



**Manual of Service Law
Volume 1
Version 1.0**

MINISTRY OF DEFENCE

31 October 2009

Equality and Diversity Impact Assessment Statement

This policy has been equality and diversity impact assessed in accordance with Departmental policy. This resulted in:

Part 1 screening only completed (no direct discrimination or adverse impact identified / policy is a reflection of statutory requirements and has been cleared by a Legal Adviser). This policy is due for review in Dec 2010.

Acknowledgement

The Ministry of Defence gratefully acknowledges the valuable help which has been obtained from Halsbury's Laws of England, Halsburys Statutes of England, Archbold's P leading Evidence and Practice in Criminal Cases and Philson on Evidence, in compiling the chapters on evidence, criminal responsibility and offences. These words have been used with the knowledge and consent, in the case of Halsbury's Laws of England and the Statutes of England, of Messrs. Butterworth and Co (Publishers) Ltd., and, in the case of Archbold's Pleading, Evidence and Practice in Criminal Cases and Phipson on Evidence, of Messrs. Sweet & Maxwell, Ltd.

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JSP 830 Manual of Service Law

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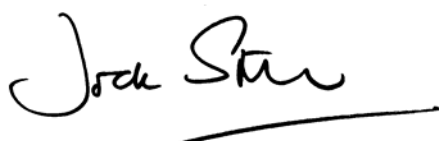
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Foreword by the Chief of the Defence Staff

The Armed Forces Act 2006 is the largest change in Service discipline for fifty years. The Act introduces a single system of Service law and discipline for all members of our armed forces and this reflects the increasingly tri-Service nature of the operations in which the armed forces are engaged.

The need for a Service Justice System is fundamental to the continued effectiveness of the armed forces across the wide spectrum of environments and situations in which they serve. Tri-Service legislation on discipline will ensure that the same basic rights and procedures apply to all members of the armed forces accused of misconduct. At the same time the new Act maintains the essential role of the Commanding Officer at the heart of the whole process of command and discipline.

The Manual of Service Law contains guidance on the Act and on how you as a member of the armed forces should carry out your responsibilities. Where the legislation gives you a discretion, the Manual sets out considerations that you will need to take into account in exercising your powers reasonably, intelligently and with due regard to the interest of the Service, so that the Service Justice System is seen to be fair and continues to command the respect of all personnel.

A handwritten signature in black ink that reads "Jock Stirrup". The signature is written in a cursive style and is underlined with a single horizontal line.

Air Chief Marshal Sir Jock Stirrup

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Glossary

Terms used in Volumes 1 and 2

Phrase	Definition
THE ACT	Armed Forces Act 2006.
ADDUCED	Offered as evidence.
ARRAIGNMENT	The process by and moment at which the accused enters a plea to a charge in a Service court.
APPLICABLE SERVICE OFFENCE	During an investigation the Service Police can only take fingerprints and samples when the alleged offence is an 'applicable Service offence' as listed in the PACE application order
BASIC POWERS	.Sentencing powers of a commanding officer to whom extended powers of punishment (see below) have not been granted by Higher Authority. See Chapter 13 Annex A for individual punishments and whether extended powers are required
BRITISH ISLANDS British Isles is also used in the MSL, see Chapter 3 (Jurisdiction and time limits)	The United Kingdom (England, Scotland, Wales and Northern Ireland) the Channel Islands and the Isle of Man.
COMMANDING OFFICER	The officer who is in command of a person for the purposes of any provision made by or under the Act. Throughout the manual it is used to describe the commanding officer and anyone who is authorised to act on his behalf (see subordinate commander below). Where a paragraph specifically refers to the Commanding officer and him alone it will be highlighted. See Chapter 2 (Meaning of commanding officer) for more detail.
COMMANDING OFFICER'S DELEGATED POWERS	Powers that a commanding officer has delegated under a power granted under the Act or any subordinate legislation under the Act (see subordinate commander below).
COMMANDING OFFICER'S INVESTIGATION	An investigation into a potential offence under AFA 06 section 115(4)(a) which is not conducted by Service Police. This process, which may be formal or informal may be used by a commanding officer, or people acting on his behalf, to gather evidence in order to determine whether there is sufficient evidence to charge a person with a Service offence
CRIMINAL CONDUCT OFFENCES	Any Service offence under sections 42 - 49 of the Act which is a criminal offence under the law of England and Wales (or

