

ARMED FORCES DISCIPLINE AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill makes a number of amendments to the Armed Forces Discipline Act 1971 and the Courts Martial Appeals Act 1953. In the main, the amendments are of a minor nature, and are of 2 kinds:

- (a) Amendments that were found desirable in the course of the preparation of the new Manual of Armed Forces Law:
- (b) Amendments consequential upon the enactment of the Criminal Justice Act 1985, and designed to keep Armed Forces law in line with the civilian law in respect of certain matters dealt with in that Act.

The Bill is in 2 Parts, and it is intended to seek final enactment of each Part as a separate Act.

Clause 1 relates to the Short Title and commencement.

PART I

AMENDMENTS TO ARMED FORCES DISCIPLINE ACT 1971

Clause 2 is a procedural provision, designed to facilitate the passage of this Part as a separate Act.

Clause 3 makes a number of amendments to section 2 of the principal Act relating to interpretation.

Subclause (1) redefines the term "able rank", by omitting references to obsolete ranks and an unnecessary reference to the equivalent women's ranks.

Subclause (2) amends the definition of the term "basic pay", by removing an obsolete reference to badge pay.

Subclause (3) amends the definition of the term "commanding officer" by excluding tenders and boats from the present reference to Her Majesty's ships in commission. The effect is that the officer in command of a tender or boat in commission will not be a "commanding officer" for the purposes of the principal Act.

Subclauses (4) and (6) should be read together. They remove an obsolete reference to narcotics within the meaning of the Narcotics Act 1965, and substitute a reference to controlled drugs within the meaning of the Misuse of Drugs Act 1975. See *clause 22*.

Subclause (5) redefines the term "leading aircraftman", by omitting references to obsolete ranks and an unnecessary reference to the equivalent women's ranks.

Subclause (7) amends the definition of the term "private", by omitting an unnecessary reference to the equivalent women's ranks.

Clause 4 seeks to dispel a slight doubt that has arisen concerning the combined effect of section 3 (2) and section 4 of the Criminal Justice Act 1985 in relation to proceedings under the principal Act. Section 3 (2) provides that the Criminal Justice Act 1985 shall not apply to proceedings under the principal Act, or to proceedings on appeal from any decision under the principal Act, except as expressly provided in the principal Act. However, section 4 (which provides that penal enactments are not to have retrospective effect to the disadvantage of an offender) is expressed to apply "notwithstanding any other enactment or rule of law to the contrary". It seems probable, therefore, that section 4 would be held to override section 3 (2), but, because of the importance of the issue, all doubt is removed by this clause.

Clause 5 clarifies and simplifies the definition of the term "active service", without changing its meaning.

Clause 6 is consequential upon the decision to introduce "officer cadet" as the lowest officer rank in the Army and Air Force, equivalent to the rank of midshipman in the Navy.

Clause 7, which should be read with *clauses 12 and 13* of the Bill, substitutes a new provision for section 13 of the principal Act. That section provides that where a person who is not subject to the principal Act is alleged to have acted as a spy for the enemy, or to have seduced or endeavoured to seduce any person subject to service law from his duty or allegiance to Her Majesty the Queen, while in a defence area or a naval ship outside New Zealand, that person shall be subject to the principal Act until either he has been acquitted, or any punishment imposed on him has been carried out, or he has been lawfully released from imprisonment or detention imposed under the sentence.

The apparent intention of this provision is to render such persons guilty of an offence against section 26 (spying in ships or establishments abroad) or section 27 (seduction from duty or allegiance) of the principal Act. However, there is considerable room to doubt that the provision in its present form achieves that purpose, because it seems to operate only from the point when an allegation is made, rather than the time when the offence was committed. Thus, it seems to render a person liable to be dealt with under the principal Act, without making him guilty of an offence.

Be that as it may, section 13 certainly seems in conflict with the prohibition against the retrospective imposition of criminal liability, previously set out in section 43B of the Criminal Justice Act 1954, and now to be found in section 10A of the Crimes Act 1961 (see section 2 of the Crimes Amendment Act (No. 2) 1985). This is so because, as explained above, section 13 imposes criminal liability (if at all) at the point when an allegation is made, and not at the time when the alleged offence took place.

This clause, together with *clauses 12 and 13* of the Bill, overcomes these problems by directly creating criminal liability for the acts themselves, and then rendering the offender liable to be dealt with under the principal Act.

Clauses 8, 17 (2), 20, 21, and 27 (2) increase the maximum fines that may be imposed for certain offences against the principal Act. Present maxima of \$200 are raised to \$1,000, and present maxima of \$500 are raised to \$3,000. This keeps them in line with the formulae used when the principal Act was enacted in 1971: \$200 was then equivalent to 28 days' basic pay, and \$500 was then equivalent to 84 days' basic pay.

Clause 9: Subclause (1) corrects a drafting error made when section 21 (1)(b) was amended by section 5 (1) of the Armed Forces Discipline Amendment Act 1981 to include a reference to the dismissal of a charge. The amendment was not carried through into the body of subsection (1), as it should have been.

Subclause (2) and clause 10 are consequential upon the proposed sections 191 (5) and 192 (7) of the principal Act set out in *clause 36* of the Bill.

Clause 11 substitutes a new provision for section 25 of the principal Act relating to the unauthorised disclosure of information. The new provision is narrower than the present one, and much more in line with the general tenor of the Official Information Act 1982.

Clause 14 amends section 32 of the principal Act relating to mutiny. The section distinguishes between a mutiny having as one of its objects the refusal or avoidance of service against the enemy or the impeding of any such service, and a mutiny having some other purpose. Those found guilty in the first case are liable to be sentenced to death, those found guilty in the second are liable to be sentenced to life imprisonment. The question is, does the distinction depend on the accused's knowledge of the objects of the mutiny (the subjective test) or is it sufficient if the prosecution proves one of the specified objects without the need to prove the accused's knowledge of that object (the objective test)? The clause plumps for the subjective test.

