

**EXPLANATORY MEMORANDUM TO  
THE ARMED FORCES (FINANCIAL  
PENALTY ENFORCEMENT ORDERS) REGULATIONS 2009**

**2009 No. 1212**

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 These Regulations are made under section 322 of the Armed Forces Act 2006 (“the Act”). The Regulations make provision for the enforcement of financial penalties (such as a fine) by certain civilian courts in England and Wales, Scotland, Northern Ireland or the Isle of Man.

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

3.1 An order under section 380 of the Act has been made which modifies the enabling powers for this instrument to enable transitional provisions to be made.

**4. Legislative Context**

4.1 This instrument provides for the Defence Council, or persons authorised by them, to make financial penalty enforcement orders (“FPE Orders”) for unpaid financial penalties. FPE Orders may then be registered by prescribed courts, for example, a magistrates’ court or sheriff court in Scotland. The financial penalty is then treated as if it had been a fine imposed on a conviction by the court specified in the order.

4.2 “Financial penalty” is defined under s322(4) of the Act, and includes a fine or service compensation order awarded either by a commanding officer at the summary hearing of a charge or by a Service court when an offender is convicted of an offence under the Act.

4.3 Broadly corresponding provisions to those set out in these Regulations and section 322 of the Act are found in the existing Acts governing the Armed Forces which are to be repealed when section 322 of the Act comes into force.

**5. Territorial extent and application**

5.1 This instrument extends to the United Kingdom, the Isle of Man and British overseas territories, but FPE Orders may only be enforced through courts in the United Kingdom or the Isle of Man.

**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 It is considered essential that procedures are available to enforce financial penalties awarded by a commanding officer or by a Service court when the offender has not or will not pay the penalty voluntarily and is no longer subject to the Act. Once the offender ceases to be subject to the Act, enforcement procedures which allow for forfeitures and deductions from pay are no longer available.

7.2 Under regulation 3(1) an FPE Order can only be made against a person who is no longer subject to the Act, for example because he or she has left the Armed Forces. This is subject to one exception: members of the Sponsored Reserve sometimes continue to be paid by their employers even when they undertake a reserve commitment and therefore service enforcement procedures cannot always be used to recover any outstanding financial penalty which has been awarded against special members of a reserve force. When a person leaves the Armed Forces an FPE Order is the only means by which any outstanding financial penalty awarded against that person can be enforced unless he or she rejoins the Armed Forces at a later date.

## **8. Consultation Outcome**

8.1 As FPE Orders will be enforced in prescribed civilian courts the Ministry of Justice has been consulted about the impact these regulations will have on the work of civilian courts. It is not anticipated that these regulations will significantly increase demands on the time and workload of the civilian courts. The Ministry of Justice has confirmed that it is content with the regulations as drafted. This instrument has also been the subject of consultation with the Services over a period of many months to ensure that policy goals have been achieved and that the provisions of this instrument can be applied in practice.

## **9. Guidance**

9.1 A new Manual of Service Law will provide guidance and supplementary information to Armed Forces personnel on the single system of Service law established under the Act. The first volume of three within the Manual, which is intended for commanding officers and those who administer the Service justice system, includes a chapter on financial penalty enforcement orders. The Manual of Service Law will be available in time to allow Service personnel to be trained ahead of full implementation of the Act and will subsequently be available to the general public on the internet.

9.2 It is not proposed to issue guidance to civilian court staff as the arrangements for registering and enforcing a FPEO in the prescribed courts will be unaffected by these Regulations.

## **10. Impact**

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

10.2 There will be no significant impact on the public sector.

10.3 A Legal Aid and Justice Impact Test is attached to this memorandum. The test was completed and submitted at the request of the Ministry of Justice when consultation regarding this instrument took place. The Ministry of Justice indicated

that it was satisfied with the content of the test but that the Ministry of Defence would need to give an undertaking to meet any additional costs that might arise.

**11. Regulating small business**

11.1 The legislation does not apply to small business.

**12. Monitoring and 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 and the provisions made under it 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 Nick Shaw at the Ministry of Defence, telephone 020 7218 0564 or email [nick.shaw460@mod.uk](mailto:nick.shaw460@mod.uk), is the point of contact regarding this instrument.

# THE LEGAL AID AND JUSTICE IMPACT TEST

## Establishing the nature and extent of impact

### Broad outline of the proposal

It is intended to produce secondary legislation under s322 of the AFA 06 which will allow financial penalty enforcement orders (FPEOs) to be made. Such orders will allow certain courts i.e. magistrates courts, sheriffs courts etc to enforce financial penalties that have been imposed by Service Courts (i.e. Court Martial, Standing Civilian Courts and Commanding Officers). The civilian courts already have such a power by virtue of s133A Army Act 1955 & Air Force Act 1955 and s128A Naval Discipline Act 1957 but it is intended that the secondary legislation made under the AFA 06 should widen the circumstances when a financial penalty enforcement order might be made.