	would be punishable if committed in England or Wales), for example, theft, burglary, rape, common assault and inflicting grievous bodily harm.
DESIGNATED AREA	See Chapter 3 (Jurisdiction and time limits) Annex A
DISCIPLINARY (NON-CRIMINAL CONDUCT) OFFENCES	Service offences which can be committed by a Service person as listed under sections 1 – 41 of the Act some of which are also applicable to a civilian subject to Service discipline.
EVIDENTIAL SUFFICIENCY TEST	There is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted.
EXTENDED POWERS	Extended powers of punishment granted to a commanding officer by higher authority that extend his basic powers (see basic powers above).
HIGHER AUTHORITY (HA)	For these purposes higher authority means any office in the commanding officer's chain of command who is superior in that chain of command to the commanding officer
INDICTABLE OFFENCE	An offence that may be heard in a Crown Court. An indictable only offence is one that can only be heard in a Crown Court.
INCHOATE OFFENCES	Where a person has attempted to commit an offence, has incited someone to commit an offence or has conspired to commit an offence.
MUST / SHOULD	MUST = A mandatory legal requirement based upon the legislation. SHOULD = A discretionary requirement that ought be complied with as a matter of policy.
OBJECTIVE TEST	Where a reasonable person would think it appropriate/inappropriate for someone to do/not do something. The test is applied to the mind of an ordinary, reasonable person rather than to the mind of the person making the decision (compare with subjective test below).
OPERATIONAL PERIOD	The period during which, whilst under a suspended sentence, if an offender commits a further offence the suspended sentence is capable of being activated. See section 190 of the Act.
PRESCRIBED CIRCUMSTANCES	Prescribed circumstances are additional circumstances in which the Service Police must be made aware or in which a decision on charging must be taken by the DSP. See Chapter 6 (Investigation,

	charging and mode of trial) Annex E
RECORDABLE OFFENCE	Recordable offences are those offences under section 42 of the Act for which the corresponding offences under the law of England and Wales are recordable on the PNC. Additionally, there are also a number of Service offences that are recordable (sections 11(1), 14, 24(1), 27, 28, 29, 30, 39, 40 and 42 of the Act)
RELEVANT CIVILIAN	A (civilian) person who is subject to Service discipline. They must fall into the category of Schedule 15 of the Act. For more detail see Chapter 3 (Jurisdiction and time limits).
RELEVANT OFFENCE	.See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 94 and Annex A.
SERVICE COURT	The Court Martial, the Summary Appeal Court and the Service Civilian Court.
SERVICE OFFENCE	Include both criminal conduct offences and disciplinary offences under Sections 1 - 49 of the Act.
SERVICE PERSON	A Service person is a member of the regular forces or of the reserve forces (when on duty) and is subject to Service law.
SCHEDULE 1 OFFENCES (Part 1)	Criminal conduct offences that may be dealt with at summary hearing without permission of HA.
SCHEDULE 1 OFFENCES (Part 2)	Criminal conduct offences that may be dealt with at summary hearing with permission of HA.
SCHEDULE 2 OFFENCES	If an alleged offence is listed in Schedule 2 the CO is under a duty to ensure the Service Police are made aware. See Chapter 6 (Investigation, charging and mode of trial) Annex D
SERIOUS SERVICE OFFENCE	See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 79.
SERVICE CIVILIAN COURT (SCC)	The SCC can only sit outside the UK and has jurisdiction (where it is not a matter for the CM) to try any Service offence committed outside the British Islands by a civilian subject to Service discipline.
SERVICE COMPENSATION ORDER	An order imposed on a person by a commanding officer, the Court Martial, the Summary Appeal Court, the Service Civilian Court or the Court Martial Appeal Court to compensate a victim.
STAFF LEGAL ADVISER	A Service lawyer who is the legal adviser in a person's chain of command.
SUBJECTIVE TEST	Where a person believes he has

	reasonable grounds for doing/not doing something. The test applies to the mind of the person making the decision (compare objective test, above).
SUBORDINATE COMMANDER	Under the Act an officer to whom powers have been delegated by a commanding officer.