Clause 15 amends section 38 of the principal Act (disobeying a lawful command). It will be a defence if the accused proves that he neither knew nor had reasonable cause to believe that the person against whom the offence was alleged to have been committed was his superior officer. This follows the approach adopted in section 36 (insubordinate behaviour) and section 37 (obstruction of provost officer) of the principal Act.

Clause 16 corrects a drafting error in section 69 (1)(b) of the principal Act.

Clause 17 (1) extends section 70 (1)(e) of the principal Act to include disobedience or evasion of any order or direction made or given by a convening officer or (in certain circumstances) a reviewing authority. At present, section 70 (1)(e) is limited to orders made or directions given by courts-martial and courts of inquiry.

Clause 18 amends section 74 of the principal Act, which relates to offences against the civil law of New Zealand. The amendment makes it clear that a court-martial or an officer exercising summary powers in such a case cannot impose a penalty of a kind peculiar to the civil law: the court or officer is limited in its or his powers of punishment to punishments authorised by the principal Act.

Clause 19 substitutes a new subsection for section 82 (3) of the principal Act relating to the rank of a non-commissioned officer sentenced to imprisonment. Such a serviceman is reduced to the lowest possible rank (while he is serving the sentence) whether or not he has also been dismissed from Her Majesty's Service. The present subsection applies only where the serviceman is not also dismissed from Her Majesty's service.

Clause 23 amends section 117 of the principal Act relating to the review by reviewing authorities of summary findings and punishments. At present, there is no time limit imposed on the making of an application for review. *Subclause (1)* imposes a limit of 6 months.

The other amendments are of a consequential nature only.

Clause 24 rewrites section 131 of the principal Act relating to the sitting of courts-martial in public. The new clause is consistent with the rules in respect of the civil courts prescribed by section 138 of the Criminal Justice Act 1985.

Clause 25 rewrites section 138 of the principal Act, relating to suspension of sentence to distinguish between those sentences that can be, and those that cannot be, suspended in part.

Clause 26 amends section 143 of the principal Act, to exclude the possibility of a review by the High Court under the Judicature Amendment Act 1972 of proceedings before a court-martial. The principal Act provides for review by reviewing authorities, and section 143 presently excludes the removal into a court of proceedings before a court-martial by means of any prerogative writ or order.

Clause 27 amends section 144 of the principal Act, relating to the powers of courts-martial in relation to contempt.

Subclause (1) extends subsection (1)(e) to include disobedience or evasion of any order or direction made or given by a convening officer or (in certain circumstances) a reviewing authority. At present, section 70(1)(e) is limited to orders made or directions given by courts-martial.

Subclause (3) corrects a drafting error in section 144(5) of the principal Act.

Clause 28 makes a number of amendments to section 147(2) of the principal Act relating to documentary evidence in proceedings under the Act.

Subclauses (1) and (2) ensure that the same rules apply in respect of attestation papers and declarations signed by persons on enlistment or re-engagement in any of the Armed Forces of New Zealand or in any Commonwealth force.

Subclause (3) extends to certificates of arrest signed by persons exercising authority under or on behalf of a provost officer the same rules that apply to such certificates signed by a provost officer himself.

Subclause (4) provides for formal proof of the contents of Defence Manuals.

Clause 29 rewrites section 159 of the principal Act, relating to convictions or sentences substituted by reviewing authorities for those entered or passed by courts-martial, in line with section 78 of the Criminal Justice Act 1985.

Clause 30 rewrites section 165, and consequentially amends section 152(2), of the principal Act relating to a stay of proceedings before a reviewing authority where application has been lodged for leave to appeal to the Courts Martial Appeals Court. The clause makes it clear that if leave to appeal is refused or the appeal is heard and determined, that is an end of the matter and the reviewing authority may take no further action in the matter. If, however, the appeal is withdrawn or abandoned, proceedings before the reviewing authority will commence or continue.

Clause 31 corrects a drafting error in the principal Act.

Clause 32 rewrites section 177 of the principal Act, relating to the commencement of sentences, in line with section 78 of the Criminal Justice Act 1985.

Clause 33 rewrites section 178 of the principal Act, relating to consecutive sentences, in line with section 78 of the Criminal Justice Act 1985.

Clause 34 cures a drafting oversight in the Armed Forces Discipline Amendment Act 1981.

Cluses 35 to 39 amend Part X of the principal Act, relating to persons found to be under disability or acquitted on account of insanity. The amendments bring the Part into line with Part VII of the Criminal Justice Act 1985.

Clause 40 is of a consequential nature only.

PART II

AMENDMENTS TO COURTS MARTIAL APPEALS ACT 1953

Clause 41 is a procedural provision, designed to facilitate the passage of this Part as a separate Act.

Clause 42 amends section 9C of the principal Act relating to the commencement of sentences substituted by the Court for sentences passed by courts martial. The amendments bring the section into line with section 78 of the Criminal Justice Act 1985.

Clause 43 is new, and gives a right of appeal against a finding of disability. Although, the civilian law has long provided such a right, the Armed Forces law has not. Thus, this provision brings the principal Act into line with the Criminal Justice Act 1985 (see section 112).

Hon. F. D. O'Flynn

ARMED FORCES DISCIPLINE AMENDMENT

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A BILL INTITULED

An Act to amend the Armed Forces Discipline Act 1971

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

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1. Short Title and commencement—(1) This Act may be cited as the Armed Forces Discipline Amendment Act 1985.

(2) This Act shall come into force on the 1st day of January 1986.

