

Draft Order laid before Parliament under section 373(3) of the Armed Forces Act 2006, for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2008 No. ***

DEFENCE

**The Armed Forces (Alignment of Service Discipline Acts) Order
2008**

Made - - - - - ***

Coming into force - - - - - ***

The Secretary of State makes the following Order in exercise of the powers conferred by section 381(1) of the Armed Forces Act 2006(a):

In accordance with section 373(3) of the Armed Forces Act 2006 a draft of this instrument was laid before, and approved by a resolution of, each House of Parliament.

Citation and commencement

1. This Order may be cited as the Armed Forces (Alignment of Service Discipline Acts) Order 2008 and shall come into force twenty one days after the day on which it is made.

Interpretation

2. In this Order—

“the 1955 Acts” means the Army Act 1955(b) and the Air Force Act 1955(c);

“the 1957 Act” means the Naval Discipline Act 1957(d); and

“commencement” means the date on which this Order comes into force.

Powers of arrest

3. For section 74 of the Army Act 1955(e) (power to arrest offenders) substitute—

“74. Power to arrest offenders

(1) A person who is reasonably suspected of being engaged in committing, or of having committed, an offence against any provision of this Act may be arrested in accordance with subsection (2), (3), (4) or (5) by a person subject to military or air-force law or to the Naval Discipline Act 1957 (c. 53).

(a) 2006 c. 52.

(b) 1955 c. 18.

(c) 1955 c. 19.

(d) 1957 c. 53.

(e) Section 74 of the Army Act 1955 was amended by the 1957 Act, Schedule 5.

- (2) An officer may be arrested under subsection (1)—
- (a) by an officer of superior rank or, if engaged in a mutiny, quarrel or disorder, by an officer of any rank;
 - (b) by a service policeman; or
 - (c) on the order of another officer, by a person who is lawfully exercising authority on behalf of a provost officer.
- (3) A person of or below the rank of warrant officer may be arrested under subsection (1)—
- (a) by an officer;
 - (b) by a warrant officer or non-commissioned officer of superior rank or rate;
 - (c) by a service policeman;
 - (d) by a person who is lawfully exercising authority on behalf of a provost officer; or
 - (e) if a member of a ship's company or an embarked force, by a person exercising authority as a member of the staff of the officer of the day.
- (4) A person to whom any provisions of Part 2 of this Act apply by virtue of section 208A or 209 of this Act (application of Act to passengers in HM ships and aircraft and to civilians) may be arrested under subsection (1)—
- (a) by an officer;
 - (b) by a service policeman; or
 - (c) by a person who is lawfully exercising authority on behalf of a provost officer.
- (5) Where none of subsections (2) to (4) applies in relation to the person to be arrested, that person may be arrested under subsection (1) by a service policeman.
- (6) The power of arrest conferred on any person by this section may be exercised—
- (a) personally;
 - (b) by giving orders for the arrest of the person who is to be arrested; or
 - (c) where that person is subject to military or air-force law or to the Naval Discipline Act 1957, by ordering him into arrest.

74A. Power of arrest in anticipation of commission of offence

(1) A service policeman may arrest a person whom he reasonably suspects of being about to commit an offence against any provision of this Act.

(2) Subsection (6) of section 74 of this Act applies in relation to the power of arrest conferred by this section as it applies in relation to the power of arrest conferred by that section.

(3) Where a person is arrested under this section—

- (a) the arrest must be reported as soon as practicable to his commanding officer; and
- (b) he may be kept in military, air-force or naval custody until such time as a service policeman is satisfied that the risk of his committing the offence concerned has passed.”

4. For section 74 of the Air Force Act 1955(a) (power to arrest offenders) substitute—

“74. Power to arrest offenders

(1) A person who is reasonably suspected of being engaged in committing, or of having committed, an offence against any provision of this Act may be arrested in accordance with

(a) Section 74 of the Air Force Act 1955 was amended by the 1957 Act, Schedule 5.

subsection (2), (3), (4) or (5) by a person subject to air-force or military law or to the Naval Discipline Act 1957 (c. 53).

(2) An officer may be arrested under subsection (1)—

- (a) by an officer of superior rank or, if engaged in a mutiny, quarrel or disorder, by an officer of any rank;
- (b) by a service policeman; or
- (c) on the order of another officer, by a person who is lawfully exercising authority on behalf of a provost officer.

(3) A person of or below the rank of warrant officer may be arrested under subsection (1)—

- (a) by an officer;
- (b) by a warrant officer or non-commissioned officer of superior rank or rate;
- (c) by a service policeman;
- (d) by a person who is lawfully exercising authority on behalf of a provost officer; or
- (e) if a member of a ship's company or an embarked force, by a person exercising authority as a member of the staff of the officer of the day.

(4) A person to whom any provisions of Part 2 of this Act apply by virtue of section 208A or 209 of this Act (application of Act to passengers in HM ships and aircraft and to civilians) may be arrested under subsection (1)—

- (a) by an officer;
- (b) by a service policeman; or
- (c) by a person who is lawfully exercising authority on behalf of a provost officer.

(5) Where none of subsections (2) to (4) applies in relation to the person to be arrested, that person may be arrested under subsection (1) by a service policeman.

(6) The power of arrest conferred on any person by this section may be exercised—

- (a) personally;
- (b) by giving orders for the arrest of the person who is to be arrested; or
- (c) where that person is subject to air-force or military law or to the Naval Discipline Act 1957, by ordering him into arrest.

74A. Power of arrest in anticipation of commission of offence

(1) A service policeman may arrest a person whom he reasonably suspects of being about to commit an offence against any provision of this Act.

(2) Subsection (6) of section 74 of this Act applies in relation to the power of arrest conferred by this section as it applies in relation to the power of arrest conferred by that section.

(3) Where a person is arrested under this section—

- (a) the arrest must be reported as soon as practicable to his commanding officer; and
- (b) he may be kept in air-force, military or naval custody until such time as a service policeman is satisfied that the risk of his committing the offence concerned has passed.”

5. In section 131(1) of each of the 1955 Acts (trial and punishment of persons no longer subject to military or air-force law), omit “arrest.”

