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STATUTORY INSTRUMENTS

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**2009 No. 1059**

The Armed Forces Act 2006  
(Transitional Provisions etc) Order 2009

PART 1

GENERAL

**Citation and commencement**

1.—(1) This Order may be cited as the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

(2) The following provisions of this Order come into force on the day after the day on which this Order is made—

- (a) in article 2(1), the definitions of “AA 1955”, “AFA 1955” and “NDA 1957”;
- (b) article 196 (complaints to employment tribunals etc).

(3) The other provisions of this Order come into force—

- (a) so far as is necessary for any purpose mentioned in article 3 of the Armed Forces Act 2006 (Commencement No. 4) Order 2009(1), on the day after the day on which this Order is made;
- (b) for all other purposes, on 31st October 2009.

**Interpretation**

2.—(1) In this Order—

- “AA 1955” means the Army Act 1955(2);
- “AFA 1955” means the Air Force Act 1955(3);
- “NDA 1957” means the Naval Discipline Act 1957(4);
- “AFA 1966” means the Armed Forces Act 1966(5);
- “CMAA 1968” means the Court Martial Appeals Act 1968(6);
- “AFA 1976” means the Armed Forces Act 1976(7);
- “RFA 1980” means the Reserve Forces Act 1980(8);

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- (1) S.I. 2009/812 (C. 54). That Order brought into force on 28th March 2009, for certain specified purposes, those provisions of AFA 2006 not already in force (except section 351 and Schedule 12).
  - (2) 1955 c. 18.
  - (3) 1955 c. 19.
  - (4) 1957 c. 53.
  - (5) 1966 c. 45.
  - (6) 1968 c. 20. The Act was formerly known as the Courts-Martial (Appeals) Act 1968. AFA 2006, section 272 and Schedule 8, paragraph 53, amends section 61(1) so as to provide for the Act to be cited as the Court Martial Appeals Act 1968.
  - (7) 1976 c. 52.
  - (8) 1980 c. 9.

- “AFA 1981” means the Armed Forces Act 1981<sup>(9)</sup>;
- “AFA 1991” means the Armed Forces Act 1991<sup>(10)</sup>;
- “RFA 1996” means the Reserve Forces Act 1996<sup>(11)</sup>;
- “AFA 2001” means the Armed Forces Act 2001<sup>(12)</sup>;
- “AFA 2006” means the Armed Forces Act 2006<sup>(13)</sup>;
- “the Appeal Court” means the Court Martial Appeal Court;
- “civilian subject to the SDAs” is to be read in accordance with paragraph (2);
- “commencement” means the beginning of 31st October 2009;
- “the corresponding civil offence”, in relation to an SDA civil offence, means—
- (a) the act or omission constituting the SDA civil offence; or
  - (b) if that act or omission is not punishable by the law of England and Wales, the equivalent act done or omission made in England or Wales;
- “SDA civil offence” means an offence under section 70 of AA 1955 or AFA 1955 or section 42 of NDA 1957;
- “SDA custodial sentence” has the meaning given by paragraph (3);
- “SDA offence” has the meaning given by paragraph (4);
- “SDA sentence of service detention” means a sentence of detention under section 71(1)(e) or 76C(2)(a) of AA 1955 or AFA 1955 or section 43(1)(e) of NDA 1957;
- “subject to air-force law” has the same meaning as in AFA 1955;
- “subject to military law” has the same meaning as in AA 1955;
- “subject to NDA 1957” means subject to NDA 1957, within the meaning of that Act.

(2) For the purposes of this Order a person was, at any time before commencement, a “civilian subject to the SDAs” if at that time any provision of AA 1955, AFA 1955 or NDA 1957 applied to him by virtue of section 209(1) or (2) of AA 1955 or AFA 1955 or section 118(1) or (2) of NDA 1957 (application of SDAs to civilians).

- (3) In this Order “SDA custodial sentence” means any of the following—
- (a) a sentence of imprisonment passed by—
    - (i) a court-martial;
    - (ii) a Standing Civilian Court;
    - (iii) the Appeal Court before commencement; or
    - (iv) the House of Lords or the Supreme Court, before commencement, on an appeal brought from a decision of the Appeal Court;
  - (b) a sentence of custody for life under section 71A(1A) or (1B) of AA 1955 or AFA 1955 or section 43A(1A) or (1B) of NDA 1957;
  - (c) a sentence of detention during Her Majesty’s pleasure under section 71A(3) of AA 1955 or AFA 1955 or section 43A(3) of NDA 1957;
  - (d) a sentence of detention under section 71A(4) of AA 1955 or AFA 1955 or section 43A(4) of NDA 1957 (detention for serious offence committed by young person);

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(9) 1981 c. 55.  
 (10) 1991 c. 62.  
 (11) 1996 c. 14.  
 (12) 2001 c. 19.  
 (13) 2006 c. 52.

- (e) a custodial order under—
  - (i) section 71AA of, or paragraph 10 of Schedule 5A to, AA 1955 or AFA 1955; or
  - (ii) section 43AA of, or paragraph 10 of Schedule 4A to, NDA 1957.
- (4) In this Order “SDA offence” means any of the following—
  - (a) any offence under Part 2 of AA 1955 or AFA 1955;
  - (b) any offence under Part 1 of NDA 1957;
  - (c) an offence under section 47K of that Act;
  - (d) an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed before commencement;
  - (e) an offence under section 18 or 20 of AFA 1991 committed before commencement;
  - (f) an offence under any of sections 95 to 97 of RFA 1996 committed before commencement;
  - (g) an offence under paragraph 5(1) of Schedule 1 to that Act committed before commencement by a person within paragraph (5) below.
- (5) A person is within this paragraph if—
  - (a) after committing the offence and before commencement, he became a member of a reserve force and—
    - (i) he remained such a member until commencement; or
    - (ii) immediately before commencement, he was subject to military law, air-force law or NDA 1957; or
  - (b) after commencement, he becomes a member of the reserve forces.

### **SDA offences to be dealt with under this Order**

**3.** A person who has committed an SDA offence shall be liable to be tried and punished in accordance with this Order (and not, except to the extent provided by article 55 or 84, under AA 1955, AFA 1955 or NDA 1957).

### **Offences triable by civilian court**

**4.—(1)** Insofar as an offence under an enactment repealed by AFA 2006 is triable by a civilian court—

- (a) nothing in this Order affects the application of section 16 of the Interpretation Act 1978(14) (general savings) in relation to the offence;
  - (b) subject to paragraph (2), nothing in this Order applies in relation to the offence.
- (2) Paragraph (1)(b) does not affect the application of articles 154 and 199 to 201.

### **“Service offence” in AFA 2006 not to include offences committed before commencement**

**5.** In section 50(2) of AFA 2006 (definition of “service offence”), references in paragraphs (g) to (i) to an offence do not include one committed before commencement.

## PART 2

### LIABILITY FOR SDA OFFENCES

#### **Liability for SDA offences**

6.—(1) A person guilty of an SDA offence is liable to any punishment mentioned in the Table in section 164 of AFA 2006; but this is subject to article 7.

(2) Section 164(2) and (3) of AFA 2006 (interpretation etc) apply in relation to paragraph (1).

#### **Punishment may not be more severe than maximum court-martial punishment**

7.—(1) A sentence awarded in respect of an SDA offence may not be more severe than the maximum court-martial sentence.

(2) In this article “the maximum court-martial sentence” means the maximum sentence that could have been awarded if the offender (having been convicted on the date he was actually convicted) had been sentenced for that offence by a relevant court-martial according to the law in force at the time the offence was committed.

(3) In paragraph (2) “a relevant court-martial” means—

- (a) where paragraph (4) applies, a district court-martial;
- (b) otherwise, a general court-martial or (as the case may be) a court-martial under NDA 1957.

(4) This paragraph applies where—

- (a) the offender was arraigned under section 91A of AA 1955 or AFA 1955 on a charge of the offence in question (or on a charge of another offence on the trial of which he was convicted of the offence in question);
- (b) at the time of arraignment, the charge sheet specified that the charge was to be tried by a district court-martial; and
- (c) it is not the case that a district court-martial was convened to try the charge and was dissolved before commencement without reaching a finding.

(5) Any provision of Part 9 of AFA 2006 which requires a court or officer to treat a matter as an aggravating factor is subject to this article.

#### **Civilian offenders**

8.—(1) In Schedule 3 to AFA 2006 (which modifies the Table in section 164 in relation to civilian offenders etc), the reference in paragraph 1(2) to a service offence includes an SDA offence.

(2) A person who (but for this paragraph) would be a civilian offender under paragraph 1(2) of Schedule 3 to AFA 2006 as modified by this article is not a civilian offender for the purposes of Part 1 of that Schedule if that person was subject to military law, air-force law or NDA 1957—

- (a) when the offence was committed; or
- (b) at any time between committing the offence and commencement.

## PART 3

### CERTAIN ACTS BEFORE COMMENCEMENT

#### **Offence incomplete at commencement**

**9.**—(1) This article applies where an offence under an enactment mentioned in article 2(4)(a), (b), (f) or (g) is partly committed by a person before commencement.

(2) For the purposes of this article an offence is partly committed by a person before commencement if—

- (a) an act or omission by the person, proof of which is required for conviction of the offence, occurs before commencement; and
- (b) a relevant event occurs after commencement.

(3) In this article “relevant event”, in relation to an offence, means any act, omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.

(4) Where this article applies in relation to an offence under an enactment mentioned in article 2(4)(a) or (b), any question whether that offence has been committed is to be decided as if the SDAs were still in force at the time of the relevant events that occurred after commencement.

(5) Where this article applies in relation to an offence under an enactment mentioned in article 2(4)(f) or (g), the offence is to be treated for the purposes of articles 2(4) and 5 as having been committed before commencement.

(6) Where this article applies in relation to an offence—

- (a) each of articles 7 and 13 has effect as if in paragraph (2) of that article the reference to the time the offence was committed were to the time of the act or omission referred to in paragraph (2)(a) above; and
- (b) for the purposes of article 20(1) and (2) the offence is to be treated as having been committed at that time.

(7) In this article “the SDAs” means—

- (a) the provisions of AA 1955, AFA 1955 and NDA 1957 whose repeal came into force at commencement; and
- (b) any subordinate legislation made under those provisions that was in force immediately before commencement.

#### **Course of conduct carried on over commencement**

**10.**—(1) This article applies where—

- (a) an act or omission, proof of which is required for conviction of an offence under an enactment mentioned in article 2(4)(a), (b) or (f), is or can be a continuing course of conduct; and
- (b) such a continuing course of conduct is carried on partly before and partly after commencement.

(2) Where this article applies in relation to an offence under an enactment mentioned in article 2(4)(a) or (b), any question whether that offence has been committed is to be decided as if the SDAs had been in force during the whole of the period over which the continuing course of conduct was carried on.

(3) Where this article applies in relation to an offence under an enactment mentioned in article 2(4)(f), the offence is to be treated for the purposes of articles 2(4) and 5 as having been committed before commencement.

(4) Where this article applies in relation to an offence, each of articles 7 and 13 has effect as if in paragraph (2) of that article the reference to the time the offence was committed were to the time immediately before commencement.

(5) In this article “the SDAs” has the same meaning as in article 9.

### **Conduct at a time unknown**

**11.**—(1) This article applies where it is alleged that a relevant act took place at an unknown time between—

- (a) a particular time before commencement; and
- (b) a particular time after commencement.

(2) In this article a “relevant act” means an act or omission which—

- (a) if it took place before commencement (or at a particular time before commencement), would be an SDA offence under an enactment mentioned in article 2(4)(a), (b), (d) or (f); and
- (b) if it took place after commencement (or at a particular time after commencement), would be a service offence.

(3) If the relevant act would (if it took place before commencement, or at a particular time before commencement) be an offence under an enactment mentioned in article 2(4)(a) or (b), any question whether the relevant act is an SDA offence is to be decided as if the SDAs had remained in force until the time referred to in paragraph (1)(b) above.

(4) Where the relevant act is an offence under an enactment mentioned in article 2(4)(f), for the purposes of articles 2(4)(f) and 5 it is to be taken to be such an offence committed before commencement.

(5) Where a person is convicted of an SDA offence by virtue of this article—

- (a) article 7 has effect as if the reference in paragraph (2) of that article to the time the offence was committed were to the time referred to in paragraph (1)(a) above; and
- (b) the sentence awarded for the offence must not be more severe than the maximum sentence that could be awarded for the service offence if the relevant act were known to have taken place at the time referred to in paragraph (1)(b) above.

(6) For the purposes of articles 13(2) and 20(1) and (2), any question whether the relevant act took place at a time when a person was a civilian subject to the SDAs is to be decided as if the SDAs had remained in force until the time referred to in paragraph (1)(b) above.

(7) If the relevant act is an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957, it is to be treated for the purposes of article 172 as having been committed after commencement.

(8) In this article “the SDAs” has the same meaning as in article 9.

## PART 4

### JURISDICTION

#### **Jurisdiction of the Court Martial**

**12.** The Court Martial has jurisdiction to try any SDA offence except an offence within section 70(4) of AA 1955 or AFA 1955 or section 48(2) of NDA 1957 (serious SDA civil offences committed in UK).

#### **Jurisdiction of the Service Civilian Court**

**13.—**(1) The Service Civilian Court has jurisdiction to try any SDA offence committed outside the British Islands by a civilian except—

- (a) an offence within paragraph (3); or
- (b) an offence in relation to which section 51(6) of AFA 2006 applies (defendant is member of regulars or reserves or liable to recall).

(2) For the purposes of paragraph (1) an offence was committed by a civilian if it was committed by a person who, at the time when it was committed, was a civilian subject to the SDAs.

(3) The offences within this paragraph are—

- (a) an indictable-only SDA civil offence;
- (b) an offence under section 57 of AA 1955 or AFA 1955 or section 38 of NDA 1957 (offences in relation to courts);
- (c) an offence under section 61 of AA 1955 or AFA 1955 or section 34A of NDA 1957 (false statements on enlistment etc);
- (d) an offence under RFA 1996.

(4) For the purposes of paragraph (3)(a) an SDA civil offence is “indictable-only” if the corresponding civil offence is, under the law of England and Wales, an offence which if committed by an adult is triable only on indictment; but this is subject to paragraph (5).

(5) Where the defendant is aged under 18 at the time a decision under section 279 of AFA 2006 is made, an SDA civil offence is “indictable-only” for the purposes of paragraph (3)(a) if (and only if)—

- (a) the corresponding civil offence is murder, manslaughter or an offence under section 5 of the Domestic Violence, Crime and Victims Act 2004<sup>(15)</sup> (causing or allowing death of child etc); or
- (b) section 51A of the Firearms Act 1968<sup>(16)</sup> would apply if the accused were convicted by a civilian court in England and Wales of the corresponding civil offence.

(6) Where section 279 of AFA 2006 is disapplied by article 132(2), the reference in paragraph (5) to the time a decision under that section is made is to be read as to the time immediately before commencement.

#### **Charges capable of being heard summarily**

**14.** In section 52 of AFA 2006 (charges capable of being heard summarily), the reference in subsection (4)(a) to being subject to service law is to be read, in relation to any time before commencement, as to having been subject to military law, air-force law or NDA 1957.

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<sup>(15)</sup> 2004 c. 28.

<sup>(16)</sup> 1968 c. 27. Section 51A was inserted by the Criminal Justice Act 2003 (c. 44), section 287.

**Offences that may be dealt with at a summary hearing**

15. The following SDA offences may be dealt with at a summary hearing (and accordingly fall within section 52(2) of AFA 2006)—

- (a) an SDA civil offence as respects which the corresponding civil offence is an offence within section 53(3)(a) or (b) of AFA 2006;
- (b) an offence under section 29, 29A or 30(c) of AA 1955 or AFA 1955;
- (c) an offence under any of sections 33 to 39 (except section 37) of AA 1955 or AFA 1955;
- (d) an offence under section 42(1)(a), 43, 43A, 44, 44A(1)(c), (d) or (e), 44B(2), 45 or 46 of AA 1955 or AFA 1955;
- (e) an offence under any of sections 50 to 56 (except section 54(1)) of AA 1955 or AFA 1955;
- (f) an offence under section 60, 61, 62, 65, 66 or 69 of AA 1955 or AFA 1955;
- (g) an offence under section 68 of AA 1955 or AFA 1955 of attempting to commit an offence within any of paragraphs (b) to (f) above;
- (h) an offence under section 75J of AA 1955 or AFA 1955;
- (i) an offence under section 5(c), 6 or 7 of NDA 1957;
- (j) an offence under any of sections 11 to 14A of that Act;
- (k) an offence under section 17, 18, 21, 22 or 25 of that Act;
- (l) an offence under section 27 of that Act of—
  - (i) falsely pretending to be suffering from sickness or disability; or
  - (ii) failing to do anything whereby any sickness or disability is prolonged or aggravated;
- (m) an offence under section 28, 29, 29A(1)(c), (d) or (e), 29B(2), 30, 31 or 33A(2) of that Act;
- (n) an offence under any of sections 33B to 35 of that Act;
- (o) an offence under section 36A, 37 or 39 of that Act;
- (p) an offence under section 40 of that Act of attempting to commit an offence within any of paragraphs (i) to (o) above;
- (q) an offence under section 47K of that Act;
- (r) an offence under section 96 or 97 of RFA 1996 of absence without leave.

**Charges in respect of SDA offences that may be heard summarily only with permission or by senior officer**

16. For the purposes of section 54(1) of AFA 2006 (charges which may be heard summarily only with permission or by senior officer), the offences within section 54(2) of that Act include an SDA civil offence as respects which the corresponding civil offence is an offence within section 54(2) (a) or (b).

**PART 5****TIME LIMITS FOR COMMENCING PROCEEDINGS ETC****No charge to be brought where SDA time limit for trial expired before commencement etc**

17.—(1) A person may not be charged with an offence if, immediately before commencement, section 132(1) of AA 1955 or AFA 1955 or section 52(1) of NDA 1957 (proceedings for SDA



civil offence barred if proceedings on indictment for the corresponding civil offence time-barred) prevented proceedings from being taken against the person for the offence.

(2) A person may not be charged with an offence if, immediately before commencement, section 132(2) of AA 1955 or AFA 1955 (no person to be tried for desertion if since the offence he has served for three or more years in an exemplary manner) prevented the person from being tried for the offence.

(3) A person may not be charged with an offence (other than one within paragraph (5)) if—

- (a) the offence was committed at a time when the person was subject to military law, air-force law or NDA 1957 or was a civilian subject to the SDAs; and
- (b) after that time, and more than six months before commencement, the person ceased to be so subject or to be a civilian subject to the SDAs (as the case may be).

(4) Paragraph (3) applies even if the person again became subject to military law, air-force law or NDA 1957 or a civilian subject to the SDAs.

(5) Paragraphs (3) and (4) do not apply in relation to the following offences—

- (a) an offence under section 31 or 32 of AA 1955 or AFA 1955;
- (b) an offence of desertion within the meaning of section 132(3A) of AA 1955 or AFA 1955;
- (c) an offence of mutiny or desertion within the meaning of section 52(3) of NDA 1957; or
- (d) an SDA civil offence committed outside the United Kingdom where the Attorney General has consented to the bringing of the charge.

(6) In this article “charged” means charged under Part 5 of AFA 2006.

### **General time limits for charging servicemen or former servicemen with SDA offences**

**18.**—(1) In sections 55 to 57 of AFA 2006 (general time limits for commencing proceedings against servicemen or former servicemen), references to a service offence include an SDA offence except one under RFA 1996.

(2) In section 55 of AFA 2006 as it applies in relation to an SDA offence—

- (a) references to a person ceasing to be a member of a regular or reserve force include a person having ceased before commencement to be such a member;
- (b) the reference to a person rejoining a regular or reserve force includes a person having rejoined it before commencement.

(3) In section 56 of AFA 2006 as it applies in relation to an SDA offence, references to a person ceasing to be subject to an additional duties commitment include a person having ceased before commencement to be so subject.

(4) In section 57 of AFA 2006 as it applies in relation to an SDA offence—

- (a) references to a person ceasing to be subject to service law include a person having ceased to be subject to military law, air-force law or NDA 1957 except where at the time he did so he became subject to service law;
- (b) references to being (or becoming) subject to service law include having been (or become) subject to military law, air-force law or NDA 1957.

### **Time limits for charging civilian formerly subject to SDAs**

**19.**—(1) Paragraph (2) applies where a person has ceased to be a civilian subject to the SDAs, except where at the time he did so he became—

- (a) subject to military law, air-force law or NDA 1957; or

- (b) a civilian subject to service discipline.
- (2) Where this paragraph applies—
  - (a) the person may not, after the end of six months beginning with the date he ceased to be a civilian subject to the SDAs, be charged with an SDA offence (other than one under RFA 1996) committed while he was such a civilian; and
  - (b) this applies even if he again became such a civilian (or a civilian subject to service discipline) within those six months.
- (3) Where a person ceased to be a civilian subject to the SDAs and at the time he did so became subject to military law, air-force law or NDA 1957, section 57 of AFA 2006 has effect as if (in addition to the modifications made by article 18)—
  - (a) the reference in subsection (2) to a service offence committed while the person was subject to service law included an SDA offence (other than one under RFA 1996) committed while he was a civilian subject to the SDAs;
  - (b) the reference in subsection (3) to becoming subject to service law included having become a civilian subject to the SDAs.
- (4) A person who ceased to be a civilian subject to the SDAs by reason only of a fact mentioned in section 209(3A)(a) or (b) of AA 1955 or AFA 1955 or paragraph 4A(a) or (b) of Schedule 4 to NDA 1957 is to be treated for the purposes of this article as not having ceased to be so subject (but nothing in this paragraph causes a person to be regarded as so subject after commencement).
- (5) Section 61(1) to (3) of AFA 2006 (exceptions and interpretation) apply in relation to this article as they apply in relation to section 57 of that Act.
- (6) Paragraph (7) applies where, at commencement—
  - (a) a person is residing or staying in an area designated for the purposes of Schedule 15 to AFA 2006, and would be a civilian subject to service discipline if in that area;
  - (b) a person is residing or staying outside the British Islands, and would be a civilian subject to service discipline if outside the British Islands; or
  - (c) a person—
    - (i) has been designated for the purposes of paragraph 7 of Schedule 15 to AFA 2006;
    - (ii) is residing or staying in an area which the designation specifies as an area that the person must be in for the designation to apply; and
    - (iii) would be a civilian subject to service discipline if in that area.
- (7) Where this paragraph applies, the person is to be regarded for the purposes of paragraph (1) as becoming a civilian subject to service discipline at commencement.

#### **Time limit for charging civilian formerly subject to service discipline with SDA offence**

**20.**—(1) In section 58(2)(a) of AFA 2006 (time limit where person ceases to be a civilian subject to service discipline without becoming subject to service law), the reference to a service offence committed while the person was a civilian subject to service discipline includes an SDA offence (other than one under RFA 1996) committed while he was a civilian subject to the SDAs.

(2) Where section 58(3) of AFA 2006 (time limit where person ceases to be civilian subject to service discipline on becoming subject to service law) applies, section 57 of that Act has effect as if (in addition to the modifications made by section 58(3)) the reference in section 57(2) to a service offence committed while the person was subject to service law included an SDA offence (other than one under RFA 1996) committed while he was a civilian subject to the SDAs.

(3) Where at commencement a person falls within paragraph (a), (b) or (c) of article 19(6), the person is to be treated for the purposes of section 58 of AFA 2006 as being a civilian subject to service discipline for so long as the person continues to fall within that paragraph.

#### **Time limit for charging SDA offence of failing to comply with requirement imposed on release from custody**

21. Section 59 of AFA 2006 (time limit for charging offence under section 107 of AFA 2006) applies in relation to an offence under section 75J of AA 1955 or AFA 1955 or section 47K of NDA 1957 as it applies in relation to an offence under section 107 of AFA 2006.

#### **Time limits for charging RFA offences**

22.—(1) In section 62 of AFA 2006 (time limit for charging Reserve Forces Act offences), the reference to a Reserve Forces Act offence includes an SDA offence under RFA 1996.

(2) In section 62 of AFA 2006 as it applies by reason of paragraph (1) above, the reference to a person's commanding officer is to be read, as regards any time before commencement, without regard to the definition in AFA 2006 of that expression.

#### **False statements made on enlistment**

23.—(1) Except where paragraph (2) applies—

- (a) the Court Martial may not try a person for an offence under section 61 of AA 1955 or AFA 1955 or section 34A of NDA 1957 (false statements made on enlistment); and
- (b) a charge against a person in respect of such an offence may not be heard summarily by an officer.

(2) This paragraph applies if the person became subject to military law, air-force law or NDA 1957 and remained so until commencement.

#### **Breach of community supervision order**

24. No proceedings shall be taken against a person for an offence mentioned in article 2(4)(d) unless the trial is begun within six months after the end of the period specified in the community supervision order.

## **PART 6**

### **DOUBLE JEOPARDY**

#### **Saving of existing bars to service proceedings**

25.—(1) This article applies where immediately before commencement a person was by virtue of a provision mentioned in paragraph (3) not liable to be tried by court-martial in respect of an SDA offence.

(2) Where this article applies—

- (a) the Court Martial may not try that person for that offence;
- (b) the Service Civilian Court may not try that person for that offence;
- (c) a charge against that person in respect of that offence may not be heard summarily by an officer.

(3) The provisions referred to in paragraph (1) are—

- (a) section 134 of AA 1955 or AFA 1955 or section 129(2) of NDA 1957 (prohibition of trial by service court for offence already disposed of);
- (b) section 18 of CMAA 1968 (conviction quashed by Appeal Court);
- (c) a direction under section 52I(12) or (13) of NDA 1957 (direction that accused not liable to be tried for offence charged);
- (d) a direction under section 81(2) of AA 1955 or AFA 1955 (direction prohibiting trial for desertion where confession made);
- (e) an order under section 74 of NDA 1957 (order dispensing with trial of rating for desertion where confession made).