PART I

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AMENDMENTS TO ARMED FORCES DISCIPLINE ACT 1971

2. Part to be read with Armed Forces Discipline Act 1971—This Part of this Act shall be read together with and deemed part of the Armed Forces Discipline Act 1971* (hereafter in this Part referred to as the principal Act).

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*1971, No. 53

Amendments: 1976, No. 13; 1980, No. 37; 1981, No. 48

3. Interpretation—(1) Section 2 (1) of the principal Act is hereby amended by repealing the definition of the term “able rank”, and substituting the following definition:

“‘Able rank’, in relation to the Navy, includes ordinary rank and apprentices:”

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(2) Section 2 (1) of the principal Act is hereby further amended by omitting from the definition of the term “basic pay”, the words “and badge pay”.

(3) Section 2 (1) of the principal Act is hereby further amended by inserting in paragraph (a) of the definition of the term “commanding officer”, after the words “in commission”, the words “other than a tender or a boat”.

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(4) Section 2 (1) of the principal Act is hereby further amended by inserting, after the definition of the term “constable”, the following definition:

“‘Controlled drug’ means a controlled drug within the meaning of the Misuse of Drugs Act 1975:”

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(5) Section 2 (1) of the principal Act is hereby further amended by repealing the definition of the term “leading aircraftman”, and substituting the following definition:

“‘Leading aircraftman’ includes an aircraftman, a general service hand, and an air force cadet:”

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(6) Section 2 (1) of the principal Act is hereby further amended by repealing the definition of the term “narcotic”.

(7) Section 2 (1) of the principal Act is hereby further amended by omitting from the definition of the term “private” the words “; and includes the equivalent women’s ranks in the Army”.

4. Special provisions relating to the interpretation, etc., of Part II—Section 3 of the principal Act is hereby amended by inserting, after subsection (1), the following subsection:

“1A) Section 4 of the Criminal Justice Act 1985 (which provides that penal enactments are not to have retrospective effect to the disadvantage of an offender) shall apply to proceedings under this Act and to proceedings on appeal from any decision under this Act.”

5. Active service—Section 5 (1) of the principal Act is hereby amended by repealing paragraph (b), and substituting the following paragraphs:

“(b) It is engaged in operations against the enemy; or
“(c) It is in armed occupation of any foreign country.”

6. Provisions of Act may be modified, etc., in relation to certain classes of persons—Section 7 (2) of the principal Act is hereby amended by adding the following paragraph:

“(d) Midshipmen and officer cadets.”

7. Spies, etc.—The principal Act is hereby amended by repealing section 13, and substituting the following section:

“13. (1) Where a person (being a person not otherwise subject to this Act) is alleged to have committed an offence against section 26 or section 27 of this Act, that person shall, on the recording of the allegation in the form of a charge, be deemed to be subject to this Act,—

“(a) Until the charge against that person is, on investigation, dismissed by an officer exercising summary powers;
or

“(b) Until that person is acquitted by a court-martial; or

“(c) If that person is convicted, until the sentence has been carried out or that person has served his sentence (including any further sentence imposed upon him while serving that sentence) or that person is released in due course of law from any imprisonment or detention imposed under the sentence.”

8. Certain civilians closely associated with Armed Forces subject to this Act—Section 16 (7) of the principal Act is hereby amended—

- (a) By omitting from paragraph (d) the expression “\$500”, and substituting the expression “\$3,000”: 5
- (b) By omitting from the proviso to that paragraph the expression “\$200”, and substituting the expression “\$1,000”:
- (c) By omitting from paragraph (f) the expression “\$200”, and substituting the expression “\$1,000”. 10

9. Person may not be tried under principal Act and civil law in respect of same act or omission—(1) Section 21 (1) of the principal Act is hereby amended by inserting, after the word “of which he was acquitted, convicted, or found guilty,” the words “or that is substantially the same as the offence contained in the charge that was dismissed,”. 15

(2) Section 21 (3) of the principal Act is hereby amended by adding to paragraph (b) the word “; or”, and by inserting, after that paragraph, the following paragraph:

- “(c) Has been found by that court or court-martial to be under disability and the proceedings against that person in the course of which the finding was made have been stayed,—”. 20

10. Persons not to be tried under this Act for offences already disposed of—Section 22 (1) of the principal Act is hereby amended by adding to paragraph (d) the word “, or”, and by inserting, after that paragraph, the following paragraph: 25

- “(e) A person who was charged with having committed an offence against this Act has been found to be under disability and the proceedings against that person in the course of which the finding was made have been stayed,—”. 30

11. Unauthorised disclosure of information—The principal Act is hereby amended by repealing section 25, and substituting the following section: 35

“25. Every person subject to this Act commits an offence, and is liable to imprisonment for a term not exceeding 2 years, who knowingly, and with knowledge that he is acting without proper authority, communicates to any other person any official information (as defined in section 78A of the Crimes Act 1961), not being official information that is publicly available, or delivers to any other person any object (as defined 40

in that provision of that Act), knowing that the communication of that information or the delivery of that object is likely—

“(a) To prejudice the security or defence of New Zealand; or

5 “(b) To prejudice the entrusting of information, being information relating directly or indirectly to the security or defence of New Zealand or otherwise of use or interest to the Armed Forces of New Zealand, to the Government of New Zealand on a basis of confidence by—

10 “(i) The government of any other country or any agency of such a government; or

“(ii) Any international organisation.”

12. Spying in ships or establishments abroad—Section 26 of the principal Act is hereby amended by omitting the words
15 “subject to this Act”.

13. Seduction from duty or allegiance—Section 27 of the principal Act is hereby amended by omitting the words “subject to this Act”.

14. Mutiny—(1) Section 32 (1) of the principal Act is hereby
20 amended by omitting the words “the object of which, or one of the objects of which,” and substituting the words “knowing that the object or one of the objects of the mutiny”.

