

# **ARMED FORCES DISCIPLINE ACT 2000**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Armed Forces Discipline Act which received Royal Assent on 25 May 2000. They have been prepared by the Ministry of Defence in order to assist the reader in understanding the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by Parliament.
2. These notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### **SUMMARY**

3. The Act alters certain aspects of the system for administering discipline in the armed forces. It introduces a provision for a judicial authority to determine whether a suspect or accused should be held in custody. The Act also gives the accused an earlier opportunity to elect to be tried by court-martial and it establishes an appeals procedure for those whose cases have been dealt with summarily.

### **BACKGROUND**

#### *The system of discipline in the armed forces*

4. The three armed services operate within a statutory framework of discipline which applies wherever in the world they are based, whether in peace or in times of conflict. In effect, this means that they have their own legal system, although as far as possible this follows the domestic law of the United Kingdom. The statutory basis for this system is the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, often known collectively as the Service discipline Acts (SDAs). These Acts have to be renewed by Parliament every five years. This is achieved by the Armed Forces Acts, which are also used to update the SDAs. The most recent was the Armed Forces Act 1996.
5. If an offence is going to be dealt with within the armed forces' system, the Services will be responsible for investigating it and for determining whether a suspect needs to be held in custody during the investigation. Service authorities will also decide whether to prosecute and, if so, will draw up the charges. The decision as to whether an accused should be held in custody pending trial is taken by the Services. Cases are heard in one of two ways: either summarily or by court-martial.
6. A case dealt with summarily is heard by the accused's commanding officer (CO) except where the accused is above a certain rank, in which case it will be heard by an officer superior in rank to the CO. Courts-martial are composed of a panel of officers and a judge advocate, who fulfils many of the functions of a judge in a civilian court. Courts-martial were generally reserved for the more serious cases or for cases where the accused was of too senior a rank to be dealt with summarily. Since 1997, however, an accused facing summary proceedings in all Army and Royal Air Force cases and in all

but minor Royal Navy cases has been able to choose to be tried by court-martial instead. It remains the case, however, that most disciplinary matters are dealt with summarily and that punishments, where cases are found proved, are relatively minor. The vast majority of sentences from summary proceedings are non-custodial.

7. The Service discipline Acts do not just apply to Service personnel. In certain circumstances, the Acts apply to civilians as well. Civil servants, their dependants and the civilian dependants of Service personnel, who are stationed abroad and fall within the command of an officer commanding a body of regular Service personnel, may be tried under the SDAs for offences against English criminal law and a limited number of Service offences.
8. More information about the arrangements which the Act amends is given as necessary in the commentary on the sections of the Act.

### ***The reasons for change***

9. The system for administering discipline in the armed forces is kept under review, with the principal vehicle for any legislative changes that may be necessary being the five-yearly Armed Forces Acts. The Armed Forces Act 1996 made substantial changes, reinforcing the independence of courts-martial, to reflect the European Convention on Human Rights. The 1996 Act also extended the right to choose trial by court-martial described in paragraph 6 above.
10. The Human Rights Act 1998 incorporates certain provisions of the European Convention into domestic law. The main provisions of the Act are expected to come into effect on 2 October 2000. The Ministry of Defence has used this as a framework for a further review of the Services' discipline system. The provisions in this Act result from that review. They address areas of the discipline system where there are concerns that the system may not be compliant with the Convention.

## **THE ACT**

11. The Act amends, or inserts new sections in, the SDAs. It covers:
  - arrangements for custody (sections 1 - 10);
  - changes to the procedure for election for court-martial trial (sections 11 -12);
  - functions of the prosecuting authority (section 13); and
  - the new system of summary appeal courts (sections 14 - 25).

## **COMMENTARY ON SECTIONS**

### ***Sections 1 - 10: Custody***

#### **Arrangements in force prior to commencement of Act**

12. The SDAs provide for the arrest of persons subject to them who are found committing an offence, are alleged to have done so or are reasonably suspected of having done so. The following paragraphs describe the arrangements for continued custody both prior to an individual being charged and in the subsequent period before the trial. These all have as their purpose the need to ensure that no one is held in custody unnecessarily.
13. The continued custody of persons subject to the Naval Discipline Act 1957 following their arrest arises from the authority of the Crown, but there are internal regulations governing such custody. These safeguard the detainee in requiring an initial and immediate examination by the CO of the need for close custody and, thereafter, a daily review by the CO of the continued need for close custody. Close custody involves deprivation of liberty and continuous supervision. The CO applies criteria similar to

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those in the Bail Act 1976, namely that an individual may be detained if there are substantial grounds for believing that the accused would:

- fail to surrender for custody,
  - commit an offence whilst on bail,
  - interfere with witnesses or otherwise obstruct the course of justice, or
  - be a danger to himself.
14. After every eight days in close custody without the detainee having been brought to trial, the CO is required to refer the need for continued close confinement for decision by higher authority, this being someone further up the chain of command.
  15. The regulations permitting the retention in arrest of persons subject to the Army Act 1955 provide safeguards in that the matter is reviewed both by the CO, on a regular basis, and by the CO's higher authority. The person detained is able to appeal against his arrest and is entitled to be kept informed about all aspects of his arrest. In this context, arrest may mean that the individual is held in close arrest or is subject to restrictions on movement. The criteria applied by the CO are similar to those in the Bail Act 1976.
  16. The powers under the Air Force Act 1955 are similar to those in the Army Act 1955. Internal regulations make it clear that an accused should only be kept in close arrest whilst awaiting trial in exceptional circumstances. Where a person is detained in arrest, he is required to be brought before his CO within 48 hours. The CO has to carry out a review of the need to retain the accused in arrest every 16 days, and the accused is able to make representations prior to each such review.