(4) Where immediately before commencement a person was by virtue of section 134 of AA 1955 or AFA 1955 not liable to be tried by court-martial in respect of an SDA offence by reason of having had an offence taken into consideration when being sentenced by a court-martial or a Standing Civilian Court, paragraph (2) above ceases to apply in respect of the SDA offence if after commencement that sentence is quashed.

#### **Saving of existing bars to civilian court proceedings**

**26.**—(1) This article applies where immediately before commencement a person was by virtue of a provision mentioned in paragraph (3) not liable to be tried by a civilian court in respect of an offence.

- (2) Where this article applies, a civilian court may not try that person for that offence.
- (3) The provisions referred to in paragraph (1) are—
  - (a) section 133 of AA 1955 or AFA 1955 (prohibition of trial by civilian court for offence already disposed of);
  - (b) section 129(1) of NDA 1957 (corresponding provision for persons subject to NDA 1957);
  - (c) section 18 of CMAA 1968 (conviction quashed by Appeal Court).

(4) Where immediately before commencement a person was by virtue of section 133 of AA 1955 or AFA 1955 not liable to be tried by a civilian court in respect of an offence (“offence C”) by reason of having had an offence taken into consideration when being sentenced by a court-martial or a Standing Civilian Court, paragraph (2) above ceases to apply in respect of offence C if after commencement that sentence is quashed.

#### **Application of AFA 2006 ss. 63 and 64**

**27.**—(1) In section 63 of AFA 2006 (service proceedings barring subsequent service proceedings)

- (a) any reference to a service offence includes an SDA offence; and
  - (b) subsection (3) has effect as if the cases mentioned in it included the following cases—
    - (i) where the person was convicted or acquitted of offence A by a court-martial convened under AA 1955 or AFA 1955 or a Standing Civilian Court and offence B is an offence of which the person could, on acquittal of offence A, have been convicted under section 98(2), (5) or (6) of AA 1955 or AFA 1955;
    - (ii) where the person was convicted or acquitted of offence A by a court-martial assembled under NDA 1957, or at a summary trial under that Act, and offence B is an offence of which the person could, on acquittal of offence A, have been convicted under section 68 of NDA 1957.
- (2) In section 64 of AFA 2006 (service proceedings barring subsequent civilian proceedings)—

- (a) the references in subsection (1) to an offence under section 42 of that Act include an SDA civil offence; and
  - (b) where section 64 applies by reason of the conviction, acquittal or taking into consideration of an SDA civil offence, the reference in subsection (3) to the offence under section 42 is to be read as a reference to the SDA civil offence.
- (3) In sections 63 and 64 of that Act, and in this article, in relation to an SDA offence—
- (a) references to conviction include—
    - (i) a finding being recorded under section 76B(7) of AA 1955 or AFA 1955 that a charge has been proved; and
    - (ii) a finding of guilt being recorded under section 52D(7) of NDA 1957;
  - (b) references to acquittal include—
    - (i) dismissal of a charge under section 76(5)(a) or 76B(2) of AA 1955 or AFA 1955 or section 52B(5)(a) of NDA 1957; and
    - (ii) referral of a charge back under section 76A(2) of AA 1955 or AFA 1955 or section 52C(2) of NDA 1957 with a direction to dismiss the charge.
- (4) For the purposes of sections 63 and 64 of AFA 2006 a person shall be taken not to have had an SDA offence taken into consideration when being sentenced if the taking into consideration was annulled by the reviewing authority.
- (5) Paragraph (4) does not affect section 65(3) of AFA 2006 in its application to SDA offences.
- (6) In section 63(3)(c) of AFA 2006, the reference to section 161 includes a reference to article 77.

#### **Application of AFA 2006 s. 66**

- 28.** In section 66 of AFA 2006 (civilian proceedings barring subsequent service proceedings)—
- (a) references to an offence under section 42 of that Act include an SDA civil offence;
  - (b) references to a non-criminal service offence include an SDA offence other than an SDA civil offence.

## **PART 7**

### **ARREST, SEARCH AND ENTRY**

#### **“Service offence”**

- 29.** In Part 3 of AFA 2006 (powers of arrest, search and entry), any reference to a service offence (except the references in section 69) includes an SDA offence.

#### **Powers of arrest**

**30.**—(1) In section 68(3)(a) of AFA 2006 (provision supplementary to power of arrest) the reference to a civilian subject to service discipline is to be read, in relation to an SDA offence, as a reference to a civilian subject to the SDAs.

(2) A person may not be arrested under section 67 of AFA 2006 for an offence mentioned in article 2(4)(d) after the end of six months beginning with the end of the period specified in the community supervision order.

**Search on arrest**

**31.**—(1) In section 70 of AFA 2006 (search by service policeman on arrest)—

- (a) in subsection (3), the reference to an arrest under section 67 or 69 includes an arrest under section 74 or 74A of AA 1955 or AFA 1955 or section 45 or 45A of NDA 1957;
- (b) in subsection (4), the reference to a person arrested under section 67, 69, 110, 111 or 303 includes a person arrested under section 74, 74A or 75K of AA 1955 or AFA 1955 or section 45, 45A or 47L of NDA 1957.

(2) Section 71(4) of AFA 2006 (power to order or authorise search of arrested person for things subject to search) applies (as well as in the case mentioned in section 71(2)) in any case where—

- (a) a person (“the SDA arrested person”) has been arrested under section 74 or 75K of AA 1955 or AFA 1955 or section 45 or 47L of NDA 1957 by a person other than a service policeman; and
- (b) the SDA arrested person’s commanding officer has reasonable grounds for believing as mentioned in section 71(2)(b) of AFA 2006.

(3) Where section 71(4) of AFA 2006 applies by virtue of paragraph (2) above, references in section 71(4), (5) and (6) to the arrested person are to be read as to the SDA arrested person, and section 71(8) does not apply.

(4) Where, immediately before commencement, an order or authorisation under section 10(5) of AFA 2001 has effect (order for or authorisation of search of arrested person), the order or authorisation has effect after commencement as if given under section 71(4) of AFA 2006.

(5) In section 73(2) of AFA 2006 (seizure and retention after search upon arrest) the reference to arrest under section 67 or 69 includes arrest under section 74 or 74A of AA 1955 or AFA 1955 or section 45 or 45A of NDA 1957.

(6) Where, immediately before commencement, a person was under section 10(10) of AFA 2001 retaining a seized item, he may continue to retain it after commencement if he has reasonable grounds for believing as mentioned in section 73(1) of AFA 2006.

(7) Where, immediately before commencement, a person was under section 10(11) of AFA 2001 retaining a seized item, he may continue to retain it after commencement if he has reasonable grounds for believing as mentioned in section 73(2) of AFA 2006 (as modified by this Part).

(8) In section 74 of AFA 2006 (power to make provision conferring power to search premises at which person arrested), the reference to section 67 includes a reference to section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957.

**Stop and search**

**32.**—(1) In sections 75(4)(b), 76(6)(b) and 77 of AFA 2006 (provisions relating to powers of stop and search)—

- (a) any reference to an offence under section 42 of that Act includes an SDA civil offence;
- (b) any reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence.

(2) Where, immediately before commencement, an order or authorisation under section 4(1) of AFA 2001 has effect (order for or authorisation of stop and search), the order or authorisation has effect after commencement as if given under section 76(1) of AFA 2006.

(3) In section 77(9) of AFA 2006 (definitions relating to stop and search), the reference to a person subject to service law is to be read, in relation to an SDA civil offence, as a reference to a person subject to military law, air-force law or NDA 1957.

### **Powers of entry, search and seizure**

**33.**—(1) Where an application has been made under section 5(1) of AFA 2001 (application for warrant authorising entry and search of premises) and has not been granted, refused or withdrawn before commencement, the application has effect after commencement as if made under section 83(1)(a) of AFA 2006.

(2) Where, immediately before commencement, a warrant issued under section 5(1) of AFA 2001 has effect, the warrant has effect after commencement as if issued under section 83(1) of AFA 2006.

(3) Where, immediately before commencement, a person was under section 5(3) or 7(3) of AFA 2001 retaining a seized item, he may continue to retain it after commencement (subject, in the case of seizure under section 7(3) of AFA 2001, to section 89 of AFA 2006 as modified by this article).

(4) In section 84(2)(a) of AFA 2006 (authorisation of entry and search)—

- (a) the reference to an offence under section 42 of that Act includes an SDA civil offence;
- (b) the reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence.

(5) Where, immediately before commencement, an authorisation under section 7(1) of AFA 2001 has effect (authorisation of entry and search), the authorisation has effect after commencement—

- (a) if given to a service policeman, as if given under section 87(1) of AFA 2006;
- (b) otherwise, as if given under section 88(1) of that Act.

(6) In section 89 of AFA 2006 (review by judge advocate of certain searches), the reference to a search under section 87 or 88 of that Act includes a search under section 7 of AFA 2001 as respects which no request for review has been made under section 8 of that Act.

(7) Where a review has been requested under section 8 of AFA 2001 and the review has not been completed before commencement, the request has effect after commencement as if made under section 89(1) of AFA 2006.

(8) An authorisation under section 9(7) of AFA 2001 (entry and search for the purpose of arrest etc) of the exercise of the powers conferred by section 9(1)(a) of that Act on a service policeman has effect after commencement as if given under section 91(1) of AFA 2006.

(9) An authorisation under section 9(7) of AFA 2001 of the exercise of the powers conferred by section 9(1)(b) of that Act on a service policeman has effect after commencement as if given under section 91(5) of AFA 2006.

(10) In section 92 of AFA 2006 (power to make provision conferring powers of entry and search after arrest), the reference to section 67 includes a reference to section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957.

(11) In section 93 of AFA 2006 (power to make provision conferring power of seizure etc), the reference to any power of retention conferred by or under Part 3 of that Act includes any power of retention conferred by article 31(6) or (7) or paragraph (3).

(12) In section 94 of AFA 2006 (property in possession of service police or CO) any reference to seizure under Part 3 of that Act includes seizure under Part 2 of AFA 2001.

**PART 8**  
**CUSTODY**  
**CHAPTER 1**  
General

**“Service offence”**

**34.** In Part 4 of AFA 2006 (custody), any reference to a service offence includes an SDA offence.

**CHAPTER 2**

## Custody without charge

**Limitations on custody without charge of person arrested before commencement**

**35.**—(1) In section 98(1) of AFA 2006 (limitations on custody without charge), the reference to a person arrested under section 67 includes a person who immediately before commencement—

- (a) was in military, air-force or naval custody having been arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957; and
- (b) had not been charged with an offence, within the meaning given by section 75(4) of AA 1955 or AFA 1955 or section 47A(4) of NDA 1957.

(2) Section 119(5) of AA 1955 and AFA 1955 (provision corresponding to section 301(4) of AFA 2006) apply for the purposes of section 98 of AFA 2006.

(3) Section 88(2) of NDA 1957 (provision corresponding to section 301(4) of AFA 2006) applies for the purposes of section 98 of AFA 2006, but as if—

- (a) the reference to civil custody were omitted; and
- (b) in the definition of “the appropriate rules” in section 88(3) of NDA 1957, paragraph (c) were omitted.

**Authorisation by CO of custody without charge**

**36.**—(1) In section 99 of AFA 2006 (authorisation by CO of custody without charge)—

- (a) in subsection (1) (duty to report to CO arrest and any grounds for keeping in custody), the reference to the case where a person is arrested under section 67 includes the case where—
  - (i) before commencement a person was arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957; and
  - (ii) immediately before commencement, the requirement imposed by section 75A(1) of AA 1955 or AFA 1955 or section 47B(1) of NDA 1957 had not been complied with in relation to that arrest;
- (b) in subsection (3), the reference to a report under subsection (1) includes a report under section 75A(1) of AA 1955 or AFA 1955 or section 47B(1) of NDA 1957 as respects which no determination under section 75A(3) of AA 1955 or AFA 1955 or section 47B(3) of NDA 1957 had been made before commencement.

(2) Where, immediately before commencement, an authorisation under section 75A(4) of AA 1955 or AFA 1955 or section 47B(4) of NDA 1957 (authorisation by CO of custody without charge) has effect—

- (a) the authorisation is not affected by the coming into force of the repeal of sections 75A(4) and 47B(4) (or by section 98(1) of AFA 2006);



- (b) for the purposes of section 100(1) of AFA 2006, the person kept in service custody under the authorisation is to be taken to be kept in service custody in accordance with section 99 of that Act; and
- (c) for the purposes of section 100(3), (4) and (6) of that Act and section 99(7)(d) of that Act the authorisation is to be taken to have been given under section 99(4) of that Act.

(3) Where, immediately before commencement, a person is in service custody by virtue of section 75B(4)(b) of AA 1955 or AFA 1955 or section 47C(4)(b) of NDA 1957 following the postponement of a review of his being kept in custody, section 100(6) of AFA 2006 applies as if—

- (a) the review had been postponed under section 100(3) or (4); and
- (b) the requirement in section 100(6)(a) were to carry out the review as soon as practicable.

### **Extension by judge advocate of custody without charge**

**37.**—(1) In section 101(1) of AFA 2006 (power to apply to judge advocate for extension of custody without charge), the reference to a person arrested under section 67 includes a person who immediately before commencement—

- (a) was in military, air-force or naval custody having been arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957; and
- (b) had not been charged with an offence, within the meaning given by section 75(4) of AA 1955 or AFA 1955 or section 47A(4) of NDA 1957.

(2) Where, immediately before commencement, an order under section 75C(1) of AA 1955 or AFA 1955 or section 47D(1) of NDA 1957 (extension of custody without charge) has effect, the order—

- (a) is not affected by the coming into force of the repeal of sections 75C(1) and 47D(1); and
- (b) has effect after commencement as if the custody in which it authorised the person to whom it relates to be kept were service custody.

(3) Paragraph (4) applies where, immediately before commencement—

- (a) an application has been made under section 75C(1) of AA 1955 or AFA 1955 or section 47D(1) of NDA 1957; and
- (b) the hearing stands adjourned under section 75C(3) or (8)(b) of AA 1955 or AFA 1955 or section 47D(3) or (8)(b) of NDA 1957.

(4) The application has effect after commencement as an application under section 101(1) of AFA 2006.

### **Persons arrested while in custody**

**38.**—(1) This article applies where before commencement a person, while kept in military, air-force or naval custody without being charged with an offence (within the meaning given by section 75(4) of AA 1955 or AFA 1955 or 47A(4) of NDA 1957), was arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957 for another offence.

(2) Paragraph (3) applies if, immediately before commencement, the requirement imposed by section 75A(1) of AA 1955 or AFA 1955 or section 47B(1) of NDA 1957 had not been complied with both in relation to the arrest for that other offence and the original arrest (and accordingly the duty in section 99(1) of AFA 2006 as modified by this Part applies).

(3) Where this paragraph applies, the reference in section 99(2)(a) of AFA 2006 to a service offence for which the person is under arrest includes the offence for which the person was originally arrested.

(4) Where the duty in section 99(3) of AFA 2006 (as modified by this Part) arises, the reference in section 99(4)(a) to a service offence for which the person is under arrest includes the offence for which the person was originally arrested.

(5) In section 99(6) of AFA 2006 the reference to the arrest is to be read as to the arrest for the offence for which the person was originally arrested.

(6) If an application is made under section 101 of AFA 2006 (as modified by this Part) in respect of the person, the reference in section 101(4) to the arrest is to be read as to the arrest for the offence for which the person was originally arrested.

(7) Any reference in section 102(1) to (7) of AFA 2006 to the arrest is to be read as to the arrest for the offence for which the person was originally arrested.

### **Custody without charge: other cases**

**39.**—(1) This article applies where immediately before commencement a person—

- (a) was in military, air-force or naval custody having been delivered into that custody under—
  - (i) section 187(2) or (3), 188(2) or 190A(3) of AA 1955 or AFA 1955;
  - (ii) section 103(3), 108(2), 109(1) or (3) of NDA 1957; or
  - (iii) paragraph 4(2) or (3), 5(3) or 6(2) of Schedule 2 to RFA 1996; and
- (b) had not been charged with an offence, within the meaning given by section 75(4) of AA 1955 or AFA 1955 or section 47A(4) of NDA 1957.

(2) Sections 98 to 102 of AFA 2006 (as modified by this Part) shall apply as if the person had been arrested under section 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957 at the time he was delivered into military, air-force or naval custody.

## CHAPTER 3

### Custody after charge

#### **Custody after charge**

**40.**—(1) In sections 105(1), (4), (5) and (7) and 106(3) of AFA 2006 (custody after charge), references to a person's being "charged" with an offence include a person's being informed in accordance with regulations of the Defence Council that a charge is to be reported to the person's commanding officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957.

(2) Where, immediately before commencement, an order under section 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957 (order authorising custody after charge) has effect, the order has effect after commencement—

- (a) as if made under section 105(2) of AFA 2006;
- (b) as if the custody in which it authorised the accused to be kept were service custody; and
- (c) in a case where the period of custody authorised by the order was so authorised by virtue of section 75G(7) of AA 1955 or AFA 1955 or section 47H(7) of NDA 1957, as if that period had been authorised by virtue of section 108(7) of AFA 2006.

(3) In section 105(5) of AFA 2006 (reasons to be given for not keeping certain persons in custody), in paragraph (a)—

- (a) the reference to an offence under section 42 of that Act includes an SDA civil offence;
- (b) the reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence; and

- (c) the reference to an offence under section 1 of the Sexual Offences Act 2003(17) includes an offence under section 1 of the Sexual Offences Act 1956(18).
- (4) In section 105(7) of AFA 2006 (disapplication of section 105(1)), the reference to an order under section 105(2) includes an order under section 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957.
- (5) Where, immediately before commencement, a requirement under section 75J(2)(b) of AA 1955 or AFA 1955 or section 47K(2)(b) of NDA 1957 has effect (requirement to secure accused's attendance at hearing), the requirement has effect after commencement as if imposed under section 107(3)(a) of AFA 2006.
- (6) Where, immediately before commencement, an application under section 75J(2A) of AA 1955 or AFA 1955 or section 47K(2A) of NDA 1957 (variation of requirement) has been made but not granted, refused or withdrawn, the application has effect after commencement as an application under section 107(4) of AFA 2006.
- (7) Where, immediately before commencement, a request under section 75G(2)(b) of AA 1955 or AFA 1955 or section 47H(2)(b) of NDA 1957 (request for review) has been made but not complied with, the request has effect after commencement as a request under section 108(2)(b) of AFA 2006.
- (8) Where before commencement a review in respect of a person's being kept in custody was carried out under section 75G(1) of AA 1955 or AFA 1955 or section 47H(1) of NDA 1957, any subsequent review under section 108(1) of AFA 2006 is to be treated for the purposes of section 108(5) and (6) of AFA 2006 as a subsequent review and not a first review.
- (9) In section 109(1) of AFA 2006 (custody during court proceedings), the reference to a review under section 108(1) which takes place between arraignment before the Court Martial or the Service Civilian Court and the conclusion of proceedings before the court includes a review which takes place—
- (a) between the arraignment of the accused under section 91A of AA 1955 or AFA 1955 or section 58A of NDA 1957 and the conclusion of proceedings before the Court Martial; or
  - (b) between the arraignment of the accused before a Standing Civilian Court and the conclusion of proceedings before the Service Civilian Court.

### **Arrest after charge**

- 41.**—(1) In section 110(1) of AFA 2006 (power to order arrest after charge), the reference to a person who has been “charged” with an offence includes a person who has been informed in accordance with regulations of the Defence Council that a charge is to be reported to the person's commanding officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957.
- (2) Where, immediately before commencement, an order under section 75K(1) of AA 1955 or AFA 1955 or section 47L(1) of NDA 1957 (arrest after charge) has effect, the order has effect after commencement as if given under section 110(1) of AFA 2006.
- (3) In section 110(4) of AFA 2006 (review), the reference to a person arrested under subsection (1) includes a person who immediately before commencement—
- (a) was in service custody having been arrested under section 75K(1) of AA 1955 or AFA 1955 or section 47L(1) of NDA 1957; and
  - (b) had not been brought before a judicial officer under section 75K(7)(b) of AA 1955 or AFA 1955 or section 47L(7)(b) of NDA 1957.
- (4) In section 111(1)(a) of AFA 2006 (arrest at direction of court), the reference to arraignment before a court mentioned there includes arraignment—

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(17) 2003 c. 42.

(18) 1956 c. 69. Section 1 (rape) was repealed by the Sexual Offences Act 2003 (c. 42), section 139 and Schedule 6, paragraph 11.

- (a) under section 91A(2) of AA 1955 or AFA 1955 or section 58A(2) of NDA 1957; or
- (b) before a Standing Civilian Court.

(5) Where, immediately before commencement, a direction under section 75K(3) of AA 1955 or AFA 1955 or section 47L(3) of NDA 1957 (arrest at direction of court) has effect, the direction has effect after commencement as if given under section 111(1) of AFA 2006.

(6) In section 111(4) of AFA 2006 (review), the reference to a person arrested under section 111 includes a person who immediately before commencement—

- (a) was in service custody having been arrested (other than before a judicial officer or judge advocate) under section 75K(3) of AA 1955 or AFA 1955 or section 47L(3) of NDA 1957; and
- (b) had not been brought before a judicial officer or judge advocate under section 75K(8)(b) of AA 1955 or AFA 1955 or section 47L(8)(b) of NDA 1957.

## PART 9

### INVESTIGATION, CHARGING AND MODE OF TRIAL

#### “Service offence”, “Schedule 2 offence”

**42.**—(1) In Part 5 of AFA 2006 (investigation, charging and mode of trial), any reference to a service offence includes an SDA offence.

(2) Paragraph (1) does not apply in relation to section 113(4) of that Act (definition of “Schedule 2 offence”); but in that Part “Schedule 2 offence” includes the following SDA offences—

- (a) an offence under section 24 of AA 1955 or AFA 1955 or section 2 of NDA 1957 (misconduct in action);
- (b) an offence under subsection (1)(a), (b), (c), (d) or (f) of section 25 of AA 1955 or AFA 1955 or of section 3 of NDA 1957 (assisting the enemy);
- (c) an offence under section 26(1) of AA 1955 or AFA 1955 or section 4(1) of NDA 1957 (obstructing operations);
- (d) an offence under section 30, 31 or 32 of AA 1955 or AFA 1955 or section 5, 9 or 10 of NDA 1957 (looting, mutiny, failure to suppress mutiny);
- (e) an offence under section 37 of AA 1955 or AFA 1955 or section 16 of NDA 1957 (desertion) where the accused intends to avoid a period of active service within the meaning of section 8 of AFA 2006;
- (f) an offence under section 44A(1)(f) of AA 1955 or AFA 1955 or section 29A(1)(f) of NDA 1957 (causing sequestration etc of aircraft) where the offender acts wilfully or with wilful neglect;
- (g) an offence under section 48A of AA 1955 or AFA 1955 or section 19 of NDA 1957 (loss or hazarding of ship);
- (h) an offence under section 49 of AA 1955 or AFA 1955 or section 20 of NDA 1957 (dangerous flying etc) where the offender acts wilfully or with wilful neglect;
- (i) an offence under section 68 of AA 1955 or AFA 1955 or section 40 of NDA 1957 of attempting to commit an offence within any of sub-paragraphs (a) to (h) above;
- (j) an SDA civil offence as respects which the corresponding civil offence is an offence mentioned in paragraph (3) below.

(3) The offences referred to in paragraph (2)(j) are—

- (a) an offence within any sub-paragraph of paragraph 12 of Schedule 2 to AFA 2006;
- (b) an offence under any of sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 and 32 of the Sexual Offences Act 1956<sup>(19)</sup>;
- (c) an offence under section 128 of the Mental Health Act 1959<sup>(20)</sup>;
- (d) an offence under section 1 of the Indecency with Children Act 1960<sup>(21)</sup>;
- (e) an offence under section 4 or 5 of the Sexual Offences Act 1967<sup>(22)</sup>;
- (f) an offence under section 1 of the Criminal Attempts Act 1981<sup>(23)</sup>, or at common law, of attempting to commit an offence within any of sub-paragraphs (a) to (e) above;
- (g) an offence under section 1 of the Criminal Law Act 1977<sup>(24)</sup>, or at common law, of conspiracy to commit an offence within any of sub-paragraphs (a) to (e) above;
- (h) an offence at common law of incitement to commit an offence within any of sub-paragraphs (a) to (e) above;
- (i) an offence under Part 2 of the Serious Crime Act 2007<sup>(25)</sup> where the offence (or one of the offences) which the offender intended or believed would be committed is an offence within sub-paragraph (a) above.

#### **Duties and powers of commanding officers in relation to allegations etc**

43.—(1) The duty in section 113(1) of AFA 2006 (CO to ensure service police aware of possibility serious offence committed) applies where at commencement an officer is aware of an allegation or circumstances within section 113(2).

(2) The duty in section 114(1) of AFA 2006 (CO to ensure service police aware of certain circumstances) applies where an officer of a description prescribed for the purposes of section 114 is, at commencement, aware of circumstances of a description so prescribed.

(3) Where—

- (a) at commencement, an officer is aware of an allegation or circumstances within section 115(2), and
- (b) section 115(1)(b) applies,

the duty in section 115(4) of AFA 2006 (duty of CO with respect to investigation of service offences) applies; but this is subject to section 115(5).

(4) In section 119(2) of AFA 2006 (circumstances in which, subject to section 119(3), a CO has initial powers in respect of a case), the reference to the commanding officer's becoming aware of an allegation such as is mentioned there includes the commanding officer's being aware at commencement of such an allegation.

#### **Charges preferred by prosecuting authority: allocation for Court Martial trial**

44.—(1) A charge within paragraph (3) or (4) is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial.

(2) Paragraph (1) has effect subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for Court Martial trial.

(19) 1956 c. 69. Sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 and 32 were repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 11.

(20) 1959 c. 72. Section 128 was repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 13.

(21) 1960 c. 33. The Act was repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 14.

(22) 1967 c. 60. Sections 4 and 5 were repealed by the Sexual Offences Act 2003, section 139 and Schedule 6, paragraph 15.