Abbreviations

AA55	Army Act 1955
AAO	Accused's Assisting Officer
ABH	Actual bodily harm
ADC	Additional duties commitment
AFA55	Air Force Act 1955
AFA96	Armed Forces Act 1996
AFA06	Armed Forces Act 2006
AFCLAA	Armed Forces Criminal Legal Aid Authority
AFCO	Armed Forces Careers Office
AGAI	Army General and Administrative Instruction
ANO	Air Navigation Order
AO	Assisting Officer
AP	Air Publication
ASA	Appropriate Superior Authority
ASP	Authorising Service policeman
AWOL	Absent without leave
BR	Book of Reference
CAA	Civil Aviation Authority
CAO	Court administration officer
CBF	Commander British Forces
CDT	Compulsory drugs testing
Ch	Chapter
CJA	Criminal Justice Act 2003
CM	Court Martial
CMAC	Court Martial Appeal Court
CO	Commanding Officer
CONDO	Contractors on deployed operations
CPIA	Criminal Procedure and Investigations Act
CPS	Crown Prosecution Service
DAO	Defendant's Assisting Officer
DEFCON	Defence Condition
DE&S	Defence Equipment and Support
DIN	Defence Internal Notice
DO	Designated officer
DOB	Date of birth
DSP	Director of Service Prosecutions
DX	Document exchange
ECHR	European Court of Human Rights
EOIT	Equal opportunities inquiry team
FLAGO	Fleet Administrative and General Orders
FLC	Front Line Command
FPEO	Financial penalty enforcement order
FTRS	Full Time Reserve Service
HA	Higher Authority
IL	Increment level
JPA	Joint Personnel Administration
JSP	Joint Service Publication
JSU	Joint Support Unit
LANDSO	LAND Standing Order
LFSO	Land Forces Standing Order

MCS	Military Courts Service
MCTC	Military Corrective Training Centre
MOD	Ministry of Defence
MOU	Memoranda of understanding
MSL	Manual of Service Law
MTD	Manned training days
NAAFI	Navy, Army and Air Force Institutes
NATO	North Atlantic Treaty Organisation
NCAO	Naval court administration officer
NCO	Non-commissioned officer
NDA57	Naval Discipline Act 1957
NOK	Next of kin
NPM	Naval Provost Marshal
NRPS	Non-regular permanent staff
OAO	Offender's assisting officer
OCI	Officer in charge of the investigation
PACE	Police and Criminal Evidence Act
PfP	Partnership for Peace
PIDAT	Post incident alcohol and drug testing
PJHQ	Permanent Joint Head Quarters
PLAGO	Personnel, Legal, Administrative General Orders
PNC	Police National Computer
PW	Prisoner of War
QR	Queen's Regulations
QRRN	Queen's Regulations Royal Navy
r.	Rule
RAF	Royal Air Force
RAH	Record of activation hearing
reg.	Regulation
RFA96	Reserve Forces Act 1996
RAFP	Royal Air Force Police
RM	Royal Marines
RMP	Royal Military Police
RN	Royal Navy
RNMPU	Royal Navy missing persons unit
RNP	Royal Navy Police
RO	Reviewing officer
ROPs	Restriction of privileges order
RRP	Relevant residential premises
RSH	Record of summary hearing
RTA	Road Traffic Act
s.	Section
ss.	Sections
SAC	Summary Appeal Court
SBA	Sovereign Base Areas
SCC	Service Civilian Court
SCE	Service Children's Education
SCO	Service compensation order
SCP	Service Complaint Panel
SDA	Service Discipline Acts
SF	Special Forces
SIB	Special Investigations Branch
SJS	Service Justice System

SNCO	Senior non-commissioned officer
SO	Superior officer
SOFA	Status of Forces Agreements
SPA	Service Prosecuting Authority
SPCB	Service Police Crime Bureau
SPVA	Service Personnel and Veterans Agency
SSAFA	Soldiers, Sailors, Airmen and Families Association
SSBN	Ship Submersible Ballistic Nuclear
SSIC	Single-Service inquiry co-ordinator
SSPO	Service supervision and punishment order
SSVC	Services Sound and Vision Corporation
TACOS	Terms and conditions of service
the Act	The Armed Forces Act 2006
TI	Technical instruction
WO	Warrant officer
XO	Executive officer

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Equivalent Service ranks/rates

NATO Code (STANAG 2116)	RN	Army ¹	RAF
OF-10	Admiral of the Fleet	Field Marshal	Marshal of the Royal Air Force
OF-9	Admiral	General	Air Chief Marshal
OF-8	Vice-Admiral	Lieutenant General	Air Marshal
OF-7	Rear Admiral	Major General	Air Vice Marshal
OF-6	Commodore	Brigadier	Air Commodore
OF-5	Captain	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant-Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
	Midshipman	Second Lieutenant	Pilot Officer Acting Pilot Officer ²
OR-9	Warrant Officer Class 1	Warrant Officer Class 1	Warrant Officer Master Aircrew
OR-8	Warrant Officer Class 2	Warrant Officer Class 2	
OR-7	Chief Petty Officer Chief Petty Officer Naval Nurse	Staff Corporal Staff Sergeant Colour Sergeant, RM	Flight Sergeant ³ Chief Technician ⁴
OR-6 OR-5	Petty Officer Petty Officer Naval Nurse	Corporal of Horse Sergeant	Sergeant
OR-4	Leading Rate Leading Naval Nurse	Corporal Bombardier	Corporal
OR-3		Lance Corporal Lance Bombardier	
OR-2	Able Rate Ordinary Rate Student Naval Nurse	Marine Private however described including: Gunner Sapper Signalman Guardsmen Fusilier Kingsman Rifleman Ranger Airtrooper Driver Craftsman	Junior Technician Senior aircraftman(T) Multi-skilled technician Leading aircraftman Aircraftman