(2) Section 32 (2) of the principal Act is hereby amended by
25 omitting the words “other than a mutiny that is referred to in”, and substituting the words “otherwise than in circumstances rendering him liable to be sentenced to death under”.

15. Disobeying a lawful command—Section 38 of the principal Act is hereby amended by adding, as subsection (2),
30 the following subsection:

“(2) In any proceedings in respect of a charge for an offence against subsection (1) of this section, it is a defence to the charge if the accused proves that he neither knew nor had reasonable cause to believe that the person against whom the offence was
35 alleged to have been committed was his superior officer.”

16. Delay or denial of justice—Section 69 (1)(b) of the principal Act is hereby amended by omitting the word “and”, and substituting the word “or”.

17. Offences relating to proceedings of courts-martial, etc.—Section 70 (1) of the principal Act is hereby further amended by repealing paragraph (e), and substituting the following paragraph:

“(e) Disobeys or evades any order or direction made or given— 5

“(i) By a convening officer under section 131 of this Act; or

“(ii) By a court-martial or court of inquiry in the course of the hearing of any proceedings before the court-martial or court of inquiry; or 10

“(iii) By a reviewing authority under **paragraph (b) or paragraph (c) of section 131 (5)** of this Act.”

(2) Section 70 (2) (b) of the principal Act is hereby amended by omitting the expression “\$200”, and substituting the expression “\$1,000”. 15

18. Offences against the civil law of New Zealand—Section 74 of the principal Act is hereby amended by inserting, after subsection (2), the following subsection:

“(2A) Notwithstanding anything in subsection (2) of this section, no person who is convicted of an offence against this section shall be liable to any punishment of a kind that is not specified in clause 1 of the Second Schedule, or clause 1 of the Third Schedule, to this Act.” 20

19. Dismissal from service and reduction in rank—Section 82 of the principal Act is hereby amended by repealing subsection (3), and substituting the following subsection: 25

“(3) Where a non-commissioned officer is sentenced by a court-martial to imprisonment or detention (whether or not such sentence includes dismissal from Her Majesty’s Service), he shall be deemed to be reduced to the lowest rank to which he can be reduced, being such rank as may be prescribed.” 30

20. Punishment by fine—Section 85 (3) (b) of the principal Act is hereby amended by omitting the expression “\$500”, and substituting the expression “\$3,000”. 35

21. Compensation for loss of or damage to property—Section 86 (4) (b) of the principal Act is hereby amended by omitting the expression “\$200”, and substituting the expression “\$1,000”.

22. Searches to prevent smuggling, etc.—Section 96 (1) of the principal Act is hereby amended by omitting the word “narcotics”, and substituting the words “controlled drugs”.

23. Summary findings and punishments to be reviewed by reviewing authorities—(1) Section 117 of the principal Act is hereby amended by repealing subsection (2), and substituting the following subsection:

“ (2) Where any serviceman tried summarily or dealt with summarily is found guilty of an offence against this Act, the finding and any punishment imposed on him may be reviewed—

“ (a) By a reviewing authority on application made by him or on his behalf within 6 months after the date of the finding; or

15 “ (b) By a reviewing authority within the meaning of paragraph (b) or paragraph (c) of subsection (1) of this section at any time on its own initiative without any such application; or

20 “ (c) By the Board of Review on being referred to the Board at any time either by the Chief of Staff of any service or the Defence Council.”

(2) Section 117 of the principal Act is hereby further amended by inserting, after subsection (8), the following subsection:

25 “ (8A) If a reviewing authority substitutes a punishment pursuant to subsection (8) of this section, the substituted punishment shall, subject to **section 178** of this Act, be deemed for all purposes to be the punishment imposed by the officer who tried the case summarily or dealt summarily with the case.”

30 (3) Section 117 of the principal Act is hereby further amended by renumbering subsection (8A) (as inserted by section 9 (1) of the Armed Forces Discipline Amendment Act 1980) as subsection (8B).

35 (4) The Armed Forces Discipline Amendment Act 1981 is hereby consequentially amended by repealing so much of the Schedule as relates to subsections (2) and (5) of section 117 of the principal Act.

24. Courts-martial to sit in open court—(1) The principal Act is hereby amended by repealing section 131, and substituting the following section:

40 “ 131. (1) Subject to the succeeding provisions of this section, a court-martial shall sit in open court and in the presence of the accused.

“(2) If at any time it appears to a convening officer or court-martial that—

“(a) Any statement may be made or evidence given in the course of the proceedings which might lead to the disclosure of information that would or might be directly or indirectly useful to the enemy or any foreign country or would or might be otherwise harmful to New Zealand; or 5

“(b) It is necessary in the interests of justice to do so; or

“(c) It is desirable in the interests of public morality to do so; or 10

“(d) It is necessary for the protection of the reputation of any victim of any alleged sexual offence or offence of extortion to do so,—

the convening officer or court-martial may make any one or more of the orders specified in **subsection (3)** of this section. 15

“(3) The orders that may be made under **subsection (2)** of this section are as follows:

“(a) An order forbidding publication of any report or account of the whole or any part of— 20

“(i) The evidence adduced; or

“(ii) The submissions made:

“(b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses: 25

“(c) Subject to **subsection (4)** of this section, an order excluding all or any persons other than the judge advocate, the prosecutor, and the accused, and any barrister, solicitor, or serviceman instructed by the accused to act on his behalf. 30

“(4) The power conferred by **paragraph (c)** of **subsection (3)** of this section shall not, except where the interests of security or defence so require, be exercised so as to exclude any accredited news media reporter. 35

“(5) An order made under **paragraph (a)** or **paragraph (b)** of **subsection (3)** of this section—

“(a) May be made for a limited period or permanently; and

“(b) If it is made for a limited period, may be renewed for a further period or periods by the convening officer or court-martial or by any reviewing authority (within the meaning of **paragraph (b)** or **paragraph (c)** of **section 151 (1)** of this Act); and 40

“(c) If it is made permanently, may be reviewed by the convening officer or court-martial or by any such reviewing authority at any time. 45

“(6) A court-martial shall hold its proceedings in closed court while deliberating on its finding or sentence on any charge.