(23) 1981 c. 47.

(24) 1977 c. 45.

(25) 2007 c. 27.

- (3) A charge is within this paragraph if—
- (a) it was preferred or substituted by the prosecuting authority under section 83B(4) or (8) of AA 1955 or AFA 1955 or section 52I(4) or (7) of NDA 1957; and
  - (b) it is current at commencement.
- (4) A charge is within this paragraph if—
- (a) the condition in sub-paragraph (a) of article 52(3) (preferment or substitution of charge under the Standing Civilian Courts Order 1997(26)) is satisfied in relation to it;
  - (b) the condition in any of sub-paragraphs (b) to (d) of that paragraph (circumstances in which charge to be tried by Standing Civilian Court rather than court-martial) is not satisfied in relation to it; and
  - (c) it is current at commencement.
- (5) For the purposes of this article a charge is “current at commencement” if, at commencement—
- (a) the accused has not already been convicted or acquitted by court-martial of the offence charged;
  - (b) the charge has not been otherwise disposed of;
  - (c) proceedings on it have not been stayed;
  - (d) the case has not been referred to the accused’s commanding officer, or the appropriate superior authority, under section 83B(2) of AA 1955 or AFA 1955 or section 52I(2) of NDA 1957;
  - (e) proceedings on the charge have not been discontinued under section 83B(8) of AA 1955 or AFA 1955 or section 52I(7) of NDA 1957, and no other charge has been substituted for it;
  - (f) the charge has not been tried by court-martial without a finding on it being recorded because it was charged as an alternative to another charge which was found proved; and
  - (g) the time limit for court-martial trial has not expired.
- (6) For the purposes of paragraph (5)(b) a charge has been “otherwise disposed of” if, under either of the following, the person who was charged could not be tried by the Court Martial in respect of the offence to which the charge related—
- (a) article 25 of this Order (double jeopardy);
  - (b) Chapter 3 of Part 2 of AFA 2006 (double jeopardy) as modified by this Order.

#### **Effect of time limits for court-martial trial**

- 45.—(1) For the purposes of article 44, the time limit for court-martial trial has expired in relation to a charge if, immediately before commencement—
- (a) trial of the charge was prohibited by section 132 of AA 1955 or AFA 1955 or section 52 of NDA 1957 (limitation of time for trial); and
  - (b) the prohibition could not have been lifted by the Attorney General’s giving consent under section 132(3A) of AA 1955 or AFA 1955 or section 52(3) of NDA 1957.
- (2) Paragraph (3) applies where—
- (a) by virtue of article 44 a charge is allocated for Court Martial trial for the purposes of Part 5 of AFA 2006;
  - (b) immediately before commencement, trial of the charge was prohibited as mentioned in paragraph (1)(a); and

- (c) the prohibition could have been lifted as mentioned in paragraph (1)(b).
- (3) Where this paragraph applies—
  - (a) the Court Martial may not without the Attorney General’s consent try the charge (or any charge substituted for it, or brought in addition to it, under section 125(2)(b) or (c) of AFA 2006); and
  - (b) the Director of Service Prosecutions may not refer the charge to the accused’s commanding officer.

**Charges reported to commanding officer: allocation for summary hearing**

**46.**—(1) A charge within paragraph (3) is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for summary hearing.

(2) Paragraph (1) has effect subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for summary hearing.

- (3) A charge is within this paragraph if—
  - (a) it is a charge which—
    - (i) was reported to an officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957; or
    - (ii) was required to be dealt with as if it had been so reported (by reason of section 83BB(3) or (4) of AA 1955 or AFA 1955 or section 52II(3) or (4) of NDA 1957); or
    - (iii) was substituted under section 76(3) or 76B(3) of AA 1955 or AFA 1955 or section 52B(3) or 52D(4B) of NDA 1957;
  - (b) it is current at commencement; and
  - (c) it is not an excluded charge within the meaning of article 47.
- (4) For the purposes of this article a charge is “current at commencement” if, at commencement—
  - (a) the charge has not been summarily dealt with or tried;
  - (b) the charge has not been dismissed under section 76(5)(a) of AA 1955 or AFA 1955 or section 52B(5)(a) of NDA 1957;
  - (c) further proceedings with respect to it have not been stayed under section 76(4) of AA 1955 or AFA 1955 or section 52B(4) of NDA 1957;
  - (d) no direction for dismissal or stay of further proceedings has been made in relation to it under section 76A(2) of AA 1955 or AFA 1955 or section 52C(2) of NDA 1957;
  - (e) no other charge has been substituted for it under section 76(3) or 76B(3) of AA 1955 or AFA 1955 or section 52B(3) or 52D(4B) of NDA 1957;
  - (f) the time limit for court-martial trial has not expired (see article 48); and
  - (g) if the case to which the charge relates has been referred to the prosecuting authority, the charge is not prevented by paragraph (5) or (6) from being current.
- (5) The charge referred to in paragraph (4)(g) (“the original charge”) is prevented by this paragraph from being current if the prosecuting authority has preferred a charge (“the PA’s charge”) and—
  - (a) has not subsequently referred the case to the accused’s commanding officer or the appropriate superior authority under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957; and

- (b) has not (either before or after preferring the PA's charge) referred a part of the case to which the original charge relates to the accused's commanding officer under section 83BB(2A) of AA 1955 or AFA 1955 or section 52II(2A) of NDA 1957.
- (6) The charge referred to in paragraph (4)(g) is prevented by this paragraph from being current if the prosecuting authority has informed the accused's commanding officer that the prosecuting authority has decided—
  - (a) not to prefer any charge; and
  - (b) (if there was no election for court-martial trial) not to refer the case, or any part of it to which the charge relates, back to the accused's commanding officer under section 83BB(2A) of AA 1955 or AFA 1955 or section 52II(2A) of NDA 1957.
- (7) For the purposes of paragraph (4)(a) the charge has been summarily dealt with or tried if—
  - (a) it has been dismissed within the meaning of section 76B(2) of AA 1955 or AFA 1955, or the accused has been acquitted of it under section 52D(6) of NDA 1957; or
  - (b) a finding that the charge has been proved has been recorded under section 76B(7) of AA 1955 or AFA 1955, or a finding of guilt in respect of it has been recorded under section 52D(7) of NDA 1957.

#### **Exceptions to allocation for summary hearing**

**47.**—(1) For the purposes of article 46(3)(c) and paragraph (2) below an “excluded charge” is any of the following—

- (a) a charge which is not capable of being heard summarily (within the meaning given by section 52 of AFA 2006 as modified by articles 14 and 15); but this is subject to paragraph (3) below;
- (b) a charge where—
  - (i) the case to which the charge relates was referred to the prosecuting authority by higher authority under section 76A(1) of AA 1955 or AFA 1955 or section 52C(1) of NDA 1957; and
  - (ii) there has been no referral back of the case, or of a part of the case to which the charge relates, under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957;
- (c) a charge as respects which the accused—
  - (i) elected court-martial trial; and
  - (ii) has not withdrawn that election with leave;
- (d) a charge where—
  - (i) the charge has been referred to higher authority under section 76(5)(b) or 76B(4) of AA 1955 or AFA 1955 or section 52B(5)(b) or 52D(5) of NDA 1957;
  - (ii) it has not been referred back under section 76A(3) or (4) of AA 1955 or AFA 1955 or section 52C(3) or (3A)(a) or (b) of NDA 1957 to be dealt with or tried summarily; and
  - (iii) the case to which the charge relates has not been referred to the prosecuting authority;
- (e) a charge against a civilian.

(2) An excluded charge, if falling within article 46(3)(a) and (b), is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial (subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for Court Martial trial).



(3) A charge which is not capable of being heard summarily is not an excluded charge by reason of paragraph (1)(a) if the case, or a part of the case to which the charge relates, was referred back under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957.

(4) For the purposes of paragraph (1)(e) a charge is “against a civilian” if, when the offence was committed or at any time since, the accused was a person who was not—

- (a) subject to service law (including military law, air-force law or NDA 1957);
- (b) a member of a volunteer reserve force; or
- (c) a member of an ex-regular reserve force who is subject to an additional duties commitment.

### **Effect of time limits for trial in relation to summary hearing**

**48.**—(1) For the purposes of article 46(4), the time limit for court-martial trial has expired in relation to a charge (“the CO’s charge”) if—

- (a) a charge has been preferred by the prosecuting authority in relation to the case to which the CO’s charge relates, and the time limit for court-martial trial of the charge so preferred has expired (within the meaning given by article 45(1)); or
- (b) no charge has been so preferred, but if a charge in the same terms as the CO’s charge had been preferred by the prosecuting authority (and no trial of it had begun by commencement), that time limit would have expired.

(2) Paragraph (3) applies where a charge is allocated for summary hearing for the purposes of Part 5 of AFA 2006—

- (a) by virtue of article 46; or
- (b) by virtue of having been referred to the accused’s commanding officer under section 125(2)(e) of AFA 2006 following initial allocation of the charge (or of a charge for which it was substituted or to which it was added) for Court Martial trial under article 44 or 47(2).

(3) If the time limit for summary dealing or trial expired before commencement, the accused’s commanding officer may not hear the charge (and section 124(2) of AFA 2006 has effect subject to this).

(4) For the purposes of paragraph (3), the time limit for summary dealing or trial expired before commencement if, immediately before commencement, summary dealing with or summary trial of the charge was prohibited by section 132 of AA 1955 or AFA 1955 or section 52 of NDA 1957.

(5) If the charge is one which would not at any time have been capable of being dealt with summarily or tried summarily under AA 1955, AFA 1955 or NDA 1957, that is to be ignored for the purposes of paragraph (4).

(6) In paragraphs (4) and (5) “the charge”, in a case where a charge has been substituted for or added to a charge initially allocated for Court Martial trial, means the charge initially allocated for Court Martial trial.

(7) Paragraph (3) does not apply if—

- (a) the offence charged is such that under section 132(3A) of AA 1955 or AFA 1955 or section 52(3) of NDA 1957 the Attorney General could have consented to proceedings in respect of it; and
- (b) the Attorney General consents to the charge being heard by the commanding officer.

(8) Where under this article a commanding officer is prevented from hearing a charge, he may not hear any charge substituted for that charge.

**Charges allocated for summary hearing: restriction on CO's powers in certain cases**

**49.**—(1) Where a charge within article 46(3)(a) is (for the purposes of Part 5 of AFA 2006) allocated for summary hearing and paragraph (2) applies, the commanding officer of the accused may not hear the charge unless—

- (a) the case, or a part of the case to which the charge relates, was referred back by the prosecuting authority under section 83B(2) or 83BB(2A) of AA 1955 or AFA 1955 or section 52I(2) or 52II(2A) of NDA 1957; or
- (b) the case to which the charge relates has been referred to the commanding officer by a service policeman under section 116(3) of AFA 2006.

(2) This paragraph applies where—

- (a) the allegation or circumstances which gave rise to the charge (“the circumstances”) are being or have been investigated by a service police force;
- (b) the circumstances are being or have been investigated by a UK police force or overseas police force, and it appears to the commanding officer that that force may refer the matter to the service police; or
- (c) the circumstances give or have given rise to the duty in section 113(1) or 114(1) of AFA 2006 (duties to inform service police).

(3) Where under this article a commanding officer is prevented from hearing a charge, he may not hear any charge substituted for that charge.

**Deemed referrals under AFA 2006 s. 116(3)**

**50.**—(1) This article applies where—

- (a) before commencement a service policeman reported to the commanding officer of a person—
  - (i) that there was sufficient evidence to charge the person with an offence (“the relevant offence”), but not sufficient evidence to charge the person with an offence mentioned in article 42(2); and
  - (ii) that the service policeman was not aware of any circumstances of a description prescribed for the purposes of section 116(2)(b) of AFA 2006; and
- (b) since that report, no service policeman has reported to the person’s commanding officer that there is sufficient evidence to charge the person with an offence mentioned in article 42(2) or that the service policeman is aware of such circumstances.

(2) Where this article applies, the case relating to the relevant offence is to be regarded for the purposes of section 119(4) of AFA 2006 and article 49(1)(b) as having been referred to the commanding officer by a service policeman under section 116(3) of AFA 2006.

(3) References in this article to there being sufficient evidence to charge a person with an offence have the meaning given by section 116(5) of AFA 2006.

**Part of a case referred back under SDAs: power of CO to charge etc**

**51.**—(1) This article applies where—

- (a) part of a case has been referred back to a person’s commanding officer under section 83BB(2A) of AA 1955 or AFA 1955 or section 52II(2A) of NDA 1957; and
- (b) immediately after commencement, no charge relating to that part of the case is regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial, Service Civilian Court trial or summary hearing.

(2) The part of the case is to be treated for the purposes of section 119(5) of AFA 2006 (by virtue of which a CO has power to bring a charge, etc, in respect of a case referred to him by the DSP) as a case referred to the commanding officer under section 121(4) of that Act.

### **Charges directed to be tried by a Standing Civilian Court**

**52.**—(1) A charge within paragraph (3) is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Service Civilian Court trial.

(2) Paragraph (1) has effect subject to any provision of that Part under which, at any time after commencement, the charge ceases to be allocated for Service Civilian Court trial.

(3) A charge is within this paragraph if—

- (a) it was preferred or substituted under article 6(1)(b), 13(1)(a) or (c) or 44(1)(a) or (c) of the Standing Civilian Courts Order 1997(27);
- (b) no determination under article 13(1)(d) of that Order (charge to be tried by court-martial) has been made in respect of it;
- (c) the accused either—
  - (i) has not elected court-martial trial of the charge and is not treated under article 17 of that Order as having done so; or
  - (ii) has withdrawn such an election;
- (d) the court has not referred the case to the prosecuting authority under paragraph 6 of Schedule 3 to AFA 1976 (unfitness to stand trial and insanity); and
- (e) the charge is current at commencement.

(4) For the purposes of this article a charge is “current at commencement” if, at commencement—

- (a) the accused has not already been convicted or acquitted of the offence charged;
- (b) the charge has not been otherwise disposed of;
- (c) proceedings on it have not been stayed;
- (d) proceedings on the charge have not been discontinued, and no other charge has been substituted for it;
- (e) the charge has not been tried by a Standing Civilian Court without a finding on it being recorded because it was charged as an alternative to another charge which was found proved; and
- (f) the time limit for trial by a Standing Civilian Court has not expired.

(5) For the purposes of paragraph (4)(b) a charge has been “otherwise disposed of” if, under either of the following, the person who was charged could not be tried by the Service Civilian Court in respect of the offence to which the charge related—

- (a) article 25 of this Order (double jeopardy);
- (b) Chapter 3 of Part 2 of AFA 2006 (double jeopardy) as modified by this Order.

### **Effect of time limits for court-martial trial in relation to SCC**

**53.**—(1) For the purposes of article 52, the time limit for trial by a Standing Civilian Court has expired in relation to a charge if, immediately before commencement—

- (a) trial of the charge was prohibited by section 7(4) of AFA 1976 or section 132(3) of AA 1955 or AFA 1955 (limitation of time for trial); and

- (b) the prohibition could not have been lifted by the Attorney General's giving consent under section 132(3A) of AA 1955 or AFA 1955.
- (2) Paragraph (3) applies where—
  - (a) by virtue of article 52 a charge is allocated for Service Civilian Court trial for the purposes of Part 5 of AFA 2006;
  - (b) immediately before commencement, trial of the charge was prohibited as mentioned in paragraph (1)(a); and
  - (c) the prohibition could have been lifted as mentioned in paragraph (1)(b).
- (3) Where this paragraph applies—
  - (a) the Service Civilian Court may not without the Attorney General's consent try the charge (or any charge substituted for it, or brought in addition to it, under section 126(2)(b) or (c) of AFA 2006); and
  - (b) if the charge (or any charge so substituted or brought) is allocated for trial by the Court Martial under section 126(2)(e) of AFA 2006, the Court Martial may not without the Attorney General's consent try it (or any charge substituted for it, or brought in addition to it, under section 125(2)(b) or (c) of that Act).

## PART 10

### SUMMARY DEALING

#### CHAPTER 1

##### Proceedings in progress at commencement

#### **Summary hearing where court-martial trial declined before commencement**

- 54.**—(1) This article applies where—
- (a) a charge falls within article 46(3) (charges allocated for summary hearing); and
  - (b) before commencement, the accused was given the opportunity to elect court-martial trial of the charge under section 76AA(1) of AA 1955 or AFA 1955 or section 52D(2) of NDA 1957 and declined to elect court-martial trial (or, having elected court-martial trial, withdrew the election with leave).
- (2) Section 129(1) of AFA 2006 (giving of opportunity to elect Court Martial trial) must be complied with before the charge is heard summarily, despite the fact that the accused had been given the opportunity to elect court-martial trial.
- (3) Where this article applies and the charge had begun to be heard summarily before commencement, in section 124(2) and 129 of AFA 2006 and paragraph (2) above references to hearing the charge summarily are to be read as references to proceeding with the hearing of the charge.
- (4) The reference in paragraph (1) to a charge falling within article 46(3) includes a charge that—
- (a) would fall within article 46(3) but for the fact that it is an excluded charge; and
  - (b) is an excluded charge only by reason of article 47(1)(a).
- (5) A charge within paragraph (4) to which this article applies is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for summary hearing.
- (6) Nothing in this article enables an officer to hear a charge summarily, or continue to do so, where summary hearing of the charge is prohibited by article 48(3) or 49.

### **Powers of punishment where finding reached before commencement**

**55.**—(1) This article applies where, at commencement, an SDA finding of guilt has been recorded but punishment has not been awarded.

(2) For the purposes of paragraph (1) “an SDA finding of guilt” has been recorded if—

(a) a finding that a charge has been proved has been recorded under section 76B(7) of AA 1955 or AFA 1955; or

(b) a finding of guilt has been recorded under section 52D(7) of NDA 1957.

(3) Where this article applies, the appropriate officer must award punishment as if the SDAs and related subordinate legislation continued in force (and had done so since commencement) and AFA 2006 were not in force.

(4) In paragraph (3) “related subordinate legislation” means—

(a) any regulations, or orders of the Secretary of State, made under the SDAs that were in force immediately before commencement; and

(b) any authorisation by the Defence Council for the purposes of section 76C(2)(e) of AA 1955 or AFA 1955 (minor punishments) that had effect immediately before commencement.

(5) The officer’s duty under paragraph (3) to award punishment includes a duty to make any other order or direction when dealing with the offender that the officer would have made under the SDAs; but this is subject to paragraph (6).

(6) If by virtue of paragraph (3) the officer imposes a sentence of detention under section 43(1)(e) of NDA 1957, the officer may not make a committal order under section 81(3) of that Act (but this does not affect his power to make an order under section 90(1) of that Act suspending the sentence).

(7) Regulations 45A, 49A and 53A of the Naval Summary Discipline Regulations (February) 2009~~(28)~~ shall continue in force in relation to any order or direction made or proposed to be made under section 91B of NDA 1957 in pursuance of paragraph (5).

(8) In paragraph (3) the reference to “the appropriate officer” is to the officer who would have awarded punishment if the repeal of the SDAs had not come into force.

(9) The powers conferred by this article include power—

(a) for the officer who recorded the finding to exercise any power that that officer would have had, under regulations made under the SDAs, to refer the case to another officer for punishment;

(b) for an officer to whom the case is referred by virtue of sub-paragraph (a), or to whom it was referred for punishment before commencement, to exercise any power that that officer would have had under such regulations to refer the case to another officer for punishment; and

(c) accordingly, for the officer (if any) to whom the case is referred by virtue of sub-paragraph (a) or (b) to award punishment as mentioned in this article.

(10) In this article “the SDAs” means the provisions of AA 1955, AFA 1955 and NDA 1957 whose repeal came into force at commencement.

(11) Any reference in this Order to a sentence or punishment under a provision of AA 1955, AFA 1955 or NDA 1957 includes such a sentence or punishment awarded by virtue of this article.

### **Deemed disrating**

**56.**—(1) Where a punishment awarded under article 55—

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(28) These Regulations are made by the Defence Council under sections 43, 52E and 52F of NDA 1957 and published in the Manual of Naval Law.

- (a) is by reason of section 43(4) of NDA 1957 required to include disrating or reduction to the ranks, and
- (b) does not include it,

the punishment is not invalid but is deemed to include disrating or (as the case may be) reduction to the ranks.

(2) Where disrating is deemed by paragraph (1) to be included in a punishment, it reduces the offender to the rate that he would have been reduced to by virtue of section 43(5) of NDA 1957, had that Act continued in force.

### **Approval of summary punishment (NDA cases)**

57.—(1) Paragraph (2) applies where—

- (a) at commencement, an SDA finding of guilt has been recorded but punishment has not been awarded;
- (b) the case is one where, under regulation 36 of the Naval Summary Discipline Regulations (February) 2009, punishment could not have been awarded without the approval of a submission under that regulation; and
- (c) at commencement, such a submission has not been made, or has been made but not approved.

(2) Punishment must not be awarded under article 55 unless a submission has been made (whether before or after commencement) and approved in accordance with that regulation.

(3) In this article “an SDA finding of guilt” has the same meaning as in article 55.

### **Warrant punishments**

58.—(1) In this article “warrant punishment” is to be read in accordance with regulation 44 of the Naval Summary Discipline Regulations (February) 2009 (“the NSD Regulations”).

(2) A warrant punishment must not be awarded under article 55 unless a warrant has, before or after commencement—

- (a) been prepared in the format prescribed under regulation 45 of the NSD Regulations; and
- (b) been approved in accordance with regulation 40, 46, 47 or 48 of those Regulations (which shall continue in force for the purposes of this article).

(3) Regulation 49 of those Regulations (powers where punishment warrant submitted for approval) shall continue in force for the purposes of any case where—

- (a) at commencement, an SDA finding of guilt has been recorded but punishment has not been awarded; and
- (b) at a time after commencement, a punishment warrant has been submitted for approval (either before commencement or, by virtue of paragraph (2), after commencement) but the warrant has not yet been approved.

(4) Regulations 50 and 53 of the NSD Regulations (formal reading of punishment warrant, and power to modify punishment) shall continue in force in relation to any award of a warrant punishment under article 55.

## CHAPTER 2

### Modifications of AFA 2006 for charge current at commencement

#### **Applications for purposes of AFA 2006 made before commencement**

**59.**—(1) Paragraph (2) applies where either of the following applications is made before commencement—

- (a) an application for permission for the purposes of section 54 of AFA 2006 (permission to hear charge summarily);
- (b) an application for extended powers for the purposes of section 133(1) or (2), 134, 135(1) or 136(1)(b) of that Act (extended powers of punishment).

(2) The application, and any grant of the application or notification of its grant (whenever made), are to be treated as validly made if made in accordance with any provision of AFA 2006 or of rules under that Act that would apply if the application had been made after commencement.

(3) Paragraph (4) applies where—

- (a) before commencement, an application for permission to award extended detention was made in accordance with regulation 30 of the Custody and Summary Dealing (Army) Regulations 2006<sup>(29)</sup> or regulation 17 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000<sup>(30)</sup>; and
- (b) (before or after commencement) the application is treated by higher authority as an application under section 133(3) of AFA 2006 for extended powers for the purposes of section 133(1).

(4) Any grant of those extended powers, or notification of their grant, in response to the application is to be treated as validly made if made in accordance with any provision of AFA 2006 or of rules under that Act that applies in relation to the grant of applications for such powers made after commencement.

(5) Nothing in paragraphs (3) and (4) invalidates the treatment of the application as an application for permission to award extended detention under the regulations mentioned in paragraph (3) (a) (whether that treatment was as well as or instead of treating the application as mentioned in paragraph (3)(b)).

#### **Permissions for purposes of AA 1955 or AFA 1955 to award extended detention**

**60.**—(1) This article applies where—

- (a) permission to award extended detention was granted before commencement under regulation 30 of the Custody and Summary Dealing (Army) Regulations 2006 or regulation 17 of the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000;
- (b) article 55 does not apply; and
- (c) punishment is awarded after commencement under AFA 2006.

(2) Where this article applies, the commanding officer is to be taken to have extended powers for the purposes of section 133(1) of AFA 2006.

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<sup>(29)</sup> These Regulations are made by the Defence Council under sections 75E, 82, 83 and 209 of AA 1955 and published in the Manual of Military Law.

<sup>(30)</sup> These Regulations are made by the Defence Council under sections 75E, 82, 83 and 209 of AFA 1955 and published in the Manual of Air Force Law. They are amended by the Pre-charge Custody and Summary Dealing (Royal Air Force) (Amendment) Regulations 2002.

**Certain consequences of election for court-martial trial**

- 61.**—(1) This article applies to a charge allocated for Court Martial trial where—
- (a) the charge is so allocated by virtue of article 44 and the case to which it relates was referred to the prosecuting authority following an election for court-martial trial; or
  - (b) the charge is so allocated by virtue of article 47(1)(c) and (2) (election for court-martial trial).
- (2) Section 130 of AFA 2006 (consequences of election for Court Martial trial) applies where this article applies to a charge, and in that section—
- (a) the reference in subsection (2)(a) to “that charge” includes a reference to a charge to which this article applies; and
  - (b) subsection (2)(b) and (3) are to be read accordingly (but subject to paragraph (3) below).
- (3) Where a charge to which this article applies was brought under NDA 1957, and the charge is referred to a commanding officer under section 125(2)(e) of AFA 2006—
- (a) the commanding officer may apply for extended powers for the purposes of section 133(1) or (2), 134, 135(1) or 136(1)(b) of AFA 2006; and
  - (b) if the commanding officer makes such an application and is notified that it has been granted, section 130(3) of AFA 2006 (which would prevent the accused from electing Court Martial trial of the charge) is to be taken to be disapplied.