6. In section 132(4) of each of the 1955 Acts (arrest and custody of person who has ceased to be triable), after “arrested” insert “under section 74 of this Act”.

7.—(1) Section 209 of each of the 1955 Acts (application of Act to civilians) is amended as follows.

(2) In each of subsections (1) and (2), after “Subject to the modifications hereinafter specified” insert “and to section 74(4) of this Act”.

(3) Omit subsection (3)(c).

8. For subsections (2) and (3) of section 45 of the 1957 Act^(a) (power to arrest offenders) substitute—

“(2) A person who is reasonably suspected of being engaged in committing, or of having committed, any such offence may be arrested in accordance with subsection (3), (4), (5) or (6) by a person subject to this Act or to military or air-force law.

(3) An officer may be arrested under subsection (2)—

- (a) by an officer of superior rank or, if engaged in a mutiny, quarrel or disorder, by an officer of any rank;
- (b) by a service policeman; or
- (c) on the order of another officer, by a person who is lawfully exercising authority on behalf of a provost officer.

(4) A person of or below the rate of warrant officer may be arrested under subsection (2)—

- (a) by an officer;
- (b) by a warrant officer or non-commissioned officer of superior rank or rate;
- (c) by a service policeman;
- (d) by a person who is lawfully exercising authority on behalf of a provost officer; or
- (e) if a member of a ship’s company or an embarked force, by a person exercising authority as a member of the staff of the officer of the day.

(5) A person to whom any provisions of Parts 1 and 2 of this Act apply by virtue of section 117 or 118 of this Act (application of Act to passengers in HM ships and aircraft and to civilians) may be arrested under subsection (2)—

- (a) by an officer;
- (b) by a service policeman; or
- (c) by a person who is lawfully exercising authority on behalf of a provost officer.

(6) Where none of subsections (3) to (5) applies in relation to the person to be arrested, that person may be arrested under subsection (2) by a service policeman.

(7) The power of arrest conferred on any person by this section may be exercised—

- (a) personally;
- (b) by giving orders for the arrest of the person who is to be arrested; or
- (c) where that person is subject to this Act or to military or air-force law, by ordering him into arrest.”

9. After section 45 of the 1957 Act insert—

“45A. Power of arrest in anticipation of commission of offence

(1) A service policeman may arrest a person whom he reasonably suspects of being about to commit an offence under any provision of Part 1 of this Act.

(2) Subsection (7) of section 45 of this Act applies in relation to the power of arrest conferred by this section as it applies in relation to the power of arrest conferred by that section.

(3) Where a person is arrested under this section—

- (a) the arrest must be reported as soon as practicable to his commanding officer; and

^(a) Section 45 of the 1957 Act was amended by the Armed Forces Act 1971 (c. 33), Schedule 3, paragraph 5(1).

- (b) he may be kept in naval, military or air-force custody until such time as a service policeman is satisfied that the risk of his committing the offence concerned has passed.”

10. In section 51(1) of the 1957 Act (jurisdiction to try persons no longer subject to the Act), for “may for that purpose be arrested and kept in custody” substitute “if arrested under section 45 of this Act may for that purpose be kept in naval, military or air-force custody”.

11.—(1) Section 118 of the 1957 Act (application of Act to civilians) is amended as follows.

(2) In subsection (1), after “Subject to the provisions of this section” insert “and to section 45(5) of this Act,”.

(3) In subsection (2), after “subject to the provisions of this section” insert “and to section 45(5) of this Act”.

12. Omit paragraph 3 of Schedule 4 to the 1957 Act (power of arrest in respect of civilians).

13.—(1) Section 225(1) of the Army Act 1955, section 223(1) of the Air Force Act 1955 and section 135(1) of the 1957 Act (general interpretation) are amended as follows.

(2) For the definition of “provost officer”, substitute—

““provost officer” means an officer (of any of Her Majesty’s forces) who is a service policeman;”.

(3) Insert in the appropriate place—

““service policeman” means anyone who is, or by reason of section 375(5) of the Armed Forces Act 2006 (c. 52) is to be treated as, a service policeman for the purposes of that Act;”.(a)

14.—(1) Section 9 of the Armed Forces Act 2001(b) (entry for purpose of arrest etc) is amended as follows.

(2) For subsection (4) substitute—

“(4) Subsection (3) applies to a person who is reasonably suspected of having committed the offence in respect of which the arrest is to be made while subject to service law, but has ceased to be so subject.”

(3) In subsection (8), before paragraph (a) insert—

“(za) the arrest is to be made under section 74 of either of the 1955 Acts or section 45 of the 1957 Act, and”.

15. In section 10(13) of the Armed Forces Act 2001 (power to make provision for entry and search of premises in which a person was when or immediately before he was arrested) and section 11(1) of that Act (power to make provision for entry and search of premises occupied or controlled by an arrested person), for “any of the services Acts” substitute “section 74 of either of the 1955 Acts or section 45 of the 1957 Act”.

Custody after charge

16. In section 75F(2) of each of the 1955 Acts and section 47G(2) of the 1957 Act(c) (custody after charge)—

(a) in paragraph (b) insert “or” at the end;

(b) omit paragraph (d) and the “or” immediately preceding it.

(a) “Service policeman” is defined by section 375(1) of the Armed Forces Act 2006, and the definition is extended by section 375(5) of that Act. Section 375(1) and (5) were brought into force on 1st January 2008 by the Armed Forces Act 2006 (Commencement No. 2) Order 2007 (S.I. 2007/2913 (C. 115)), article 3.

(b) 2001 c. 19.

(c) Section 75F(2) of each of the 1955 Acts and section 47G of the 1957 Act were inserted by the Armed Forces Discipline Act 2000 (c. 4), section 2.

Referral of charge to commanding officer

17.—(1) Section 83B of each of the 1955 Acts(a) (functions of the prosecuting authority) is amended as follows.

(2) In subsection (4)—

- (a) in paragraph (a) omit “and section 83BB of this Act”; and
- (b) in paragraph (b) omit “(subject to section 83BB of this Act)”.