¹ Royal Marine rank structure corresponds to Army structure and seniority

² Junior to Second Lieutenant

³ A qualified RAF Musician appointed to the post of Drum Major retains his normal rank while holding the appointment

⁴ A qualified RAF Musician appointed to the post of Drum Major retains his normal rank while holding the appointment

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Chapter 1

Introduction

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Chapter 1

Introduction

Background

1. Military tasks and the associated training and administration are increasingly conducted in a joint environment. In recognition of this fact the Armed Forces Act 2006¹ (the Act) completely overhauled the Service Justice System (SJS) for the first time in fifty years, bringing together and harmonising the single-Service Discipline Acts² and modernising elements of the system of Service law.

The Act

2.
 - a. The system of discipline that will operate under the Act should be fair and consistent in order to support operational effectiveness.
 - b. Commanding officers (COs) of units are at the very heart of the Service Justice System with appropriate disciplinary and administrative powers over all personnel under their command.
 - c. COs should deal with one higher authority³ in the handling of disciplinary cases and therefore each unit should have a higher authority assigned to it.
 - d. All those responsible for administering the SJS should strive at all times to avoid unnecessary delay and, where such delay is unavoidable, take steps to mitigate its effects.
3. The Act is subject to annual renewal which requires the approval of both Houses of Parliament. In addition, the Act is reviewed every five years by an Act of Parliament. This provides the opportunity for Parliament to make any adjustments to the legislation deemed appropriate in order to ensure that the Service Justice System continues to achieve its fundamental aims.

Governance

4. A system of governance for the Service Justice System was established in December 2007. Its purpose is to bring together the various agencies in the Service Justice System to determine policy issues and standards, to set direction and objectives, to provide oversight and to facilitate joint working and cooperation.
5. This work is undertaken by a Service Justice Board and a supporting Service Justice Executive Group. The Board is chaired by the Armed Forces Minister and has Ministers from the Attorney General's Office and the Ministry of Justice as members, along with the Principal Personnel Officers, the Director of Service Prosecutions and the Judge Advocate General. The Board sets the strategic direction, with objectives and targets, for the Service Justice System.

¹ Full implementation of the Act took place on 31 Oct 09.

² The Naval Discipline Act 1957, Army Act 1955 and the Air Force Act 1955.

³ This higher authority performs the statutory role within the meaning of the Act as required and at all other times provides the necessary administrative and specialist support to a CO.

6. The Service Justice Executive Group is responsible to the Board for monitoring performance and improving joint working and cooperation across the Service Justice System. It is also responsible to the Board for standards, both of fairness to the individual and in delivering consistency in the Service Justice System, so as to support the operational effectiveness of the armed forces and maintain public confidence.

Purpose of MSL

7. The MSL is a guide to the Service Justice System to which all Service personnel can refer. While it will be of particular interest to the chain of command, the explanation and interpretation of the new legislation will be essential for all who are involved with Service discipline, in whatever capacity, in providing the knowledge and understanding necessary to carry out their duties effectively. It will also be an essential point of reference for those with a more general interest in the subject. As any adjustments are made to the Service Justice System the MSL will be amended so that at any particular time it represents a reliable and up to date reference. It should be noted that while Volume 1 and 2 contain policy and guidance on the law it is not an authoritative document in the strict legal sense.

Structure of MSL

8. The MSL has been divided into three volumes:

a. **Volume 1.** This volume covers the Service disciplinary system generally and includes a wide range of matters such as jurisdiction, arrest, custody, investigation, charging and mode of trial, summary hearing, review and appeal. This volume is intended to provide guidance for those involved in decision making and the administration of discipline at unit level. There are other matters provided for in the Act that are closely associated with but not wholly contained within the Service disciplinary system. Areas such as redress of individual grievance, Service inquiries, alcohol and substance misuse and testing, management of personnel within Service custody and the protection of children are therefore provided for in separate Joint Service Publications (JSPs), which provide comprehensive guidance. The main provisions relating to these matters are summarised in the MSL volume 1 with signposts to the relevant JSP.

b. **Volume 2.** This volume covers matters pertaining to the Service courts including the Court Martial, the Service Civilian Court and the Summary Appeal Court. It is intended to provide guidance for the staff of the Military Court Service who administer proceedings before these Courts and for legal advisers.

c. **Volume 3.** This volume contains the Act and the underpinning secondary legislation, as well as other allied legislation and source material, which will be useful to legal professionals.