#### The new arrangements

17. Following the judgement of the European Court of Human Rights in the case of *Hood v UK*, the arrangements for pre-trial custody under the Service discipline Acts have been reviewed. In this case, one of the applicant's complaints was that his commanding officer could not be considered impartial in relation to authorising his pre-trial detention and that this was in violation of Article 5 of the Convention. The Court concluded that the applicant's misgivings were objectively justified.
18. Decisions on whether an individual should be held in Service custody during an investigation will, under the Act, be taken by a judicial officer.
19. The main effect of sections 1–10, in addition to introducing greater commonality between the practices of the three Services, is to make provision in all three Service discipline Acts for a judicial officer to determine whether a suspect or accused should be held in custody. He will apply criteria similar to those used in ordinary domestic law, namely under the Police and Criminal Evidence Act 1984 pre-charge and the Bail Act 1976 post-charge. For the purposes of these provisions, a judicial officer will normally be a judge advocate or a naval judge advocate, but may be other suitably qualified persons specified in [section 7](#) of the Act. The flexibility to appoint other qualified persons for this purpose will facilitate readier territorial coverage of applications, wherever they need to be heard. The Services also intend to use live television links where possible, to ensure that applications are dealt with as expeditiously as possible.
20. A judge advocate is a civilian lawyer appointed by the Judge Advocate General, who is responsible to the Lord Chancellor, to be a member of an Army or Royal Air Force court-martial. The Royal Navy have uniformed judge advocates (who are naval barristers of at least five years standing) appointed by the Chief Naval Judge Advocate to be members of naval courts-martial.
21. If a CO wishes to keep a suspect in custody during the investigation, he must be brought before a judicial officer in order for the judicial officer to authorise his continuing custody. When this must be done will depend on the circumstances of the investigation and may be very soon after his arrest. In no circumstances can the period during which a

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person is in custody without charge exceed 96 hours. Once the 96 hour point is reached the suspect will either have to be charged or released.

22. Once a suspect has been charged, if he is to be kept in custody, he must be brought before a judicial officer as soon as practicable. The judicial officer may at this stage, and subsequently, authorise detention for periods of no more than eight days (28 days with the consent of the accused).

***Section 1: Custody without charge***

23. This section inserts new sections into each of the SDAs.

*Subsection (1)* inserts six new sections into the Army Act 1955 dealing with custody without charge after arrest.

The new *section 75* deals with limitations on custody without charge. It provides that:

- Persons under arrest must not be held in custody without charge except as permitted by the legislation. If the original grounds for holding the person in custody no longer apply and there are no other grounds in the legislation which do apply, the commanding officer must order his immediate release.
- This does not apply to someone who appears to have been unlawfully at large when he was arrested.
- The section provides that a person is deemed to have been charged for the purposes of these provisions once is he informed that a charge is to be reported to his commanding officer.

The new *section 75A* deals with authorisation of custody without charge.

- The CO of the person arrested must be notified of his arrest and the grounds for the arrest as soon as practicable. Until this point, the person who made the arrest may authorise the continued custody of the person under arrest if he has reasonable grounds for believing that it is necessary to do so to preserve evidence or obtain evidence.
- Once the CO is notified, he must determine whether or not to retain the individual based on the set criteria. These are that it is necessary to do so to preserve evidence or obtain evidence by questioning him and that the investigation is being conducted diligently. The individual can be kept in custody while the CO deliberates.
- The section imposes various time limits on the periods for which the CO may authorise custody. Authority for custody will end 12 hours after the time of the arrest unless it is renewed by the CO for a further period of up to 24 hours, making a total of 36 hours from arrest. The authority may be renewed once the 36 hours has expired for a maximum of a further 12 hours. The individual must be released at this 48 hour point unless the provisions of *section 75C* apply.

The new *section 75B* deals with review of custody.

- It requires the CO to review the need for continuing custody before the expiry of the custody period already authorised and he must be satisfied that the same criteria for custody are satisfied. These additional periods of custody shall only be authorised within the time limits specified in the section.
- The review may be postponed if, in all the circumstances, it is not practicable to carry it out by the end of the authorised period of custody, particularly if the person in custody is being interviewed at the time and it could be prejudicial to the investigation to interrupt at that time. However, it must be carried out as soon as practicable thereafter. In the meantime, the authority to keep someone in custody is still valid.

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The new *section 75C* deals with extension of custody without charge.

- The CO of the person arrested may apply to a judicial officer for his continued detention and the judicial officer may grant this if he believes there are reasonable grounds to justify doing so. These grounds are specified later in the section but mirror those applied by the CO.
- There are a number of safeguards built in to ensure that the person under arrest is able to object to his continued detention. He must, therefore, be informed of the application and appear in person before the judicial officer (this includes the use of live television links). He is also entitled to legal representation and to an adjournment to seek such representation, although he may be kept in custody during that adjournment.
- An application to the judicial officer may be made at any time before the 48 hour limit from the time of arrest. An application may also be heard outside the 48 hour period if it is not practicable to hear it within the time limit and the CO's power to authorise custody, in 6 hour periods, continues until the application has been heard. However, he may not be retained in custody for more than 96 hours from the time of his arrest in any circumstances. If the judicial officer believes that a late application could reasonably have been made prior to the expiry of the 48 hour time limit, he must dismiss it.
- If the judicial officer does not believe that there are reasonable grounds for continuing custody, he must either hear the application later (but within the 48 hour time limit) or refuse an extension of time. The purpose of this provision is to allow an individual to be held in custody up to the 48 hour point if the judicial officer believes that the authorities may be able to secure further evidence to strengthen their case.
- If an application is made before 48 hours has passed, and the judicial officer declines to authorise further custody, he may direct that that individual be either charged or released from custody immediately. However, if the application was made after 48 hours and the judicial officer refuses an extension, he must order that the individual be released or charged. Any application for further custody which is granted can only allow an individual to be detained for a maximum of 96 hours from the time of the arrest.