(3) For subsection (9A) substitute—

“(9A) If the case has been referred to the prosecuting authority as a result of an election for court-martial trial, the prosecuting authority may not—

- (a) determine under subsection (4)(a) above that a charge which is not capable of being dealt with summarily is to be preferred,
- (b) substitute, before the commencement of the trial, any charge which is not capable of being dealt with summarily for any charge preferred against the accused, or
- (c) prefer any additional charge against the accused before the commencement of the trial,

unless the accused has given his written consent.”.

18.—(1) Section 83BB of each of the 1955 Acts(b) (referral of charge or case to commanding officer) is amended as follows.

(2) For the sidenote substitute “Referral of case to commanding officer”.

(3) Omit subsections (1) and (2).

(4) For subsection (3) substitute—

“(3) Where a case is referred to a commanding officer under this section, he shall deal with such charge as he considers appropriate in relation to the case as if it had been reported to him under section 76(1) of this Act.

(4) Where part of a case is referred to a commanding officer under this section, he shall deal with such charge as he considers appropriate in relation to that part of the case as if it had been reported to him under section 76(1) of this Act.”

19. In section 85A of each of the 1955 Acts(c) (powers of court-martial where accused elected court-martial trial), omit subsection (3).

20.—(1) Section 52I of the 1957 Act(d) (functions of the prosecuting authority) is amended as follows.

(2) In subsection (4), omit “(subject to section 52II of this Act)”.

(3) For subsection (8A) substitute—

“(8A) If the case has been referred to the prosecuting authority as a result of an election for court-martial trial, the prosecuting authority may not—

- (a) determine under subsection (4) above that a charge which is not capable of being tried summarily is to be preferred,
- (b) substitute, before the commencement of the trial, any charge which is not capable of being tried summarily for any charge preferred against the accused, or

(a) Section 83B of each of the 1955 Acts was inserted by the Armed Forces Act 1996 (c. 46), Schedule 1, paragraphs 14 and 15. Subsection (4) was amended, and subsection (9A) inserted, by the Armed Forces Discipline Act 2000, Schedule 2, paragraph 1.

(b) Section 83BB of each of the 1955 Acts was inserted by the Armed Forces Discipline Act 2000, Schedule 2, paragraph 3, and amended by the Armed Forces Act 2001 (c. 19), Schedule 1, paragraph 3.

(c) Section 85A of each of the 1955 Acts was inserted by the Armed Forces Discipline Act 2000, section 12(1).

(d) Section 52I of the 1957 Act was inserted by the Armed Forces Act 1996, Schedule 1, paragraph 16. Subsection (4) was amended, and subsection (8A) inserted, by the Armed Forces Discipline Act 2000, Schedule 2, paragraph 2.

- (c) prefer any additional charge against the accused before the commencement of the trial,

unless the accused has given his written consent.”.

21.—(1) Section 52II of the 1957 Act(a) (referral of charge or case to commanding officer) is amended as follows.

(2) For the sidenote substitute “Referral of case to commanding officer”.

(3) Omit subsections (1) and (2).

(4) For subsection (3) substitute—

“(3) Where a case is referred to a commanding officer under this section, he shall deal with such charge as he considers appropriate in relation to the case as if it had been reported to him under section 52B(1) of this Act.

(4) Where part of a case is referred to a commanding officer under this section, he shall deal with such charge as he considers appropriate in relation to that part of the case as if it had been reported to him under section 52B(1) of this Act.”

22. In section 62ZA of the 1957 Act(b) (powers of court-martial where accused elected court-martial trial), omit subsection (4).

Suspended sentences of military and air-force courts-martial

23. In section 118(2) of each of the 1955 Acts(c) (commencement of suspended sentence), omit the words from “: Provided that” to “may specify”.

24.—(1) Section 120 of each of the 1955 Acts (suspension of sentences) is amended as follows.

(2) Omit subsection (4)(d).

(3) For subsection (5)(e) substitute—

“(5) Where, while a sentence is suspended under this section, the person sentenced commits a fresh offence and is convicted of that offence by a court-martial, then (unless the balance of the earlier sentence is remitted by virtue of section 119A(3) of this Act) the court may determine the suspension of the sentence by an order committing the person sentenced to imprisonment or detention, as the case may be.

(5A) Subsections (5B) to (5E) apply where a court-martial makes an order under subsection (5).

(5B) The court may direct that the sentence in respect of which the order is made shall begin to run from the end of another term of imprisonment or detention which—

- (a) has been passed on the person on a previous occasion; or
- (b) the court passes on him on the same occasion.

(5C) In subsection (5B) the reference to another term of imprisonment does not include a term from which the person has been released early under Part 2 of the Criminal Justice Act 1991 (c. 53) or Chapter 6 of Part 12 of the Criminal Justice Act 2003 (c. 44).

(5D) Subsection (5B) is subject to section 119A of this Act (limitation of total period of sentences of detention).

(5E) For the purposes of sections 113 and 113AA of this Act (review) and subsection (3) above, the order is to be treated as a sentence passed on the offender for the earlier offence.”

(a) Section 52II of the 1957 Act was inserted by the Armed Forces Discipline Act 2000, Schedule 2, paragraph 4, and amended by the Armed Forces Act 2001, Schedule 1, paragraph 14.

(b) Section 62ZA of the 1957 Act was inserted by the Armed Forces Discipline Act 2000, section 12(3).

(c) Section 118(2) of each of the 1955 Acts was amended by the Armed Forces Act 1996, Schedule 6, paragraph 4(2).

(d) Section 120(4) of each of the 1955 Acts was amended by the Armed Forces Act 1986 (c. 21), Schedule 2.

(e) Section 120(5) of each of the 1955 Acts was amended by the Armed Forces Act 1971, Schedule 1, paragraph 1(6) and Schedule 4, and the Armed Forces Act 1996, Schedule 6, paragraph 4(1)(c) and Schedule 7.

(4) In subsection (6)(a), for “an order under the last foregoing subsection directing that the suspension of that sentence shall be determined” substitute “an order under subsection (5)”.

25. After section 120 of each of the 1955 Acts insert—

“120ZA. Activation of suspended sentence: appeals

(1) Subsections (2) to (4) apply where a court-martial makes an order under section 120(5) of this Act.