**CHAPTER 3****Activation of SDA suspended sentence of service detention following civilian conviction****Activation where application for approval made before commencement**

- 62.**—(1) This article applies where at commencement—
- (a) an officer has made an application for approval, under regulation 49A of the Naval Summary Discipline Regulations (February) 2009, of an order which the officer proposes to make under section 91B of NDA 1957 (activation of sentence of detention by CO) by virtue of section 91B(1)(b) (conviction of offence in the British Islands); and
  - (b) either—
    - (i) no decision has been made on the application; or
    - (ii) approval has been granted but the order has not been made.
- (2) In any such case an order under section 91B(1) of NDA 1957, with or without a direction under section 91B(6)(a), may be made as if NDA 1957 continued in force (and had done so since commencement); but this is subject to paragraph (3).
- (3) Paragraph (2) is subject to regulations 45A and 49A of the Naval Summary Discipline Regulations (February) 2009 (requirement for approval and for notification of order to offender), which shall continue in force for the purposes of this article.
- (4) Regulation 53A of those regulations (power to withdraw order etc) shall continue in force in relation to any order or direction made by virtue of this article.



## CHAPTER 4

### The Summary Appeal Court

#### **Right of appeal**

**63.**—(1) In section 141(1) of AFA 2006 (right of appeal to Summary Appeal Court), the reference to a person in respect of whom a charge has been heard summarily and a finding that the charge has been proved has been recorded includes a person in respect of whom a charge was heard summarily, and a finding that the charge has been proved was recorded, under AA 1955, AFA 1955 or NDA 1957 before commencement.

(2) Where, immediately before commencement, a period allowed by a summary appeal court under section 83ZE(2) of AA 1955 or AFA 1955 or section 52FK(2) of NDA 1957 (extra time for appeal) is current and an appeal for which the period was allowed has not yet been brought, the period is to be treated as allowed by the Summary Appeal Court under section 141(2)(b) of AFA 2006.

(3) Where, immediately before commencement, a period allowed by a summary appeal court under section 83ZE(3) of AA 1955 or AFA 1955 or section 52FK(3) of NDA 1957 (extra time for appeal) is current and an appeal for which the period was allowed has not yet been brought, the period is to be treated as allowed by the Summary Appeal Court under section 141(3) of AFA 2006.

#### **Appeal brought but not heard before commencement**

**64.**—(1) This article applies where—

- (a) an appeal to a summary appeal court was brought before commencement; and
- (b) by commencement, the court had not begun to hear the appeal and the appeal had not been abandoned.

(2) For the purposes of Chapter 2 of Part 6 of AFA 2006 (appeals to the Summary Appeal Court), the appeal is to be treated as an appeal brought to the Summary Appeal Court under section 141 of AFA 2006.

(3) If before commencement a person was specified by or on behalf of the Judge Advocate General to be the judge advocate for the appeal, the specification has effect after commencement as a specification under section 142(3) of AFA 2006.

(4) If before commencement a person was specified by or on behalf of a court administration officer to be a member of the court for the appeal, the specification has effect after commencement as a specification under section 142(4) of AFA 2006.

(5) In this article “court administration officer” means a court administration officer within the meaning of section 83ZA of AA 1955 or AFA 1955 or section 52FF of NDA 1957.

#### **Officers and warrant officers ineligible for membership of court**

**65.** In section 144(1) of AFA 2006 (officers and warrant officers ineligible for membership of SAC in particular circumstances)—

- (a) in paragraph (a), “commanding officer”, in relation to times before commencement, means commanding officer within the meaning of Part 2 of AFA 2001;
- (b) in paragraph (c), the reference to a higher authority as mentioned there includes an officer who, in relation to the charge to which the appeal relates—
  - (i) acted as the appropriate superior authority under section 76B of AA 1955 or AFA 1955 or section 52EE of NDA 1957;

- (ii) was the higher authority to whom a referral was made under section 76(5), 76AA(3) or 76B(4) of AA 1955 or AFA 1955 or section 52B(5) or 52D(3) or (5) of NDA 1957; or
- (iii) was asked, as higher authority, to approve the award of any punishment;
- (c) in paragraph (f), the reference to an inquiry includes—
  - (i) an investigation conducted by a board of inquiry under section 135 of AA 1955 or AFA 1955;
  - (ii) an inquiry held under section 137 of AA 1955 or AFA 1955;
  - (iii) an inquiry held by the Royal Navy under the prerogative.

### **Punishments substituted for punishments imposed under AA 1955**

66.—(1) This article applies to a rehearing as respects punishment held by virtue of section 146(1) (b) or (2) of AFA 2006 (rehearing by SAC) where the punishment to which the rehearing relates was imposed—

- (a) on a summary dealing under AA 1955; or
- (b) under article 55 in relation to a finding recorded under AA 1955.

(2) If only one offence has been proved, section 147(3) of AFA 2006 (power to substitute punishment) has effect as if for paragraph (b) there were substituted—

- “(b) quash that punishment and award in substitution for it any punishment which—
  - (i) would be available under Chapter 1 of this Part if a charge of the offence had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and
  - (ii) in the opinion of the court is neither more severe than the punishment originally awarded nor more severe than the most severe punishment which could have been awarded, for the offence for which the court is awarding punishment, by the officer who originally awarded punishment.”

(3) If two or more offences have been proved, section 147(3) of AFA 2006 has effect as if for paragraphs (a) and (b) there were substituted—

- “(a) confirm the punishments awarded; or
- (b) quash those punishments and award in substitution for them any punishment which—
  - (i) would be available under Chapter 1 of this Part if charges of the offences had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and
  - (ii) in the opinion of the court is neither more severe than the punishments originally awarded nor more severe than the most severe punishments which could have been awarded, for the offences for which the court is awarding punishment, by the officer who originally awarded punishment.”

### **Punishments substituted for punishments imposed under AFA 1955**

67.—(1) This article applies to a rehearing as respects punishment held by virtue of section 146(1) (b) or (2) of AFA 2006 (rehearing by SAC) where the punishment to which the rehearing relates was imposed—

- (a) on a summary dealing under AFA 1955; or

(b) under article 55 in relation to a finding recorded under AFA 1955.

(2) In its application to the rehearing, section 147(3) of AFA 2006 (power to substitute punishment) has effect as if for paragraph (b) there were substituted—

“(b) quash that punishment and award in substitution for it any punishment which—

(i) would be available under Chapter 1 of this Part if a charge of the offence (or charges of the offences) had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and

(ii) in the opinion of the court is neither more severe than the punishment originally awarded nor more severe than the most severe punishment which could have been awarded, for the offence or offences for which the court is awarding punishment, by the officer who originally awarded punishment.”

### **Punishments substituted for punishments imposed under NDA 1957**

**68.**—(1) This article applies to a rehearing as respects punishment held by virtue of section 146(1) (b) or (2) of AFA 2006 (rehearing by SAC) where the punishment to which the rehearing relates was imposed—

(a) on a summary trial under NDA 1957; or

(b) under article 55 in relation to a finding recorded under NDA 1957.

(2) In its application to the rehearing, section 147(3) of AFA 2006 (power to substitute punishment) has effect as if for paragraph (b) there were substituted—

“(b) quash that punishment and award in substitution for it any punishment which—

(i) would be available under Chapter 1 of this Part if a charge of the offence (or charges of the offences) had just been found proved by the accused’s commanding officer and that officer had extended powers for the purposes of section 133(1) or (2) (as the case may be), 134, 135(1) and 136(1)(b); and

(ii) in the opinion of the court is neither more severe than the punishment originally awarded nor more severe than the most severe punishment which could have been awarded, for the offence or offences for which the court is awarding punishment, by the officer who originally awarded punishment.”

(3) For the purposes of section 147(3)(b) of AFA 2006 as substituted by paragraph (2) above, the punishments in the Table in section 132 of AFA 2006 are to be taken to include—

(a) dismissal from Her Majesty’s service;

(b) (as an alternative to disrating or reduction in rank as permitted by row 3 of the Table) disrating, or reduction in rank, to an extent which was available to the officer who awarded punishment.

(4) Nothing in section 138 of AFA 2006 prevents the Summary Appeal Court from awarding, by virtue of this article, dismissal from Her Majesty’s service in addition to any punishment or combination of punishments permitted by that section.

(5) For the purposes of section 147(3)(b)(i) of AFA 2006 as substituted by paragraph (2) above, it is to be assumed that the charge or charges are capable of being heard summarily under AFA 2006, even if they are not in fact so capable.

### **Appeals from decisions of a summary appeal court**

**69.**—(1) The appellant may question any decision of a summary appeal court under AA 1955, AFA 1955 or NDA 1957 on the ground that it was wrong in law or was in excess of jurisdiction,

by applying to the Summary Appeal Court to have a case stated for the opinion of the High Court in England and Wales.

(2) Where, immediately before commencement, an application under section 83ZH(2) of AA 1955 or AFA 1955 or section 52FN(2) of NDA 1957 (application to a summary appeal court to have a case stated) has been made but a case has not been stated, the application has effect after commencement as an application to the Summary Appeal Court under paragraph (1).

## CHAPTER 5

### Review of summary findings and punishments

#### **Power to review summary findings and punishments**

**70.**—(1) In section 152(1) of AFA 2006 (power to review summary finding or punishment), the reference to the case where a charge has been heard summarily and a finding that the charge has been proved has been recorded includes—

- (a) the case where a charge was heard summarily, and a finding that the charge has been proved was recorded, under AA 1955 or AFA 1955; and
- (b) the case where a charge was tried summarily, and a finding of guilt was recorded, under NDA 1957.

(2) Where an order under section 91B(1) of NDA 1957 (activation by officer of suspended sentence of detention) has been made in respect of a sentence of detention passed by a court-martial, the order is to be treated for the purposes of section 152 of AFA 2006 as a punishment which may be reviewed under that section.

(3) Paragraph (2) is without prejudice to section 195(1) of AFA 2006 as modified by article 98(1) (by virtue of which an order under section 91B(1) of NDA 1957 activating a suspended sentence of detention passed at a summary trial may be reviewed under section 152).

(4) References in this article to an order under section 91B(1) of NDA 1957 include such an order made after commencement by virtue of article 55 or 62.

#### **Power to complete review begun before commencement**

**71.**—(1) In section 152(2) of AFA 2006 (persons who are to carry out review), any reference to a review under section 152 includes the completion of a pre-commencement review.

(2) In this article a “pre-commencement review” means a review that had begun to be carried out before commencement under section 115 of AA 1955 or AFA 1955 or section 71B of NDA 1957 but was not completed by commencement.

(3) In section 152(3) to (7) of AFA 2006 any reference to the carrying out of a review under section 152 includes the completion of a pre-commencement review by virtue of this article.

#### **Powers on a review carried out or completed under AFA 2006**

**72.**—(1) This article applies where a review is carried out, or completed, under section 152 of AFA 2006 in respect of—

- (a) a finding under AA 1955, AFA 1955 or NDA 1957;
- (b) a punishment awarded in respect of such a finding; or
- (c) an order under section 91B(1) of NDA 1957 (including such an order made after commencement by virtue of article 55 or 62).

(2) Section 152(3) of AFA 2006 has effect as if for paragraph (b) there were substituted—

“(b) the person to whom the review relates has not brought an appeal to a summary appeal court under section 83ZE of AA 1955 or AFA 1955 or section 52FK of NDA 1957 or an appeal to the Summary Appeal Court under section 141, and the period provided by section 141(2) has ended.”

(3) Section 152(5) of AFA 2006 has effect as if for paragraph (b) there were substituted—

“(b) the person to whom the review relates has brought an appeal to a summary appeal court under section 83ZE of AA 1955 or AFA 1955 or section 52FK of NDA 1957 or an appeal to the Summary Appeal Court under section 141.”

(4) Where this article applies and an appeal was brought to a summary appeal court, section 152(6) of AFA 2006 has effect as if for paragraph (a) there were substituted—

“(a) the appeal is in the course of being heard, or is to be heard, by the Summary Appeal Court, and”.

(5) Where this article applies and an appeal was brought to a summary appeal court, section 152(7) of AFA 2006 has effect—

(a) as if in paragraph (a) the reference to the Summary Appeal Court included a reference to a summary appeal court; and

(b) in a case where the hearing of the appeal was completed by a summary appeal court, as if both references to “the court” in paragraph (b), and the second reference to “the court” in the words after that paragraph, were to the summary appeal court.

### **Powers where review completed before commencement**

**73.**—(1) Paragraph (2) applies where—

(a) before commencement, a review of a finding or punishment was carried out under section 115 of AA 1955 or AFA 1955 or section 71B of NDA 1957;

(b) the finding or punishment was not quashed on the review; and

(c) by commencement, no reference has been made under subsection (5A) or (5B) of section 115 of AA 1955 or AFA 1955 or of section 71B of NDA 1957.

(2) Subsections (3) to (7) of section 152 of AFA 2006 shall apply (with the modifications made by article 72) as if the review had been carried out under that section.

(3) Where, immediately before commencement, leave for a reference has been granted under subsection (5A) or (5B) of section 115 of AA 1955 or AFA 1955 or of section 71B of NDA 1957 but the reference has not been made, the leave has effect after commencement as leave granted by the Summary Appeal Court under section 152(4) or (7) of AFA 2006.

## **PART 11**

### **TRIAL BY COURT MARTIAL**

#### **CHAPTER 1**

##### **Trial by Court Martial**

### **Pre-commencement selection of members of Court Martial**

**74.**—(1) If before commencement a person is specified by or on behalf of the Judge Advocate General to be the judge advocate for Court Martial proceedings intended to take place after commencement, the specification has effect after commencement as a specification under section 155(5) of AFA 2006.

(2) If before commencement a person is specified by or on behalf of a court administration officer to be a lay member of the court for Court Martial proceedings intended to take place after commencement, the specification has effect after commencement as a specification under section 155(6) of AFA 2006.

(3) If before commencement a judicial officer directs that the number of lay members of the court for Court Martial proceedings intended to take place after commencement must be more than the minimum required, the direction has effect after commencement as a direction under section 155(7) of AFA 2006.

(4) In this article—

“court administration officer” means a court administration officer within the meaning of section 84A of AA 1955 or AFA 1955 or section 53A of NDA 1957;

“judicial officer” means a judicial officer appointed under section 75L of AA 1955 or AFA 1955 or section 47M of NDA 1957;

“the minimum required” has the meaning given by section 155(8) of AFA 2006.

#### **Eligibility to be member of the court**

**75.** In section 157(1) of AFA 2006 (officers and warrant officers ineligible for membership of Court Martial in particular circumstances)—

(a) in paragraph (a), “commanding officer”, in relation to times before commencement, means commanding officer within the meaning of Part 2 of AFA 2001;

(b) in paragraph (c), the reference to an inquiry includes—

(i) an investigation conducted by a board of inquiry under section 135 of AA 1955 or AFA 1955;

(ii) an inquiry held under section 137 of AA 1955 or AFA 1955;

(iii) an inquiry held by the Royal Navy under the prerogative.

#### **Arraignment before commencement**

**76.** Court Martial rules may provide that a plea offered on arraignment at a hearing under section 91A of AA 1955 or AFA 1955 or section 58A of NDA 1957 is to be treated, for such purposes as may be specified, as having been offered on arraignment before the Court Martial.

#### **Power to convict of alternative offences**

**77.—(1)** This article applies in relation to a trial by the Court Martial, and is without prejudice to section 161 of AFA 2006.

(2) Where the Court Martial acquits a person of an SDA offence specifically charged in the charge sheet, but the allegations in the charge sheet amount to or include (expressly or by implication) an allegation of—

(a) another SDA offence, or

(b) a service offence,

the court may convict the person of that other SDA offence or that service offence.

(3) Where the Court Martial acquits a person of a service offence specifically charged in the charge sheet, but the allegations in the charge sheet amount to or include (expressly or by implication) an allegation of an SDA offence, the court may convict him of the SDA offence.

(4) For the purposes of this article—

- (a) an allegation of an offence under any of sections 24 to 66 or 69 of AA 1955 or AFA 1955 (“offence X”) is to be taken to include an allegation of an offence under section 68 of attempting to commit offence X;
  - (b) an allegation of an offence under any of sections 2 to 39 of NDA 1957 (“offence Y”) is to be taken to include an allegation of an offence under section 40 of attempting to commit offence Y;
  - (c) an allegation of a completed SDA civil offence is to be taken to include an allegation of an SDA civil offence of attempting to commit that offence.
- (5) Paragraphs (2) and (3) apply in relation to a charge sheet containing more than one charge as if each charge were contained in a separate charge sheet.
- (6) In this article a “completed SDA civil offence” means an offence that would be an offence to which section 1 of the Criminal Attempts Act 1981(31) applies if subsection (4) of that section had effect as modified by section 70(2A) of AA 1955 or AFA 1955 or section 42(2A) of NDA 1957.

### **Sentencing powers where election for Court Martial trial**

**78.**—(1) An offence of which a person has been convicted or acquitted by the Court Martial is “relevant” for the purposes of section 165 of AFA 2006 (sentencing powers where election for Court Martial trial) if the person was tried for the offence in pursuance of an election for court-martial trial.

(2) In section 165(1)(c) of AFA 2006, the reference to Court Martial trial includes court-martial trial.

(3) Section 165(5) of AFA 2006 has effect as if the cases mentioned in paragraphs (a) and (b) included the following cases—

- (a) where the court convicts a person of an offence that is relevant by virtue of this article;
- (b) where the court convicts a person of two or more such relevant offences the charges in respect of which—
  - (i) would have been dealt with or tried summarily together if no election for court-martial trial had been made; or
  - (ii) are under Court Martial rules to be treated as if they would have been so dealt with or tried.

### **Appeals against pre-commencement orders restricting publicity etc**

**79.** In section 163(9) of AFA 2006 (rules relating to certain appeals)—

- (a) the reference to rules made by virtue of section 163(3)(i) includes any Court Martial rules that make provision, corresponding to that mentioned in section 163(3)(i), in relation to orders and directions of courts-martial or orders or rulings made in proceedings preliminary to a court-martial trial; and
- (b) the reference to appeals made by virtue of section 163(3)(i) includes appeals made under such rules.

## CHAPTER 2

## Unfitness to stand trial and insanity

**Continuation of hospital orders etc made before commencement**

**80.**—(1) Where immediately before commencement a hospital order or restriction order made by a court-martial by virtue of section 116A of AA 1955 or AFA 1955 or section 63A of NDA 1957 is in force, the order has effect after commencement as if made by the Court Martial by virtue of section 169 of AFA 2006.

(2) Where immediately before commencement there is in force any other order under the Mental Health Act 1983<sup>(32)</sup> made by a court-martial by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, the order has effect after commencement as if made by the Court Martial by virtue of Schedule 4 to AFA 2006.

(3) Where immediately before commencement a supervision order made by a court-martial under section 116A of AA 1955 or AFA 1955 or section 63A of NDA 1957 is in force, the order has effect after commencement as a service supervision order under section 169 of AFA 2006.

(4) Paragraphs (5) to (7) apply where immediately before commencement a hospital order or restriction order made by the Appeal Court is in force.

(5) If the order was made by virtue of section 16(2) of CMAA 1968, it has effect after commencement as if made by virtue of section 169 of AFA 2006 as applied by section 16(2) of CMAA 1968 (as substituted by AFA 2006).

(6) If the order was made by virtue of section 23(2) of CMAA 1968, it has effect after commencement as if made by virtue of section 169 of AFA 2006 as applied by sections 16(2) and 22(3A) of CMAA 1968 (as substituted by AFA 2006).

(7) If the order was made by virtue of section 25B of CMAA 1968, it has effect after commencement as if made by virtue of section 169 of AFA 2006 and section 25B of CMAA 1968 (as amended by AFA 2006).

(8) Paragraphs (9) to (11) apply where immediately before commencement there is in force any other order under the Mental Health Act 1983 made by the Appeal Court.

(9) If the order was made by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, as applied by section 16(4) of CMAA 1968, it has effect after commencement as if made by virtue of Schedule 4 to AFA 2006 as applied by section 16(2) of CMAA 1968 (as substituted by AFA 2006).

(10) If the order was made by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, as applied by section 23(4) of CMAA 1968, it has effect after commencement as if made by virtue of Schedule 4 to AFA 2006 as applied by sections 16(2) and 22(3A) of CMAA 1968 (as substituted by AFA 2006).

(11) If the order was made by virtue of section 25B of CMAA 1968, it has effect after commencement as if made by virtue of Schedule 4 to AFA 2006 and section 25B of CMAA 1968 (as amended by AFA 2006).

(12) Paragraphs (13) to (15) apply where immediately before commencement a supervision order made by the Appeal Court was in force.

(13) If the order was made by virtue of section 16(2) of CMAA 1968, it has effect after commencement as a service supervision order made by virtue of section 169 of AFA 2006 as applied by section 16(2) of CMAA 1968 (as substituted by AFA 2006).

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(32) 1983 c. 20.



(14) If the order was made by virtue of section 23(2) of CMAA 1968, it has effect after commencement as a service supervision order made by virtue of section 169 of AFA 2006 as applied by sections 16(2) and 22(3A) of CMAA 1968 (as substituted by AFA 2006).

(15) If the order was made by virtue of section 25B of CMAA 1968, it has effect after commencement as a service supervision order made by virtue of section 169 of AFA 2006 and section 25B of CMAA 1968 (as amended by AFA 2006).

(16) In paragraphs (2) and (8) to (11) “order” includes a remand.

(17) In this article references to an order made by the Appeal Court include an order made by the House of Lords or the Supreme Court on an appeal brought from a decision of the Appeal Court.

### **Remission for trial**

**81.**—(1) Without prejudice to the generality of article 80, where a hospital order and restriction order made by virtue of section 116A(1)(a) of AA 1955 or AFA 1955 or section 63A(1)(a) of NDA 1957 are continued in effect by that article, the orders are to be treated for the purposes of section 171 of AFA 2006 (remission for trial) as a hospital order and restriction order made by the Court Martial which the Court Martial had power to make by virtue of section 169(1)(a).

(2) Where—

- (a) a person has been remitted for court-martial trial under section 116B(5) of AA 1955 or AFA 1955 or section 63B(5) of NDA 1957, and
- (b) the trial has not begun by commencement,

the person is to be treated as having been remitted under section 171(1) of AFA 2006 for trial by the Court Martial.

(3) The first reference in paragraph (1) to a hospital order and restriction order made as mentioned there includes—

- (a) a hospital order and restriction order made by virtue of section 16(1)(b) or 23(2)(a) of CMAA 1968;
- (b) a hospital order and restriction order made by virtue of section 25B(1) of that Act in a case in which a finding within section 116A(1)(a) of AA 1955 or AFA 1955 or section 63A(1) (a) of NDA 1957 was made by a court-martial.

### **Finding that defendant who is unfit to stand trial did the act or made the omission charged**

**82.**—(1) Section 167 of AFA 2006 (duty to find whether defendant who is unfit to stand trial did the act or made the omission charged) applies (as well as in the case mentioned in subsection (1)) where—

- (a) under section 115A of AA 1955 or AFA 1955 or section 62A of NDA 1957 a person has been found to be unfit to stand trial; and
- (b) by commencement no determination had been made under section 115B of AA 1955 or AFA 1955 or section 62B of NDA 1957 (determination whether defendant did the act charged).

(2) Where section 167 of AFA 2006 applies by reason of this article, the reference in subsection (2) to “the court” is to the Court Martial.

### **Powers to make hospital orders etc**

**83.**—(1) Section 169 of AFA 2006 (Court Martial powers where person unfit to stand trial or not guilty by reason of insanity) applies (as well as in the case mentioned in subsection (1)) in the following cases—

- (a) where by virtue of article 82 the Court Martial finds that a defendant did the act (or made the omission) charged;
- (b) where on a trial by court-martial the defendant was found—
  - (i) to be unfit to stand trial and to have done the act (or made the omission) charged, or
  - (ii) to be not guilty by reason of insanity,
 and by commencement the court had not made an order by virtue of section 116A(2) of AA 1955 or AFA 1955 or section 63A(2) of NDA 1957.
- (2) Where section 169 of AFA 2006 applies by reason of this article—
  - (a) the reference in subsection (2) to “the court” is to the Court Martial;
  - (b) subsection (6) is to be treated as omitted;
  - (c) the functions referred to in subsection (6) are to be exercised by—
    - (i) the judge advocate who was judge advocate for the court-martial; or
    - (ii) if that judge advocate made an interim hospital order by virtue of section 116B of AA 1955 or AFA 1955 or section 63B of NDA 1957, that or any other judge advocate.

## CHAPTER 3

### Variation of court-martial sentence

#### **Variation of court-martial sentence**

**84.** Where under Court Martial rules the Court Martial varies a court-martial sentence, the sentence as varied must be a sentence that the court-martial could have passed.

## PART 12

### SENTENCING POWERS IN RELATION TO SDA OFFENCES

#### CHAPTER 1

##### Consecutive sentences

#### **Consecutive custodial sentences and consecutive service detention**

**85.**—(1) In section 188 of AFA 2006(**33**) (consecutive custodial sentences), references to a service offence include an SDA offence.

(2) The sentences referred to in subsection (4)(b) of that section are to be taken to include a determinate sentence of detention under section 71A(4) of AA 1955 or AFA 1955 or section 43A(4) of NDA 1957.

(3) In section 189 of that Act (consecutive sentences of service detention), the references in subsections (1) and (3) to any other sentence of service detention include an SDA sentence of service detention.

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(33) Section 188 of AFA 2006 is amended by the Criminal Justice and Immigration Act 2008 (c. 4), section 145 and Schedule 25, paragraphs 10 and 11.

## CHAPTER 2

### Young offenders

#### **Offenders under 18 convicted of certain serious SDA offences: power to detain for specified period**

**86.** In section 209 of AFA 2006<sup>(34)</sup> (detention for person under 18 convicted of serious offence)

- (a) references to an offence under section 42 of that Act include an SDA civil offence;
- (b) references to the corresponding offence under the law of England and Wales include the corresponding civil offence.

#### **Offenders under 18: detention and training orders**

**87.**—(1) In section 212 of AFA 2006 (term of detention and training order)—

- (a) subsection (1) has effect in relation to an SDA offence as if for the words “, 10, 12, 18 or 24 months” there were substituted “or 10 months”;
- (b) in subsection (2)—
  - (i) the reference to an offence under section 42 of that Act includes an SDA civil offence;
  - (ii) the reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence.