Under new arrangements, it is proposed that the civilian courts should be able to enforce the financial penalty where the offender is convicted on any service offence. Currently, the courts may only do this where the offender has been convicted of a “civil” offence (i.e. an offence in the Service Discipline Acts for which there is a civilian criminal equivalent under the law of England or Wales offence) or for a very limited other service offences under the SDAs.

Under the AFA 06, an FPEO can only be made where the offender has ceased to be subject either to service law (in the case of members of the Armed Forces, reservists etc) or service discipline (in the case of certain civilians who for example are Crown Servants working overseas for the MOD or are civilians residing with their spouse, father mother etc. who is a member of the HM Forces serving overseas). A FPEO will therefore only be required if Service enforcement mechanisms are not available.

### What is it intended to achieve?

The widening of the circumstances in which a FPEO might be made is intended to remove the arbitrary distinction that exists in the Service Discipline Acts. Under current arrangements, for example a fine imposed in respect of a conviction for criminal damage (a civil offence charged under s70 of the Army Act 1955) can be enforced in a magistrates’ court if it remains unpaid, but a fine imposed for damaging service property (an offence under s44 of the Army Act 1955) cannot. There is no policy justification for retaining this limitation and FPEOs should be available to enforce financial penalties which have been imposed in respect of all service offences (as defined in section 50(2) of AFA 2006).

It is essential that a mechanism be available to enforce financial penalties imposed by a Service Court or a Commanding Officer. It should not be possible for any offender to avoid paying a fine or compensating a victim because this would be contrary to the interests of justice. It would also undermine the Service discipline, which underpins the operational effectiveness of the Armed Forces.

### What commitments have been given and by whom?

The subject of FPEOs was not contentious when the Bill was considered by parliament and we therefore do not believe that this issue has been the subject of any specific Ministerial commitment.

#### **How the proposal changes what happens now?**

Generally there will be no change to current practice; the only difference will be that a FPEO may be made in respect of all service offences. The process applied by the civilian courts to deal with FPEOs will be the same as that already followed when dealing with FPEOs made under the current Service Discipline Acts which we understand mirrors the process applied where the courts enforce unpaid financial penalties imposed by a civilian court (section 120 of the Magistrates Court Act 1980 and section 140 of the Powers of Criminal Courts Sentencing Act 2000)

#### **Who will be affected, including your best estimate of numbers?**

Offenders who have not paid their financial penalty when they cease to be subject to either service law or service discipline will be affected. The numbers of persons who are likely to be affected will not be significant.

If the circumstances are widened so that an FPEO may be applied for when an offender has been convicted of any service offence, the number of service offences for which an FPEO might be applied for will rise by approximately 50. It will not always be appropriate to impose a financial penalty on the defendant when he is convicted of these offences and in many cases defendants will pay the financial penalty without the need to apply for an FPEO.

In the case of Service personnel, the AFA 06 will enable an amount equivalent to the financial penalty to be deducted at source from the offender's pay as long he remains subject to Service law. This means that FPEOs will not normally be required because financial penalties are normally discharged before an offender leaves the Services. Under the AFA 06, there is no Service enforcement mechanism available in respect of civilians subject to service discipline. However, most civilian offenders voluntarily pay the fine or compensation imposed.

In the case of both service and civilian offenders, historical data suggests that applications made for FPEOs under the SDA are rare. Records maintained by the Armed Forces indicate that over the last 3 years, the RAF and the Navy have not made any applications for a FPEO. The Army prosecute more cases than the other Services. However, it appears that in the same period, only 3 applications for FPEOs have been made by the Army, even though Army courts-martial have imposed financial penalties on 524 occasions and in 9 of these cases the defendant was a civilian.

Given the above, even allowing for the increased circumstances in which an FPEO might be applied for if the proposal is accepted, we believe the civilian courts will be required to deal with no more than a maximum of 10 cases a year.

## **COURTS AND TRIBUNALS**

Will caseloads increase or decrease for HMCS or the Tribunals Service, and will this affect the case mix in the courts or tribunals?

For the reasons set out above there may be a negligible increase to the workload of the civilian courts. There will be no foreseeable increase in the case mix.

Will a new jurisdiction or case type be created requiring new forms and guidance? (eg leaflets)

No – as the process followed by the courts when dealing with a financial penalty enforcement order will not change, new forms or guidance will not be required

Will tribunal, civil, family or criminal procedure rules be affected?

The proposed amendments simply involve extending the range of service offences to which financial penalty enforcement orders will apply. This will not require any change to the *procedures* which are already in place in relation to financial penalty enforcement orders made under s. 133A of the Army Act 1955 and Air Force Act 1955, and s. 128A of the Naval Discipline Act 1957. We do not believe that this will require any amendment to the criminal procedure rules.

Will changes to IT systems be needed?

The process followed by the civilian court when dealing with an FPEO need not change.