(2) For the purposes of the Courts-Martial (Appeals) Act 1968 (c. 20) (“the 1968 Act”)—

- (a) the order is to be treated as a sentence passed on the offender for the offence for which the sentence was passed;
- (b) any appeal, or application for leave to appeal, against the sentence passed in respect of the new offence is to be treated as also being an appeal or application for leave to appeal against the order; and
- (c) any appeal, or application for leave to appeal, against the order is to be treated as also being an appeal or application for leave to appeal against the sentence passed in respect of the new offence.

(3) In relation to any appeal against the order, section 16A of the 1968 Act (powers on appeals against sentence) is to be read as conferring power—

- (a) to quash the order; or
- (b) if the court-martial gave a direction under section 120(5B) of this Act, to quash that direction.

(4) Where the Appeal Court quashes the order, or any direction under section 120(5B) of this Act, then in relation to any appeal against the sentence passed in respect of the new offence—

- (a) section 16A of the 1968 Act has effect as if the words “and which is not of greater severity than that for which it is substituted” were omitted; but
- (b) the Appeal Court may not exercise its powers under that section in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(5) Subsections (6) and (7) apply where a court-martial has power to make an order under section 120(5) of this Act in respect of a sentence (“the suspended sentence”) but does not do so.

(6) On any appeal against the sentence passed in respect of the new offence, the Appeal Court’s power under section 16A of the 1968 Act to pass a sentence in substitution for the sentence of the court-martial includes—

- (a) power to make an order under section 120(5) of this Act in respect of the suspended sentence; and
- (b) if the court makes such an order, power to give a direction under section 120(5B) of this Act in relation to the order.

(7) But the Appeal Court may not exercise its powers under subsection (6) in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(8) In this section—

- (a) “the new offence” means the offence mentioned in section 120(5) of this Act; and
- (b) “the Appeal Court” means the Courts-Martial Appeal Court.”

(a) Section 120(6) of each of the 1955 Acts was amended by the Armed Forces Act 1996, Schedule 7.

Suspended sentences of Standing Civilian Courts

26.—(1) In Schedule 3 to the Armed Forces Act 1976(a), paragraph 20 (review of findings or sentences of a Standing Civilian Court) is amended as follows.

(2) Omit sub-paragraph (5A).

(3) In sub-paragraph (6), for the words from “then without prejudice” to the end substitute “, the suspension of the earlier sentence may be determined by order of any such court on awarding the later sentence.”

(4) Omit sub-paragraph (7).

27. After paragraph 20 of that Schedule insert—

“21.—(1) Where the suspension of a sentence is determined under paragraph 20(6) above by order of a Standing Civilian Court—

- (a) for the purposes of paragraph 18 above and rules under section 103 of the Army Act 1955 or the Air Force Act 1955 the order is to be treated as a sentence passed on the offender for the offence for which the suspended sentence was passed; and
- (b) on an appeal against the order, the court-martial may quash the order.

(2) Sub-paragraphs (3) to (5) apply where the suspension of a sentence is determined under paragraph 20(6) above by order of a court-martial.

(3) For the purposes of the Courts-Martial (Appeals) Act 1968 (c. 20) (“the 1968 Act”)—

- (a) the order is to be treated as a sentence passed on the offender for the offence for which the sentence was passed;
- (b) the offender is to be treated as having been convicted by court-martial of that offence;
- (c) any appeal, or application for leave to appeal, against the sentence passed in respect of the fresh offence is to be treated as also being an appeal or application for leave to appeal against the order; and
- (d) any appeal, or application for leave to appeal, against the order is to be treated as also being an appeal or application for leave to appeal against the sentence passed in respect of the fresh offence.

(4) In relation to any appeal against the order, section 16A of the 1968 Act (powers on appeals against sentence) is to be read as conferring power to quash the order.

(5) Where the Appeal Court quashes the order, in relation to any appeal against the sentence passed in respect of the fresh offence—

- (a) section 16A of the 1968 Act has effect as if the words “and which is not of greater severity than that for which it is substituted” were omitted; but
- (b) the Appeal Court may not exercise its powers under that section in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(6) Where a court-martial passing sentence on a person has power to determine the suspension of a sentence under paragraph 20(6) above but does not do so—

- (a) on an appeal against the sentence passed by the court-martial, the power of the Appeal Court under section 16A of the 1968 Act to pass a sentence in substitution for the sentence of the court-martial includes power to make an order under paragraph 20(6) above in respect of the suspended sentence; but
- (b) the court may not exercise that power in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(a) 1976 c. 52. Sub-paragraph (5A) of paragraph 20 of Schedule 3 was inserted, and sub-paragraph (6) amended, by the Armed Forces Act 1981 (c. 55), Schedule 1, paragraph 4.

(7) In this paragraph—

- (a) “the fresh offence” means the offence mentioned in paragraph 20(6) above; and
- (b) “the Appeal Court” means the Courts-Martial Appeal Court.”

Suspended sentences and committal orders under the 1957 Act

28.—(1) Section 52F of the 1957 Act(a) (regulations as to summary trial etc) is amended as follows.

(2) In subsection (1), for “and summary trial” substitute “, summary trial and hearings as regards the making of orders under section 91B of this Act (activation of suspended sentence by commanding officer)”.

(3) In subsection (2)(d), after “summary trial” insert “and on hearings as regards the making of orders under section 91B of this Act”.

(4) After subsection (2)(e) insert—

“(ee) limitations on the orders which may be made, and the directions which may be given, under section 91B of this Act by a commanding officer of a specified description;”.

(5) In subsection (2)(f), for “so awarded” substitute “awarded on summary trial”.

(6) In subsection (2)(g), after “punishments” insert “, and orders and directions under section 91B of this Act,”.

29.—(1) Section 81 of the 1957 Act(b) (place of imprisonment or detention) is amended as follows.

(2) In subsection (3)—

(a) insert after paragraph (c)—

“(ca) where the offender appeals to the summary appeal court, that court;”;

(b) insert after paragraph (d)—

“(e) where an officer makes an order under section 91B(1) of this Act determining the suspension of the sentence, that officer;”.