(2) Section 101(3) to (7) of the Powers of Criminal Courts (Sentencing) Act 2000<sup>(35)</sup> (which relate to consecutive terms of detention and training orders and are applied by section 213 of AFA 2006) have effect in relation to the sentencing of an offender by the Court Martial with the following modifications.

(3) In subsection (3), the reference to any other detention and training order includes an SDA custodial order.

(4) For the purposes of the references in each of subsections (4) and (5) to “detention and training orders”, an SDA custodial order is to be treated as a detention and training order.

(5) In relation to the sentencing by the Court Martial of an offender for an SDA offence, subsections (4), (5) and (7) have effect as if the references to 24 months were to 12 months.

(6) In section 213(3) of AFA 2006 (taking into account time spent in service custody), the reference to service custody is to be read, in relation to any time before commencement, as a reference to military custody, air-force custody or naval custody.

(7) In this article an “SDA custodial order” means—

- (a) an order under section 71AA of, or paragraph 10 of Schedule 5A to, AA 1955 or AFA 1955; or
- (b) an order under section 43AA of, or paragraph 10 of Schedule 4A to, NDA 1957.

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<sup>(34)</sup> Section 209 of AFA 2006 is amended by the Criminal Justice and Immigration Act 2008, section 145 and Schedule 25, paragraphs 10 and 12.

<sup>(35)</sup> 2000 c. 6.

## CHAPTER 3

### Mandatory etc sentences

#### **Mandatory life imprisonment etc**

**88.** In sections 217 and 218 of AFA 2006 (mandatory life imprisonment or detention at HM pleasure)—

- (a) references to an offence under section 42 of that Act include an SDA civil offence;
- (b) references to the corresponding offence under the law of England and Wales include the corresponding civil offence.

#### **Sentences required by SDAs**

**89.**—(1) This article applies where—

- (a) a person is convicted by the Court Martial of an SDA civil offence; and
- (b) if the person had been convicted of the offence by a court-martial immediately before commencement, that court would have been required by section 70(3A) of AA 1955 or AFA 1955 or section 42(1A) of NDA 1957 to impose the sentence required by section 109(2) of the Powers of Criminal Courts (Sentencing) Act 2000 unless of the opinion that there were exceptional circumstances which justified its not doing so.

(2) Where this article applies, the Court Martial must impose a sentence of life imprisonment unless it is of the opinion that there are exceptional circumstances which justify its not doing so.

(3) It is to be assumed for the purposes of this article that section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 remained in force for the purposes of section 70(3A) of AA 1955 and AFA 1955 and section 42(1A) of NDA 1957 until immediately before commencement.

(4) Sections 237, 252, 260 and 261 of AFA 2006 do not apply to an offence for which a sentence of life imprisonment falls to be imposed under this article.

## CHAPTER 4

### Court orders other than sentences

#### **Service restraining orders**

**90.** In section 230(3) of AFA 2006 (remission by Appeal Court of case to Court Martial), the reference to an appeal against conviction includes such an appeal brought from a court-martial.

#### **Recognizances**

**91.**—(1) In section 235(4) of AFA 2006 (variation or revocation of recognizance), the reference to an order under section 233 of that Act includes an order under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

(2) In section 236(1) of AFA 2006 (forfeiture of recognizance)—

- (a) the reference in paragraph (a) to a recognizance under section 233 of that Act includes a recognizance under paragraph 14(1) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957;
- (b) the reference in paragraph (b) to a service offence includes an SDA offence.

## CHAPTER 5

### Miscellaneous

#### **Power of Supreme Court to make service compensation order**

**92.** Where the Supreme Court restores a conviction of an offence of which the offender was convicted by a court-martial, it may make any service compensation order which the Court Martial could have made if it had convicted the offender.

## PART 13

### ACTIVATION OF SUSPENDED SENTENCES

#### CHAPTER 1

##### Interpretation

#### **Suspended sentences**

**93.**—(1) References in this Part to a sentence which is for the time being suspended are to a sentence which—

- (a) on a date not more than one year ago (“the suspension date”) was suspended under section 120(2) or (3) of AA 1955 or AFA 1955 or section 90(1) or (2) of NDA 1957; and
- (b) has not been activated since that date.

(2) For the purposes of paragraph (1)(b)—

- (a) a sentence of imprisonment is activated if an order in respect of it is made under section 120(5) of AA 1955 or AFA 1955, section 91(1) of NDA 1957 or article 94; and
- (b) an SDA sentence of service detention is activated if an order in respect of it is made under section 120(5) of AA 1955 or AFA 1955, section 91(1) or 91B(1) of NDA 1957 or (by virtue of any of articles 95 to 97) section 191(3) or 193(3) of AFA 2006.

(3) In paragraph (1)(a) the reference to suspension under section 90(1) of NDA 1957 includes suspension after commencement by virtue of article 55.

(4) In paragraph (2)(b) the reference to an order under section 91B(1) of NDA 1957 includes such an order made after commencement by virtue of article 55 or 62.

#### CHAPTER 2

##### Activation of suspended SDA sentence by the Court Martial

#### **Activation of suspended SDA sentence of imprisonment**

**94.**—(1) Where—

- (a) a sentence of imprisonment passed on a person by a court-martial is for the time being suspended, and

(b) the Court Martial convicts the person of an offence committed since the suspension date, the court may make an order under this article determining the suspension of the sentence and committing the person to imprisonment.

(2) Paragraph (1) is subject to any provision of Court Martial rules made by virtue of section 165(6) of AFA 2006 as modified by article 78(1) (powers of Court Martial where election for trial by that court or by court-martial).

- (3) An order under this article is an order—
  - (a) that the suspended sentence shall take effect with the original term unaltered; or
  - (b) that the suspended sentence shall take effect with the substitution of a lesser term for the original term.
- (4) In paragraph (1)(a) the reference to a sentence passed by a court-martial includes a sentence passed—
  - (a) by the Appeal Court before commencement; or
  - (b) by the House of Lords or the Supreme Court before commencement, on an appeal brought from a decision of the Appeal Court.

#### **Activation of suspended SDA sentence of service detention on conviction by Court Martial**

- 95.**—(1) Where—
- (a) an SDA sentence of service detention passed on a person is for the time being suspended, and
  - (b) the Court Martial convicts the person of an offence committed since the suspension date,
- the court may make an order under section 191(3) of AFA 2006 in respect of the sentence.
- (2) This article is subject to section 244 of AFA 2006 (limit on combined term of sentences) as modified by article 104.

#### **Activation of suspended NDA 1957 sentence of service detention following conviction by another court or a CO**

- 96.**—(1) Where—
- (a) an SDA sentence of service detention passed on a person by a court-martial under NDA 1957 is for the time being suspended,
  - (b) the person—
    - (i) has been convicted of a service offence,
    - (ii) has been convicted since commencement of an SDA offence, or
    - (iii) has been convicted of an offence in the British Islands,
  - (c) the offence was committed since the suspension date, and
  - (d) the person appears or is brought before the Court Martial following the issue of a summons or warrant under paragraph (8),
- the court may make an order under section 191(3) of AFA 2006 in respect of the sentence.
- (2) Paragraphs (3) to (6) apply where—
- (a) by virtue of this article the Court Martial makes an order under section 191(3) of AFA 2006 in respect of a sentence for a term of more than 90 days; and
  - (b) the sentence is not one to which paragraph (5) applies (by virtue of a previous order under section 191(3) of AFA 2006).
- (3) The order must be an order that the suspended sentence shall take effect with the substitution for the original term of a specified term, which must be 90 days or less.
- (4) For the purposes of section 244 of AFA 2006 (limitation of combined term of sentences) the term of the sentence is to be treated as the term specified in the order.
- (5) For the purposes of this Part, the part of the sentence that exceeds 90 days (“the excess”) is to be treated as a sentence passed by a court-martial under NDA 1957 and suspended under

section 90(1) of NDA 1957 on the date when the order under section 191(3) of AFA 2006 was made; but this is subject to paragraph (6).

(6) The court may order that paragraph (5)—

- (a) shall not apply; or
- (b) shall apply only in relation to a specified part of the excess.

(7) Where—

- (a) the Court Martial makes an order under section 191(3) of AFA 2006 by virtue of this article, and
- (b) the conviction mentioned in paragraph (1)(b) is a conviction by an officer or the Summary Appeal Court,

any unserved part of any service supervision and punishment order or minor punishment awarded by the officer or the Summary Appeal Court is remitted by the making of the order.

(8) If it appears to the Court Martial—

- (a) that paragraph (1)(a) to (c) apply, and
- (b) that the offender has not been dealt with in respect of the sentence mentioned in paragraph (1)(a),

the court may issue a summons requiring him to appear at the time and place specified in it, or a warrant for his arrest.

(9) This article is subject to section 244 of AFA 2006 (limit on combined term of sentences) as modified by article 104 and (where it applies) paragraph (4).

(10) In paragraph (1)(a) the reference to a sentence passed by a court-martial under NDA 1957 includes a sentence passed—

- (a) by the Appeal Court before commencement, on appeal from a court-martial under that Act; or
- (b) by the House of Lords or the Supreme Court before commencement, on an appeal brought from a decision of the Appeal Court where the appeal to that court was from a court-martial under that Act.

## CHAPTER 3

### Activation of suspended NDA 1957 sentence of service detention by CO or SAC

#### Activation by CO

97.—(1) Where—

- (a) an SDA sentence of service detention passed on a person by an officer under NDA 1957, or the summary appeal court under that Act, is for the time being suspended, and
- (b) an officer records a finding after commencement that a charge against the person is proved in respect of an offence committed since the suspension date,

the officer may make an order under section 193(3) of AFA 2006 in respect of the sentence.

(2) Where—

- (a) an SDA sentence of service detention passed on a person by an officer under NDA 1957, or the summary appeal court under that Act, is for the time being suspended,
- (b) the person has been convicted of an offence in the British Islands committed since the suspension date, and subsequently appears before his commanding officer, and
- (c) article 62 (activation under section 91B of NDA 1957 where application for approval made before commencement) does not apply,

the officer may make an order under section 193(3) of AFA 2006 in respect of the sentence.

(3) Where an officer makes an order under section 193(3) of AFA 2006 by virtue of this article, section 194(1) to (6) of AFA 2006 (maximum term of suspended sentence of service detention activated by CO) do not apply.

(4) Rules made under section 153 of AFA 2006 (rules as to summary hearings and the activation of suspended sentences by commanding officers) may make provision requiring an order under section 193(3) of AFA 2006 to be approved before it may be made by virtue of this article.

(5) This article is subject to section 244 of AFA 2006 (limit on combined terms of sentences) as modified by article 104.

### **Powers of SAC**

**98.**—(1) In section 195(1) of AFA 2006 (order activating suspended sentence to be treated as punishment for purposes of provisions about appeals and reviews) the reference to an order under section 193 includes an order under section 91B(1) of NDA 1957 (activation of suspended sentence).

(2) In section 195(2) of AFA 2006, the reference to the case where an order under section 193 was made by virtue of a finding within section 193(2)(a) includes the case where an order under section 91B(1) of NDA 1957 was made by virtue of a finding within section 91B(1)(a) of NDA 1957.

(3) On an appeal against an order under section 91B(1) of NDA 1957, the Summary Appeal Court may—

- (a) if no direction under section 91B(6) of NDA 1957 was given in respect of the sentence to which the order relates—
  - (i) quash the order;
  - (ii) confirm the order; or
  - (iii) make, in substitution for the order, an order under section 193(3) of AFA 2006;
- (b) if a direction under section 91B(6) of NDA 1957 was given in respect of the sentence to which the order relates—
  - (i) quash the order (and the direction);
  - (ii) confirm the order and the direction;
  - (iii) confirm the order and quash the direction; or
  - (iv) make, in substitution for the order and direction, an order under section 193(3) of AFA 2006.

(4) Section 195(9) of AFA 2006 (period of suspended sentence served to be taken into account) applies in relation to the Summary Appeal Court's powers under paragraph (3) to substitute an order under section 193(3).

(5) The Summary Appeal Court may make an order under section 193(3) of AFA 2006 on an appeal to that court in a case in which—

- (a) section 91B(1)(a) of NDA 1957 applied; and
- (b) the officer who awarded punishment did not make an order under section 91B(1).

(6) On an appeal to the Summary Appeal Court in a case in which section 91B(1)(a) of NDA 1957 applied—

- (a) section 147(3) of AFA 2006 has effect, as regards the Summary Appeal Court's powers of punishment in respect of the officer's finding (or any substituted finding), as if any requirement that the punishment be no more severe than the punishment originally awarded were omitted; but



(b) the court may not exercise its powers under section 147(3) or paragraph (3) or (5) above 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.

(7) On an appeal against an order under section 91B(1) of NDA 1957 made by virtue of section 91B(1)(b), the Summary Appeal Court may not exercise its powers under paragraph (3) above 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.

(8) References in this article and article 99 to an order under section 91B(1) of NDA 1957 include such an order made after commencement by virtue of article 55 or 62.

### **SAC powers where suspended sentence of more than 90 days**

**99.**—(1) This article applies where by virtue of article 98(3) the Summary Appeal Court substitutes an order under section 193(3) of AFA 2006 for an order under section 91B(1) of NDA 1957 in respect of a sentence for a term of more than 90 days.

(2) The order must be an order that the suspended sentence shall take effect with the substitution for the original term of a specified term, which must be 90 days or less.

(3) For the purposes of section 244 of AFA 2006 (limitation of combined term of sentences) the term of the sentence is to be treated as the term specified in the order under section 193(3).

(4) For the purposes of this Part, the part of the sentence that exceeds 90 days is to be treated as a sentence passed by a court-martial under NDA 1957 and suspended under section 90(1) of NDA 1957 on the date when the order under section 91B(1) of NDA 1957 was made.

## **CHAPTER 4**

### **Consecutive activated sentences**

#### **Activated SDA sentence of imprisonment**

**100.**—(1) An order under article 94 (activation of suspended SDA sentence of imprisonment) may provide that the sentence to which it relates shall take effect—

- (a) immediately;
- (b) from the end of another term of imprisonment which the court passes on the offender on the same occasion; or
- (c) from the end of another term of imprisonment which has been passed on the offender on a previous occasion.

(2) In paragraph (1)(c) the reference to another term of imprisonment which has been passed on the offender does not include a term from which he has been released early under Part 2 of the Criminal Justice Act 1991(36) or Chapter 6 of Part 12 of the Criminal Justice Act 2003(37).

#### **Activated sentence of service detention**

**101.** In sections 191(4) and 193(4) of AFA 2006 (powers to make activated sentence of service detention consecutive to another sentence) references to any other sentence of service detention that has been passed on a person on a previous occasion include an SDA sentence of service detention.

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(36) 1991 c. 53.

(37) 2003 c. 44.

## PART 14

### SENTENCING PRINCIPLES AND PROCEDURES

#### **Sentencing principles and procedures: references to “service offence”, “service custody”, etc**

**102.** In Part 9 of AFA 2006 (sentencing: principles and procedures)—

- (a) any reference to a service offence (except the reference in section 237(1)(c)) includes an SDA offence;
- (b) any reference to service custody is to be read, in relation to any time before commencement, as a reference to military custody, air-force custody or naval custody;
- (c) any reference to a person’s being “charged” with an offence includes a person’s being informed in accordance with regulations of the Defence Council that a charge is to be reported to the person’s commanding officer under section 76(1) of AA 1955 or AFA 1955 or section 52B(1) of NDA 1957.

#### **Increase in sentence for racial or religious aggravation**

**103.** In section 240(3) of AFA 2006 (offences to which section 240 does not apply)—

- (a) the reference to an offence under section 42 of that Act includes an SDA civil offence;
- (b) the reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence.

#### **Limit on combined term of service detention**

**104.**—(1) Section 244 of AFA 2006 (limit on combined term of sentences of service detention) is modified as follows.

(2) For the purposes of the references in subsections (1) and (3) to “sentences of service detention”, an SDA sentence of service detention is to be treated as a sentence of service detention.

(3) In subsection (4) the reference to a sentence of service detention includes an SDA sentence of service detention.

#### **Limit on combined term: supplementary**

**105.**—(1) Paragraphs (2) and (3) below apply, in addition to section 245 of AFA 2006, for the purposes of section 244 of that Act as modified by article 104.

(2) A person is to be regarded as not subject to an SDA sentence of service detention if the sentence is for the time being suspended, within the meaning given by article 93.

(3) Subject to paragraph (2), a person is to be regarded as subject to any SDA sentence of service detention that has been passed on him but—

- (a) has not taken effect; or
- (b) has ceased to have effect as a result of a relevant provision and has not resumed effect.

(4) In paragraph (3) “a relevant provision” means—

- (a) section 118ZA(3) or (4) of AA 1955 or AFA 1955;
- (b) section 85A(4) or (5) of NDA 1957; or
- (c) section 290(5) or (6) or 291(6) or (7) of AFA 2006.

(5) Section 245 of AFA 2006 (provision supplementary to section 244) is modified as follows.

(6) For the purposes of the reference in subsection (5) to two or more sentences of service detention, an SDA sentence of service detention is to be treated as a sentence of service detention.

(7) The reference in subsection (6) to section 290(3), (5) or (6) or 291(5), (6) or (7) includes a reference to section 118ZA(3) or (4) of AA 1955 or AFA 1955 or section 85A(4) or (5) of NDA 1957.

### **Crediting of time in service custody**

**106.**—(1) In section 246 of AFA 2006 (crediting of time in service custody), the reference in subsection (3)(a)(i) to a sentence of service detention includes an SDA sentence of service detention.

(2) In section 247 of AFA 2006 (crediting of time in service custody: supplementary), in subsection (3), the reference to a suspended sentence of imprisonment or a suspended sentence of service detention includes a sentence of imprisonment, or an SDA sentence of service detention, which (until an order that it shall take effect is made) is suspended within the meaning given by article 93.

(3) For the purposes of the references in subsection (5) of that section to consecutive terms of service detention and terms of service detention which are wholly or partly concurrent, an SDA sentence of service detention is to be treated as a term of service detention.

## **PART 15**

### **APPEALS AND REFERENCES TO THE COURT MARTIAL APPEAL COURT**

#### **Interpretation**

**107.** In this Part, “sentence” has the same meaning as in CMAA 1968.

#### **Right of appeal against conviction or sentence by court-martial**

**108.**—(1) In section 8(1) of CMAA 1968 the reference to the Court Martial includes a court-martial.

(2) Where—

(a) a court-martial dealt with a person—

(i) under paragraph 3(2) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 for an offence in respect of which an order for conditional discharge had previously been made, or

(ii) under paragraph 4(8) of any of those Schedules for an offence in respect of which a community supervision order had previously been made, and

(b) the person was convicted of the offence by a Standing Civilian Court,

he is to be treated for the purposes of section 8(1) of CMAA 1968 as if he had been convicted of the offence by the court-martial.

(3) In subsection (5) of section 268 of AFA 2006 (order that fine or compensation be paid by service parent or guardian) the reference to an order under that section includes an order made by a court-martial under paragraph 13 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

(4) No appeal shall lie from—

(a) an order by a court-martial under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 requiring an offender’s service parent or guardian to enter into a recognisance; or

- (b) a declaration by a court-martial that such a recognisance is forfeited (in whole or in part).

**Right of appeal against activation of suspended SDA sentence by Court Martial or court-martial**

**109.**—(1) Section 192 of AFA 2006 applies in relation to an order under article 94 (activation of suspended SDA sentence of imprisonment by Court Martial) as it applies in relation to an order under section 191 of AFA 2006.

(2) Section 192(1) to (3) of AFA 2006 apply in relation to an order under section 120(5) of AA 1955 or AFA 1955 or section 91(1) of NDA 1957 (activation of suspended sentence of imprisonment or detention by court-martial) as they apply in relation to an order under section 191 of AFA 2006.

**Application for leave to appeal against sentence by court-martial where previous conviction set aside**

**110.** Section 228(3) of AFA 2006 applies, notwithstanding anything in section 9(1) of CMAA 1968, where—

- (a) a court-martial has sentenced a person for an SDA civil offence;
- (b) the corresponding civil offence was one to which section 109 of the Powers of Criminal Courts (Sentencing) Act 2000(38) would apply;
- (c) the court imposed a sentence of life imprisonment or custody for life in accordance with section 70(3A) of AA 1955 or AFA 1955 or section 42(1A) of NDA 1957; and
- (d) any previous conviction of the person's without which section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 would not have applied to the corresponding civil offence has been subsequently set aside on appeal.

**Quashing of conviction by court-martial**

**111.** In section 12(1)(a) of CMAA 1968 (duty to allow appeal against unsafe conviction), the reference to the Court Martial includes a court-martial.

**Power to re-sentence when some but not all convictions successfully appealed**

**112.**—(1) This article applies, and section 13 of CMAA 1968 does not apply, where—

- (a) on a single occasion a person was sentenced by a court-martial in respect of two or more offences; and
- (b) the Appeal Court allows an appeal against conviction in respect of some but not all of the offences.

(2) If the appellant remains convicted of only one of the offences, the Appeal Court may pass a sentence in substitution for the sentence passed by the court-martial in respect of that offence.

(3) If—

- (a) the appellant remains convicted of two or more of the offences,
- (b) the court-martial passed more than one sentence in respect of the offences of which he remains convicted, and
- (c) any of those sentences was in respect of only one of those offences,

the Appeal Court may pass a sentence in substitution for that sentence.

(4) If—

- (a) the appellant remains convicted of two or more of the offences, and
- (b) any sentence passed by the court-martial was in respect of more than one of the offences of which he remains convicted,

the Appeal Court may pass, in substitution for that sentence, separate sentences in respect of both or all of the offences of which he remains convicted and in respect of which that sentence was passed.

- (5) A sentence passed under this article in respect of an offence must be a sentence that—
  - (a) the court thinks appropriate; and
  - (b) the Court Martial would have had power to pass in respect of the offence if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant of the offence.

(6) But the Appeal Court may not exercise its powers under this article 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.

#### **Substitution of conviction on different charge otherwise than after guilty plea**

- 113.**—(1) This article applies, and section 14 of CMAA 1968 does not apply, where—
- (a) an appellant has been convicted by a court-martial of an offence to which he did not plead guilty (“offence A”);
  - (b) the court-martial could lawfully have found him guilty of some other offence (“offence B”); and
  - (c) it appears to the Appeal Court on an appeal against conviction that the court-martial must have been satisfied of facts which prove him guilty of offence B.

(2) The Appeal Court may, instead of allowing or dismissing the appeal, substitute for the finding in relation to offence A a finding of guilty of offence B.

- (3) Where the Appeal Court exercises the power conferred by paragraph (2), it may exercise any power that it would have had if—
  - (a) the court-martial had convicted the appellant of offence B instead of offence A;
  - (b) the court-martial had passed, in respect of offence B (and any other offence in respect of which the sentence in respect of offence A was passed), the sentence that it passed in respect of offence A; and
  - (c) the appellant had appealed against that sentence.

#### **Substitution of conviction on different charge after guilty plea**

- 114.**—(1) This article applies, and section 14A of CMAA 1968 does not apply, where—
- (a) an appellant has been convicted by a court-martial of an offence to which he pleaded guilty (“offence A”);
  - (b) if he had not so pleaded, he could lawfully have pleaded guilty to, or been found guilty of, some other offence (“offence B”); and
  - (c) it appears to the Appeal Court on an appeal against conviction that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of offence B.

(2) The Appeal Court may, instead of allowing or dismissing the appeal, substitute for the appellant’s plea of guilty a plea of guilty of offence B.

- (3) Where the Appeal Court exercises the power conferred by paragraph (2), it may exercise any power that it would have had if—

- (a) the appellant had been charged with, and had pleaded guilty to, offence B instead of offence A;
- (b) the court-martial had passed, in respect of offence B (and any other offence in respect of which the sentence in respect of offence A was passed), the sentence that it passed in respect of offence A; and
- (c) the appellant had appealed against that sentence.

#### **Variation of conviction so as to attract different sentence**

**115.**—(1) On an appeal against conviction by court-martial, section 15(1) and (2) of CMAA 1968 apply notwithstanding their repeal by AFA 2006.

(2) Where the Appeal Court exercises the power conferred by section 15(1) of CMAA 1968, article 113 or 114 (as the case may be) applies as if references to guilt of offence B were to guilt of offence A in circumstances involving the lower of the two degrees of punishment mentioned in that subsection.

(3) Where the Appeal Court exercises the power conferred by section 15(2) of CMAA 1968, article 113 or 114 (as the case may be) applies as if references to guilt of offence B were to guilt of offence A subject to the exceptions or variations to which the finding substituted by the court is subject.

#### **Effect of appeal, or application for leave to appeal, against sentence**

**116.** Section 16A(1) of CMAA 1968 (appeal, or application for leave to appeal, against one sentence treated as appeal or application in respect of other sentences) applies where a court-martial passed two or more sentences on a person on the same occasion.

#### **Powers of Appeal Court on appeal against sentence**

**117.**—(1) This article applies, and section 16A(2) and (3) of CMAA 1968 do not apply, on an appeal against one or more sentences passed by a court-martial.

(2) If the appeal is against a sentence passed in respect of one offence, the Appeal Court may pass a sentence in substitution for that sentence.

(3) If the appeal is against a sentence passed in respect of two or more offences, the Appeal Court may pass, in substitution for that sentence, separate sentences in respect of both or all the offences.

(4) If the appeal is against two or more sentences, paragraph (2) or (3) (as the case may be) applies in relation to each of the sentences.

(5) A sentence passed under this article in respect of an offence must be a sentence that—

- (a) the court thinks appropriate; and
- (b) the Court Martial would have had power to pass in respect of the offence if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant of the offence.

(6) But the Appeal Court may not exercise its powers under this article 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.