The new *section 75D* applies the provisions of sections 75 to 75C to persons delivered into military custody, subject to any modifications made by statutory instrument. This refers to persons who are arrested by the civilian police under certain provisions in the Army Act 1955 or the Reserve Forces Act 1996 and handed over to the military authorities. For the purposes of the time limits for custody, the "relevant time" is defined here as either the time of arrest or the time of surrender.

The new *section 75E* provides that the Defence Council may make regulations:

- Allowing the functions of the CO, in relation to custody, to be delegated,
- Dealing with the circumstances in which a person in custody without charge is informed of any matter or given a chance to make representations about any matter, and
- Providing for the keeping of written records relating to the custody.

The section also provides that time periods mentioned above are only approximate. The effect of this provision is similar to that of section 45(2) of the Police and Criminal Evidence Act 1984.

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*Subsection (2)* inserts six new sections into the Air Force Act 1955 dealing with custody without charge after arrest. These sections are identical in effect to those described above, but they apply to persons arrested under the provisions of the Air Force Act 1955.

*Subsection (3)* inserts six new sections into the Naval Discipline Act 1957 dealing with custody without charge after arrest. These sections are identical in effect to those described in subsection (1) above but they apply to persons arrested under the provisions of the Naval Discipline Act 1957.

## **Section 2: Custody after charge**

24. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new section into the Army Act 1955 dealing with custody after charge.

- The new *section 75F* requires that any individual subject to military law being kept in military custody shall be seen by a judicial officer promptly if he is charged with an offence under Part II of the Army Act 1955. The judicial officer may then authorise the continued custody of the accused if he is satisfied that the conditions listed in *subsection (2)* are met. When considering whether to authorise the continued custody of the accused, the judicial officer is to take account of the matters listed in *section 75F(3)*, such as the nature and seriousness of the offence and any other matters that may be relevant. These subsections reflect the provisions of Part I of Schedule 1 to the Bail Act 1976.
- If the judicial officer decides not to authorise custody in relation to an accused charged with any of the serious offences listed in *subsection (5)*, he must give reasons and these must be included in the record of proceedings.
- The maximum period for which an accused may be ordered to be retained in custody is limited to 8 days. *Section 75G* allows this order to be renewed by the judicial officer after each 8 day period for up to a further 8 days, or up to 28 days if the accused consents to that extended period.
- If the judicial officer does not authorise the retention in custody of an accused, he must be released immediately. An individual does not need to be brought before a judicial officer if charged when he is already in military custody by reason of a sentence for a previous offence, or if his custody has already been authorised under *subsection (2)* for other reasons.

*Subsection (2)* inserts a new *section 75F* into the Air Force Act 1955 dealing with custody after charge. This section is identical in effect to that described above, but applies to persons arrested under the provisions of the Air Force Act 1955.

*Subsection (3)* inserts a new *section 47G* into the Naval Discipline Act 1957 dealing with custody after charge. This section is identical in effect to that described in subsection (1) above, but applies to persons arrested under the provisions of the Naval Discipline Act 1957.

## **Section 3: Review of custody after charge**

25. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new section into the Army Act 1955 dealing with review of custody after charge.

- The new *section 75G* requires that any order authorising the detention of an accused be reviewed by a judicial officer before it expires. It also requires the CO to either release the accused or request a review, as soon as practicable, if the reason for detaining the accused no longer exists. This section is similar to *section 75F* in that

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the judicial officer is required to apply the same criteria and considerations to a review of custody as he would if this was the first occasion on which detention was being considered, and an accused must be released forthwith if continuing detention is not authorised.

- At the first review, the accused may advance any arguments of fact or law against his continuing custody, even those advanced at the first hearing. At any subsequent reviews he may only advance new arguments. If continued detention is authorised, it may be renewed by the judicial officer for a period not exceeding a further 8 days or up to 28 days if the accused consents to that extended period.

*Subsection (2)* inserts a new *section 75G* into the Air Force Act 1955 dealing with review of custody after charge. This section is identical in effect to that described above but applies to persons arrested under the provisions of the Air Force Act 1955.

*Subsection (3)* inserts a new *section 47H* into the Naval Discipline Act 1957 dealing with review of custody after charge. This section is identical in effect to that described in subsection (1) above but applies to persons arrested under the provisions of the Naval Discipline Act 1957.

#### ***Section 4: Custody during court-martial proceedings***

26. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new section into the Army Act 1955 dealing with custody during court-martial proceedings.

- The new *section 75H* applies the custody provisions in *sections 75F/G*, where appropriate, with modifications. The effect of *subsection (2)* is that the trial judge advocate will review the need for custody up until the court martial announces its finding.
- *Section 75F(2)* has an additional ground for custody inserted for the purposes of *Section 75H*, enabling the accused to be kept in custody during an adjournment, but an accused cannot be kept in military custody after he is sentenced by the court. *Section 75F(3)(d)*, relating to the strength of the evidence, is not to be applied in relation to a person awaiting sentence.
- If the court-martial is dissolved, these modified provisions will not apply. This will not affect any order already in force.

*Subsection (2)* inserts a new *section 75H* into the Air Force Act 1955 dealing with custody during courts-martial proceedings. This section is identical in effect to that described above, but applies to persons subject to the provisions of the Air Force Act 1955.

