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# The new *Armed Forces Act* of the United Kingdom

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*Britain has replaced its single-service discipline acts with a single tri-service act. Here, Nigel Evans explains the background to these changes and outlines the key provisions of the new legislation.*

In 1982, Australia replaced the disciplinary parts of *Australian Military Regulations*, the *Army Act 1944*, and their naval and air force equivalents, with the *Defence Force Discipline Act*. More recently, there have been further significant changes with the introduction of the Military Court and its juries. Britain, similarly, recently enacted the *Armed Forces Act 2006* to replace its separate service discipline acts (*Naval Discipline Act 1957*, *Army Act 1955* and *Air Force Act 1955*). The new act was to take full effect in January 2009, but the transitional arrangements have caused postponement of some elements until November. This article summarises some of its history and outlines the main features of the new act.

## Historic Position

The 1688 *Bill of Rights* made a standing army illegal. As a consequence, the army had to be re-legalised each year by an annual army act. In 1689, the *Mutiny Act* was passed to govern the peacetime army, supplementing the older *Articles of War*. In 1881, these became the army's disciplinary code as part of a new annual *Army Act*. This approach was inherited by the Royal Air Force in the *Air Force Act*. The Royal Navy had an entirely different legal origin, but its *Articles of War* eventually became part of the *Naval Discipline Act*.

In 1961, the *Army and Air Force Act* removed the need for annual continuation acts by making the two service acts valid for 5 years, subject to an annual Order in Council tabled in and passed by parliament. In 1964, the armed forces were brought together by creating the position of Secretary of State for Defence and the Defence Council 'having powers of command and administration over Her Majesty's armed forces'<sup>2</sup>. Powers were transferred from the Admiralty, including the First Lord of the Admiralty, the Secretary of State for War and the Army Council, and the Secretary of State for Air and the Air Council, which were all abolished, although single service Boards and, more recently, a Defence Management Board, were created.

The 1961 act was replaced by the *Armed Forces Act 1966*. This act, valid for 5 years with annual Orders in Council, enabled the continued existence of the army and air force. A new *Armed Forces Act* has appeared every five years since 1966.

The single service acts were never limited to discipline. They also dealt with enlistment and terms of

service, forfeitures and deductions from pay, inquiries, redress of complaints, and the procedures for administering justice. The quinquennial acts addressed all these matters, harmonising them as they evolved. For example, the 1966 act gave the Defence Council the authority to make regulations concerning enlistment and discharge. They also amended other legislation that affects the armed forces<sup>3</sup>. Some noteworthy changes introduced by the armed forces acts include:

- revision and harmonisation of offences (1971);
- standing civilian courts with judge advocate 'magistrates', sometimes with assessors, to deal with dependents and United Kingdom civilians employed or contracted by the armed forces overseas (1976);
- permitting civilian members of courts-martial when trying civilians (1976);
- arrangements for juvenile offenders (1976); and
- protection of service children overseas (1991).

## European Convention on Human Rights

By 1996, the European Convention on Human Rights was looming and was embodied in British law by the *Human Rights Act 1998*. Perhaps the most obvious issue was the summary powers of commanding officers – under the convention, justice without judicial officers is unacceptable. The right of an accused to elect trial by court-martial, however, negated this problem. Courts-martial themselves were a different matter, because the convening authority was in the chain-of-command, as was the confirming authority, so they lacked the required independence.

The 1996 *Armed Forces Act* abolished confirming authorities and substituted a senior officer, appointed by the Defence Council, as reviewing authority who could reduce sentences or overturn convictions. It also replaced convening authorities with prosecution authorities and court administration officers. Each service appointed a serving officer, legally-qualified for at least 10 years, as its 'prosecuting authority'. This authority could delegate any of his/her functions to legally-qualified prosecuting officers. The authority decided whether or not court-martial proceedings should start, what the charges should be and the type of court-martial. S/he notified the court administration officer (appointed by the Defence Council) to convene a particular type of court-martial in facilities provided by the Military Court Service.

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<sup>2</sup>*Defence (Transfer of Functions) Act 1964*

<sup>3</sup>The new act continues this and gives the Defence Council the authority to make regulations. It also consolidates all matters concerning pay, allowances and bounties into the Pay Warrant, which is necessary because the armed forces do not have a contract of employment.