“(7) A court-martial may hold its proceedings in closed court on any other deliberation among the members.

5 “(8) Where a court-martial holds its proceedings in closed court, all persons, except members of the court and such other persons as may be authorised by the rules of procedure, shall be excluded from the place where the court is deliberating.

10 “(9) Without limiting any of the foregoing provisions of this section, sections 139 to 141 of the Criminal Justice Act 1985, so far as they are applicable and with any necessary modifications, shall apply to proceedings under this Act and to proceedings on appeal from any decision under this Act.”

15 (2) Section 10 of the Armed Forces Discipline Amendment Act 1980 is hereby consequentially repealed.

25. Certain sentences may be suspended—The principal Act is hereby amended by repealing section 138, and substituting the following section:

“138. Subject to sections 181 to 183 of this Act,—

20 “(a) If a court-martial passes a sentence of imprisonment, detention, or a fine on any offender, the court may suspend the operation of the sentence or any part of it; and

25 “(b) If a court-martial passes a sentence of reduction in rank or forfeiture of seniority on any offender, the court may suspend the operation of the sentence.”

26. Proceedings not invalid for want of form—Section 143 of the principal Act is hereby amended by adding the words “or be liable to review by any court under the Judicature 30 Amendment Act 1972 or otherwise”.

27. Powers of courts-martial in relation to contempt—(1) Section 144 (1) of the principal Act is hereby amended by repealing paragraph (e), and substituting the following paragraph:

35 “(e) Disobeys or evades any order or direction made or given—

“*(i)* By a convening officer under section 131 of this Act; or

40 “*(ii)* By a court-martial in the course of the hearing of any proceedings before it; or

“*(iii)* By a reviewing authority under paragraph (b) or paragraph (c) of section 131 (5) of this Act.”

(2) Section 144 (4) of the principal Act is hereby amended by omitting the expression “\$200”, and substituting the expression “\$1,000”.

(3) Section 144 (5) of the principal Act is hereby amended by inserting, after the words “the provisions of subsections (1) to (4)”, the word “of”. 5

28. Evidence in proceedings under this Act—(1) Section 147 (2) of the principal Act is hereby amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The attestation paper purporting to be signed by a person on his being attested as a rating, soldier, or airman in the Armed Forces of New Zealand or in any Commonwealth force, and the declaration purporting to be made by any person upon his re-engagement in any of the Armed Forces of New Zealand or in any Commonwealth force, shall be evidence of that person having given the answers to questions that he is represented as having given in the paper or declaration:” 10 15

(2) Section 147 (2) (b) of the principal Act is hereby amended by inserting, after the words “the enlistment of a person”, the words “in any of the Armed Forces of New Zealand or”. 20

(3) Section 147 (2) of the principal Act is hereby further amended by repealing paragraphs (i) and (j), and substituting the following paragraphs: 25

“(i) Where the proceedings are proceedings against a serviceman on a charge of being a deserter or an absentee without leave, and the serviceman has surrendered himself into the custody of a provost officer or a person lawfully exercising authority under or on behalf of a provost officer, or of any other officer of any New Zealand or allied force, a certificate purporting to have been signed by that provost officer, or person, or other officer, and stating the fact, date, and place of the surrender, shall be evidence of the matters so stated:” 30 35

“(j) Where the proceedings are proceedings against a serviceman on a charge of being a deserter or an absentee without leave, and the serviceman has been arrested and taken into the custody of a provost officer or a person lawfully exercising authority under or on behalf of a provost officer, or of any other officer of any New Zealand or allied force, a certificate purporting to have been signed by that 40

provost officer, or person, or other officer, and stating the fact, date, and place of the arrest, shall be evidence of the matters so stated.”.

(4) Section 147 (2) of the principal Act is hereby further amended by inserting, after paragraph (n), the following paragraph:

“(na) A certificate purporting to be signed by the commanding officer of any accused, or signed by any other officer authorised by that commanding officer to give the certificate, and stating the contents of any part of any Defence Manual shall, in the proceedings against the accused, be evidence of the matters stated in the certificate:”

29. Substituted conviction or sentence deemed to be conviction or sentence of court-martial—The principal Act is hereby amended by repealing section 159, and substituting the following section:

“159. (1) If a reviewing authority substitutes a conviction or sentence for the conviction or sentence imposed by a court-martial, or if any such authority exercises the powers conferred by section 157 of this Act to remit or commute a punishment imposed by a sentence of a court-martial, the substituted conviction or sentence, or the sentence having effect after the exercise of those powers, as the case may be, shall, subject to the succeeding provisions of this section, be deemed for all purposes to be the conviction or sentence of the court.

“(2) Where—

“(a) A sentence imposed by a court-martial was directed to be cumulative on any earlier sentence; and

“(b) A reviewing authority substitutes any sentence for the sentence imposed by the court-martial or remits or commutes that sentence but does not direct the sentence to be cumulative on the earlier sentence referred to in **paragraph (a)** of this subsection,—

the term of the substituted, remitted, or commuted sentence shall be deemed to have commenced or shall commence on the date when the sentence imposed by the court-martial would have commenced had that sentence not been directed to be cumulative on the earlier sentence.