(3) After subsection (3) insert—

“(4) But a committal order may not be made by virtue of subsection (3)(a), (b), (d) or (e) while the sentence is suspended by virtue of section 85A(4) of this Act.”

30.—(1) Section 90 of the 1957 Act (suspension of sentences) is amended as follows.

(2) In subsection (1)(c), for “a committal order is issued under section ninety-one of this Act” substitute “an order determining the suspension of the sentence is made under section 91(1) or 91B(1) of this Act and a committal order is issued”.

(3) In subsection (1A)(d), for “, the court-martial” substitute “or by the summary appeal court to detention, the court”.

(4) In subsection (2), for “a further committal order is issued in respect of that sentence under section ninety-one of this Act” substitute “an order determining the suspension of the sentence is made under section 91(1) or 91B(1) of this Act and a further committal order is issued”.

31. For section 91 of the 1957 Act(a) (committal or re-committal of persons under suspended sentence) substitute—

(a) Section 52F of the 1957 Act was inserted by the Armed Forces Act 1996, Schedule 1, paragraphs 11 and 13, and amended by the Armed Forces Discipline Act 2000, Schedule 3, paragraph 5, and the Armed Forces Act 2001, Schedule 1, paragraph 13.

(b) Section 81(3) of the 1957 Act was amended by the Defence (Transfer of Functions) (No. 1) Order 1964 (S.I. 1964/488), Schedule 1, and the Armed Forces Act 1996, Schedule 1, paragraph 90.

(c) Section 90(1) of the 1957 Act was amended by the Armed Forces Act 1991 (c. 62), section 12(1).

(d) Section 90(1A) of the 1957 Act was inserted by the Armed Forces Act 1991, section 12(1).

“91. Activation of suspended sentence by court-martial

(1) Where, while a sentence of imprisonment or detention is suspended under section 90 of this Act, the person sentenced is convicted by court-martial of an offence committed since the sentence was suspended, the court may make an order determining the suspension of the sentence (whether or not it also makes a committal order under section 81(3) of this Act).

(2) A court-martial which makes an order under subsection (1) may direct that the sentence shall begin to run from the end of another term of imprisonment or detention which—

- (a) has been passed on the offender on a previous occasion; or
- (b) the court passes on him on the same occasion.

(3) In subsection (2) the reference to another term of imprisonment does not include a term from which the person has been released early under Part 2 of the Criminal Justice Act 1991 (c. 53) or Chapter 6 of Part 12 of the Criminal Justice Act 2003 (c. 44).

(4) Subsection (2) is subject to section 89 of this Act (limitation of total period of sentences of detention).

(5) Subsection (1) does not apply if—

- (a) the sentence was passed by a court-martial or the Courts-Martial Appeal Court; and
- (b) the person was tried by court-martial for the offence mentioned in subsection (1) in pursuance of an election for court-martial trial.

91A. Activation of suspended sentence by court-martial: appeals

(1) Subsections (2) to (4) apply where a court-martial makes an order under section 91(1) of this Act.

(2) For the purposes of the Courts-Martial (Appeals) Act 1968 (c. 20) (“the 1968 Act”)—

- (a) the order is to be treated as a sentence passed on the offender for the offence for which the sentence was passed;
- (b) if the offender was not convicted by court-martial of that offence, he is to be treated as having been so convicted;
- (c) any appeal, or application for leave to appeal, against the sentence passed in respect of the new offence is to be treated as also being an appeal or application for leave to appeal against the order; and
- (d) any appeal, or application for leave to appeal, against the order is to be treated as also being an appeal or application for leave to appeal against the sentence passed in respect of the new offence.

(3) In relation to any appeal against the order, section 16A of the 1968 Act (powers on appeals against sentence) is to be read as conferring power—

- (a) to quash the order; or
- (b) if the court-martial gave a direction under section 91(2) of this Act, to quash the direction.

(4) Where the Appeal Court quashes the order, or a direction under section 91(2) of this Act, then in relation to any appeal against the sentence passed in respect of the new offence—

- (a) section 16A of the 1968 Act has effect as if the words “and which is not of greater severity than that for which it is substituted” were omitted; but

(a) Section 91 of the 1957 Act was amended by the Defence (Transfer of Functions) (No. 1) Order 1964 (S.I. 1964/488), Schedule 1.

- (b) the Appeal Court may not exercise its powers under that section in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(5) Subsections (6) and (7) apply where a court-martial has power to make an order under section 91(1) of this Act in respect of a sentence (“the suspended sentence”) but does not do so.

(6) On any appeal against the sentence passed in respect of the new offence, the Appeal Court’s power under section 16A of the 1968 Act to pass a sentence in substitution for the sentence of the court-martial includes—

- (a) power to make an order under section 91(1) of this Act in respect of the suspended sentence; and
- (b) if the court makes such an order, power to give a direction under section 91(2) of this Act in relation to the order.

(7) But the Appeal Court may not exercise its powers under subsection (6) in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the court-martial.

(8) In this section—

- (a) “the new offence” means the offence mentioned in section 91(1) of this Act;
- (b) “the Appeal Court” means the Courts-Martial Appeal Court.

91B. Activation of suspended sentence by commanding officer

(1) Where, while a sentence of detention is suspended under section 90 of this Act—

- (a) an officer finds the offender guilty on summary trial of an offence committed since the sentence was suspended, or
- (b) the offender is convicted of an offence in the British Islands committed since the sentence was suspended and subsequently appears before the officer in command of the ship or naval establishment to which he belongs,

the officer may make an order determining the suspension of the sentence (whether or not he also makes a committal order under section 81(3) of this Act, in a case in which he is not prohibited by section 81(4) from doing so).

(2) Subsections (3) to (8) apply where an officer makes an order under subsection (1).

(3) If the sentence is for a term of more than 90 days, the order has effect as if the sentence were for a term of 90 days; but this is subject to section 91C of this Act (partial activation by commanding officer of suspended sentence for more than 90 days).

(4) The sentence in respect of which the order is made is to be treated for the purposes of section 85A of this Act (commencement of sentence of detention awarded on summary trial) as a sentence awarded on summary trial at the time at which the order is made.