*Subsection (3)* inserts a new *section 47J* into the Naval Discipline Act 1957 dealing with custody during courts-martial proceedings. This section is identical in effect to that described in subsection (1) above, but applies to persons subject to the provisions of the Naval Discipline Act 1957.

#### ***Section 5: Release from custody after charge or during court-martial proceedings***

27. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new section into the Army Act 1955 dealing with release from custody after charge or during proceedings.

- The new *section 75J* applies when an accused is released from custody either at a custody hearing or at any later review of custody and provides that he shall be released from custody forthwith.

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- The section also provides that certain persons have to comply with conditions which may be imposed by the judicial officer or judge advocate relating to his subsequent attendance at any hearing relating to the offence charged. Anyone who does not comply with these conditions will be guilty of an offence punishable by up to two years imprisonment.
- The persons to whom this section applies include persons who are no longer subject to military law except in relation to dealing with the offence and members of the volunteer or reserve forces.

*Subsection (2)* inserts a new *section 75J* into the Air Force Act 1955 dealing with custody after charge or during court-martial proceedings. This section is identical in effect to that described above, but applies to persons arrested under the provisions of the Air Force Act 1955.

*Subsection (3)* inserts a new *section 47K* into the Naval Discipline Act 1957 dealing with custody after charge or during court-martial proceedings. This section is identical in effect to that described in subsection (1) above, but applies to persons arrested under the provisions of the Naval Discipline Act 1957.

### ***Section 6: Arrest during proceedings***

28. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new section into the Army Act 1955 dealing with arrest during proceedings.

- The new *section 75K* applies to persons subject to military law who are charged with an offence or awaiting sentencing for an offence but not in custody. The section makes provision for the CO or judge advocate to order his arrest if they believe that there are substantial grounds for believing that the accused may fail to attend a hearing, commit an offence, injure himself or interfere with witnesses or obstruct the course of justice.
- The section also provides that persons subject to military law only by virtue of *section 131* of the Army Act 1955 may be taken into custody if they have failed to attend a hearing.
- Anyone arrested under these provisions will be treated as if held in custody under *section 75F* and must be brought before a judicial officer or the judge advocate as soon as practicable.

*Subsection (2)* inserts a new *section 75K* into the Air Force Act 1955 dealing with arrest during proceedings. This section is identical in effect to that described above, but applies to persons arrested under the provisions of the Air Force Act 1955.

*Subsection (3)* inserts a new *section 47L* into the Naval Discipline Act 1957 dealing with arrest during proceedings. This section is identical in effect to that described in subsection (1) above, but applies to persons arrested under the provisions of the Naval Discipline Act 1957.

### ***Section 7: Judicial Officers***

29. This section inserts a new section into each of the SDAs describing who shall appoint judicial officers and what criteria must be fulfilled to qualify as a judicial officer. Judicial officers will normally be judge advocates but the sections allow for the appointment of certain other persons to act as a judicial officer. The section inserted into the Naval Discipline Act varies slightly from those in the Army and Air Force Acts because their judge advocates differ from those used by the Army and Air Force. A definition of the two types of judge advocate is given in paragraph 20.



### **Section 8: Custody Rules**

30. This section inserts a new section into each of the SDAs enabling the Secretary of State to make rules regulating proceedings preliminary to, and at, a custody hearing. These rules will be made by statutory instrument. *Subsection (2)* of the inserted sections lists matters that are expected to be dealt with in the rules, such as representation and witnesses, but this list is not exhaustive.

### **Section 9: Bail in proceeding for illegal absence.**

31. This section amends each of the SDAs and Schedule 2 of the Reserve Forces Act 1996.

*Subsection (1)* amends *section 187* of the Army Act 1955 dealing with proceedings before a civil court where a person is suspected of illegal absence. At the moment, if anyone who is illegally absent from the Army is brought before a magistrate on suspicion of being an absentee or a deserter, the legislation requires the magistrate to either deliver him into military custody or hold him in custody. There is no provision for bail. The effect of the amendment is to allow the magistrate to remand him either into custody or on bail, as he sees fit.

*Subsection (2)* amends *section 187* of the Air Force Act 1955 in the manner described above.

*Subsection (3)* amends *section 109* of the Naval Discipline Act 1957 to produce the same result as described above.

*Subsection (4)* amends *Schedule 2* of the Reserve Forces Act 1996 to produce the same result as described above.

### **Section 10: Further amendments relating to custody**

32. This section introduces *Schedule 1* to the Act which makes the following further minor amendments to the SDAs in respect of custody arrangements.

- *Paragraphs 1&6* amend the three SDAs provide that offences which can be committed in relation to courts-martial in each of the Acts, such as failure to comply with a summons or the refusal of a witness to answer a question which the court requires him to answer, can also be committed in relation to persons appointed to be judicial officers for the purposes of the Act. This will allow an offence committed in relation to judicial officers to be tried summarily by the judicial officer.
- *Paragraphs 2&8* amend the three SDAs to provide that the meaning of commanding officer encompasses those dealing with persons in custody as well as those charged with an offence.
- *Paragraphs 3&9* amend the three SDAs to provide that offences which can be committed by civilians not subject to Service law, in relation to courts-martial, such as those mentioned above, shall also apply to judicial officers. In these cases, the judicial officer cannot apply a sanction but can certify to a court with jurisdiction over the offender that he has committed a contempt of court. This will allow the court to investigate and punish the offender if appropriate.
- *Paragraph 4* amends *section 209(3)* of both the Army and Air Force Acts to provide that persons have to comply with conditions which may be imposed by the judicial officer, judge advocate or court-martial relating to his subsequent attendance at any hearing relating to the offence charged.
- *Paragraphs 5&11* amend the general provisions as to interpretation in both the Army Act 1955 and Air Force Acts to reflect the changes to the system.
- *Paragraph 10* amends *section 118* of the Naval Discipline Act 1957 to apply the custody provisions to deserters from the Commonwealth and colonial forces.