Will there need to be a separate appeals process/route to judicial review either through a court (civil, family or criminal) or creation of a new tribunal or addition to the unified tribunal system. It is important not to presume that new tribunals will be created and you should always consult with the Tribunals Service on how best to utilise the existing system.

The process followed by the courts when dealing with a financial penalty enforcement order need not change if the new policy is adopted.

Are the rules relating to appeals likely to be affected and will this lead to a change in volume?

The proposed amendments will not require any change to the appeals process. We do not anticipate that they will lead to any significant increase in volume.

How will disputes be handled? Has the use of ADR procedures (including mediation, conciliation and ombudsman schemes) been considered?

Any disputes will be dealt with under the existing appeals procedure and remedies.

## **THE JUDICIARY**

Will the role of the judiciary change?

No

Consider how the policy will interact with the Constitutional Reform Act 2005 and the independence of the judiciary.

We do not believe the policy will have any impact on the Constitutional Reform Act 2005 and the independence of the judiciary

## Judges

Consider how changes in caseload, mix or categories may affect the type and number of judges needed.

We do not anticipate that the proposed amendments will have any impact on the type and number of judges needed.

If there is change to the type of judge consider what type? eg circuit, district or high court judge and in what areas? eg civil, family, crime. Differing areas or types of judge may need differing levels of training and resource.

Not applicable – the types of judge dealing with such cases need not change.

Will the policy affect the fee-paid judiciary or the salaried?

It is anticipated that this policy will principally affect those sitting on the bench in Magistrates' Courts (both lay magistrates and District Judges). In the event that any appeals are brought this would affect judges sitting in the Crown Court and/or the High Court.

If more judges need to be appointed, when will they be needed?

We do not anticipate that this policy will require more judges to be appointed.

## Tribunal judiciary

Provisions for tribunal judiciary are usually laid down in legislation. Any policy that is considering change or creation of a tribunal will need to consider what qualifications or experience will be needed by lawyer and other applicants for appointment, any training requirements, and what should be outlined in legislation (judicial policy and appointments division will be happy to advise).

The proposed amendments simply involve extending the range of service offences to which financial penalty enforcement orders will apply. This will not require any change to the *procedures* which are already in place in relation to financial penalty enforcement orders made under s. 133A of the Army Act 1955 and Air Force Act 1955, and s. 128A of the Naval Discipline Act 1957. This policy will not require any provision for tribunal judiciary.

## Timing

Consider how any training needs, legislative changes or constitutional arrangements may affect your timescales.

These proposals will not require any additional training or changes to constitutional arrangements. If approved the legislative changes will be provided for in secondary legislation by means of a statutory instrument made by the Secretary of State for Defence. There will be no change to the existing procedure for registering and enforcing financial penalty enforcement orders in magistrates' courts.

Ensure that the Judicial Appointments Commission are aware of any appointment requirements so they have time to make the necessary arrangements.

Not applicable

## Consultation

Have you consulted the judiciary? If not do you plan to?

Given the limited impact of this proposal we do not plan to consult the judiciary.

If you have conducted consultation what are the views of the judiciary to your policy?

Not applicable

Do you need to have the judiciary represented on a project or implementation board?

No

## Training

Will there be judicial training requirements?

No

Have you consulted with the JSB?

No

## Location

Will the policy be regional or national? Some circuits may be disproportionately affected

Section 322 of the AFA 06 permits legislation to be made which enable the Defence Council or an authorised person to make orders for the enforcement of financial penalties by prescribed courts in England, Wales, Scotland, Northern Ireland and the Isle of Man. The courts that will be prescribed for this purpose will be

- (a) the magistrates' court in England or Wales,
- (b) the Sherriff court in Scotland,
- (c) the court of summary jurisdiction in Northern Ireland, or
- (d) a court of summary jurisdiction in the Isle of Man.

It should be noted that the same courts (other than a court of summary jurisdiction in the Isle of Man<sup>1</sup>) are also prescribed in the sections on FPEOs in the Service Discipline Acts. Therefore the new policy does not alter the courts that will have the power to deal with FPEOs. As under current arrangements, the court that deals with the enforcement of a particular financial penalty will be determined by the place that the offender resides because the court that deals with the FPEO will be the court within whose jurisdiction the offender resides or is likely to reside. Therefore, the policy will have national application but it is not possible to say whether some circuits might be more affected than others.

## Impact test stage two: costing or quantifying the wider impact

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<sup>1</sup> This is currently provided for by Order in Council : see The Army Act 1955 ( Isle of Man) Order 1996 ( 1996 No. 723), The Air Force Act 1955 (Isle of Man) Order 1996 ( 1996 No. 719) and The Naval Discipline Act 1957 ( Isle of Man) Order 1996 ( 1996 No. 727)



**This may not be required**

Having consulted Chris Lancaster in relation to this policy proposal we are satisfied that the policy will not have an impact on legal aid. We are satisfied that it will not have an impact on the courts, tribunals and the judiciary.