“(3) Where—

“(a) A sentence imposed by a court-martial is directed to be cumulative on any earlier sentence; and

“(b) A reviewing authority substituting for that earlier sentence, a sentence other than one of a kind upon which the later sentence can be cumulative or remits or commutes the earlier sentence to such a sentence,—
the later sentence shall commence when the earlier sentence commenced or would have commenced.” 5

30. Effect of appeal—(1) Section 152 (2) of the principal Act is hereby amended by inserting, before the words “As soon as practicable”, the words “Subject to **section 165** of this Act,”. 10

(2) The principal Act is hereby further amended by repealing section 165, and substituting the following section:

“165. Where an application for leave to appeal against conviction by a court-martial has been lodged under section 7 of the Courts Martial Appeals Act 1953, a reviewing authority shall not commence or proceed with a review of the proceedings of that court-martial until— 15

“(a) The application to appeal is withdrawn or abandoned, in which case the reviewing authority shall consider the legality and propriety of the conviction and sentence (if any) of the court; or 20

“(b) The application to appeal is refused or the appeal is determined, in which case the reviewing authority shall consider the legality and propriety of the sentence (if any) of the court.” 25

31. Execution of sentences of death—Section 167 (1) (b) of the principal Act is hereby amended by omitting the word “of” where it thirdly occurs, and substituting the word “or”.

32. Commencement of sentences—Section 177 of the principal Act is hereby amended by adding the following subsection: 30

“(3) Where—

“(a) A sentence of imprisonment or detention is passed by a court-martial on the conviction of any person; and

“(b) That conviction is subsequently quashed and a new trial ordered; and 35

“(c) Following the new trial the person is again convicted and sentenced to imprisonment or detention,—

the term of the new sentence shall be deemed to have commenced or shall commence on the date on which the term of the original sentence commenced or would have commenced; but the period commencing with the quashing of the conviction and ending with the imposition of the new sentence shall not count as part of the new sentence.” 40

33. Consecutive sentences—The principal Act is hereby amended by repealing section 178, and substituting the following section:

5 “178. (1) Where a person who is already serving a term of imprisonment, whether imposed under this Act or otherwise, is sentenced to a further term of imprisonment by a court-martial under this Act, the court may order that the further term shall run from the expiration of the term already being served.

10 “(2) Where, in any case to which **subsection (1)** of this section applies,—

“(a) The earlier sentence is quashed on review or appeal or is otherwise set aside; and

15 “(b) No other sentence of imprisonment is substituted for that earlier sentence,—

the sentence imposed by the court-martial shall be deemed to have commenced or shall commence on the date when the term of the earlier sentence commenced or would have commenced.

20 “(3) Where, in any case to which **subsection (1)** of this section applies,—

“(a) The earlier sentence is quashed on review or appeal or is otherwise set aside; and

25 “(b) Another sentence of imprisonment is substituted for that earlier sentence,—

the sentence imposed by the court-martial shall commence or shall be deemed to have commenced on the date on which the substituted sentence will expire or is deemed to have expired.

30 “(4) Where a person who is already serving a sentence of detention is sentenced to a further term of detention by a court-martial or an officer exercising summary powers, that court or officer may order that the further term shall run from the expiration of the sentence already being served.

35 “(5) Where, in any case to which **subsection (4)** of this section applies,—

“(a) The earlier sentence is quashed on review or appeal or is otherwise set aside; and

40 “(b) No other sentence of detention is substituted for that earlier sentence,—

the sentence imposed by the court-martial or the officer exercising summary powers shall be deemed to have commenced or shall commence on the date when the term of the earlier sentence commenced or would have commenced.

“(6) Where, in any case to which **subsection (4)** of this section applies,—

“(a) The earlier sentence is quashed on review or appeal or is otherwise set aside; and

“(b) Another sentence of detention is substituted for that earlier sentence,—

the sentence imposed by the court-martial or the officer exercising summary powers shall be deemed to have commenced or shall commence on the date on which the substituted sentence will expire or is deemed to have expired.”

34. Compensation to victims of offences occasioning physical harm—Section 186A of the principal Act (as inserted by section 2 (1) of the Armed Forces Discipline Amendment Act 1976) is hereby amended by inserting in subsection (1), and also in subsection (2), before the words “dealing summarily” in each case, the words “trying summarily or”.

35. Person found under disability—Section 188 (2) of the principal Act is hereby amended by inserting, after the words “is satisfied by medical evidence”, the words “that his mental condition is such”.

36. When plea of not guilty may be substituted for plea of guilty—Section 189 of the principal Act is hereby repealed.

37. New sections (relating to insanity and disability) substituted in principal Act—The principal Act is hereby amended by repealing sections 190 to 194, and substituting the following sections:

“190. **Finding of insanity**—(1) If, on the trial by court-martial of any person charged with an offence, the accused person pleads insanity and the court finds him not guilty on account of his insanity, the court shall direct a finding to that effect to be recorded.

“(2) If, on the trial by court-martial of any person charged with an offence, the accused person pleads insanity and the court finds him not guilty, the court shall be required to declare whether or not it has acquitted the accused person on account of his insanity.

“(3) Nothing in this section shall limit or affect the power of a judge advocate to leave to a court-martial the question of whether an accused person was insane (within the meaning of section 23 of the Crimes Act 1961) notwithstanding that the accused person has not pleaded insanity nor put the question of his sanity in issue, where it appears in evidence that he may have been insane at the time of the commission of the offence.”

“191. **Order to be made if person under disability or insane**—(1) Subject to **subsections (2) and (4)** of this section, if any person tried by court-martial (whether in New Zealand or elsewhere)—

5 “(a) Is found to be under disability; or
 “(b) Is acquitted on account of his insanity,—
the court shall make an order that he be detained in a psychiatric hospital as a special patient.

10 “(2) In any case to which **subsection (1)** of this section applies, the court, having regard to all the circumstances of the case, and being satisfied, after hearing medical evidence, that it would be safe in the interests of the public to make an order under this subsection, may, instead of making an order under **subsection (1)** of this section,—

15 “(a) Make an order that the person be detained in a psychiatric hospital as a committed patient; or
 “(b) Make an order for his immediate release; or
 “(c) If the person is subject to a sentence of imprisonment or detention (whether imposed under this Act or
20 otherwise) decide not to make an order under this section.

