

**EXPLANATORY MEMORANDUM TO
THE COURTS-MARTIAL (PROSECUTION APPEALS) ORDER 2006**

2006 No.1786

1. This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

2.1 The above Order(s) make(s) provision for a prosecution right of appeal at court-martial against a terminating ruling by a judge advocate. Such a ruling has the effect of terminating the trial either at a pre-trial hearing or during the trial itself. Terminating rulings can take the form of a stay of proceedings, a ruling of no case to answer, or rulings that are so fatal to the prosecution case that the prosecution proposes to treat them as terminating rulings and, in the absence of the right of appeal, would offer no or no further evidence. The avenue of appeal available to the prosecution against a terminating ruling at court-martial is to the Courts-Martial Appeal Court. The provisions apply to court-martial proceedings in respect of trials by courts-martial that commence on or after 5 July 2006.

2.2 This Explanatory Memorandum has been prepared by the Ministry of Defence in order to assist the reader in understanding the Order. It does not form part of the Order.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 This Order is the first to exercise the general order-making power provided for by the Armed Forces Act 2001 (“the 2001 Act”). Section 31 of the 2001 Act provided a general order-making power enabling the Secretary of State to make provisions for the Armed Forces equivalent to those contained in any future criminal justice legislation or any existing legislation that it amends.

3.2 As the effect of the Order is to amend the Courts-Martial Appeal Act 1968 by extending that court’s jurisdiction to entertain prosecution appeals, it is made under the affirmative resolution procedure.

3.3 It is noted that Article 12(1) of the Order may require elucidation as to its purpose. The underlying requirement was to follow civil legislation (Part 9 of the Criminal Justice Act 2003) as closely as possible. To this extent the drafting of Article 12(1) relies upon section 74(3) of the Criminal Justice Act 2003. The purpose of this is to provide that where a prosecutor has previously informed the court of his intention to appeal a ruling (and regardless of whether the appeal was proceeded with), no further appeal could lie against the same ruling. The intended effect is thus to prevent that same ruling from being appealed against more than once (it is observed that the only party which could possibly attempt this “second bite at the cherry” would

be the prosecution). The effect of section 74(3) (and thereby the read across to Article 12(1)) has been discussed with the Office for Criminal Justice Reform. They consider the provision to work in terms of making it absolutely clear that a prosecutor cannot return to the chase should there be an aspect of a ruling with which he is unhappy. This presupposes a rather limited set of circumstances whereby a prosecutor is successful in appealing a terminating ruling but that not all the terms of the ruling are necessarily overturned in his favour. Given this view, the MOD considers it appropriate that the draft Order contain the same provision as specified in the civilian legislation.

4. Legislative Background

4.1 Part 9 of the Criminal Justice Act 2003 (“the 2003 Act”) provides a prosecution right of appeal against two categories of ruling made by a Crown Court judge. The first category comprise terminating rulings as described in paragraph 2.1 above, the provisions for which came into force for criminal courts in England and Wales on 4 April 2005. The second category relates to evidentiary rulings and the provisions governing this category of ruling have yet to be brought into force. As highlighted in paragraph 3.1 above, by operation of the general order-making power provided by section 31 of the 2001 Act, it is the provisions in respect of the first category only – terminating rulings – which are to have effect, subject to minor modifications, in relation to courts-martial.

5. Extent

5.1 This instrument applies to proceedings before courts-martial whether in the United Kingdom or elsewhere.

6. European Convention on Human Rights

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

In my view the provisions of the Courts-Martial (Prosecution Appeals) Order 2006 are compatible with the Convention rights.

7. Policy background

7.1 By introducing a prosecution right of appeal at trial by court-martial, the policy objective for the Armed Forces is to mirror, as far as practicable, the procedures and practices in place in the civilian criminal courts in England and Wales. The Order therefore makes for provisions very similar to those set out in Part 9 of the 2003 Act.

8. Impact

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

9. Contact

9.1 Sue McIntosh at the Ministry of Defence can answer any queries regarding the instrument. Her contact details are:

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