(5) The reference in subsection (3) of that section to the signature of the warrant by the officer by whom the offender was tried is to be read, in relation to the sentence in respect of which the order is made, as a reference to the making, in accordance with regulations made under section 52F of this Act, of an application to higher authority for permission to make the order.

(6) The officer may direct that the sentence in respect of which the order is made (“the subsequent sentence”) shall begin to run from the end of another sentence of detention (“the current sentence”) which—

- (a) has been passed on the offender on a previous occasion; or
- (b) where the order is made by virtue of subsection (1)(a), the officer passes on him on the same occasion.

(7) Subsection (6) is subject to section 89 of this Act (limitation of total period of sentences of detention), as modified by section 91C of this Act in a case where that section applies.

(8) Where the officer gives a direction under subsection (6)—

- (a) section 85A of this Act applies to the subsequent sentence as if the reference in subsection (2) of that section to the day on which the sentence is awarded were to the expiry of the current sentence, and subsection (3) of that section were omitted; and
- (b) where the suspension of the subsequent sentence by virtue of subsection (4) or (5) of that section would end before the expiry of the current sentence, the subsequent sentence shall run from the expiry of the current sentence.

91C. Partial activation by commanding officer of suspended sentence for more than 90 days

(1) This section applies where an officer has made an order under section 91B(1) of this Act (activation of suspended sentence by commanding officer) in respect of a sentence for a term of more than 90 days.

(2) That part of the term which exceeds 90 days is not to be remitted by virtue of section 89(2) of this Act (limitation of total period of sentences of detention).

(3) Unless the order is quashed on appeal, sections 91 and 91B of this Act (activation of suspended sentence by court-martial and by commanding officer respectively) have effect as if—

- (a) the sentence were for that part of the term which exceeds 90 days; and
- (b) no order determining the suspension of the sentence had been made.

(4) For the purposes of section 92(3) of this Act (remission of suspended sentence) the date on which the order was made is to be treated as the date on which the suspension of the sentence took effect.

91D. Activation of suspended sentence by commanding officer: appeals etc.

(1) For the purposes of sections 52FF to 52FR and 71B of this Act (appeals and review) an order under section 91B(1) of this Act is to be treated as a punishment awarded for the offence for which the sentence was passed.

(2) In relation to any appeal against such an order, section 52FM(4) of this Act (powers of the summary appeal court on an appeal against punishment) has effect as if for paragraphs (a) and (b) there were substituted—

- “(a) may confirm the order;
- (b) may quash the order; or
- (c) if the officer who made the order gave a direction under section 91B(6) of this Act, may confirm the order but quash the direction.”

(3) Subsections (4) to (6) apply where an officer makes an order under section 91B(1) of this Act by virtue of paragraph (a) of that subsection.

(4) Any appeal, or application for leave to appeal, against the finding or the punishment awarded in respect of the offence mentioned in that paragraph (“the new offence”) is for the purposes of sections 52FF to 52FR of this Act to be treated as also being an appeal or application for leave to appeal against the order.

(5) Any appeal, or application for leave to appeal, against the order is for those purposes to be treated as also being an appeal or application for leave to appeal against the punishment awarded in respect of the new offence.

(6) Where the summary appeal court quashes the order, or a direction under section 91B(6) of this Act, then—

- (a) in relation to any appeal against the finding of guilt in respect of the new offence, the references in section 52FM(2)(b)(ii) and (3)(b) of this Act to the punishment originally awarded include the order and any such direction given in relation to it (as well as the punishment awarded in respect of the new offence); and
- (b) in relation to any appeal against the punishment awarded in respect of the new offence, the reference in section 52FM(4)(b)(ii) of this Act to the punishment originally awarded includes the order and any such direction given in relation to it (as well as the punishment awarded in respect of the new offence).

(7) Subsections (8) and (9) apply where an officer has power to make an order under section 91B(1) of this Act by virtue of paragraph (a) of that subsection but does not do so.

(8) On any appeal against the finding of guilt or the punishment awarded in respect of the new offence, the summary appeal court's powers under section 52FM(2)(b), (3) and (4)(b) of this Act to vary the punishment or substitute another punishment include—

- (a) power to make the order under section 91B(1) of this Act which the officer could have made; and
- (b) power to give any direction under section 91B(6) of this Act which the officer could have given if he had made the order.

(9) But the court may not exercise its powers under subsection (8) in such a way that, taking the case as a whole, the appellant is dealt with more severely on appeal than he was dealt with by the officer who tried him for the new offence.”

32. In section 92(1)(b) of the 1957 Act (reconsideration of sentences), omit “or section ninety-one”.

Postponement of sentence

33.—(1) Each of the 1955 Acts is amended as follows.

- (2) In section 113AA(a) (powers of reviewing authority), omit subsection (5)(a).
- (3) Omit section 120A(b).

34.—(1) The 1957 Act is amended as follows.

- (2) In section 71(c) (powers of reviewing authority), omit subsection (5)(a).
- (3) Omit section 89A(d).

Transitional provisions

35. The Schedule to this Order shall have effect.

Signatory text

Address
Date

Parliamentary Under Secretary of State
Ministry of Defence

(a) Section 113AA of each of the 1955 Acts was substituted by the Armed Forces Act 1996, Schedule 5, paragraph 4.
 (b) Section 120A of the Army Act 1955 was inserted by the Armed Forces Act 1996, section 9(1), and section 120A of the Air Force Act 1955 by the Armed Forces Act 1996, section 9(2).
 (c) Section 71 of the 1957 Act was substituted by the Armed Forces Act 1996, Schedule 5, paragraph 10.
 (d) Section 89A of the 1957 Act was inserted by the Armed Forces Act 1996, section 9(3).

TRANSITIONAL PROVISIONS

Powers of arrest

1. In section 51(1) of the 1957 Act (jurisdiction to try persons no longer subject to the Act), as amended by this Order, the reference to an arrest under section 45 of that Act includes an arrest carried out before commencement by virtue of section 51(1) of that Act.