(7) If the sentence (or any of the sentences) passed by the court-martial included an order under section 120(5) of AA 1955 or AFA 1955 or section 91(1) of NDA 1957 (activation of suspended sentence), paragraphs (2) and (3) do not apply in relation to the order; but the Appeal Court may—

- (a) substitute for the order any order which the Court Martial would have had power to make under article 94 or (by virtue of article 95 or 96) section 191 of AFA 2006 if—

- (i) Parts 1 to 13 of that Act, and this Order, had been in force at the time of the conviction by virtue of which the court-martial made the order, and
- (ii) that conviction had been by the Court Martial;
- (b) quash the order; or
- (c) if the court-martial gave a direction under section 120(5B) of AA 1955 or AFA 1955 or section 91(2) of NDA 1957 (activated sentence to run from the end of another sentence), quash the direction.

(8) In relation to an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 (failure to comply with requirements of a community supervision order) as respects which the court-martial imposed a fine under paragraph 4(10) of that Schedule, any reference in this article to a sentence which the Court Martial would have had power to pass in respect of the offence is to be read as a reference to any punishment in rows 2 to 7 of the Table in Part 1 of Schedule 3 to AFA 2006.

### **Term of sentence**

**118.**—(1) In section 17(1) of CMAA 1968 (term of sentence) the reference to a sentence passed by the Appeal Court under section 13, 14, 14A or 16A of that Act includes a sentence passed under article 112, 113, 114 or 117.

(2) In relation to a sentence passed by the Appeal Court in substitution for a sentence passed by a court-martial, the reference in section 17(1) of CMAA 1968 to the day on which the Court Martial passed sentence is to the day on which the court-martial passed sentence.

### **Retrial authorised by Appeal Court**

**119.**—(1) Where the Appeal Court has made (whether before or after commencement) an order under section 19 of CMAA 1968 (power to authorise retrial) on quashing a conviction by court-martial, subsection (3) of that section applies without the amendments made by AFA 2006.

(2) In paragraph (1), the reference to a conviction by court-martial includes a finding of not guilty by reason of insanity.

(3) Where—

- (a) before commencement, the Appeal Court made an order under section 19 of CMAA 1968 for the retrial of a person on a charge, and
- (b) the charge is current at commencement,

the charge is to be regarded for the purposes of Part 5 of AFA 2006 as allocated for Court Martial trial.

(4) For the purposes of this article a charge is “current at commencement” if, at commencement—

- (a) neither article 25 of this Order (saving of existing bars to service proceedings) nor Chapter 3 of Part 2 of AFA 2006 (double jeopardy) as modified by this Order prohibits the trial of the person by the Court Martial for the offence to which the charge relates;
- (b) proceedings on the charge have not been stayed; and
- (c) proceedings on the charge have not been discontinued under section 83B(8) of AA 1955 or AFA 1955 or section 52I(7) of NDA 1957, and no other charge has been substituted for it.

(5) In section 20(1) of CMAA 1968 (requirement of leave for arraignment more than three months after making of order for retrial) the reference to an order under section 19 of that Act includes one made before commencement.

**Appeal against finding of not guilty by reason of insanity**

**120.**—(1) In section 21(1) of CMAA 1968 (appeal against finding of not guilty by reason of insanity) the reference to the Court Martial includes a court-martial.

(2) In relation to an appeal brought by virtue of paragraph (1), the references to the Court Martial in section 22(2) and (3A) of CMAA 1968 are to be read as references to the court-martial.

(3) Paragraph (4) applies, and section 22(3) of CMAA 1968 does not apply, where the Appeal Court substitutes a finding of guilty of an offence for a finding by court-martial of not guilty by reason of insanity.

(4) The Appeal Court shall have the like powers of sentencing the appellant, and other powers, as the Court Martial would have had if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant of the offence on the date when the court-martial found him not guilty by reason of insanity; and section 17 of CMAA 1968 applies as in the case of a sentence passed by the Appeal Court under article 112, 113, 114 or 117.

**Appeal against finding of unfitness to stand trial**

**121.**—(1) In section 24(1) of CMAA 1968 (appeal against finding of unfitness to stand trial) the reference to the Court Martial includes a court-martial.

(2) Where, before commencement, the Appeal Court allowed an appeal under section 24 of CMAA 1968, paragraph (b) of section 25(2) of that Act applies as if the court had made an order under paragraph (a) of that subsection.

(3) Where section 20 of CMAA 1968 applies by virtue of paragraph (2) above—

- (a) the Appeal Court is to be regarded for the purposes of that section as having made an order under section 25(2)(a) of that Act on the date on which the court allowed the appeal; and
- (b) references in that section to the setting aside of the order under section 19 of that Act are to be read as references to a direction by the Appeal Court that paragraph (2) above shall cease to apply.

**Appeal against order made in cases of insanity or unfitness to stand trial**

**122.**—(1) In section 25A(1) of CMAA 1968 (appeal against hospital order etc) the reference to the Court Martial includes a court-martial.

(2) For the purposes of that subsection as it applies in relation to an order made by a court-martial, the reference in section 25A(2) of CMAA 1968 to a service supervision order is to be read as a reference to a supervision order.

(3) In relation to an appeal under section 25A of CMAA 1968 by virtue of paragraphs (1) and (2) above, references in section 25B(1) of that Act to the Court Martial are to be read as references to the court-martial.

(4) For the purposes of section 25B(1) of CMAA 1968 (disposal of appeal against hospital order etc) as modified by paragraph (3) above, the court-martial shall be regarded as having had power to make a service supervision order (as defined by section 170 of AFA 2006) if it had power to make a supervision order.

(5) In section 25B(4) of CMAA 1968, the reference to a service supervision order includes a supervision order.

(6) In this article, “supervision order” has the meaning given by section 116A(6) of AA 1955 or AFA 1955 or section 63A(6) of NDA 1957, as the case may be.



### **Costs of successful appeal**

**123.** In relation to an appeal from a court-martial, section 31 of CMAA 1968 applies without the amendment made by AFA 2006.

### **Reference of cases by Service authorities**

**124.—(1)** In section 34(1) of CMAA 1968, the first reference to the Court Martial includes a court-martial.

(2) In relation to a person convicted by a court-martial, other references in section 34 of that Act to the Court Martial are to be read as references to the court-martial.

(3) Section 34(1) and (2) of CMAA 1968 apply in relation to a finding by a court-martial of not guilty by reason of insanity as they apply in relation to a conviction by court-martial.

### **Provision of record of proceedings of court-martial**

**125.** In relation to an appeal or application for leave to appeal from a court-martial, section 37 of CMAA 1968 has effect as if for the words “a record of the proceedings of the Court Martial” there were substituted “a record of the proceedings of the court-martial and any petition presented by the appellant or applicant”.

### **Appeal to House of Lords or Supreme Court**

**126.—(1)** In relation to an appeal brought from a decision of the Appeal Court before commencement, the reference in section 41(3) of CMAA 1968 (powers of the Supreme Court) to the powers of the Appeal Court is to be read as to the powers that the Appeal Court would have had if it had heard the appeal after commencement.

(2) Where—

(a) the Secretary of State made an application before commencement for leave to appeal to the House of Lords or the Supreme Court, and

(b) the Appeal Court, the House of Lords or the Supreme Court dismisses the application,

section 47(1) of CMAA 1968 applies as if the application had been made by the Director of Service Prosecutions.

(3) In relation to an appeal from a decision of the Appeal Court where the appeal to that court was brought from a court-martial, section 47(3) of CMAA 1968 applies without the amendment made by AFA 2006.

### **Duties of registrar with respect to appeals etc**

**127.** In relation to an appeal or application for leave to appeal from a court-martial, section 50(1) of CMAA 1968 (duties of registrar with respect to appeals etc) applies without the amendment made by AFA 2006.

### **Saving for prerogative**

**128.** In section 54(1) of CMAA 1968 (saving for right of Her Majesty to quash a conviction) the reference to the Court Martial includes a court-martial.

### **Review of unduly lenient sentence for SDA offence**

**129.—(1)** Where, immediately before commencement, a reference has been made under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957 (review of unduly

lenient sentence by Appeal Court) but the Appeal Court has not concluded its review of the case, the reference has effect after commencement as a reference under section 273(1) of AFA 2006.

(2) In section 273(1)(a) of AFA 2006—

(a) the reference to a sentence passed by the Court Martial—

(i) includes a sentence passed by a court-martial;

(ii) does not include a sentence passed on an appeal under paragraph 18 of Schedule 3 to AFA 1976 or by virtue of article 134 (appeal from Standing Civilian Court);

(b) the reference to an offence under section 42 of AFA 2006 includes an SDA civil offence.

(3) In relation to a sentence passed by the Court Martial in respect of an SDA civil offence, the reference in section 273(2) of AFA 2006 to the corresponding offence under the law of England and Wales is to be read as a reference to the corresponding civil offence.

(4) In relation to a sentence passed by a court-martial, section 273(1) of AFA 2006 has effect as if for paragraph (b) there were substituted—

“(b) that section 113C of the [Army Act 1955 \(c. 18\)](#) or the [Air Force Act 1955 \(c. 19\)](#) or section 71AC of the [Naval Discipline Act 1957 \(c. 53\)](#) applied to the case;”;

and section 273(2) and (3) of AFA 2006 do not apply.

(5) For the purposes of section 273(1)(a) of AFA 2006, the Attorney General may consider that a sentence passed by the Court Martial is unduly lenient if he considers that the sentence is not that required by article 89 (sentences required by SDAs); but this paragraph is without prejudice to section 273(6) of AFA 2006, and nothing in it limits section 273(1)(a).

(6) For the purposes of section 273(1)(a) of AFA 2006, the Attorney General may consider that a sentence passed by a court-martial is unduly lenient if he considers—

(a) that the court-martial erred in law as to its powers of sentencing; or

(b) that the sentence is not that required by section 70(3A) of AA 1955 or AFA 1955 or section 42(1A) of NDA 1957;

but nothing in this paragraph limits section 273(1)(a) of AFA 2006.

(7) Where, immediately before commencement, leave for a reference has been granted under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957 but the reference has not been made, the leave has effect after commencement as leave granted under section 273(4) of AFA 2006.

(8) Paragraphs (9) to (11) apply, and section 273(5) of AFA 2006 does not apply, on a reference under section 273(1) of that Act of a case in which sentence was passed by a court-martial (including a reference which by virtue of paragraph (1) above has effect as a reference under that subsection).

(9) If the court-martial passed sentence in respect of one offence, article 117(2) applies as if the reference were an appeal against the sentence; but article 117(6) does not apply.

(10) If the court-martial passed one sentence in respect of two or more offences, article 117(3) applies as if the reference were an appeal against the sentence; but article 117(6) does not apply.

(11) If the court-martial passed two or more sentences, article 117(4) applies as if the reference were an appeal against the sentences; but article 117(6) does not apply.

(12) On—

(a) a reference which by virtue of paragraph (1) has effect as a reference under section 273(1) of AFA 2006, or

(b) a reference under that subsection of a case in which sentence was passed by a court-martial, where the Attorney General applied for leave to refer the case under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957 before commencement,

section 273(7) of AFA 2006(39) applies as enacted.

(13) In section 274(1) of AFA 2006 (reference of point of law to Supreme Court), the reference to a case referred to the Appeal Court under section 273(1) of that Act includes a case referred to the Appeal Court under section 113C(1) of AA 1955 or AFA 1955 or section 71AC(1) of NDA 1957.

(14) Where—

(a) a point of law has been referred to the House of Lords or the Supreme Court under section 113C(4) of AA 1955 or AFA 1955 or section 71AC(4) of NDA 1957, and

(b) neither the House of Lords nor the Supreme Court has exercised its powers under that subsection,

section 274(4) and (5) of AFA 2006 apply as if the point of law had been referred under section 274(1).

### **Compensation for miscarriages of justice**

**130.**—(1) For the purposes of section 276 of AFA 2006(40) (compensation for miscarriages of justice) a person who was convicted by a court-martial is to be regarded as having been convicted by the Court Martial; but that section does not apply in relation to such a person if—

(a) any compensation assessed to be payable to him under section 10 of AFA 1991 was paid in full before commencement; or

(b) the Secretary of State determined under section 10(3) of that Act that there was no right to such compensation.

(2) Section 276(7A) of AFA 2006 does not apply in relation to a conviction as respects which an application for compensation was made under section 10 of AFA 1991 before commencement.

(3) In relation to a conviction which was reversed before commencement, or a pardon which was given before commencement, the reference in section 276(3) of AFA 2006 to the date on which the conviction is reversed, or the person concerned is pardoned, is to be read as a reference to commencement.

(4) Where an application for compensation under section 10 of AFA 1991 was made before commencement but the Secretary of State did not determine under section 10(3) of that Act whether there was a right to compensation, the application is to be regarded as an application for compensation under section 276 of AFA 2006.

(5) Where the Secretary of State determined that there was a right to compensation under section 10 of AFA 1991 but the amount payable was not assessed—

(a) the Secretary of State is to be regarded as having determined that there is a right to compensation under section 276 of AFA 2006;

(b) any person appointed under section 10(4) of AFA 1991 to assess the amount payable is to be regarded as having been appointed under section 276(5) of AFA 2006;

(c) section 276(6) of AFA 2006 applies as if the substitution made by the Criminal Justice and Immigration Act 2008 had not been made; and

(d) sections 276A and 276B of AFA 2006(41) do not apply.

(6) Where the amount of any compensation payable under section 10 of AFA 1991 was assessed under that section but the compensation so assessed was not paid in full before commencement—

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(39) Section 273(7) of AFA 2006 is substituted by the Criminal Justice and Immigration Act 2008 (c. 4), section 145 and Schedule 25, paragraphs 10 and 28.

(40) Section 276 of AFA 2006 is amended by the Criminal Justice and Immigration Act 2008, section 145 and Schedule 25, paragraphs 10 and 29.

(41) Sections 276A and 276B of AFA 2006 are inserted by the Criminal Justice and Immigration Act 2008, section 145 and Schedule 25, paragraphs 10 and 30.

- (a) the amount so assessed is the amount payable under section 276 of AFA 2006, and subsection (5) of that section does not apply; and
- (b) any sums paid in pursuance of the assessment are to be regarded as having been paid under that section.

## PART 16

### STANDING CIVILIAN COURTS AND THE SERVICE CIVILIAN COURT

#### **Constitution of the Service Civilian Court**

**131.** If before commencement a person is specified by or on behalf of the Judge Advocate General to be the judge advocate for Service Civilian Court proceedings intended to take place after commencement, the specification has effect after commencement as a specification under section 278(2) of AFA 2006.

#### **Arraignment before a Standing Civilian Court**

**132.**—(1) SCC rules may provide that a plea offered on arraignment before a Standing Civilian Court is to be treated, for such purposes as may be specified, as having been offered on arraignment before the Service Civilian Court.

(2) Section 279 of AFA 2006 (consideration of whether trial by Court Martial more appropriate) does not apply in relation to a charge on which the defendant was arraigned before a Standing Civilian Court.

#### **Maximum fine for SDA civil offence**

**133.** In section 284(2) of AFA 2006 (maximum fine by Service Civilian Court for criminal conduct offence)—

- (a) the reference to an offence under section 42 of that Act includes an SDA civil offence;
- (b) the reference to the corresponding offence under the law of England and Wales includes the corresponding civil offence.

#### **Appeal against conviction or sentence by Standing Civilian Court**

**134.**—(1) In section 285(1) of AFA 2006 (appeal to the Court Martial), the reference to a person convicted by the Service Civilian Court includes a person convicted by a Standing Civilian Court.

(2) Where such a person brought an appeal under paragraph 18 of Schedule 3 to AFA 1976 and the appeal has not been determined or abandoned, the appeal is to be regarded as an appeal under section 285 of AFA 2006.

(3) Any appeal by such a person must be brought within 40 days of the court's sentence, and section 285(3) and (4) of AFA 2006 do not apply in relation to such an appeal.

(4) On an appeal by such a person, the Court Martial may only pass a sentence that the Service Civilian Court could have passed if Parts 1 to 13 of AFA 2006 had been in force and that court had convicted the appellant on the date on which the Standing Civilian Court convicted him; and section 286(6) of AFA 2006 does not apply.

(5) On an appeal against a fine imposed by a Standing Civilian Court under paragraph 4(10) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 (fine for offence of failure to comply with requirements of a community supervision order), the Court Martial—

- (a) may substitute any punishment in rows 2 to 7 of the Table in Part 1 of Schedule 3 to AFA 2006; but
  - (b) may not deal with the offender for the offence for which the community supervision order was made.
- (6) In section 268(5) of AFA 2006 (appeal against order that fine or compensation be paid by service parent or guardian) references to an order under section 268 include an order made by a Standing Civilian Court under paragraph 13 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.
- (7) No appeal shall lie from—
- (a) an order by a Standing Civilian Court under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 requiring an offender’s service parent or guardian to enter into a recognisance; or
  - (b) a declaration by a Standing Civilian Court that such a recognisance is forfeited (in whole or in part).
- (8) In relation to an appeal by a person convicted by a Standing Civilian Court, references in section 287 of AFA 2006 (findings made and sentences passed by Court Martial on appeal from SCC) to the Service Civilian Court are to be read as references to the Standing Civilian Court.

## PART 17

### SERVICE AND EFFECT OF SENTENCES IN RESPECT OF SDA OFFENCES

#### CHAPTER 1

##### General

#### **General saving for SDA sentences**

**135.** A punishment awarded before commencement under an enactment repealed by AFA 2006 is not affected by the coming into force of the repeal of the enactment under which it was awarded, or by article 6.

#### CHAPTER 2

##### Custodial sentences and detention

#### **Committal orders under NDA 1957: custodial sentences**

**136.—**(1) This article applies where—

- (a) a person has been sentenced under NDA 1957 to an SDA custodial sentence; and
- (b) at commencement, no committal order has been issued under section 81(3) of that Act in respect of the sentence.

(2) Subject to paragraph (3), the sentence shall be sufficient warrant for sending the person to such place as the Commandant of the Military Corrective Training Centre may direct, and detaining him in service custody until he reaches that place; and, accordingly, no committal order shall be required.

(3) Where the sentence has been suspended under section 90 of NDA 1957, and no order has been made under section 91(1) of that Act in respect of it—

- (a) paragraph (2) does not apply unless an order is made under article 94 in respect of the sentence; but
- (b) any such order shall have the effect mentioned in paragraph (2).

**Committal orders under NDA 1957: sentences of service detention**

137.—(1) Paragraphs (2) to (4) apply where—

- (a) a person has before commencement been sentenced to detention under section 43(1)(e) of NDA 1957; and
- (b) at commencement, no committal order has been issued under section 81(3) of that Act in respect of the sentence.

(2) Subject to paragraphs (3) and (4), the sentence shall be sufficient warrant for sending the person in service custody to the Military Corrective Training Centre; and, accordingly, no committal order shall be required.

(3) Where the sentence has been suspended under section 90 of NDA 1957, and at commencement no order has been made under section 91(1) or 91B(1) of that Act in respect of it—

- (a) paragraph (2) does not apply unless an order is made under section 91B(1) of that Act (by virtue of article 55 or 62), or section 191(3) or 193(3) of AFA 2006 (by virtue of any of articles 95 to 97), in respect of the sentence; but
- (b) any such order shall have the effect mentioned in paragraph (2).

(4) Where the sentence was passed by an officer and, immediately before commencement, was suspended by virtue of section 85A(4) of NDA 1957, paragraph (2) applies only when the sentence takes effect by virtue of section 290 or 291 of AFA 2006 (as modified by article 138 or 140).

(5) Where—

- (a) a person is sentenced to detention under section 43(1)(e) of NDA 1957 by virtue of article 55 (award of SDA punishment for offence found proved before commencement), and
- (b) the sentence is not suspended under section 90 of NDA 1957,

the sentence shall be sufficient warrant for sending the person in service custody to the Military Corrective Training Centre; but this is subject to sections 290 and 291 of AFA 2006 (as modified by article 142).

(6) Where—

- (a) a person is sentenced to detention under section 43(1)(e) of NDA 1957 by virtue of article 55,
- (b) the sentence is suspended under section 90 of NDA 1957, and
- (c) an order under section 191(3) or 193(3) of AFA 2006 is made (by virtue of any of articles 95 to 97) in respect of the sentence,

the order shall be sufficient warrant for sending the person in service custody to the Military Corrective Training Centre; but, in the case of an order under section 193(3) of AFA 2006, this is subject to sections 290 to 292 of that Act (as modified by article 144).

**Commencement of SDA sentence of service detention awarded by CO: sentence not running at commencement**

138.—(1) This article applies where—

- (a) immediately before commencement, an SDA sentence of service detention awarded by an officer (or the remainder of such a sentence) was suspended by virtue of section 118ZA(3) or (4) of AA 1955 or AFA 1955 or section 85A(4) or (5) of NDA 1957 (commencement of sentence of detention awarded by CO); and
- (b) either—

- (i) the officer did not make an order under section 118A(2) of AA 1955 or AFA 1955 or section 86(2) of NDA 1957 that the sentence should run from the expiry of another sentence; or
- (ii) the officer made such an order but the other sentence expired before commencement.

(2) If at commencement—

- (a) the offender has made no election under section 118ZA(2) of AA 1955 or AFA 1955 or section 85A(2) of NDA 1957,
- (b) the appeal period has not expired, and
- (c) no appeal has been brought,

section 290(3) of AFA 2006 applies as if the sentence were a sentence of service detention as respects which the offender made no election under section 290(2).

(3) If at commencement—

- (a) the offender has made an election under section 118ZA(2) of AA 1955 or AFA 1955 or section 85A(2) of NDA 1957 but has withdrawn it,
- (b) the appeal period has not expired, and
- (c) no appeal has been brought,

section 290(5) of AFA 2006 applies as if the sentence were a sentence of service detention as respects which the offender made an election under section 290(2) but withdrew the election under section 290(4).

(4) In paragraphs (2) and (3) “the appeal period” means the period mentioned in section 141(2) of AFA 2006 (as modified by article 63(2)) for the bringing of an appeal.

(5) If at commencement an appeal has been brought and has not been abandoned or determined, section 290(3) or (as the case may be) (5) of AFA 2006 applies (with the omission of paragraph (a)) as if—

- (a) the sentence were a sentence of service detention;
- (b) any election under section 118ZA(2) of AA 1955 or AFA 1955 or section 85A(2) of NDA 1957, or failure to make such an election, were an election under section 290(2) of AFA 2006 or (as the case may be) a failure to make such an election;
- (c) any withdrawal of an election under section 118ZA(2) of AA 1955 or AFA 1955 or section 85A(2) of NDA 1957 were a withdrawal under section 290(4) of AFA 2006 of an election under section 290(2); and
- (d) the appeal had been brought under section 141 of AFA 2006.

(6) If at commencement—

- (a) the sentence has taken or resumed effect, and
- (b) an appeal which was subsequently brought has not been abandoned or determined,

section 290(6) of AFA 2006 applies (with the omission of paragraph (a)) as if the sentence had taken or resumed effect under section 290(2), (3)(a) or (5)(a) of that Act and the appeal had been brought under section 141.

### **Commencement of SDA sentence of service detention awarded by CO: sentence running at commencement**

**139.**—(1) This article applies where—

- (a) an SDA sentence of service detention was awarded by an officer before commencement; and

- (b) immediately before commencement, the sentence was not suspended by virtue of section 118ZA(3) or (4) of AA 1955 or AFA 1955 or section 85A(4) or (5) of NDA 1957 (but had not expired).
- (2) If the offender made an election under section 118ZA(2) of AA 1955 or AFA 1955 or section 85A(2) of NDA 1957—
  - (a) section 290(4) of AFA 2006 applies as if the sentence were a sentence of service detention as respects which the offender made an election under section 290(2);
  - (b) section 290(5) of that Act applies if the election is withdrawn within the appeal period; and
  - (c) section 290(6) of that Act applies if—
    - (i) the election is not withdrawn but an appeal is subsequently brought; or
    - (ii) the election is withdrawn during the appeal period, the remainder of the award resumes effect under section 290(5)(a) of that Act and an appeal is subsequently brought.
- (3) In paragraph (2) “the appeal period” means the period mentioned in section 141(2) of AFA 2006 (as modified by article 63(2)) for the bringing of an appeal.
- (4) If—
  - (a) the appeal period (within the meaning of section 118ZA of AA 1955 or AFA 1955 or section 85A of NDA 1957) has expired before commencement without an appeal being brought, and
  - (b) an appeal is subsequently brought,
 section 290(6) of AFA 2006 applies as if the sentence were a sentence of service detention which took or resumed effect under section 290(3)(a) or (5)(a).

**Commencement of consecutive SDA sentence of service detention awarded by CO before commencement**

- 140.**—(1) This article applies where—
- (a) before commencement, an officer awarded an SDA sentence of service detention (“the subsequent sentence”);
  - (b) the officer made an order under section 118A(2) of AA 1955 or AFA 1955 or section 86(2) of NDA 1957 that the subsequent sentence should begin to run from the expiry of a sentence of detention which the offender was already serving (“the initial sentence”); and
  - (c) immediately before commencement, the initial sentence had not expired.
- (2) Section 291(3) to (9) of AFA 2006 apply as if—
- (a) both the initial sentence and the subsequent sentence were sentences of service detention awarded under section 132 of that Act;
  - (b) the order were a direction under section 189(3) of that Act that the subsequent sentence should take effect from the end of the initial sentence;
  - (c) any election made under section 118ZA(2) of AA 1955 or AFA 1955 or section 85A(2) of NDA 1957, or failure to make such an election, were an election or (as the case may be) failure to make an election under section 291(2) of AFA 2006; and
  - (d) any withdrawal of an election under section 118ZA(3) of AA 1955 or AFA 1955 or section 85A(4) of NDA 1957, or failure to make such a withdrawal, were a withdrawal under section 291(3) of AFA 2006 or (as the case may be) a failure to make such a withdrawal.



