instrument adds sexual assault, exposure and voyeurism to the list of serious service offences in Schedule 2 to the Armed Forces Act 2006 (“the 2006 Act”). Sections 113 and 116 of the 2006 Act impose specific duties on commanding officers and service police forces with respect to the investigation of Schedule 2 offences.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument amends primary legislation.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and includes Northern Ireland.

4. Legislative Context

- 4.1 Schedule 2 to the 2006 Act lists those serious service offences (“Schedule 2 offences”) to which sections 113 and 116 of the 2006 Act apply. Section 113 requires a commanding officer to notify a service police force if he or she becomes aware that a Schedule 2 offence has or may have been committed. Section 116 requires a service policeman who considers that there is sufficient evidence to charge a person with a Schedule 2 offence to refer the case to the Director of Service Prosecutions.
- 4.2 Under section 113(5) of the 2006 Act, the list of service offences in Schedule 2 may be amended by order. The effect of section 373(1) and (3)(a) of the 2006 Act is that the power to make orders under section 113(5) is exercisable by statutory instrument subject to the affirmative procedure.

5. Extent and Territorial Application

- 5.1 This instrument extends to the whole of the United Kingdom.
- 5.2 The 2006 Act applies to members of the armed forces wherever they are in the world and applies to civilians subject to service discipline in certain areas outside the United Kingdom or on service ships or aircraft. Civilians subject to service discipline are defined groups (the groups are defined in Schedule 15 to the 2006 Act) principally of persons who work or reside with the armed forces in certain areas outside the United Kingdom or are travelling on service ships or aircraft.

6. European Convention on Human Rights

6.1 The Minister of State for Defence has made the following statement regarding human rights:

In my view the provisions of the Armed Forces Act 2006 (Amendment of Schedule 2) Order 2017 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 Schedule 2 to the 2006 Act lists those serious service offences (“Schedule 2 offences”) to which sections 113 and 116 of the 2006 Act apply. Section 113 requires a commanding officer to notify the service police if he or she becomes aware that a Schedule 2 offence has or may have been committed. The offences of sexual assault, exposure and voyeurism are not currently Schedule 2 offences.
- 7.2 Currently, a commanding officer who becomes aware that an offence of sexual assault, exposure or voyeurism has or may have been committed is under a duty to ensure that this is investigated appropriately (see section 115(4) of the 2006 Act) but is not required to notify a service police force unless this is necessary to conduct the investigation appropriately. Commanding officers are directed that they must take legal advice in respect of any allegations of sexual misconduct, and that they should normally ensure that the service police are aware of allegations of sexual assault, exposure and voyeurism.
- 7.3 There is concern that, in the absence of a duty under the 2006 Act to ensure that the service police are aware of all allegations or circumstances indicating that one of these offences may have been committed, a commanding officer could sweep evidence and allegations of these offences under the carpet.
- 7.4 During the passage of the Bill that became the Armed Forces Act 2016, Earl Howe informed the House of Lords, on 27 April 2016, (Official Report, column 1201) of the decision to review the existing provision in legislation governing the investigation by the service police of sexual assault, voyeurism and exposure. Earl Howe undertook to report the outcome of that review to Parliament by the end of 2016. Mark Lancaster MP, then the Minister for Defence Reserves, Veterans and People, reported in the House of Commons, on 7 November 2016, (Official Report, column 1252) that the review had concluded that the offences of sexual assault, voyeurism, and exposure should be added to Schedule 2 to the 2006 Act by order under that Act.
- 7.5 Accordingly, article 2 of the instrument adds sexual assault, exposure and voyeurism to the list of offences in Schedule 2. This ensures that a commanding officer who becomes aware that one of these offences has or may have been committed must notify a service police force (under section 113 of the 2006 Act).
- 7.6 It also ensures that a service policeman who considers that there is sufficient evidence to charge a person with one of these offences must refer the case to the Director of Service Prosecutions (under section 116 of the 2006 Act). However, it should be noted that, when amendments made to section 116 by section 3 of the Armed Forces Act 2016 come into force, a service policeman who considers that there is sufficient evidence to charge a person with one of these offences will have to refer the case to the Director of Service Prosecutions in any event (because the offences are not “CO

offences” within the meaning of section 116(5) (as amended by section 3(4)(b) of the 2016 Act)).

8. Consultation outcome

- 8.1 There has been no formal consultation on this instrument, but consultation has been carried out on the legislation that it amends (the Armed Forces Act 2006). A memorandum about consultation on the 2006 Act was submitted in written evidence to the Select Committee on the Armed Forces Bill and published on 9 May 2006 in the Committee’s Special Report of Session 2005-06 (HC 828). The memorandum explained how stakeholder consultation had been carried out and listed the individuals and organisations consulted.
- 8.2 This instrument has been the subject of consultation with a range of stakeholders (including the Ministry of Justice, the Judge Advocate General, the Military Court Service, the Service police forces and the Services themselves) to ensure that the policy goals have been achieved and that the provisions of the instrument will work in practice.

9. Guidance

- 9.1 The Manual of Service Law provides guidance and supplementary information to armed forces personnel on the single system of Service law established under the 2006 Act. The first volume of the Manual, which is intended for commanding officers and those who administer the Service justice system, covers the Service justice system generally and includes a wide range of matters such as jurisdiction, arrest, custody, investigation, charging and mode of trial, summary hearing, review and appeal. The Manual of Service Law is available to the public at the following address:
<https://www.gov.uk/government/collections/manual-of-service-law-msl>

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 activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The 2006 Act (which provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice) is renewed by 5-yearly Act. The last such Act was the Armed Forces Act 2016. The provisions of the 2006 Act are subject to review as part of work to prepare for the next 5-yearly Act.

13. Contact

- 13.1 Tracy Sexton at the Ministry of Defence (telephone: 0207 218 0564 or email: tracy.sexton743@mod.uk.) is the point of contact regarding this instrument.