 “(3) In the exercise of its powers under **subsection (2)** of this section, the court may take into account any undertaking given by or on behalf of the person that the person will undergo or
25 continue to undergo a particular course of treatment.

 “(4) Where a person is found to be under disability or is acquitted on account of his or her insanity, the court may, instead of exercising immediately any of its powers under **subsections (1) and (2)** of this section, adjourn and report the
30 matter to the convening officer for the purpose of having enquiries made to determine the most suitable method of dealing with the case pursuant to this section.

 “(5) Where, in respect of any person found to be under disability, the court makes an order under **paragraph (a)** or
35 **paragraph (b)** of **subsection (2)** of this section, or decides under **paragraph (c)** of that subsection not to make any order under this section, the proceedings against that person in the course of which the finding was made shall be stayed, and no further proceedings shall be taken against the person in respect of any
40 offence charged in those proceedings.

 “(6) Subject to the provisions of this Part of this Act, where a person is found to be under disability, or is acquitted on account of his insanity, he shall be kept in strict custody in accordance with Defence Council Orders pending his removal
45 to a psychiatric hospital.

“(7) A person found to be under disability shall be removed to a psychiatric hospital as soon as practicable after the finding has been approved by a reviewing authority under section 198 (4) (a) of this Act, or if he has been acquitted on account of his insanity, as soon as practicable after that acquittal. 5

“(8) If an order is made under **subsection (1)** of this section in respect of a person who is subject to a sentence of imprisonment or detention, whether imposed before or after the making of the order, the term of that sentence shall, except during any period while he is unlawfully at large, continue to 10 run during the currency of the order and any period spent as a committed patient; and, on his discharge from the hospital in which he is detained pursuant to the order or as a committed patient, he may, unless the sentence has sooner expired, be removed to and received in a penal institution, service prison, 15 or detention quarter in New Zealand, as the case may require, to undergo the remainder of the sentence.

“192. **Duration of order for detention as special patient where defendant under disability**—(1) In this section the expression ‘maximum period of detention as a special patient’, 20 in relation to any accused person who has been found by a court-martial to be under disability means—

“(a) Seven years from the date of the making of the order pursuant to **section 191 (1)** of this Act, in a case where any offence charged was punishable by 25 imprisonment for life; or

“(b) A period from the date of the making of the order pursuant to **section 191 (1)** of this Act equal to half the maximum term of imprisonment to which the accused person was liable on conviction of the 30 offence charged or (if the defendant was charged with more than one offence) of the offence punishable by the longer or longest term of imprisonment, in any other case.

“(2) If an order is made by a court-martial pursuant to **section 191 (1)** of this Act in respect of an accused person who has been found to be under disability, the order shall, subject to sections 72 and 74 of the Mental Health Act 1969, continue in force until— 35

“(a) He is brought before a court-martial pursuant to a 40 direction given under this section; or

“(b) A direction is given under this section that he shall thereafter be held as a committed patient.

“(3) Notwithstanding anything in **subsection (1)** of this section, where, in any case to which that subsection applies, every 45

charge against the person concerned is withdrawn, the order made by the court under **section 191 (1) (a)** of this Act shall be deemed to be cancelled.

5 “(4) If at any time before the expiry of the maximum period of detention as a special patient a certificate is given by 2 medical practitioners, or by the superintendent of a psychiatric hospital, that the person is no longer under disability, the Attorney-General shall either direct that the person be placed in service custody for trial by court-martial or direct that he 10 shall thereafter be held as a committed patient.

“(5) If at any time before the expiry of the maximum period of detention as a special patient, the Minister of Health, acting with the concurrence of the Attorney-General, is satisfied, on the recommendation of 2 medical practitioners, that it is no 15 longer necessary for the person, though still under disability, to be subject to the order, the Minister may direct that the person shall thereafter be held as a committed patient.

“(6) If no direction is given under **subsection (4)** or **subsection (5)** of this section before the expiry of the maximum period 20 of detention as a special patient, the following provisions shall apply on the expiry of that period:

“*(a)* If a certificate is given by 2 medical practitioners, or by the superintendent of a psychiatric hospital, that the person is no longer under disability, the Attorney-General shall either direct that the person be placed 25 in service custody for trial by court-martial or direct that he shall thereafter be held as a committed patient; or

“*(b)* If no such certificate is given, the Attorney-General shall 30 direct that the person shall thereafter be held as a committed patient.

“*(7)* On the giving under this section of any direction that the person shall be held as a committed patient, the proceedings in which the order for detention was made shall 35 be stayed, and no further proceedings shall be taken against the person in respect of any offence charged in those proceedings.

“*(8)* The powers and duties conferred and imposed on the Attorney-General by any of the provisions of this section shall 40 not be capable of being exercised or performed by the Solicitor-General.

“193. Duration of order for detention as special patient when person acquitted on account of his insanity—(1) If an order is made by a court-martial pursuant to **section 191 (1)** of this Act in respect of an accused person who has been acquitted on account of his insanity, the order shall continue in force until— 5

“(a) A direction is given under this section that that person shall thereafter be held as a committed patient; or

“(b) That person is discharged pursuant to a direction given under this section. 10

“(2) If at any time while the order continues in force the Minister of Health is satisfied, on the recommendation of 2 medical practitioners, that the person’s mental condition no longer requires, either in the person’s own interest or for the safety of the public, that he should be subject to the order, 15 the Minister may direct that the person shall thereafter be held as a committed patient, or that the person be discharged by the superintendent of the hospital.