9. **Transitional provisions.** The provisions of the 2006 Act do not replicate those in the SDAs and there are, therefore, changes in the system of Service discipline when the new Act is implemented. These new provisions take effect from the date of implementation of the 2006 Act (31 October 2009) and disciplinary matters occurring on and after that date will be dealt with under the new Act. There will be some matters, however, that might begin before the 2006 Act is implemented, but not be completed before by the date of implementation. For this reason it has been necessary to produce transitional provisions that effectively provide a bridge between the old and new legislation. It is important to be able to recognise in broad terms when a transitional issue might arise because this will affect the way in which a discipline case will be handled. In such circumstances, staff legal advice should always be

sought before any action is taken. The possible existence of transitional issues has been identified at the end of each relevant chapter of volumes 1 and 2 of the MSL, using both descriptive text and flow charts where appropriate.

Service law

10. Within the United Kingdom members of Her Majesty's forces are subject to civil law and to Service law and have a duty to uphold both. In respect of criminal law of England and Wales, Service personnel are no different from other citizens. In addition, the civil criminal offences created by the law of England and Wales are incorporated into Service law. Two special requirements of the armed forces have led to the development of the distinct code of Service law:

a. In order that the armed forces can operate effectively a necessary reliance is placed on the maintenance of both personal and imposed discipline. Although the Act includes offences under the criminal law of England and Wales, Service law creates additional offences that are exclusively of a Service nature. Service disciplinary offences, such as failing to attend for duty and ill-treatment of subordinates, are subject to the same procedures and the same sort of penalties as criminal offences. This reflects the unique circumstances and ethos that exist in the Services.

b. Recognising the needs of our expeditionary forces, the Act ensures parity in dealing with Service persons, under a familiar system of law, wherever they may be serving. The Services' disciplinary system will operate effectively anywhere in the world and applies to conduct both within and outside the United Kingdom.

Armed forces and employment law

11. Members of the armed forces do not have contracts of employment and much of the law which governs civilian employment does not apply to Service personnel. The Act does, however, deal with a number of areas which are broadly similar to those that would be covered in a contract of employment; for example enlistment, discharge, terms and conditions of service, forfeitures and deductions from pay and the making of complaints. All of these matters form part of Service law and are therefore addressed in MSL volume 1.

Chapter 2

Meaning of commanding officer

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Chapter 2

Meaning of commanding officer (CO)

General

1. **Introduction.** This chapter explains how a person's CO, for any purpose under the Armed Forces Act 2006 (the Act), is identified. The CO is at the apex of a unit's command and control structure and has disciplinary and other powers under the Act. It is essential therefore that Service personnel and relevant civilians¹ are clear who their CO is for disciplinary purposes. Equally, an officer must be sure that he is a person's CO for the purposes of the legislation before he exercises CO's powers. It is also important to remember that a person's CO in the conventional sense may not be the same officer as that person's CO for a particular purpose under the Act. The appointment of a CO also confers duties and responsibilities for administrative action² and Service complaints³.
2. **The law.** The Act places COs at the centre of the Service Justice System and confers a range of powers on them. The identity of a person's CO is determined under Defence Council regulations⁴. The Act also defines higher authority (HA) as any officer in the CO's disciplinary chain of command who is superior in that chain of command to the CO. The Services' disciplinary chains of command are set out in single-Service guidance⁵.
3. **General principles.** The following general principles apply in relation to a CO:
 - a. Every officer appointed as a CO should be clear for whom he has disciplinary responsibility. This includes sub-units, attached personnel⁶ and relevant civilians. These disciplinary relationships should be published routinely in unit orders.
 - b. Every CO should know who is his HA. Likewise, every HA should know who are his COs. Where the situation is unclear, guidance should be sought from Front Line Commands (FLCs).
 - c. A CO should make clear and promulgate any delegation of his powers and functions. A CO should be certain that the person to whom powers are delegated is entitled and qualified to hold and exercise those powers. See [Chapter 6](#) (Investigation, charging and mode of trial).
 - d. Every Service person and relevant civilian should have a CO for disciplinary purposes who, in the case of a Service person, will normally be the CO of the unit of which the Service person is a member. If it would not be appropriate for a CO to discipline a person in his unit⁷ another CO for disciplinary purposes will be appointed (see paragraph 7 below) and the person concerned informed.
4. **Consultation and liaison between COs.** A spirit of cooperation is essential to ensure that any differences in the handling of discipline between units is minimised. COs,

¹ See glossary.