- *Paragraph 12 amends Schedule 4 to the Naval Discipline Act 1957 to provide that the custody provisions shall apply to certain civilians and also to provide that these civilians have to comply with conditions which may be imposed by the judicial officer, judge advocate or court-martial relating to his subsequent attendance at any hearing relating to the offence charged.*

### ***Sections 11 – 12: Election for court-martial trial***

#### **Arrangements in force prior to commencement of this Act**

33. It was explained in paragraph 6 that an accused serving in the Army or Royal Air Force may, in all cases, elect trial by court-martial instead of being dealt with summarily by the CO. In the Royal Navy, this right to elect applies only in certain cases with the aim of ensuring that every person facing a charge which has potentially serious consequences, such as disrating (ie loss of rank), detention, imprisonment, or dismissal, has the right to elect trial by court-martial. In the Army and Air Force, the right to elect to be dealt with by court-martial can only be exercised after a CO has found the charge proved. Moreover, a court-martial has the power to award a greater sentence than the CO could have done.
34. The right to elect trial by court-martial was expanded by the Armed Forces Act 1996 because of concerns that summary proceedings, on their own, might not be compliant with the European Convention on Human Rights. It was considered that offering a wider right to trial by a court complying with the Convention would meet such concerns.

#### **The new arrangements**

35. With the introduction in this Act of a summary appeal court, the procedures for electing trial by court-martial have been reviewed. In order to allow the accused the right to be dealt with from the outset by a court complying with the Convention, the accused is now to be offered this right prior to the CO hearing the evidence on the charge. The right to elect court martial trial will, in future, be available at the outset of any summary proceedings and at any subsequent time should the authorities amend or change the charge. In the Royal Navy, election for court-martial trial is already made prior to the CO hearing the charge.
36. To ensure that an accused is not disadvantaged by electing court-martial trial, the sentencing powers of the court-martial will be limited to those that the CO could have exercised if he had heard that particular charge. However, should the prosecuting authority amend a charge and refer it back to the CO, the CO may decide that it is an offence that should be tried by court-martial, without the accused having the option of being dealt with summarily. In this case the sentencing powers of the court martial would not be restricted to those of the CO.
37. In the Royal Navy, officers are not dealt with summarily. In the Army and Royal Air Force, cases where warrant officers and officers up to and including the rank of Major or Squadron Leader are dealt with summarily are heard by an appropriate superior authority (ASA) rather than by the CO; an ASA is an officer superior in rank to the CO. However, throughout these notes, references to CO will encompass references to ASA for convenience.

### ***Section 11: Right to elect court-martial trial***

38. This section inserts a new section into both the Army and Air Force Acts 1955.  
The new *section 76AA* deals with the process of electing trial by court-martial.
  - Where a charge or number of charges are to be dealt with summarily, this section requires the CO to give the accused the right to elect trial by court-martial prior to the commencement of any summary dealings and, if the accused should elect to be

dealt with by court-martial, the case is to be referred to a higher authority in the chain of command.

- If the accused is later given leave to withdraw his election, the case will be passed back to the CO to be dealt with summarily and the accused will not be permitted to re-elect trial by court-martial.
- If the charge or charges are changed in any way, and the new charge is one which can be dealt with summarily, the section requires the accused to be given the opportunity to elect trial by court-martial in respect of the new charge.
- The section also makes amendments to *section 76B* of each Act as a consequence of these changes.

### ***Section 12: Limits on powers of courts-martial where accused elected court-martial trial***

39. This section inserts a new section into each of the three SDAs.

*Subsection (1)* inserts a new section into both the Army and Air Force Acts 1955.

- The new *section 85A* imposes a limit on the power of a court-martial to award a punishment in cases that have come before them as a result of an election. The maximum punishment that the court-martial can award is limited to the maximum that the CO could have awarded if he had dealt with the case summarily.
- *Subsection (3) of section 85A* provides that a court-martial shall not be restricted in its sentencing power in relation to a charge before them, if the original charge on which election was made was referred back to the CO by the prosecuting authority and the fresh charge was dealt with by the CO under *section 83BB*. For example, if the prosecuting authority refer the original charge back to the CO because they consider that a more serious charge would be appropriate, the CO must deal with the suggested charge afresh. If it is not one that he would consider appropriate to be dealt with summarily, he may refer it directly to the prosecuting authority under *section 76(1)* of the Army or Air Force Act and the limitation on sentencing imposed by election would not arise.

*Subsection (3)* inserts a new *section 62ZA* into the Naval Discipline Act 1957. This section is similar in effect to that described in subsection (1) but has an additional provision. In determining the maximum, *subsection (3) of section 52F* provides that punishments which the CO could only have awarded with the consent of a superior officer are included. This provision is not required for the Army and Air Force because consent for extended powers of punishment is granted prior to an individual being given the opportunity to elect for trial.

### ***Section 13: Functions of prosecuting authority***

40. This section introduces *Schedule 2* to the Act. This schedule amends the SDAs in relation to the functions and role of the prosecuting authority concerning cases where an election for court-martial trial has been made.

*Paragraph 1* amends *section 83B* of the Army and Air Force Acts 1955.