Issues soon emerged in the form of judgements against the British Government by the European Court of Human Rights, leading to the *Armed Forces Discipline Act 2000*, although changes were mostly made while the matters were working their way through the courts. One problem was custody – placing people under arrest without charging them when they had committed, or were suspected of, or alleged to have committed, an offence. The ability to keep a person in custody without charge for more than a short time became subject to review by a judicial officer as was custody after being charged.

Another issue was the right of an accused to elect trial by court-martial in summary proceedings. The Army and Air Force adopted the naval practice of giving the accused the option before any evidence was presented, instead of after evidence but before sentencing. More significantly, the Summary Appeals Courts had to be introduced for those convicted at summary proceedings by their commanding officer. These courts comprise a judge advocate and two service officers. Judge advocates are selected by the Judge Advocate General, who is appointed by the Queen on the Lord Chancellor's recommendation. The Judge Advocate General is neither a commissioned officer nor part of the Ministry of Defence and his/her office is provided by the Ministry of Justice, which holds the budget for the judge advocate function.

The *Armed Forces Act 2001* addressed and regularised the powers of entry, stopping, search and seizure by service police and commanding officers, and review by judge advocates. Powers of commanding officers were limited and mostly subject to automatic review by a judge advocate. Among many other matters, it enabled warrant officers to be members of courts-martial and allowed the Attorney General to refer courts-martial sentences to the Courts-Martial Appeals Court, but limited the High Court's powers of judicial review over courts-martial proceedings<sup>4</sup>.

### **Armed Forces Act 2006**

The 1998 Strategic Defence Review identified that the trend to joint-service operations and organisations would be better supported by a single system of service law and the *Armed Forces Act 2006* has been introduced to meet this need. The key principles underlying the new act are the traditional ones underpinning the existing service acts, but with a harmonised approach. They build on the evolution in service law since the 1950s which has led to a system of service law that seeks to:

- be fair and be seen to be fair;
- reinforce the link between command and discipline;
- be efficient and simple to use and not overburden commanding officers;
- be conducive to the expeditious application of justice;
- be 'transportable' anywhere in the world;

- be compliant with the *European Convention on Human Rights*; and
- provide for consistent treatment in single-service and joint-service environments.

The new act runs to 386 sections with 17 schedules and generally covers the subjects in the individual service discipline acts. Consequential amendments change over 150 acts from the 1860s onwards. There is one historic matter – section 359 pardons those convicted and executed in World War 1 under the *Army Act 1881* and *Indian Act 1911* for cowardice, desertion and battlefield offences excluding murder. It drops the traditional subjects of billeting and requisitioning, presumably because they have no 21<sup>st</sup> century relevance.

### **Powers of commanding officers**

The role of the commanding officer remains central to service discipline. The Defence Council will continue to define who may be a commanding officer and the disciplinary authority of subordinate commanders. Commanding officers retain discretion on how the majority of cases are handled. Where, however, a commanding officer suspects a serious offence (such as rape or murder), the service police have to be notified. They then deal with the prosecuting authority and the matter is beyond the commanding officer's jurisdiction<sup>5</sup>.

Certain offences under the act can only be dealt with by civilian courts. These concern civilians aiding or abetting service people to commit certain service offences or obstructing a service person in their duty. There are 41 sections of service offences, including offences concerning ships and aircraft.

The obvious issue is the longstanding need for naval commanding officers to have greater summary powers than those in the other services. The result reduces naval powers, but increases army and air force ones in terms of offences they can deal with and sentences they can award. Criminal offences can be dealt with by commanding officers with permission from a senior officer, or by a senior officer, who has to be of 'two-star'<sup>6</sup> or higher rank. A higher authority can also authorise a commanding officer to exercise greater powers on a case-by-case basis, including awarding more than 28-days detention.

### **The Court Martial**

The major change is the Court Martial to replace all previous types of courts-martial. The Court Martial, normally an open court, is a standing court – it is not convened for each case, and can be in session in many places at the same time. Each session has three to seven members – officers or warrant officers who do not have to be from the same service – and a judge advocate. Members reach their verdict and decide sentence by majority voting. The judge advocate provides legal direction and has a casting vote for sentencing, which has to be in accordance with

<sup>4</sup>The new act does not deal with the Courts-Martial Appeals Court, which sits as required and comprises judges of the Court of Appeal, apart from slightly changing its name.

<sup>5</sup>This prevents a commanding officer dismissing a serious charge after limited investigation, particularly in an operational theatre.

<sup>6</sup>Rear admiral, major general, air vice-marshal or equivalent

sentencing guidelines. The Attorney General can seek review by the Court Martial Appeal Court of an unduly lenient sentence by the Court Martial and the accused's rights of appeal are unchanged.