### **Commencement of sentence of detention activated by CO under NDA 1957 before commencement**

**141.**—(1) Article 138 applies in relation to an SDA sentence of service detention as respects which an officer made an order under section 91B(1) of NDA 1957 before commencement as it applies in relation to an SDA sentence of service detention awarded by an officer, but with the following modifications—

- (a) the references in article 138(1)(b) to an order under section 86(2) of that Act are to be read as to a direction under section 91B(6) of that Act;
- (b) in section 290(3), (5) and (6) of AFA 2006 as applied by article 138, references to the award are to be read as to the SDA sentence of service detention to which the order relates;
- (c) in relation to section 290(3) and (5) of AFA 2006 as applied by article 138, the reference in section 290(7) of that Act to an appeal is to an appeal against the order;
- (d) in relation to section 290(3)(b), (5)(b) and (6)(b) of AFA 2006 as applied by article 138, in section 290(8) of that Act—
  - (i) the reference to the award is to be read as to the order; and
  - (ii) the reference to another punishment is to be read as to an order under section 193(3) of AFA 2006.

(2) Article 139 applies in relation to a sentence of detention as respects which an officer made an order under section 91B(1) of NDA 1957 before commencement as it applies in relation to an SDA sentence of service detention awarded by an officer, but with the following modifications—

- (a) in section 290(5) and (6) of AFA 2006 as applied by article 139, references to the award are to be read as to the SDA sentence of service detention to which the order relates;
- (b) in relation to section 290(4) and (5) of AFA 2006 as applied by article 139, the reference in section 290(7) of that Act to an appeal is to an appeal against the order;
- (c) in relation to section 290(5)(b) and (6)(b) of AFA 2006 as applied by article 139, in section 290(8) of that Act—
  - (i) the reference to the award is to be read as to the order; and
  - (ii) the reference to another punishment is to be read as to an order under section 193(3) of AFA 2006.

(3) Article 140 applies in relation to an SDA sentence of service detention as respects which an officer made an order under section 91B(1) of NDA 1957 before commencement and gave a direction under section 91B(6) of that Act as it applies in relation to an SDA sentence of service detention as respects which an officer made an order under section 86(2) of that Act, but with the following modifications—

- (a) the reference in article 140(1)(b) to an order under section 86(2) of that Act is to be read as to a direction under section 91B(6) of that Act;
- (b) in section 291(4) to (7) of AFA 2006 as applied by article 140, references to the award are to be read as to the SDA sentence of service detention to which the order relates;
- (c) in relation to section 291(5) and (6) of AFA 2006 as applied by article 140, the reference in section 291(8) of that Act to an appeal is to an appeal against the order;
- (d) in relation to section 291(5)(b), (6)(b) and (7)(b) of AFA 2006 as applied by article 140, in section 291(9) of that Act—
  - (i) the reference to the award is to be read as to the order; and
  - (ii) the reference to another punishment is to be read as to an order under section 193(3) of AFA 2006.

(4) In this article, “the order” means the order under section 91B(1) of NDA 1957.

**Commencement of SDA sentence of service detention awarded by CO after commencement**

**142.**—(1) Section 290 of AFA 2006 (commencement of term of service detention awarded by CO) applies where an officer—

- (a) awards an SDA sentence of service detention by virtue of article 55 (award of SDA punishment for offence found proved before commencement);
- (b) in the case of a sentence under NDA 1957, does not make an order under section 90(1) of that Act suspending the sentence; and
- (c) does not order under section 118A(2) of AA 1955 or AFA 1955, or section 86(2) of NDA 1957, that the sentence shall begin to run from the expiry of another sentence.

(2) Section 291 of AFA 2006 (commencement of consecutive term of service detention awarded by CO) applies where an officer—

- (a) awards an SDA sentence of service detention by virtue of article 55; and
- (b) orders under section 118A(2) of AA 1955 or AFA 1955, or section 86(2) of NDA 1957, that the sentence shall begin to run from the expiry of another sentence.

(3) In section 291 of AFA 2006 as applied by paragraph (2)—

“the initial sentence” means the second sentence mentioned in paragraph (2)(b);

“the appeal period” means the period mentioned in section 141(2) of AFA 2006 for the bringing of an appeal against the award mentioned in paragraph (2)(a).

**Commencement of sentence of detention activated by CO under NDA 1957 after commencement**

**143.**—(1) Section 292(2) of AFA 2006 (commencement of suspended sentence of service detention activated by CO) applies where an officer—

- (a) makes an order under section 91B(1) of NDA 1957 by virtue of article 55 or 62; and
- (b) does not direct under section 91B(6) of that Act that the sentence in respect of which the order is made shall begin to run from the end of another sentence.

(2) Section 292(3) of AFA 2006 (commencement of suspended sentence of service detention activated by CO and made consecutive to another sentence) applies, with the omission of paragraph (b), where an officer—

- (a) makes an order under section 91B(1) of NDA 1957 by virtue of article 55 or 62; and
- (b) directs under section 91B(6) of that Act that the sentence in respect of which the order is made shall begin to run from the end of another sentence.

(3) In section 292(2) and (3) of AFA 2006 as applied by this article—

(a) “the activation order” means the order under section 91B(1) of NDA 1957;

(b) references to the award of service detention to which the activation order relates are to the SDA sentence of service detention to which the order under section 91B(1) of NDA 1957 relates.

(4) In section 291(2) to (9) of AFA 2006 as modified by section 292(3) of that Act by virtue of paragraph (2) above, “the initial sentence” means the second sentence mentioned in paragraph (2)(b).

**Commencement of SDA sentence of service detention activated by CO under AFA 2006**

**144.**—(1) This article applies where an officer makes an order under section 193(3) of AFA 2006 by virtue of article 97 (activation of suspended NDA 1957 sentence of service detention by CO).

(2) If the order does not provide that the suspended sentence shall take effect from the end of another sentence, section 290(2) to (8) of AFA 2006 apply as modified by section 292(2) of that Act (except paragraph (c) of that subsection) as if the sentence were a suspended sentence of service detention.

(3) In section 290(2) to (7) of AFA 2006 as applied by paragraph (2), any reference to “the award” (other than one to which section 292(2)(a) or (b) applies) is to the award of detention (under NDA 1957) to which the order relates.

(4) If the order provides that the suspended sentence shall take effect from the end of another sentence, section 291(2) to (9) of AFA 2006 apply as modified by section 292(3) of that Act (except paragraph (c) of that subsection), as if the sentence were a suspended sentence of service detention.

(5) In section 291(4) to (7) of AFA 2006 as applied by paragraph (4), any reference to “the award” is to the award of detention (under NDA 1957) to which the order relates.

#### **Effect of custodial sentence or detention on rank or rate**

**145.** The sentences to which section 294 of AFA 2006 (rank or rate of WOs and NCOs while in custody or detention) applies include—

- (a) a custodial sentence passed in respect of an SDA offence;
- (b) an SDA custodial sentence; and
- (c) an SDA sentence of service detention.

#### **Service of SDA sentence of service detention**

**146.—**(1) In section 296 of AFA 2006 (service of sentence of service detention), references to a sentence of service detention include an SDA sentence of service detention.

(2) In subsection (2)(b) of that section the reference to section 290 or 291 includes a reference to section 118ZA(3) or (4) of AA 1955 or AFA 1955 or section 85A(4) or (5) of NDA 1957.

#### **Detention in service custody following passing of custodial sentence etc in respect of SDA offence**

**147.** In section 297(1)(a) of AFA 2006 (detention in service custody following passing of custodial sentence etc), the reference to a custodial sentence passed in respect of a service offence includes—

- (a) an SDA custodial sentence; and
- (b) a custodial sentence passed in respect of an SDA offence.

#### **Removal to England and Wales following passing of custodial sentence etc in respect of SDA offence**

**148.—**(1) In section 298(1)(a) of AFA 2006 (removal to England and Wales following passing of custodial sentence etc), the reference to a custodial sentence passed in respect of a service offence includes—

- (a) an SDA custodial sentence; and
- (b) a custodial sentence passed in respect of an SDA offence.

(2) Nothing in this article applies section 298 of AFA 2006 in relation to a person who, before commencement, was committed to the appropriate establishment in the United Kingdom.

**Duty to receive and detain prisoners**

**149.** In section 299 of AFA 2006 (duty to receive prisoners), the reference to rules under section 300 of that Act includes Imprisonment and Detention Rules within the meaning of section 122 of AA 1955.

**Service custody etc rules**

**150.** In section 300 of AFA 2006 (service custody etc rules)—

- (a) references to a sentence of service detention include an SDA sentence of service detention;
- (b) references to a relevant sentence include (as well as, by reason of paragraph (a), an SDA sentence of service detention)—
  - (i) an SDA custodial sentence; and
  - (ii) a custodial sentence passed in respect of an SDA offence;
- (c) the reference in subsection (4) to a disciplinary offence created by the rules includes a disciplinary offence created by rules under section 122 of AA 1955.

**Duration of sentences: persons unlawfully at large or on temporary release**

**151.—(1)** In section 301 of AFA 2006 (duration of sentences: persons unlawfully at large or on temporary release)—

- (a) references to service detention include an SDA sentence of service detention;
- (b) references to a custodial sentence passed in respect of a service offence include—
  - (i) an SDA custodial sentence; and
  - (ii) a custodial sentence passed in respect of an SDA offence.

(2) In subsection (3) of that section, the reference to rules under section 300 includes rules made under section 122 of AA 1955.

(3) Section 119(5) of AA 1955 and AFA 1955 (provision corresponding to section 301(4) of AFA 2006) apply for the purposes of section 301 of AFA 2006.

(4) Section 88(2) of NDA 1957 (provision corresponding to section 301(4) of AFA 2006) applies for the purposes of section 301 of AFA 2006, but as if—

- (a) the reference to civil custody were omitted; and
- (b) in the definition of “the appropriate rules” in section 88(3) of NDA 1957, paragraph (c) were omitted.

**Remission of certain sentences on passing of custodial sentence etc**

**152.—(1)** In section 302(1) of AFA 2006 (remission of certain sentences on passing of custodial sentence etc)—

- (a) the reference to a “relevant sentence” includes—
  - (i) an SDA sentence of service detention; and
  - (ii) an SDA minor punishment; and
- (b) the reference in paragraph (a) to a service offence includes an SDA offence.

(2) Where part of an SDA minor punishment was unserved immediately before commencement, that part is remitted on commencement if, between the award of that punishment and commencement, there has been passed on the offender (and not quashed)—

- (a) an SDA custodial sentence; or

(b) a sentence of imprisonment, or a sentence that corresponds to a custodial sentence within the meaning of AFA 2006, passed by a civilian court in the British Islands.

(3) In this article “an SDA minor punishment” means a minor punishment under section 71(1) (l) or 76C(2)(e) of AA 1955 or AFA 1955 or section 43(1)(m) of NDA 1957.

#### **Power of service policeman to arrest person unlawfully at large**

**153.**—(1) In section 303(1) of AFA 2006 (power of service policeman to arrest person sentenced to service detention who is unlawfully at large), the reference to service detention includes an SDA sentence of service detention.

(2) Section 119(5) of AA 1955 and AFA 1955 (provision corresponding to section 303(2) of AFA 2006) apply for the purposes of section 303(1) of AFA 2006.

(3) Section 88(2) of NDA 1957 (provision corresponding to section 303(2) of AFA 2006) applies for the purposes of section 303(1) of AFA 2006, but as if—

- (a) the reference to civil custody were omitted; and
- (b) in the definition of “the appropriate rules” in section 88(3) of NDA 1957, paragraph (c) were omitted.

#### **Sentences passed by civilian courts**

**154.** In section 304(1) of AFA 2006 (references to custodial sentence do not include sentence passed by civilian court), the reference to a service offence includes an SDA offence.

### CHAPTER 3

#### Financial penalties

#### **Effect of appeal on SDA service compensation order, etc**

**155.**—(1) In section 176(1) of AFA 2006 (suspension of entitlement to payment of service compensation order), the reference to a service compensation order includes a compensation order under paragraph 11 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

(2) In section 176(3) of AFA 2006 (effect of appeal, etc, where service compensation order made in respect of offence taken into consideration), the reference to a service compensation order includes—

- (a) stoppages under AA 1955, AFA 1955 or NDA 1957; and
- (b) a compensation order under paragraph 11 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

#### **Review of stoppages and SDA compensation order, etc**

**156.** In section 177 of AFA 2006 (review of service compensation order), references to a service compensation order include—

- (a) stoppages under AA 1955, AFA 1955 or NDA 1957; and
- (b) a compensation order under paragraph 11 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

#### **Power to allow payment of fine or stoppages by instalments**

**157.** In section 251(2) to (7) of AFA 2006 (power to allow payment of fine or service compensation order by instalments)—

- (a) references to a fine include one awarded by virtue of any provision of AA 1955, AFA 1955, NDA 1957 or AFA 1976;
- (b) references to a service compensation order include—
  - (i) stoppages under AA 1955, AFA 1955 or NDA 1957; and
  - (ii) a compensation order under paragraph 11 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

### **Imprisonment in default of payment of fine**

**158.**—(1) An order under section 71B(1) of AA 1955 or AFA 1955 or section 43B(1) of NDA 1957 (power to fix further consecutive term of imprisonment or detention in default of payment of fine) shall continue to have effect notwithstanding the repeal of that subsection by AFA 2006.

(2) In relation to such an order—

- (a) subsections (3) to (6) of section 71B of AA 1955 or AFA 1955 or of section 43B of NDA 1957 (as the case may be) shall apply notwithstanding their repeal by AFA 2006; and
- (b) in relation to any time after commencement, references in subsection (6) of section 71B of AA 1955 or AFA 1955 or of section 43B of NDA 1957 (as the case may be) to deductions from pay and amounts forfeited under Part 3 of AA 1955 or AFA 1955 or Part 4 of NDA 1957 are to be read as references to (respectively) deductions from pay and amounts forfeited in accordance with authority given by or under AFA 2006 or any other enactment.

## **CHAPTER 4**

### **Second class for conduct**

#### **Second class for conduct**

**159.**—(1) This article applies to a punishment of Reduction to the Second Class for Conduct, awarded by virtue of regulation 43 of the Naval Summary Discipline Regulations (February) 2009(42), all or any of which falls to be served after commencement.

(2) Regulation 55 of those Regulations shall continue in force for the purposes of any such punishment, but with the following amendments.

(3) For paragraphs (c) and (d) substitute—

- “(c) perform extra duties (that is, work, training or any other duty performed by the rating at times when he would not otherwise be required to perform any duty)—
- (i) during the first 14 days of the punishment, for a period not exceeding 5½ hours each day;
  - (ii) during the remainder of the punishment, for a period not exceeding 1 hour each day.”

(4) In relation to a punishment of Reduction to the Second Class for Conduct to which this article applies, the offender’s commanding officer—

- (a) must decide in respect of each day of the punishment—
  - (i) what extra duties the rating must perform;
  - (ii) the period (not exceeding the permitted maximum) for which extra duties are to be performed; and
  - (iii) the time or times for performing the extra duties; and

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(42) These Regulations are made by the Defence Council under sections 43, 52E and 52F of NDA 1957 and published in the Manual of Naval Law.

(b) must inform the rating accordingly.

(5) The commanding officer may delegate any functions under paragraph (4) to a person of or above the rate of chief petty officer.

## CHAPTER 5

### Restitution orders

#### **Restitution orders**

**160.**—(1) Paragraph (2) applies in any case where an order under section 138 of AA 1955 or AFA 1955 or section 76 of NDA 1957 (restitution orders) was, immediately before commencement, suspended by virtue of section 138(10) of AA 1955 or AFA 1955 or section 77(1) of NDA 1957.

(2) The following provisions shall continue in force for the purposes of any such case—

(a) section 138(9), (10), and (12) of AA 1955 or AFA 1955 or, as the case may be, section 77 of NDA 1957 (with the substitution for references to the Courts-Martial Appeal Court of references to the Court Martial Appeal Court);

(b) section 46 of CMAA 1968.

(3) Section 46 of CMAA 1968 shall continue in force for the purposes of any case where, immediately before commencement, an order under section 138 of AA 1955 or AFA 1955 or section 76 of NDA 1957 is suspended by virtue of section 46 of CMAA 1968.

(4) For the avoidance of doubt, the operation of an order under section 138 of AA 1955 or AFA 1955 or section 76 of NDA 1957 which has taken effect (either before or after commencement) is not affected by the coming into force of the repeal of those sections.

## CHAPTER 6

### SDA orders for conditional discharge

#### **SDA orders for conditional discharge**

**161.** In this Chapter—

“SDA order for conditional discharge” means an order under paragraph 3(1) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 discharging a person subject to a condition;

“the period of conditional discharge” means the period specified in the SDA order for conditional discharge.

#### **Order of court-martial: conviction of further offence by Court Martial**

**162.**—(1) This article applies where—

(a) a person in whose case an SDA order for conditional discharge has been made is convicted by the Court Martial of an offence committed during the period of conditional discharge; and

(b) the order was made by a court-martial or the Appeal Court.

(2) The Court Martial may deal with the offender for the offence for which the order was made in any way in which it could deal with the offender if it had just convicted the offender of that offence.

**Order of any SDA court: conviction of further offence by Service Civilian Court**

**163.**—(1) This article applies where a person in whose case an SDA order for conditional discharge has been made is convicted by the Service Civilian Court of an offence committed during the period of conditional discharge.

(2) The Service Civilian Court may deal with the offender for the offence for which the order was made in any way in which it could deal with the offender if it had just convicted the offender of that offence.

(3) It is to be assumed for the purposes of paragraph (2) that the offence is one the Service Civilian Court would have jurisdiction to try.

**Order of Standing Civilian Court: conviction of further offence by Court Martial**

**164.**—(1) This article applies where—

- (a) a person in whose case an SDA order for conditional discharge has been made is convicted by the Court Martial of an offence committed during the period of conditional discharge; and
- (b) the order was made by a Standing Civilian Court.

(2) The Court Martial may deal with the offender for the offence for which the order was made in any way in which the Service Civilian Court could deal with the offender if it had just convicted the offender of that offence.

(3) It is to be assumed for the purposes of paragraph (2) that the offence is one the Service Civilian Court would have jurisdiction to try.

**Appeals against re-sentence, etc**

**165.**—(1) Paragraph (2) applies where a person is sentenced by a court under this Chapter for an offence in respect of which an SDA order for conditional discharge was made.

(2) The person is to be treated, for the purpose of enabling the making of an appeal against the sentence under CMAA 1968 or section 285 of AFA 2006, as if the conviction of that offence had been by the court which sentenced the person under this Chapter.

(3) Paragraph 5 of Schedule 5A to AA 1955 and AFA 1955 and of Schedule 4A to NDA 1957 continues to have effect in relation to SDA orders for conditional discharge, but as if the references in sub-paragraphs (1)(i) and (6) to paragraph 3(2) or (3) were to this Chapter.

**CHAPTER 7****Community supervision orders****Community supervision orders**

**166.**—(1) In this Chapter “a community supervision order” means an order under paragraph 4(1) of Schedule 5A to AA 1955 or of Schedule 5A to AFA 1955 or of Schedule 4A to NDA 1957.

(2) For the purposes of this Chapter a community supervision order is “current at commencement” if by commencement—

- (a) the order has not been discharged under paragraph 4(11) of that Schedule or ceased to have effect by reason of paragraph 5(5) of that Schedule; and
- (b) the supervision period has not ended.

(3) In this Chapter “the supervision period” means the period specified in a community supervision order.



### **Savings in respect of community supervision orders: provisions of SDAs**

**167.**—(1) In this article “the Schedule” means each of Schedule 5A to AA 1955, Schedule 5A to AFA 1955 and Schedule 4A to NDA 1957.

(2) The following provisions of paragraph 4 of the Schedule continue to have effect in relation to a community supervision order which is current at commencement—

- (a) sub-paragraph (6) (failure to comply with order), subject to the modification in paragraph (3) below;
- (b) sub-paragraph (7D) (limitation period for proceedings in respect of failure to comply);
- (c) sub-paragraph (11) (power to discharge or vary order, or replace supervisor);
- (d) sub-paragraph (2) (definitions), so far as relating to the provisions saved by this Chapter.

(3) In paragraph 4(6) of the Schedule, as saved by this article, the words “triable by court-martial” are omitted.

### **Offence of failure to comply to be treated as service offence for certain purposes**

**168.**—(1) An offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed after commencement is to be treated as a service offence for the purposes of the following provisions of AFA 2006—

- (a) section 50(1) (jurisdiction of Court Martial);
- (b) section 51(1) (jurisdiction of Service Civilian Court);
- (c) section 63 (double jeopardy);
- (d) sections 67 and 68(3) (powers of arrest);
- (e) Part 4 (custody);
- (f) section 116(2) and (5) (duty of service policeman to refer case to DSP), subject to the modification in paragraph (4)(a) below;
- (g) section 118 (duty of service policeman to notify CO of referral to DSP), subject to the modification in paragraph (4)(b) below;
- (h) section 127(1) (direction barring further proceedings).

(2) A person may not be arrested under section 67 of AFA 2006 by virtue of paragraph (1)(d) above after the end of 6 months beginning with the end of the supervision period.

(3) In section 92 of AFA 2006 (power to make provision conferring powers of entry and search after arrest), the reference to a person who has been arrested under section 67 of that Act does not include a person so arrested by virtue of paragraph (1)(d) above.

(4) In their application to an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed after commencement—

- (a) section 116(2)(b) of AFA 2006 has effect as if the words from “and is aware” to the end of the paragraph were omitted; and
- (b) section 118 of that Act has effect as if subsection (3)(b) were omitted.

### **Community supervision order made by court-martial: conviction of further offence by Court Martial**

**169.**—(1) This article applies where—

- (a) a person in whose case a community supervision order has been made is convicted by the Court Martial of any offence committed during the supervision period (including an

offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957); and

(b) the order was made by a court-martial or the Appeal Court.

(2) The Court Martial may deal with the offender for the offence for which the order was made in any way in which it could deal with the offender if it had just convicted the offender of that offence.

#### **CSO made by any SDA court: conviction of further offence by Service Civilian Court**

**170.**—(1) This article applies where a person in whose case a community supervision order has been made is convicted by the Service Civilian Court of an offence committed during the supervision period (including an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957).

(2) The Service Civilian Court may deal with the offender for the offence for which the order was made in any way in which it could deal with the offender if it had just convicted the offender of that offence.

(3) It is to be assumed for the purposes of paragraph (2) that the offence is one the Service Civilian Court would have jurisdiction to try.

#### **CSO made by Standing Civilian Court: conviction of further offence by Court Martial**

**171.**—(1) This article applies where—

(a) a person in whose case a community supervision order has been made is convicted by the Court Martial of an offence committed during the supervision period (including an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957); and

(b) the order was made by a Standing Civilian Court.

(2) The Court Martial may deal with the offender for the offence for which the order was made in any way in which the Service Civilian Court could deal with the offender if it had just convicted the offender of that offence.

(3) It is to be assumed for the purposes of paragraph (2) that the offence is one the Service Civilian Court would have jurisdiction to try.

#### **Restriction on other powers of punishment in respect of failure to comply with order**

**172.**—(1) Where the Court Martial or the Service Civilian Court convicts a person of an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed before commencement, the court—

(a) may, instead of dealing with the offender under article 169, 170 or 171 for the offence for which the order was made, impose on the offender a fine not exceeding £1,000 for the offence under paragraph 4(6);

(b) may not impose any other punishment on the offender for that offence.

(2) Where the Court Martial or the Service Civilian Court convicts a person of an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed after commencement, the court may not impose any punishment for that offence (but this is without prejudice to its power to deal with the offender under article 169, 170 or 171 for the offence for which the order was made).

### **Appeals against re-sentence, etc**

**173.**—(1) Paragraph (2) applies where a person is sentenced by a court under this Chapter for an offence in respect of which a community supervision order was made.

(2) The person is to be treated, for the purpose of enabling the making of an appeal against the sentence under CMAA 1968 or section 285 of AFA 2006, as if the conviction of that offence had been by the court which sentenced the offender under this Chapter.

(3) Paragraph 5 of Schedule 5A to AA 1955 and AFA 1955 and of Schedule 4A to NDA 1957 continues to have effect in relation to community supervision orders, but as if the references in subparagraphs (1)(i) and (6) to paragraph 4(8) or (9) were to this Chapter.

(4) A conviction of an offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed after commencement shall be deemed not to be a conviction except for the purposes of—

- (a) this Chapter; and
- (b) any appeal against the conviction or against a sentence passed by reason of the conviction.

### **Savings of regulations**

**174.**—(1) The following provisions of the Courts-Martial and Standing Civilian Courts (Army and Royal Air Force) (Additional Powers on Trial of Civilians) Regulations 1997(43) continue to have effect in relation to a community supervision order—

- (a) regulation 4 (persons fit to be supervisors);
- (b) regulation 6 (general duty of supervisor);
- (c) regulation 8(4) (requirements may not operate so as to conflict with religion, work or education);
- (d) regulation 9 (calculation of periods specified);
- (e) regulation 12 (discharge or modification of order or replacement of supervisor), together with—
  - (i) row 1 of the Table in Part 2 of Schedule 2 as applied by regulation 12(1)(b); and
  - (ii) regulation 3 so far as relating to regulation 12(1)(b);
- (f) the definition of “the 1955 Act” in regulation 2.

(2) In row 1 of the Table in Part 2 of Schedule 2 to those Regulations as saved by paragraph (1) (e) above, the reference to “the commanding officer of the offender” is to be read as to the person who is the offender’s commanding officer within the meaning of AFA 2006.

## **CHAPTER 8**

### **Supplementary provisions relating to trial of civilians**

#### **Service of documents**

**175.**—(1) Regulation 11 of and Part 2 of Schedule 2 to the Additional Powers on Trial of Civilians Regulations (duty to serve court orders and copies) shall continue to have effect in relation to any case where, immediately before commencement, they required an order or certified copy to be served on a person.

(2) Regulation 3 of those regulations (method of service) shall continue in effect for the purposes of the provisions saved by paragraph (1).