² JSP 833 and RN PLAGO, FLAGO and QRRN, Army AGAI67 Appendix 1 and Annex D, RAF QR 1028 and AP 3392, Volume 5 leaflet 127.

³ JSP 831 (Redress of Individual Grievance) and JSP 763 (MOD Harassment Complaints Procedure).

⁴ The Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

⁵ RN PLAGO/FLAGO, Army LF/Org/1/3/3/2/3 dated 27 Jan 09, RAF QR 56.

⁶ Attached personnel are individuals, or groups of individuals, from other units or organisations brought onto the strength of a host unit for a given purpose (see paragraph 19).

⁷ For example, if a CO is unable to deal summarily with a Service person because he is a witness for or against that Service person in a particular case, an alternative CO can be appointed in relation to that case only.

particularly in joint environments, should liaise and consult in order that discipline is fairly and evenly administered and that the context in which the offence was alleged to have been committed is understood and taken into account.

Transitional guidance

5. This paragraph outlines the main transitional provisions related to Part 3 of the Act, the 380 Order and the Armed Forces (meaning of “Commanding Officer”) Regulations 2009. The basic aim of the transitional arrangements for Part 3 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie before 31 October 2009). Under AFA 06 there will be no requirement to re-appoint COs already appointed, before commencement, to be COs for **individuals** because:

a. If an officer was appointed before commencement to be a person’s CO, and the appointment was still in effect immediately before commencement, the officer is that person’s commanding officer for general purposes after commencement and;

b. If an officer was appointed before commencement to be a person’s CO in relation to a **particular matter**, and that appointment was still in effect immediately before commencement, the officer is that person’s commanding officer for **general purposes** in relation to the **particular matter** after commencement.

But in any event, a specific (‘bespoke’) appointment of a new CO for an individual can be made at any time. A specific appointment would override an appointment of the kind mentioned in a. or b. above. If in any doubt seek legal advice.

Status of CO – general rules

6. **Unit COs.** In most circumstances a Service person’s CO for all purposes⁸ will be the officer in command of the Unit of which he is a member. Normally, this will be the officer appointed to be a CO of a unit by the Naval, Military or Air Secretary or by the chain of command. However, another officer may act as unit CO⁹ where a unit CO is due to be, but has not yet been, appointed; has been appointed but has not yet assumed command; or is incapacitated or absent. See single-Service guidance¹⁰ for circumstances in which another officer may assume command, and circumstances in which an officer may be appointed temporarily in command.

7. **Specific appointment of COs.** In some circumstances¹¹ it may not be appropriate or desirable for a person’s usual CO to deal with him or exercise a particular power (indeed, it is possible that cases will arise where a person has no CO or no clearly identifiable CO). In such circumstances another officer may be specifically appointed his CO for any or all purposes under the Act. Such appointments may be made in relation to all matters or any particular matter. Specific appointments can only be made by or on behalf of the Defence Council or by an officer authorised by the Defence Council¹². For this purpose the Defence Council and the single-Service Boards have given authority to a number of officers to make appointments. Officers authorised to make specific appointments for joint units are listed within MSL Volume 3. Those officers authorised to make specific appointments within each

⁸ This may not apply for Summary Hearing because of the ‘two rank rule’ – see paragraph 25.

⁹ This will normally be as the result of a decision made by his chain of command, for example his own CO could appoint him. See the Armed Forces (Meaning of “Commanding Officer”) Regulations 2009, regulation 3.

¹⁰ RN QRRN Chapter 3, Army QR 2.016, RAF QR 56.

¹¹ Thus it may be possible for a Service person to have more than one CO at any given time eg. one CO in command of him, and another CO to exercise the disciplinary function, or to deal with complaints. Where this is the case the Service person should be informed who his CO is in relation to specific issues.

¹² The Armed Forces (Meaning of “Commanding Officer”) Regulations 2009, regulation 3.

of the single-Services are listed in Volume 3. Specific appointments of COs override all other provisions as to the identity of the person's CO.

8. **Definition of a unit.** A unit is defined as¹³:

- a. A naval ship or establishment.
- b. Any body of members of Her Majesty's forces formed under the command of a person appointed to be the commanding officer of the body.
- c. An air force station.