“194. Power of court-martial to commit to hospital on conviction—(1) Subject to **subsection (2)** of this section, where a person is convicted by a court-martial (whether in New Zealand or elsewhere) of any offence against this Act, the court, on being satisfied by the production of a certificate by a medical practitioner that the person is mentally disordered, and that his mental condition requires that he should be detained in a hospital either in his own interest or for the safety of the public, may, instead of passing sentence, make an order that the person be detained in a psychiatric hospital as a committed patient. 25

“(2) No order shall be made under this section in respect of a person who is, at the time of the conviction, subject to a sentence of imprisonment or detention. 30

“(3) Every such person shall be kept in strict custody pending the review of his conviction, and, if the conviction and order are approved by the reviewing authority, the accused shall be removed to a psychiatric hospital as soon as practicable thereafter.” 35

38. Substitution of finding and quashing of sentence where accused was insane—Section 197 (2) of the principal Act is hereby amended by inserting, after the words “this Act”, the words “and section 9E of the Courts Martial Appeals Act 1953”. 40

39. Powers of reviewing authority where person under disability or insane, and promulgation of finding—

(1) Section 198 (1) of the principal Act is hereby amended by inserting, after the words “under disability”, the words “or
5 acquits a person on account of his insanity”.

“(2) Section 198 (4) of the principal Act is hereby amended by omitting the words “the finding” where they first occur, and substituting the words “a finding that a person is under disability”.

10 (3) Section 198 of the principal Act is hereby further amended by inserting, after subsection (4), the following subsection:

“(4A) After considering the legality and propriety of an acquittal of a person on account of his insanity, together with the advice given under subsection (3) of this section, the
15 reviewing authority may—

“(a) Direct that the finding of the court-martial shall stand:

“(b) Quash the finding, and, if the reviewing authority is satisfied that in the absence of such a finding the proper finding would have been that the person
20 was guilty of an offence (whether that with which he was charged or any other offence of which he could have been convicted at the trial), the reviewing authority may substitute for the acquittal a conviction for the offence; and, in any such case,
25 the reviewing authority shall have the same powers of sentencing or otherwise dealing with the person as the court-martial would have had if the substituted conviction had been recorded at the trial:

“(c) Quash the finding, and substitute an acquittal (otherwise
30 than an acquittal on account of insanity):

“(d) Exercise any power, whether to direct a new trial or otherwise, that it could have exercised if the review were a review of a conviction.”

(4) Section 198 of the principal Act is hereby amended by
35 adding the following subsection:

“(7) At any time after a court-martial has found any person to be under disability or has acquitted any person on account of his insanity, but before the expiration of 6 months from the date of promulgation of the decision of the reviewing
40 authority which first examined the court’s record of proceedings, he may lodge with a reviewing authority in accordance with the rules of procedure a petition against the court’s finding; and the authority petitioned shall thereupon consider the petition and carry out a review in accordance with
45 the powers conferred on reviewing authorities by Part VIII of this Act and by the rules of procedure.”

40. Repeal—Section 17 of the Armed Forces Discipline Amendment Act 1980 is hereby consequentially repealed.

PART II

AMENDMENTS TO COURTS MARTIAL APPEALS ACT 1953

41. Part to be read with Courts Martial Appeals Act 1953—This Part of this Act shall be read together with and deemed part of the Courts Martial Appeals Act 1953* (hereafter in this Part referred to as the principal Act). 5

*Reprinted 1974, Vol. 3, p. 2281
Amendment: 1980, No. 38

42. Term of sentence passed under sections 9, 9A, 9B, and 9C—Section 9D of the principal Act (as substituted by section 208 (1) of the Armed Forces Discipline Act 1971) is hereby amended by adding the following subsections: 10

“(3) Except in a case to which **subsection (4)** of this section applies, where the Court substitutes a sentence of imprisonment or of detention for the sentence of imprisonment or of detention passed by a court martial, the term of the substituted sentence shall be deemed to have commenced or shall commence on the date when the term of the original sentence commenced or would have commenced. 15

“(4) Where— 20

“(a) A sentence of imprisonment or of detention passed by a court martial was directed to be cumulative on any earlier sentence; and

“(b) The Court substitutes a sentence of imprisonment or of detention for the sentence of imprisonment or of detention passed by the court martial, but does not direct the sentence to be cumulative on the earlier sentence referred to in **paragraph (a)** of this subsection,— 25

the term of the substituted sentence shall be deemed to have commenced or shall commence on the date when the sentence passed by the court martial would have commenced had that sentence not been directed to be cumulative on the earlier sentence. 30

“(5) Where— 35

“(a) A sentence of imprisonment or of detention passed by a court martial is directed to be cumulative on any earlier sentence of imprisonment or of detention; and

“(b) The Court substitutes a sentence other than one of imprisonment or of detention for that earlier sentence,—
the sentence passed by the court martial shall commence when
5 the earlier sentence would have commenced.”

43. Appeal against finding of disability—The principal Act is hereby amended by inserting, after section 9E (as substituted by section 208 (1) of the Armed Forces Discipline Act 1971), the following section:

10 “9EA. (1) A person who is found by a court martial to be under disability shall have the same right of appeal against the finding of the court martial as he would have if the finding were a conviction.

15 “(2) If, on any such appeal, the court is satisfied, on the evidence of 2 medical practitioners, that the appellant is mentally disordered, it shall, after giving the appellant and the respondent an opportunity to be heard and to call evidence on the matter, determine whether the appellant is under disability.

20 “(3) If the court determines that the appellant is under disability, it shall confirm the finding under appeal.

25 “(4) If the court determines that the appellant is not mentally disordered, or is mentally disordered but is not under disability, it shall quash the finding under appeal, and, by order in writing addressed to the appropriate convening officer, shall direct him to convene a court-martial to try the charge on which the appellant was previously remanded for trial by court martial.”