

EXPLANATORY MEMORANDUM TO
THE ARMED FORCES (ALIGNMENT OF SERVICE DISCIPLINE ACTS) ORDER
2008

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. Description

2.1 This instrument amends certain provisions of the current Service Discipline Acts (the Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957, collectively known as the SDAs), the Armed Forces Act 1976 and Armed Forces Act 2001 so that they more closely reflect the legal position as it will be when the Armed Forces Act 2006 (AFA 06) is brought into force. This is planned to be in January 2009.

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

3.1 None.

4. Legislative background

4.1 This instrument amends certain provisions of the SDAs. Its purpose is to provide the means of aligning some of the provisions of the SDAs with those of AFA 06. The Order is to be made under section 381 of AFA 06, which provides for the repeal or amendment of any of the provisions of the SDAs and certain other provisions repealed by AFA 06, for the purpose of reducing or eliminating any differences between their effects now and the effects of AFA 06 when it is brought into force.

4.2 The SDAs are aligned to the new provisions in sections 67 and 69 of AFA 06 regarding the powers of arrest for an offence. In particular, the instrument enables Service policemen to arrest Service personnel of all ranks without seeking prior approval and to arrest a person whom they reasonably suspect of being about to commit a Service offence.

4.3 The instrument amends the SDAs by removing one of the grounds on which a judicial officer can authorise post-charge custody (that the accused has previously deserted or gone absent without leave after being charged with the offence and released from custody). An order for custody is justifiable only if necessary and not merely because the accused has previously absconded.

4.4 Additionally, under current sections of the SDAs, the prosecuting authorities (PAs) can require an accused's commanding officer (CO) to consider a charge other than that on which the accused elected court-martial trial, without the accused's consent. This could create a disincentive to elect for trial by court-martial. The amendments prevent a PA from sending a different charge back to the CO where the accused has elected. They allow the PA to prefer a charge other than that on which the accused elected, but this may not be done without the accused's consent unless the charge preferred is one which the CO could have heard if the accused had not elected.

4.5 The Order amends the SDAs and AFA76 so that a suspended sentence cannot be activated by a reviewing authority but only by a court or (under the Naval Discipline Act 1957) by a CO. The power of an Army or RAF court-martial to activate a suspended sentence is in some respects aligned with the corresponding power of the Court Martial under AFA 06, and Naval courts-martial (which have no such power at present) are given a similar power. The amendments provide for appeals against the activation of suspended sentences. In the case of the Naval Discipline Act 1957, the existing power of a CO to activate a suspended sentence is restricted so as to align it more closely with the corresponding power under AFA 06 (together with the safeguards provided by AFA 06). However, by contrast with AFA 06, a Naval CO will still be able to activate a suspended sentence of detention passed by a court-martial. Where the original sentence was for more than 90 days and it is activated by a commanding officer, only the first 90 days will take effect: the rest will remain suspended. The order also addresses the rights of appeal in relation to activation of suspended sentences passed by a Standing Civilian Court.

4.6 Finally, the order repeals all powers to postpone the date on which a sentence is to take effect. Under AFA 06, the Court Martial will not have the corresponding power to postpone, thus repeal will bring about maximum alignment.

5. Territorial Extent and Application

5.1 This instrument extends to all of the United Kingdom.

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) Order 2008 are compatible with the Convention rights.

7. Policy Background

7.1 This order amends various sections of the SDAs in order to align them to the AFA 06. This is being done to ensure greater coherence with the position as it will be when AFA 06 is brought into force. This is planned to be in January 2009. In policy terms these measures are both useful to the Service justice system and make it more robust against potential challenge in the future by aligning it to the important benefits and safeguards that the new Act will bring.

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 Mrs S McIntosh at the Ministry of Defence, telephone 020 7218 0564 or email sue.mcintosh641@mod.uk, is the point of contact regarding this instrument.