The Summary Appeal Court continues and the Standing Civilian Court becomes the Service Civilian Court. Both have a judge advocate, but only the Summary Appeal Court has members and may be open to the public.

### **Judge advocates**

The Judge Advocate General remains, but vice and assistant judge advocate general are abolished. There are now only 'judge advocates'. Future appointments will be in accordance with United Kingdom practices for selecting judges, which are based on publicly advertising vacant positions. The selection criteria are likely to be similar to those for Recorders in the Crown Court. The Judge Advocate General can sit as a judge advocate and can appoint judges of the High Court as judge advocates, an option only likely for the most serious offences.

### **Director of Service Prosecutions**

A Director of Service Prosecutions has been appointed to replace the single-service prosecution authorities and is accountable to the Attorney-General. The newly-appointed incumbent has no previous military experience. The Director may appoint prosecuting officers. This office will decide whether or not to prosecute a case in the Court Martial and will conduct the prosecution.

### **Court Administration Officer**

A single Court Administration Officer replaces the single service ones and makes arrangements for the Court Martial sitting. This officer also makes arrangements for sittings of the Summary Appeal Court and Service Civilian Court.

### **Custody rules**

Rules about holding a person in custody without being charged have been tightened. It is only permissible for preserving or securing evidence, for questioning, or to prevent a crime being committed. The commanding officer must be notified as soon as possible, be satisfied that it is necessary and that investigations are being diligently conducted. Given this, a further 12 hours of custody can be granted. This can be extended up to 48 hours after arrest, but beyond this a judge advocate must normally hold a hearing.

### **Redress of complaints**

Redress of complaints has been significantly changed. The act retains the right for officers to petition the Queen (because they hold her commission), but only after consideration of the matter by the Defence Council.

The new complaints system is designed to be fast, fair and transparent by applying case management and removing duplicated effort. Most complaints will be dealt with at the lowest appropriate level (commanding officer or superior officer) and there will be a maximum of three levels – commanding officer, superior officer and Defence Council – in the process. In most cases,

the Defence Council will delegate to an empowered Service Complaints Panel that is independent of the chain-of-command and exercises the powers of the Defence Council. When the Service Complaints Panel deals with complaints of bullying and other forms of unacceptable behaviour, it will have an independent member who is neither a member of the armed forces nor a civil servant.

The Service Complaints Commissioner, essentially a service ombudsman, is an independent appointment who receives allegations and complaints from service personnel and members of the public. S/he will refer allegations and complaints concerning unacceptable behaviour into the chain-of-command. The chain-of-command will have to ascertain if the individual wishes to make a complaint and to ensure that s/he understands what to do. The Commissioner will also review the redress system for its effectiveness, fairness and efficiency and provide an annual report to the Secretary of the State who will lay it before Parliament.

### **Service Inquiries**

The various types of inquiry are all replaced by a single type of Service Inquiry that can investigate any matter to establish the facts. The new inquiries must have at least three members, with at least a major or equivalent presiding. Members may or may not be from the same service and members from a foreign armed-service are permitted. Witnesses can be from any service and the presiding officer can request a judge advocate to order civilian witnesses to attend and give evidence. Evidence given at an inquiry, however, cannot be used for any subsequent prosecution.

### **Administrative action**

Administrative action is outside the disciplinary process and major administrative action includes discharge. The army, however, introduced formal minor administrative action in 2004. This permits extra parades, duties or tasks for minor lapses in behaviour. It halved the number of cases dealt with summarily and has been adopted by the other services. In essence, any officer or non-commissioned officer can award up to three 'extras' to a subordinate of commander-equivalent or lower rank, but this has to be reviewed by someone of higher rank before being actioned and a local record made.

### **Conclusion**

A comparison of the *Armed Forces Act 2006* with the Australian *Defence Force Discipline Act 1982* is instructive. The Australian act is concerned solely with discipline and its administration and it explicitly details matters that the British act leaves to rules, orders and regulations made as statutory instruments by the Secretary of State or Defence Council. The most significant differences, however, are those concerning the military courts. The British Court Martial retains the small panel to decide guilt or innocence and the sentence. In contrast, the Australian Military Court has a 12-person or 6-person jury, or a judge sitting alone. Further, unlike Australia, there is no requirement for the British judicial officers to have military experience – they have no service rank or commission and are part of the Ministry of Justice not Defence.