9. Each Service uses specific terms to define bodies of individuals who fall within paragraph 8b, examples of these are:

- a. For the RN this would include a body of sailors in a Naval Party.
- b. For the Army this would include a body of soldiers such as an infantry battalion or armoured/combat support/combat service support or training regiment which has a CO appointed as such by the Military Secretary.
- c. For the RAF this would include a body of personnel deployed in a tactical wing.

10. **Joint units and units created for specific circumstances.** Joint units can be created in certain circumstances that may not meet existing single-Service criteria. In deciding¹⁴ whether a formed body of members which does not match the single-Service criteria is to be a unit with its own CO, the key questions are as follows:

- a. **Does the organisation have a specific, and individual, mission?** If the mission is directly linked to another unit it is unlikely that the force element needs to be a unit in its own right. For example, a joint helicopter support element operating in direct support of an RAF station is unlikely to require a CO with the relevant powers of discipline. The officer in command of such an organisation should be subordinate to the station commander. Alternatively, a helicopter flight required to operate in support of another distinct organisation, away from its parent station with a high degree of self sufficiency may need to be a unit with a CO.
- b. **Does the organisation need to have a CO, for discipline, in order to achieve its mission?** Discipline is not an end in itself, it supports operational effectiveness. There may be occasions when it is clear that a force element will be operationally ineffective unless it is a unit with a CO. This may be a result of the span of command, geographical location, force composition, mission type or duration.
- c. **Is the organisation capable of deploying as a discrete body in order to achieve operational effect?** Deployability may be an important factor, especially if linked to the delivery of a specific operational effect once deployed. If an organisation's role demands deployment to distant locations, and possibly operating independently with limited access to its headquarters, then it might need to be established as a unit.
- d. **If another CO exercised discipline over the organisation would that decrease operational effectiveness?** In many respects this is the defining question;

¹³ The Armed Forces (Meaning of "Commanding Officer") Regulations 2009, regulation 2(1).

¹⁴ This decision should be reached by the chain of command and the lead FLC. The decision should be transparent, logical, objective and defensible. Force elements should not be units for administrative convenience.

however, it should be applied objectively and should not be used as an excuse to avoid placing persons from one Service under command of another Service.

e. **Does the organisation have the training and administrative support needed by a CO who has full disciplinary powers?** Although decisions should be based on operational effectiveness, not administrative convenience, it may be counter productive to impose powers of a CO on an officer if he does not have the support of qualified administrative staff to enable him to exercise his disciplinary powers effectively.

f. **Is there an appropriate higher authority (HA)?** If an organisation is to be a unit it should have a clear, and appropriate, disciplinary chain of command.

11. Headquarters.

a. **If the Headquarters is a single-Service HQ.** All Service personnel and relevant civilians in a headquarters will need to be allocated to a unit and their CO for discipline will usually be the CO of that unit.

b. **If the Headquarters comprises jointly of Service personnel from the RN, the Army or the RAF.** For each non single-Service headquarters such as the MOD, PJHQ and DE&S, a Joint Support Unit (JSU) headed by a CO, with a single HA, will usually administer discipline for the whole headquarters so that all those subject to Service law in the headquarters have the same CO for all purposes.

Status of CO – exceptions to general rules

12. **Service custody and Service detention**¹⁵. When a Service person or relevant civilian is, for the time being, in Service custody or detention at MCTC, the officer in command of MCTC is to be his CO for all purposes under the Act¹⁶. This is to allow the CO of the MCTC to exercise discipline over all the persons in his unit. However because he may not wish to deal with any other offences committed by Service personnel or relevant civilians prior to their arrival at MCTC those persons can have a bespoke appointment of a CO for a particular case.

13. Where an individual is serving a sentence in a Service custody facility other than MCTC he is to be attached to the unit responsible for that facility in order that the CO of that unit can maintain discipline over that individual in his facility.

14. Where a person is arrested¹⁷, the arrest and any grounds on which he is being kept in Service custody without being charged should be reported as soon as practicable to his CO¹⁸. Until that report is made the person may be kept in Service Custody without being charged if the person who arrested him has reasonable grounds for believing that this is necessary to secure or preserve evidence relating to the offence for which he was arrested or to obtain such evidence by questioning him, see [Chapter 5](#) (Custody). If a person is arrested within his own unit, his CO should be informed as a matter of routine. If, however, the individual was arrested by a member of another unit, and the individual is held in a place away from his own unit, the unit holding him should, as soon as practicable, inform the person's parent unit CO.

¹⁵ See regulation 4(2)(d) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

¹⁶ As with an ordinary unit the officer who is in command at a particular time may not be the formally appointed CO. It may, for example, be an officer acting as CO in his place (see paragraph 6 and 7 of this chapter). This may not apply for Summary Hearing because of the 'two rank rule' – see paragraph 25.