Referral of charge to commanding officer

2. In relation to a charge referred under section 83BB(1) of either of the 1955 Acts or section 52II(1) of the 1957 Act (referral of charge to commanding officer) before the repeal of those subsections by this Order—

- (a) section 83BB(3) of the Army Act 1955 or the Air Force Act 1955 or section 52II(3) of the 1957 Act (as the case may be) shall apply without the substitution made by this Order; and
- (b) section 85A(3) of the Army Act 1955 or the Air Force Act 1955 or section 62ZA(4) of the 1957 Act (as the case may be) shall apply as if it had not been repealed by this Order.

3. For the purposes of section 120(7A) of each of the 1955 Acts (exception to power to activate suspended sentence where offender elected court-martial trial), and section 91(5)(b) of the 1957 Act as substituted by this Order (restriction on power to activate suspended sentence where offender elected court-martial trial), a person is not tried by court-martial for an offence in pursuance of an election for court-martial trial if—

- (a) a charge of that offence (whether or not in the same terms as those of the charge on which he is tried) was referred by the prosecuting authority to the person's commanding officer under section 83BB(1) of either of the 1955 Acts or section 52II(1) of the 1957 Act (before the repeal of those subsections by this Order) after the person had elected court-martial trial in relation to a charge of another offence; and
- (b) the person did not elect court-martial trial in relation to the charge so referred.

Suspended sentences of military and air-force courts-martial

4.—(1) In relation to a sentence which is suspended at commencement—

- (a) section 120(5) of each of the 1955 Acts (power to activate suspended sentence), as substituted by this Order, applies only if the court-martial passes a sentence of imprisonment or detention on the person; and
- (b) section 120(5B) of each of those Acts (power to make activated sentence consecutive to another sentence) has effect as if paragraph (a) were omitted.

5.—(1) Section 120(5E) of each of the 1955 Acts (review, and suspension by reviewing authority, of activated suspended sentence) applies in relation to an order made under paragraph (a) of the old section 120(5) as it applies in relation to an order made under section 120(5) of that Act as substituted by this Order.

(2) In this paragraph “the old section 120(5)” means section 120(5) of the Army Act 1955 or the Air Force Act 1955 (as the case may be) as it stood before the substitution made by this Order.

6.—(1) Section 120ZA of each of the 1955 Acts (activation of suspended sentence: appeals) is modified as follows.

(2) Where a court-martial made an order under the old section 120(5)—

- (a) subsections (2) to (4) apply, subject to the modifications made by paragraphs (b) to (d) below, as if the order had been made under section 120(5) as substituted by this Order;

- (b) in subsection (2)(b)—
 - (i) the reference to an appeal against the sentence passed in respect of the new offence includes an appeal brought before commencement; and
 - (ii) the reference to an application for leave to appeal against that sentence includes an application made before commencement;
- (c) in subsection (2)(c)—
 - (i) the reference to an appeal against the order includes an appeal brought before commencement; and
 - (ii) the reference to an application for leave to appeal against the order includes an application made before commencement; and
- (d) in subsections (3)(b) and (4), the references to a direction under section 120(5B) include a direction given under the old section 120(5) that the two sentences there mentioned were to run consecutively.

(3) Where a court-martial passing sentence on a person before commencement could have determined the suspension of an earlier sentence under the old section 120(5) but did not do so, subsections (6) and (7) have effect as if—

- (a) the reference in subsection (6)(a) to the suspended sentence were to the earlier sentence; and
- (b) in subsection (6)(b), for “a direction under section 120(5B) of this Act in relation to the order” there were substituted “a direction that the earlier sentence shall begin to run from the end of another term of imprisonment or detention passed on the person by the court-martial or the Appeal Court”.

(4) Where a court-martial determined the suspension of an earlier sentence under the old section 120(5) and directed that the two sentences there mentioned were to run concurrently, subsections (6) and (7) have effect as if for paragraphs (a) and (b) of subsection (6) there were substituted “power to give a direction that the earlier sentence shall begin to run from the end of another term of imprisonment or detention passed on the person by the court-martial or the Appeal Court.”.

(5) In this paragraph “the old section 120(5)” has the same meaning as in paragraph 5.

7. In relation to section 120ZA(6) of each of the 1955 Acts as modified by paragraph 6, section 120(5C) and (5D) of that Act apply as they apply in relation to section 120(5B) of that Act.

Suspended sentences of Standing Civilian Courts

8.—(1) In paragraph 21 of Schedule 3 to the Armed Forces Act 1976 (activation of suspended sentence of a Standing Civilian Court: appeals), as inserted by this Order, the references to an order under paragraph 20(6) of that Schedule include an order made before commencement.

(2) Paragraph 21(6) of that Schedule applies where a court-martial passing sentence on a person before commencement had power to make an order under paragraph 20(6) of that Schedule in respect of another sentence but did not do so.

Suspended sentences and committal orders under the 1957 Act

9. In section 81(3)(ca) of the 1957 Act (power of summary appeal court to issue committal order) the reference to an appeal to the summary appeal court includes an appeal brought before commencement.

10.—(1) In sections 91(1) and 91B(1) of the 1957 Act (activation of suspended sentence by court-martial and by commanding officer respectively), as substituted by this Order, the references to a sentence which is suspended under section 90 of that Act include a sentence which was suspended before commencement and is still suspended.

(2) In section 91(1) of that Act, as so substituted, the reference to a conviction by court-martial includes a conviction which occurred before commencement.

(3) In section 91B(1)(a) of that Act, the reference to a finding of guilt includes a finding recorded before commencement.

(4) In section 91B(1)(b) of that Act, the reference to a conviction of an offence in the British Islands includes a conviction which occurred before commencement.

11.—(1) Where—

- (a) a sentence of detention is suspended under section 90 of the 1957 Act (suspension of sentences),
- (b) before commencement, the offender was convicted by court-martial of an offence committed since the sentence was suspended,
- (c) the court-martial was dissolved before commencement, and
- (d) the offender appears before the officer in command of the ship or naval establishment to which he belongs,

the officer may make an order determining the suspension of the sentence.