- Currently an individual can only elect trial by court-martial after the CO has found the charge proved. If a defendant chooses to be tried by court-martial, the case is passed to the prosecuting authority (the authority in each Service responsible for prosecuting in court-martial trials). If the accused subsequently changes his mind, the prosecuting authority must send the case back to the CO so that the original finding of guilt can be recorded. However, under the provisions in this Act, an individual will exercise the option of court-martial trial prior to the case being heard summarily. If he exercises this right and then changes his mind, the case sent back

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by the prosecuting authority will be heard from the beginning when it is dealt with summarily by the CO. A similar provision is not needed for the Royal Navy as they already allow an election to be made before summary trial.

- A new *subsection (9A)* is inserted which provides that the prosecuting authority may not prefer a new charge or amend, substitute or add another charge, unless the accused has given his written consent.
- *Subsection (13)* is replaced with a new subsection. Cases may arise where for whatever reason the prosecuting authority considers it inappropriate to prefer a charge on the basis of the charge determined by the CO or may decide to discontinue proceedings on any charge they have preferred. In those circumstances, the prosecuting authority will exercise its discretion not to proceed to court-martial. This revised subsection gives the prosecuting authority a power to direct that the charge brought against the accused by the CO is deemed to have been heard by court-martial, to ensure that the individual cannot be tried summarily on this same charge at a later date.

*Paragraph 2* provides for similar amendments to the Naval Discipline Act 1957.

*Paragraph 3* inserts a new *section 83BB* into the Army and Air Force Acts 1955. It applies to cases that have been referred to the prosecuting authority as a result of election for court-martial trial, where the authority decides to substitute or add a charge. In these circumstances, the prosecuting authority may refer the case back to the CO. Once the suggested charge or charges are referred back, the CO then decides, as happens now, whether to dismiss the charge, refer it for court-martial or deal with it summarily.

*Paragraph 4* inserts a new *section 52II* into the Naval Discipline Act 1957. This section is identical in effect to that described above.

*Paragraphs 5&6* create a power to make rules addressing how an election relating to multiple charges shall be dealt with by the prosecuting authority and CO where charges are discontinued, amended or substituted.

### ***Sections 14 – 25: Summary Appeal Courts***

#### **The new arrangements**

41. The Act will introduce a right of appeal to a summary appeal court established under each of the three SDAs. This supplements the right to elect trial by court-martial described in the previous section of these notes, by offering to those who have been dealt with summarily a second avenue to a court that is compliant with the European Convention on Human Rights.
42. The summary appeal court for each Service can sit in two or more divisions (that is, a number of courts can sit in different places to hear different cases at the same time). When hearing an appeal, the court will consist of a judge advocate/naval judge advocate and two Service officers, generally of the same Service as the appellant.
43. The appeal on finding, or on finding and sentence, will take the form of a re-hearing along the lines of an appeal to the Crown Court from a decision of the magistrates' court. Therefore, the rules of the court will be similar to those of the Crown Court. The rules of evidence will mirror those in the civilian system, with appropriate modifications. Where the appeal is on sentence alone, and there is no material dispute on the facts, the court will only hear a statement of facts followed by pleas in mitigation.
44. The appellant will be entitled to legal representation at the hearing of his appeal before the summary appeal court. He will also be entitled to apply for legal aid for this purpose, under the Services' legal aid system.

45. The sentencing powers of the summary appeal court will be restricted so that the sentence cannot be more severe than that actually imposed by the CO. Hearings before the summary appeal court will be in public. There will be no appeal from the summary appeal court on the facts, but an appeal on a point of law will be allowed to the High Court.

#### ***Section 14: Summary Appeal Courts***

46. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new section into both the Army and Air Force Acts 1955.

The new *section 83ZA* creates a summary appeal court to hear appeals against findings and sentences awarded summarily by COs. The section specifies the composition of the court and refers to the qualifications needed to sit on the court. These qualifications are explained in the following sections. The section also specifies where the court may sit and that it may sit in two or more divisions at once. Provision is made for the appointment of a court administration officer whose functions will include that of determining when and where the court is to sit.

*Subsection (2)* inserts a new *section 52FF* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1).

#### ***Section 15: Appointment of judge advocates***

47. This section inserts a new section into each of the SDAs.

*Subsection(1)* inserts a new *section 83ZB* into both the Army and Air Force Acts 1955. This section requires that judge advocates for the summary appeal court be appointed by the Judge Advocate General. It also refers to the section in the Acts specifying the necessary qualifications, i.e. at least five years standing as a qualified lawyer.

*Subsection (2)* inserts a new *section 52FG* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) although it refers to the Chief Naval Judge Advocate as the appointing authority in this case.

#### ***Section 16: Officers qualified for membership of the Summary Appeal Court***

48. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new *section 83ZC* into the Army Act 1955. This section permits, with exceptions, any officer, who has held a commission in the Services for a total of two years or more, to sit as a member of the summary appeal court. There are two exceptions to this rule. *Subsection(2)* of the new *section 83ZC* allows rules to be made permitting officers who do not meet the qualifying criteria to be allowed to sit as members, in certain circumstances. *Subsection(3)* of the new *section 83ZC* excludes from membership various categories of persons, i.e. provost officers, lawyers, and the prosecuting authority and court administration officer or their staffs. Exchange officers who have a legal qualification from a Commonwealth country are also excluded. The exclusion of lawyers is intended to avoid undue influence on lay members of the court. (Similar reasoning underlies the exclusion of lawyers from juries in civilian criminal courts).

*Subsection(2)* inserts a new *section 83ZC* into the Air Force Act 1955. This section is identical in effect to that described above.

*Subsection (3)* inserts a new *section 52FH* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above, except that an officer is required to have held a commission for three years before he is qualified to

sit as a court member. The commissioned service requirements for membership of the summary appeals court mirror those in each Service for membership of a court-martial.