- (3) In those provisions—
- (a) “the court administration officer” has the meaning given by section 374 of AFA 2006; and
  - (b) any reference to the commanding officer of the offender is to be read as to the person who is the offender’s commanding officer within the meaning of AFA 2006.
- (4) In this article “the Additional Powers on Trial of Civilians Regulations” means the Courts-Martial and Standing Civilian Courts (Army and Royal Air Force) (Additional Powers on Trial of Civilians) Regulations 1997.

## PART 18

### DISCIPLINE: MISCELLANEOUS

#### **Findings and sentences passed by reviewing authority**

**176.** Any finding or sentence which, immediately before commencement, is to be treated by virtue of section 113AA of AA 1955 or AFA 1955, section 71 of NDA 1957 or paragraph 20 of Schedule 3 to AFA 1976 as having been made or passed by a court-martial or Standing Civilian Court is to continue to be treated for all purposes as having been made or passed by that court.

#### **Testing for alcohol and drugs**

**177.—**(1) In section 308(1) of AFA 2006 (power to make regulations about testing for alcohol and drugs), the reference to the analysis of samples obtained under sections 305(1) and 306(2) of that Act includes the analysis of samples obtained under section 34A(1) of AA 1955 or AFA 1955, section 12A(1) of NDA 1957 or section 32(3) or (4) of AFA 2001.

- (2) In section 308(3) of AFA 2006 (inadmissibility of analysis of sample)—
- (a) the reference to a requirement imposed under section 305(1) or 306(2) of that Act includes a requirement imposed under section 34A(1) of AA 1955 or AFA 1955, section 12A(1) of NDA 1957 or section 32(3) or (4) of AFA 2001; and
  - (b) the reference to proceedings in respect of a service offence includes proceedings in respect of an SDA offence.

#### **Offences in relation to service courts**

**178.—**(1) Where a person has been sentenced under section 57(2) of AA 1955 or AFA 1955 or section 38(3) of NDA 1957 (summary disposal of offences in relation to service courts), the sentence may be revoked and (if the person is in custody) his discharge ordered.

- (2) The powers conferred by paragraph (1) may be exercised—
- (a) where the person was sentenced by a court-martial, by the judge advocate for the court-martial;
  - (b) where the person was sentenced by a summary appeal court, by the judge advocate for the proceedings before the summary appeal court;
  - (c) where the person was sentenced by a judicial officer, by the judicial officer.
- (3) Where—
- (a) an offence has under section 101 of AA 1955 or AFA 1955 or section 65 of NDA 1957 been certified to a civil court in the United Kingdom or a British overseas territory, and
  - (b) that court has not exercised the powers conferred by that section,

section 311(3) of AFA 2006 (power of civil court to deal with contempt certified by service court) applies as if the offence had been certified to that court under section 311(2) of that Act.

(4) In section 312(3) and (4) of AFA 2006 (power to make committal for misbehaviour in court consecutive to a sentence), references to a sentence of service detention that has been passed on the person on a previous occasion include an SDA sentence of service detention.

(5) In section 312(6)(a) of AFA 2006 (inclusion of committal for misbehaviour in court in references to service detention), the reference to a committal to service custody under section 309 of that Act includes a sentence of detention under section 57(2) of AA 1955 or AFA 1955 or section 38(3) of NDA 1957.

### **Witness anonymity orders**

**179.**—(1) In section 6(1) of the Criminal Evidence (Witness Anonymity) Act 2008(**44**) (discharge or variation of witness anonymity order), the reference to a court that has made a witness anonymity order in relation to any criminal proceedings is to be read—

- (a) in relation to an order made by a court-martial, as a reference to the Court Martial;
- (b) in relation to an order made by a Standing Civilian Court, as a reference to the Service Civilian Court; and
- (c) in relation to an order made by a summary appeal court, as a reference to the Summary Appeal Court.

(2) Section 311 of AFA 2006 (certification of contempt to civil courts) applies if, in relation to a witness anonymity order made by a court-martial, a Standing Civilian Court or a summary appeal court, a person within section 309(6) of that Act does any act that would constitute contempt of court if the order had been made by a court having power to commit for contempt.

(3) Where section 311 of AFA 2006 applies by virtue of paragraph (2) above—

- (a) in subsection (2) of that section, “the qualifying service court” means—
  - (i) if the order was made by a court-martial, the Court Martial,
  - (ii) if the order was made by a Standing Civilian Court, the Service Civilian Court, and
  - (iii) if the order was made by a summary appeal court, the Summary Appeal Court,and the definition of “qualifying service court” in subsection (5) of that section applies only for the purposes of subsection (4);
- (b) in that section, “the offence” means the act mentioned in paragraph (2) above.

(4) In this article—

“act” includes an omission, and references to the doing of an act are to be read accordingly;  
“witness anonymity order” has the same meaning as in the Criminal Evidence (Witness Anonymity) Act 2008.

### **Arrest by civilian police under warrant**

**180.**—(1) Section 313 of AFA 2006 (arrest by civilian police under warrant of judge advocate) is modified as follows.

(2) In subsection (1), the reference to a service offence includes an SDA offence.

(3) In subsections (3) and (4), references to a warrant issued under that section include a warrant issued under section 190A of AA 1955 or AFA 1955 or section 103 of NDA 1957.

**Arrest by civilian police of deserters etc**

**181.**—(1) In sections 314 to 316 of AFA 2006 (arrest etc by civilian police of deserters and absentees without leave), references to a person subject to service law who has deserted include a person who is subject to service law and has committed an offence under section 37(1) of AA 1955 or AFA 1955 or section 16(1) of NDA 1957.

(2) In section 314(4) of AFA 2006, the reference to a person arrested under section 314 includes—

- (a) a person who was arrested before commencement under section 186 of AA 1955 or AFA 1955 or section 105 of NDA 1957 in a relevant territory (as defined by section 314(5) of AFA 2006) and has not been brought before a court of summary jurisdiction; and
- (b) a person arrested after commencement, in a relevant territory, in pursuance of a warrant issued under section 186(3) of AA 1955 or AFA 1955 or section 105(3) of NDA 1957.

(3) Section 315(1) of AFA 2006 applies in relation to a person who before commencement surrendered himself to a constable in a relevant territory as being a person illegally absent from the regular forces (within the meaning of AFA 2006) and has not been brought to a police station under section 188(1) of AA 1955 or AFA 1955 or section 108(1) of NDA 1957.

(4) Section 315(3) and (4) of AFA 2006 apply in relation to a person who—

- (a) was brought to a police station in a relevant territory under section 188(1) of AA 1955 or AFA 1955 or section 108(1) of NDA 1957, or surrendered himself to a constable at such a police station as being a person illegally absent from the regular forces (within the meaning of AFA 2006); and
- (b) has not been delivered into service custody, brought before a court of summary jurisdiction or released from police custody.

(5) In paragraphs (3) and (4)—

- (a) references to section 188(1) of AA 1955 include that subsection as applied by section 13 of the Visiting Forces Act 1952<sup>(45)</sup>; and
- (b) references to a person illegally absent from the regular forces include a person illegally absent from the forces of a country to which that section applies.

**Remand by civil court**

**182.**—(1) In this article, references to a person's remand are to his remand under section 187(2) or (3) of AA 1955 or AFA 1955, section 109(1)(b) or (3)(a) of NDA 1957 or paragraph 4(2)(b) or 5(3) of Schedule 2 to RFA 1996 for the purpose of arranging for his delivery into service custody.

(2) A person remanded in custody is to be regarded as having been committed under section 316(5) of AFA 2006 to be held in custody pending his transfer into service custody.

(3) Where a person was remanded on bail and answers to his bail, section 316(3) of AFA 2006 (transfer into service custody) applies.

(4) Where a person was remanded on bail and does not answer to his bail, he is to be regarded for the purposes of section 317 of AFA 2006 (warrant for arrest) as having been released under section 316(3)(a)(ii) of that Act subject to a condition that he report to the court by which he was remanded on the date to which he was remanded.

(45) 1952 c. 67.

### **Arrest of persons unlawfully at large**

**183.**—(1) In section 318(1) of AFA 2006 (arrest by civilian police of persons unlawfully at large) the reference to a person who has been sentenced to service detention includes a person on whom an SDA sentence of service detention has been passed.

(2) Section 119(5) of AA 1955 and AFA 1955 (provision corresponding to section 301(4) of AFA 2006) apply for the purposes of section 318(1) of AFA 2006.

(3) Section 88(2) of NDA 1957 (provision corresponding to section 301(4) of AFA 2006) applies for the purposes of section 318(1) of AFA 2006, but as if—

- (a) the reference to civil custody were omitted; and
- (b) in the definition of “the appropriate rules” in section 88(3) of NDA 1957, paragraph (c) were omitted.

(4) Where a person on whom an SDA sentence of service detention had been passed was arrested by a constable under section 190B of AA 1955 or AFA 1955 or section 104 of NDA 1957 and has not been taken to a place in which he could be required to be detained, paragraph (b) of section 318(1) of AFA 2006 applies as if the constable had arrested him under paragraph (a) of that subsection.

### **The Criminal Cases Review Commission**

**184.**—(1) In section 12A(1) of the Criminal Appeal Act 1995(46) (reference of conviction by the Court Martial) the reference to a person convicted by the Court Martial includes a person so convicted on an appeal brought from a Standing Civilian Court.

(2) In section 12A(2) of that Act (reference of sentence passed by the Court Martial on appeal against sentence) the reference to a person convicted by the Service Civilian Court includes a person convicted by a Standing Civilian Court.

(3) In section 12B(1) of that Act (reference of conviction or sentence by the Service Civilian Court) the reference to a person convicted of an offence by the Service Civilian Court includes a person convicted of an offence by a Standing Civilian Court; but, in relation to such a person, that subsection has effect as if for paragraphs (a) and (b) there were substituted “may at any time refer to the Court Martial any sentence imposed by the Service Civilian Court in proceedings relating to the conviction”.

### **Financial penalty enforcement orders**

**185.**—(1) In section 322 of AFA 2006 (power to make regulations for the enforcement of financial penalties), “financial penalty” includes—

- (a) a fine or stoppages awarded under AA 1955, AFA 1955 or NDA 1957;
- (b) a fine awarded by a Standing Civilian Court;
- (c) a compensation order made under paragraph 11 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957;
- (d) an order under paragraph 13 of any of those Schedules that a service parent or guardian pay a fine or compensation; and
- (e) a sum adjudged to be paid under paragraph 14(4) of any of those Schedules (forfeiture of recognisance).

(2) In paragraph (1) the reference to a fine awarded under AA 1955 or AFA 1955 includes a fine to which a person was sentenced under section 57(2) of either of those Acts, and the reference to a

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(46) 1995 c. 35. Sections 12A and 12B are inserted by AFA 2006, section 321 and Schedule 11, paragraph 2.

fine awarded under NDA 1957 includes a fine to which a person was sentenced under section 38(3) of that Act.

### **Evidential burden as respects excuses**

**186.** The offences to which section 325 of AFA 2006 (evidential burden as respects lawful or reasonable excuse) applies include—

- (a) any SDA offence (other than an SDA civil offence) which is such that a person who would otherwise commit the offence—
  - (i) does not do so if he has a lawful excuse; or
  - (ii) does not do so if he has a reasonable excuse; and
- (b) an offence committed after commencement under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 (as saved by article 167).

### **Local probation boards**

**187.** In section 5A(1) of the Criminal Justice and Court Services Act 2000<sup>(47)</sup> (powers of local probation boards in relation to service justice) the reference to persons who have been subject to proceedings before the Court Martial, the Summary Appeal Court or the Service Civilian Court includes persons who have been subject to proceedings before a court-martial, a summary appeal court or a Standing Civilian Court.

### **Judge advocates**

**188.** In section 362(c) of AFA 2006 (nomination of puisne judge to sit as judge advocate) the reference to nomination includes nomination before commencement.

## **PART 19**

### **ENLISTMENT, TERMS OF SERVICE ETC**

#### **Interpretation**

**189.** References in this Part to a person's enlistment before commencement are to—

- (a) his enlistment in the regular army, the Royal Marines or the regular air force before commencement, or
- (b) his entry for service in the Royal Navy before commencement,

and references to persons enlisted before commencement are to be read accordingly.

#### **Enlistment**

**190.** In section 328 of AFA 2006 (power to make regulations with respect to the enlistment of persons in the regular forces)—

- (a) subsection (1) is to be read as including power to make provision deeming a person to have been appointed as a recruiting officer if immediately before commencement he was—
  - (i) a recruiting officer within the meaning given by section 1 of AA 1955 or AFA 1955;
  - or

<sup>(47)</sup> 2000 c. 43. Section 5A was inserted by AFA 2006, section 378(1) and Schedule 16, paragraph 178, with effect from 1st January 2008, and is substituted by section 327 of that Act.



- (ii) authorised under regulations made by the Defence Council to enter persons for service in the Royal Navy;
- (b) in subsection (2)(g) (approval for service) the reference to persons who have enlisted includes persons enlisted before commencement;
- (c) in subsection (3) (validity of enlistment) references to a person's enlistment include a person's enlistment before commencement, and "enlisted" is to be read accordingly.

### **Terms and conditions of enlistment and service**

**191.**—(1) In section 329(1) of AFA 2006 (power to make regulations with respect to terms and conditions of enlistment and service) the reference to persons who have enlisted in the regular forces includes persons enlisted before commencement.

(2) Each of the following have effect as if made under that subsection—

- (a) the Royal Marines Terms of Service Regulations 2006<sup>(48)</sup>;
- (b) the Royal Navy Terms of Service (Ratings) Regulations 2006<sup>(49)</sup>;
- (c) the Royal Air Force Terms of Service Regulations 2007<sup>(50)</sup>;
- (d) the Army Terms of Service Regulations 2007<sup>(51)</sup>.

### **Desertion and absence without leave: forfeiture of service etc**

**192.**—(1) In section 330(1) of AFA 2006 (power to make regulations with respect to a confession of desertion) references to a confession that a person is guilty of an offence under section 8 of that Act include a confession, whether made before or after commencement, that he is guilty of an offence under section 37 of AA 1955 or AFA 1955 or section 16 of NDA 1957.

(2) In section 330(2) of AFA 2006 (power to make regulations providing for forfeiture of service by a person convicted of desertion) the reference to an offence under section 8 of that Act includes an offence under section 37 of AA 1955 or AFA 1955 or section 16 of NDA 1957.

(3) Section 330(1) to (3) of AFA 2006 are to be read as including power to make provision as to the effect of—

- (a) a direction given under section 81(2) of AA 1955 or AFA 1955,
- (b) an order made under section 74(1) of NDA 1957, or
- (c) the forfeiture of a period of service by virtue of section 17(1) or 81(2) of AA 1955 or AFA 1955, or section 74(1) or 129D(1) of NDA 1957,

and enabling a determination to be made in prescribed circumstances restoring (in whole or in part) a period of service forfeited by virtue of such a direction or order or of any provision mentioned in sub-paragraph (c).

### **Discharge etc from the regular forces and transfer to the reserve forces**

**193.**—(1) In section 331(3) of AFA 2006 (power to make regulations conferring on a warrant officer a right to be discharged following his reduction in rank or rate) references to a warrant officer's reduction in rank or rate include a reduction imposed before commencement.

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<sup>(48)</sup> S.I. 2006/2917.

<sup>(49)</sup> S.I. 2006/2918.

<sup>(50)</sup> S.I. 2007/650.

<sup>(51)</sup> S.I. 2007/3382. The Regulations are amended by the Army Terms of Service (Amendment etc) Regulations 2008, S.I. 2008/1849, regulation 2.

(2) Section 331(4) of that Act (power to make regulations enabling a person's discharge or transfer to the reserve forces to be postponed) is to be read as including power to make provision as to the effect of—

- (a) a person's retention in service by virtue of section 9 of AA 1955 or AFA 1955, paragraph 4A of Schedule 7 to AA 1955 or section 4 of AFA 1966;
- (b) a declaration made by a person under section 9(6) of AA 1955 or AFA 1955, paragraph 4A(6) of Schedule 7 to AA 1955 or section 4(6) of AFA 1966; and
- (c) any notice given by a person in accordance with such a declaration.

### **Membership of reserve force**

**194.** Paragraph 25 of Schedule 14 to AFA 2006 (amendment of section 2(2)(a) of RFA 1996) does not prevent a person who, immediately before commencement, was a member of a reserve force from continuing to be a member of that force.

### **Term of compulsory service**

**195.** In section 13(7) of RFA 1996 (definition of "term of compulsory service") the reference to a requirement imposed under AFA 2006 includes a requirement imposed by or under AA 1955, AFA 1955 or AFA 1966.

### **Complaints to employment tribunals etc**

**196.—(1)** In the following provisions, references to a service complaint include a complaint made under the service redress procedures—

- (a) sections 7A(5), 7AB and 7AC of the Equal Pay Act 1970<sup>(52)</sup>;
- (b) sections 6A(5) and 6AB of the Equal Pay Act (Northern Ireland) 1970<sup>(53)</sup>;
- (c) section 85(9B) of the Sex Discrimination Act 1975<sup>(54)</sup>;
- (d) section 75(9) of the Race Relations Act 1976<sup>(55)</sup>;
- (e) article 82(9B) of the Sex Discrimination (Northern Ireland) Order 1976<sup>(56)</sup>;
- (f) section 192(4) of the Employment Rights Act 1996<sup>(57)</sup>;
- (g) article 71(8) of the Race Relations (Northern Ireland) Order 1997<sup>(58)</sup>.

(2) In the following provisions, references to the service complaint procedures include the service redress procedures—

- (a) section 7A(7) of the Equal Pay Act 1970;
- (b) section 6A(7) of the Equal Pay Act (Northern Ireland) 1970;
- (c) section 85(9D) of the Sex Discrimination Act 1975;
- (d) section 75(9B) of the Race Relations Act 1976;
- (e) article 82(9D) of the Sex Discrimination (Northern Ireland) Order 1976;
- (f) section 192(5) of the Employment Rights Act 1996;
- (g) article 71(10) of the Race Relations (Northern Ireland) Order 1997;

<sup>(52)</sup> 1970 c. 41.

<sup>(53)</sup> 1970 c. 32.

<sup>(54)</sup> 1975 c. 65.

<sup>(55)</sup> 1976 c. 74.

<sup>(56)</sup> S.I. 1976/1042 (N.I. 15).

<sup>(57)</sup> 1996 c. 18.

<sup>(58)</sup> S.I. 1997/869 (N.I. 6).

but nothing in this paragraph authorises the making, after 31st December 2007, of a complaint under the service redress procedures.

(3) In this article “the service redress procedures” means the procedures, excluding those which relate to the making of a report on a complaint to Her Majesty, referred to in section 180 of AA 1955 or AFA 1955 or section 130 of NDA 1957.

## PART 20

### FORFEITURES AND DEDUCTIONS

#### **Permitted forfeitures and deductions**

**197.**—(1) Section 342(1) of AFA 2006 (power to make regulations permitting forfeitures and deductions) is modified as follows.

(2) In paragraph (a), the reference to a period of prescribed absence from duty includes a period of such absence at a time when the person subject to service law was subject to military or air-force law or to NDA 1957.

(3) In paragraph (b), the reference to an order by a civilian court includes an order made before commencement.

(4) In paragraph (c), the reference to loss or damage includes loss or damage before commencement.

(5) In paragraph (d), the reference to a financial penalty includes—

- (a) a fine or stoppages imposed by virtue of any provision of AA 1955, AFA 1955 or NDA 1957 (including a fine with respect to which an order under paragraph 13 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 (order for service parent or guardian to pay fine or compensation) has been made);
- (b) a compensation order with respect to which such an order has been made;
- (c) a sum adjudged to be paid under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 (forfeited recognisance).

#### **Forfeitures and deductions permitted, ordered or authorised before commencement**

**198.**—(1) Where, immediately before commencement, any sum is liable to be deducted from a person’s pay by virtue of section 146 of AA 1955 or AFA 1955 or section 128B of NDA 1957 (deductions for payment of civil penalties), the sum may be deducted from his pay notwithstanding the repeal of that section by AFA 2006.

(2) Where, immediately before commencement, an order made against a person under section 147(2) of AA 1955 or AFA 1955 or section 128C(2) of NDA 1957 has effect (compensation for loss or damage), the sum specified in the order may be deducted from his pay, in so far as not otherwise paid by him, notwithstanding the repeal of that subsection by AFA 2006.

(3) Where, immediately before commencement, an order made under—

- (a) section 150(1), 150A(2), 150AA(2) or 151(1) of AA 1955 or AFA 1955 (maintenance etc), or
- (b) section 151A(1) of AA 1955 or AFA 1955, or section 128E(1) of NDA 1957 (judgment debts etc),

has effect, the order shall continue to have effect notwithstanding the repeal of that subsection by AFA 2006; but this is subject to paragraph (4).

- (4) The Defence Council or an officer authorised by them—
- (a) may by order vary or revoke any order made under section 150(1), 151(1) or 151A(1) of AA 1955 or AFA 1955, or section 128E(1) of NDA 1957; and
  - (b) may treat any order made under section 150(1), 151(1) or 151A(1) of AA 1955 or AFA 1955 as being in suspense at any time while the person against whom the order was made is absent without leave.
- (5) Where, immediately before commencement, an authorisation of deductions from a person's pay by virtue of section 1(1) of the Naval Forces (Enforcement of Maintenance Liabilities) Act 1947<sup>(59)</sup> has effect (deductions in respect of liabilities for maintenance etc), the authorisation shall continue to have effect notwithstanding the repeal of that subsection, and the amendment of section 3 of the Naval and Marine Pay and Pensions Act 1865<sup>(60)</sup>, by AFA 2006.
- (6) In subsection (3) of section 342 of AFA 2006 (power to remit forfeitures and deductions), the reference to a forfeiture or deduction imposed by virtue of subsection (1)(a), (b) or (c) of that section includes—
- (a) a forfeiture imposed by virtue of section 145 of AA 1955 or AFA 1955 or section 16(2), 17 or 75(1) of NDA 1957 (forfeiture of pay for absence from duty etc); and
  - (b) a deduction imposed by virtue of this article or any provision mentioned in this article.

## PART 21

### MISCELLANEOUS

#### Offences punishable by civilian courts

**199.**—(1) In paragraph (a) of section 344(3) of AFA 2006 (offence of impeding a person's apprehension or prosecution for desertion or absence without leave), the reference to an offence under section 8 or 9 of that Act includes an offence under section 37 or 38 of AA 1955 or AFA 1955 or section 16 or 17 of NDA 1957.

(2) The repeal of section 220 of AA 1955, section 218 of AFA 1955 and section 100 of NDA 1957 does not deprive any court of any jurisdiction which it would otherwise have had.

#### Evidence in proceedings before civilian courts

**200.**—(1) In section 372 of AFA 2006 (evidence in proceedings before civilian courts) the reference to an offence created by or under AFA 2006 includes—

- (a) an SDA offence;
- (b) an offence under any of sections 19, 161, 171 and 191 to 197 of AA 1955 or AFA 1955.

(2) In relation to any proceedings which are part heard at commencement, section 198 of AA 1955 and AFA 1955 and paragraphs 1 to 8 of Schedule 3 to RFA 1996 shall continue to apply, notwithstanding their repeal by AFA 2006.

- (3) For the purposes of paragraph (2), proceedings before a civilian court are part heard if—
- (a) the first hearing (or, in Scotland, the first calling) in those proceedings has taken place; and
  - (b) the proceedings have not been concluded.

<sup>(59)</sup> 1947 c. 24.

<sup>(60)</sup> 1865 c. 73.

### **Trial by civil courts of offences committed before commencement**

**201.**—(1) In section 105(3) of RFA 1996 (service offences triable by civil court) the reference to any service offence other than an offence under that Act or an offence mentioned in section 98(1) of that Act includes any SDA offence other than—

- (a) an offence under RFA 1996; or
- (b) an offence under section 37 or 38 of AA 1955 or AFA 1955 or section 16 or 17 of NDA 1957 (desertion and absence without leave).

(2) In relation to an offence under section 95(1)(b) of RFA 1996 (threatening or insulting language or insubordination), section 95(2)(b) of that Act has effect without the amendment made by AFA 2006.

(3) In section 98(1) and (3) of RFA 1996 (trial and punishment by civil court of desertion or absence without leave), references to an offence under section 8 or 9 of AFA 2006 include an offence under section 37 or 38 of AA 1955 or AFA 1955 or section 16 or 17 of NDA 1957.

(4) In relation to an offence under section 99 of RFA 1996 (false pretence of illegal absence) committed before commencement, that section has effect notwithstanding its repeal by AFA 2006.

(5) In section 107(1) of RFA 1996 (time for institution of proceedings) the reference to a service offence includes an SDA offence.

(6) Section 107(3) of RFA 1996 (time for institution of proceedings for an offence under section 96(1) committed by a person liable to recall) does not apply in relation to an offence under section 96(1) of that Act committed before commencement if, immediately before commencement, any enactment prohibited the institution of proceedings for the offence.

(7) For the purposes of paragraph (6), an enactment is to be regarded as having prohibited the institution of proceedings for an offence if, had proceedings been instituted, the enactment would have prohibited the trial of the offence.

### **Affidavits and declarations**

**202.** Section 204(2) of AA 1955 or (as the case may be) AFA 1955 (admissibility of document pursuant to affidavit or declaration) shall continue to apply in relation to an affidavit or declaration taken in pursuance of the power conferred by section 204(1) of that Act, notwithstanding its repeal by AFA 2006.

### **Protection of children of service families**

**203.** In section 20(6)(b)(iii) of AFA 1991 (return of child to person other than parent etc), the reference to the agreement of a judge advocate includes an agreement given before commencement by the officer having jurisdiction.

### **Service of process**

**204.** In section 355(2)(b) of AFA 2006 (power to make provision with respect to cases in which service of process is to be of no effect), the reference to service of process includes service of process on a person's commanding officer before commencement.

### **Minor and consequential amendments and repeals**

**205.** Schedule 1 has effect.

**Transitory provisions**

**206.** Schedule 2 has effect.

23rd April 2009

*John Hutton*  
Secretary of State for Defence  
Ministry of Defence