(2) An order under this paragraph has effect as if it were an order under section 91B(1) of the 1957 Act (activation of suspended sentence by commanding officer) made by virtue of paragraph (b) of that subsection (conviction of an offence in the British Islands).

12. Where a committal order has been issued under section 91 of the 1957 Act as it stood before the substitution made by this Order, section 92(1) of that Act applies without the amendment made by this Order.

Postponement of sentence

13.—(1) This paragraph applies where—

- (a) an order has been made under section 120A of either of the 1955 Acts or section 89A of the 1957 Act (postponement of sentence) in relation to a sentence; and
- (b) the sentence has not had or (in the case of an order under subsection (2)(b) of the relevant section) resumed effect.

(2) Subject to sub-paragraph (3), the sentence shall have or resume effect (as the case may be) at the end of the period specified in the order.

(3) If the period specified in the order has been extended for a further period under subsection (4) of the relevant section, the sentence shall have or resume effect (as the case may be) at the end of that further period.

(4) In this paragraph “the relevant section” means the section under which the order was made.

(5) This paragraph is without prejudice to section 118(1) of each of the 1955 Acts and section 85(1) of the 1957 Act (commencement of sentence of imprisonment or detention).

EXPLANATORY NOTE

(This note is not part of the Order)

Articles 3, 4, 8 and 9 replace those provisions of the Army Act 1955 and the Air Force Act 1955 (“the 1955 Acts”) and the Naval Discipline Act 1957 (“the 1957 Act”) that confer power to arrest a person for an offence. The new provisions correspond to sections 67 and 69 of the Armed Forces Act 2006 (“the 2006 Act”). In particular they confer a new power (similar to that conferred by section 69 of the 2006 Act) to arrest a person reasonably suspected of being about to commit an offence. Articles 5 to 7 and 10 to 15 make consequential amendments.

Article 16 amends the 1955 Acts and the 1957 Act so that, where a person is brought before a judicial officer after being charged with an offence, the judicial officer may not authorise the keeping of the person in custody solely on the ground that the person has previously absconded after being released from custody. This aligns the relevant provisions with section 106 of the 2006 Act.

Articles 18 and 21 abolish the power of a prosecuting authority, following an election for court-martial trial of a charge, to refer a different charge back to the accused’s commanding officer. However, articles 17 and 20 relax the existing rule that in these circumstances the prosecuting authority may not, without the accused’s consent, prefer a different charge, amend a charge preferred by him or substitute a different charge for such a charge. Instead, the provisions as amended permit the prosecuting authority to prefer a different charge, or to substitute a different charge for a charge which he has preferred, without the accused’s consent, provided that the new charge is one which the accused’s commanding officer could have chosen to deal with if the accused had not elected court-martial trial. The prosecuting authority is also permitted to *amend* a charge without the accused’s consent. The existing rule that he may not *add* a charge without the accused’s consent is retained. Section 125(3) of the 2006 Act permits the corresponding powers of the Director of Service Prosecutions to be restricted, in corresponding circumstances, by Court Martial rules made under section 163. Articles 19 and 22 make consequential amendments.

Article 24 amends the 1955 Acts so as to abolish the power of a reviewing authority to activate a suspended sentence of imprisonment or detention, and article 23 makes a consequential amendment. Article 24 also aligns the powers of a military or air-force court-martial in respect of a suspended sentence of detention with those of the Court Martial under section 191 of the 2006 Act, and aligns the powers of such a court-martial in respect of a suspended sentence of imprisonment with those of the Court Martial under Schedule 12 to the Criminal Justice Act 2003 (c. 44) as modified by Schedule 7 to the 2006 Act. Article 25 inserts into the 1955 Acts new provisions for appeals to the Courts-Martial Appeal Court against the activation of a suspended sentences, and appeals in cases where the court-martial had power to activate such a sentence but did not so. The new provisions correspond to section 192 of the 2006 Act.

Article 26 amends the Armed Forces Act 1976 so as to abolish the powers of a reviewing authority to activate a suspended sentence passed by a Standing Civilian Court. Article 27 provides for rights of appeal in relation to the activation of such a sentence.

Article 31 replaces section 91 of the 1957 Act, which confers power to activate a suspended sentence by issuing a committal order, with five new sections, numbered 91 to 91D. The new provisions distinguish between the order activating the sentence and the committal order, which is to be issued under section 81 of the Act rather than (as at present) section 91. Article 29 amends section 81 so as to clarify the circumstances in which a committal order may be issued.

The new sections 91 and 91A inserted into the 1957 Act by article 31 make provision for the activation of suspended sentence by a naval court-martial, and in relation to appeals, which is similar to that made by the 1955 Acts as amended by articles 24 and 25.

The new section 91B of the 1957 Act provides for the activation of a suspended sentence of detention by the offender’s commanding officer, in circumstances corresponding to those in which such a sentence can be activated by a commanding officer under section 193 of the 2006 Act.

Article 28 amends section 52F of the 1957 Act so that naval summary discipline regulations may include provision as to the making of orders under section 91B.

Under the 2006 Act a commanding officer cannot activate a sentence passed by a court-martial. Under section 91 of the 1957 Act as it stands, he can; and this power is retained in the new section 91B. Where the sentence was passed by a court-martial and is for more than 90 days, however, a commanding officer can only activate it for 90 days. Under the new section 91C, the remainder of the sentence continues to be suspended, and is not remitted until one year after the activation.

The new section 91D of the 1957 Act makes provision (corresponding to that made by section 195 of the 2006 Act) in relation to appeals against, and the review of, orders under section 91B, and appeals in cases where a commanding officer had power to make such an order but did not do so. As under section 292 of the 2006 Act, a sentence activated under section 91B does not take effect until the offender has had an opportunity to appeal, or he so elects.

Articles 30 and 32 make amendments consequential on those made by articles 29 and 31.

Articles 33 and 34 abolish the powers of courts-martial and reviewing authorities to postpone the date on which a sentence is to take effect.

The Schedule makes transitional provision.

Draft Order laid before Parliament under section 373(3) of the Armed Forces Act 2006, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2008 No. ***

DEFENCE

**The Armed Forces (Alignment of Service Discipline Acts) Order
2008**

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