### ***Section 17: Constitution of Summary Appeal Court for appeals***

49. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a *section 83ZD* into both the Army and Air Force Acts 1955. This section specifies that the court shall consist of one judge advocate and two officers, qualified as described above, subject to any rules made regulating practice and procedure. For each appeal, the judge advocate will be chosen by or on behalf of the Judge Advocate General and the officers will be chosen by the court administration officer.

*Subsection (2)* inserts a new *section 52FJ* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above except that it provides for the judge advocates to be chosen by or on behalf of the Chief Naval Judge Advocate, and also provides that at least one member of the court holds a minimum rank of commander and that the most senior member of the court at that sitting shall act as president.

### ***Section 18: Right of appeal***

50. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new *section 83ZE* into both the Army and Air Force Acts 1955. This section provides that anyone who is dealt with summarily and found guilty may appeal against the finding, the sentence or both. The section imposes a time limit of 14 days from the date the sentence was awarded to lodge an appeal, although the court may extend this period at its discretion. It can also give leave to appeal at any time after the 14 day period has expired. In the case of an appeal, the section provides that the respondent (that is, the other party to the appeal) will be the prosecuting authority.

*Subsection (2)* inserts a new *section 52FK* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above.

### ***Section 19: Hearing of appeals***

51. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new *section 83ZF* into both the Army and Air Force Acts 1955. This section provides as follows:

- An appeal against a finding of conviction shall be by way of a rehearing (so that the whole case will be heard again).
- Appeals against sentence will also be by way of rehearing but only the evidence relevant to sentencing will be reheard.
- Appeals will generally be heard in open court unless the rules of procedure of the court allow otherwise and will be conducted in accordance with the law of England and Wales.
- Questions of law, procedure and practice will be decided by the judge advocate and any directions given by him will be binding on the court.

*Subsection (2)* inserts a new *section 52FL* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above.

### ***Section 20: Powers of the Summary Appeal Court***

52. This section inserts a new section into each of the SDAs.

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*Subsection (1)* inserts a new *section 83ZG* into both the Army and Air Force Acts 1955. This section provides that:

- When a finding of guilt is appealed, the summary appeal court may either confirm this finding, quash it, or substitute a finding that another charge has been proved, if this alternative would have been available to the CO at the original hearing.
- Where the court does quash a finding, the court shall also quash the punishment that went with it or, in the case of a number of findings, the punishments that went with each of the individual findings. Where the punishment relates to a number of findings, one or more of which is quashed but with some remaining, the court may vary the overall punishment. This is provided that the substituted punishment is one that the CO could have awarded originally and is no more severe than the original punishment.
- Where the court confirms the original finding or substitutes another, the court may vary the punishment as long as the substituted punishment is one which the CO could have awarded originally and it is no more severe than the original punishment.
- On an appeal against punishment only, the court may confirm the original punishment or substitute another, as long as the substituted punishment is one which the CO could have awarded originally and it is no more severe than the original punishment.
- Any substituted finding or punishment will be deemed to have been awarded by the officer who conducted the original summary trial and any substituted punishment will be treated as having been imposed at the date of the original punishment.

*Subsection (2)* inserts a new *section 52FM* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above.

***Section 21: Making of, and appeals from, decisions of the court.***

53. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new *section 83ZH* into both the Army and Air Force Acts 1955. This section provides for majority decisions and for an appeal to the High Court by case stated on a point of law.

*Subsection (2)* inserts a new *section 52FN* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above.

***Section 22: Rules***

54. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new *section 83ZJ* into both the Army and Air Force Acts 1955. This section provides that the Secretary of State may, by statutory instrument, make rules to regulate the practice and procedure of the court. These rules of practice and procedure will deal with a number of matters set out in detail in the section, although this list is not exhaustive. Examples of these are:

- the procedure to be followed when the court deals with matters at a preliminary hearing before a full appeal hearing, such as giving directions or making preliminary rulings on, for example, admissibility of evidence,
- allowing the appellant to object to members of the court, and
- the admissibility of evidence.

The section also provides that any legislation relating to the practice and procedure of courts-martial may be applied to the summary appeal court with any appropriate modifications.

*Subsection (2)* inserts a new *section 52FP* into the Naval Discipline Act 1957. This section is similar in effect to that described in subsection (1) above.

### ***Section 23: Oaths required of members of the court***

55. This section inserts a new section into each of the SDAs.

*Subsection (1)* inserts a new *section 83ZK* into both the Army and Air Force Acts 1955. This section requires every member of the court to swear an oath prior to sitting as a member of the court. The general interpretation provisions in each Act already provide that “oaths” include “affirmations”. Rules governing how these oaths are sworn may be made by statutory instrument.

*Subsection (2)* inserts a new *section 52FQ* into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above.

### ***Section 24: Privileges of witnesses and others***

56. This section inserts a new section into each of the SDAs providing that witnesses will have the same privileges and immunities as they would if they had been called before the High Court of England and Wales. This provision mirrors that in the three SDAs for witnesses appearing before courts-martial.

### ***Section 25: Further amendments relating to the Summary Appeal Courts***

57. This section introduces *Schedule 3* to the Act which makes further amendments to the SDAs in respect of the summary appeal court. These include:

- *Paragraphs 1,2 &3* amend the three SDAs to provide that offences which can be committed in relation to courts-martial in each of the Acts, such as failure to comply with a summons or the refusal of a witness to answer a question which the court requires him to answer, can also be committed in relation to the summary appeal courts. An offence committed in relation to the summary appeal court can be tried by court-martial or, in certain cases, by the summary appeal court itself.
- *Paragraphs 4&5* amend the three SDAs to allow regulations in respect of summary dealing to include provisions dealing with the procedure for making and withdrawing election for court-martial trial.
- *Paragraphs 6&7* amend the three SDAs to provide that offences which can be committed by civilians not subject to Service law, in relation to courts-martial, such as those mentioned above, shall also apply to summary appeal courts. In these cases, the summary appeal court cannot apply a sanction but can certify to a court with jurisdiction over the offender that he has committed a contempt of court. This will allow the latter court to investigate and punish the offender if appropriate. The paragraphs also make the necessary technical and drafting amendments which arise because of these changes.
- *Paragraphs 8-11* amend the three SDAs to make new provisions about the commencement sentences of detention awarded by the CO. Currently they take effect immediately. In the new system, any sentence of detention will be suspended until the period in which an appeal can be brought has elapsed or, if an appeal is lodged within that period, until the appeal has been heard, unless the accused chooses to begin serving his sentence as soon as it is awarded. If an accused is serving his sentence and an appeal brought, the remainder of the sentence will be suspended until the appeal is decided.



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- *Paragraphs 12&13* insert new provisions in the three SDAs dealing with consecutive terms of detention. If the CO orders that a sentence of detention is to run from the expiry of any sentence of detention currently being served, the date of the award when the offender shall be deemed to have begun his sentence will be the date of the expiry of the current sentence. Where a sentence would normally begin once an appeal has been determined, the new sentence will be deemed to have begun at the date of the expiry of the current sentence if that is later.
- *Paragraphs 14&15* amend the sections in the three SDAs which deal with limitations on total periods of detention. An individual cannot be continuously detained for more than two years maximum if serving consecutive sentences of detention. The amendments provide that for the purposes of this limit, two periods of detention which are interrupted by a period of suspension, (by virtue of the amendments made by paragraphs 6-9) are to be taken to be continuous. This ensures that a person whose sentence is suspended still benefits from the application of the limits.
- *Paragraph 16* amends the Army and Air Force Acts 1955 to reflect the introduction of the summary appeal court. *Section 131* of the Army and Air Force Acts 1955 currently allows an individual, who is no longer subject to Service jurisdiction, to be tried under the Acts for offences he is suspected of having committed whilst he was still subject to Service law. The section allows him to be retained for the purposes of, *inter alia*, arrest, custody or trial, and it is amended to include the period of an appeal to the summary appeal court.
- *Paragraphs 17&18* deal with membership of the summary appeal court when it is hearing an appeal by a civilian. They amend the SDAs to allow one or both of the officers on a court to be replaced by civilians in the service of the Crown who are themselves subject to Service law. The paragraphs also provide that these civilians are deemed to be qualified to sit on a court for the purposes of the provisions inserted by *section 16* above.
- *Paragraphs 19&20* amend the provisions in the three SDAs dealing with review of summary findings and awards. At the moment, an accused may request a review of the summary finding and/or sentence. This is done by the reviewing authority who will normally be an officer superior in rank to the CO. A review of the finding and sentence can also be carried out by the Services at any other time. The reviewing authority's current powers allow him to carry out the function of an appeal system. The amendments to the SDAs remove the provisions allowing the accused to request a review and amend the powers of the reviewing authority in relation to summary dealings. This is because a court is being put in its place and the reviewing authority no longer needs the powers to quash findings etc; these will rest with the court. This does not prevent the reviewing authority from examining the decision of the CO and, if it thinks there is a miscarriage of justice, but the accused has not brought an appeal himself, referring the case to the summary appeal court (with the leave of the court). Additionally, the reviewing authority can refer to the summary appeal court, with the leave of the court, a case which it has already heard on appeal if the authority thinks that there are matters worthy of further consideration which were not put before the court at the time of the appeal. The reviewing authority also retains the residual power to quash a finding and the related punishment, in exceptional circumstances, This power would be exercised in cases where it was in the Service interest to do so. An example of such a case would be where an individual with specialist skills is urgently required for operational reasons.
- *Paragraphs 21&22* make consequential amendments to provisions of the SDAs relating to the powers of the civil courts.
- *Paragraphs 23&24* insert a definition of the summary appeal court into the interpretation section of each of the SDAs.

**Section 26: Interpretation**

58. This section defines the terms “ the 1955 Acts ” and “the 1957 Act” for the purposes of the Act.

**Section 27: Repeals**

59. This section introduces *Schedule 4* to the Act that lists all the provisions to be repealed as a consequence of the changes made by this Act.

**Section 28: Short title and commencement**

60. This section provides that the provisions of the Act (except sections 22 and 24 which come into force on Royal Assent) are to come into force on a day or days to be appointed by a commencement order by the Secretary of State.

**COMMENCEMENT DATE**

61. It is anticipated that the Act will be commenced by or on 2 October 2000.

**HANSARD REFERENCES**

The following table sets out the dates and Hansard references for each stage of this Act’s passage through Parliament.

<i>Stage</i>	<i>Date</i>	<i>Hansard Reference</i>
<b>House of Lords</b>		
Introduction	18 November 1999	Vol 607 Col 23
Second Reading	29 November 1999	Vol 607 Cols 666-702
Committee	16 December 1999	Vol 608 Cols 310-387
Report	18 January 2000	Vol 608 Cols 978-1019
Third Reading	24 January 2000	Vol 608 Cols 1327-1344
<b>House of Commons</b>		
Introduction	24 January 2000	
Second Reading	17 February 2000	Vol 344 Cols 1119-1208
Committee	29 February and 2, 7 9 and 14 March 2000	Hansard Standing Committee D
Report & Third Reading	6 April 2000	Vol 347 Cols 1164-1209
Royal Assent:	25 May 2000	House of Lords Hansard Vol 613 Col 914
		House of Commons Hansard Vol 350 Col 1143