¹⁷ See section 99 (1) of the Act, for more detail on this subject and time limits see [Chapter 5](#) (Custody).

¹⁸ . See regulation 4(2)(c) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

The CO of the parent unit¹⁹ should then decide whether he wishes to deal with him by having him returned to his unit, or whether it would be more appropriate for the CO of the unit holding the person to be made his CO for the purposes of the Act (this could be achieved by attaching the individual to the unit holding the person, see paragraph 18, or through a bespoke appointment, see paragraph 7).

15. If, after six hours, the individual's parent unit CO cannot be contacted that individual should be attached to the unit in which he is in Service custody.

16. **Medical units**²⁰. Where a Service person is for the time being in a Service hospital as a patient, the CO of that hospital is his CO for all purposes²¹ subject to the 'two rank rule' (see paragraph 25 below). This is also subject to the bespoke appointment of a CO for a particular case. The CO of that Service hospital may relinquish authority over an individual. If he does so the CO of the unit of which he is a member becomes his CO unless he is already attached to another unit. In the latter case the CO of the unit to which he is attached becomes his CO.

Lodger units, attachments and detachments

17. **Lodger units.** A unit lodged²² with another unit will retain its own discipline chain and the CO will retain full powers. The status of an organisation does not change administratively simply because it is lodged with other units²³.

a. **Disciplinary incidents.** Where a person from one unit (A) is alleged to have committed an offence which affects another unit (B) the CO of (A) should discuss the matter with the CO of (B) before deciding what action to take. COs of units in a shared site should ensure that discipline is seen to be fairly and evenly administered across the site. This spirit of cooperation is essential to ensure that any difference between units in the application of discipline is minimised²⁴, see [Chapter 6](#) (Investigation, charging and mode of trial).

b. **Dealing with co-accused**²⁵. An incident involving offenders from more than one unit should normally result in a single investigation and common legal advice issued by the lead Command. The lead Command will normally be the Command of the main protagonist. Where this test does not apply, the lead Command will be the Command of the CO of the unit at which the incident occurred. Advice should be sought from HA and consideration given to whether one CO should be appointed to deal with all offenders. Although each case should be judged on its own merits, COs should consult to ensure fair and even administration of discipline.

18. **Lodger sub-units.** Where a sub-unit is lodged with another unit (host unit) and the parent unit CO of the lodged sub-unit cannot exercise discipline effectively, the host unit CO should be made the CO of the members of the sub-unit for the purposes of discipline. This can be achieved by a bespoke appointment. The test as to whether discipline can be effectively exercised is where the effect of the geographical dislocation causes undue delay or complications in the discipline process. The decision as to whether discipline can be

¹⁹ The needs of the investigation should be considered when making this decision.

²⁰ A Service hospital means any naval, military, Air Force or Joint Unit, establishment or ship, at or in which medical or surgical treatment is provided for persons subject to Service law.

²¹ As with an ordinary unit the officer who is in command at a particular time may not be the formally appointed CO. It may, for example, be an officer acting as CO in his place (see paragraph 6 and 7 of this chapter).

²² When units or sub-units live and work alongside each other within a military location but where there is no direct command and control relationship between them.

²³ For an exception to this on board a warship see paragraph 22, 23 and 24.

²⁴ See paragraph 4.

²⁵ See [Chapter 5](#) (Custody), [Chapter 6](#) (Investigation, charging and mode of trial), [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) and [Chapter 13](#) (Summary hearing sentencing and punishments).

effectively exercised rests with the parent unit CO of the lodged sub-unit, having consulted in accordance with paragraph 4 above. If there are operational or other issues, relating to clearances or qualifications²⁶, which indicate that discipline should not be handed over to another unit CO, these will normally override the impact of geographical dislocation.

a. **Disciplinary incidents.** See sub-paragraph 17a above.

b. **Dealing with co-accused.** An incident involving offenders from more than one unit should normally result in a single investigation and common legal advice issued by the lead Command. The lead Command will normally be the Command of the main protagonist. Advice should be sought from HA and consideration given to whether one CO should be appointed to deal with all offenders. Although each case should be judged on its own merits, COs should consult to ensure fair and even administration of discipline.

19. **Attachments.** Where a Service person is attached to a unit his CO for all purposes²⁷ is the officer in command of the unit to which he is attached, for the period of the attachment. This information should be covered in the relevant attachment, assignment or operation order.

20. If the CO becomes aware of the need for formal disciplinary action against an attached person but then, after consultation, refers the matter back to the parent unit CO he should then act in support of that CO. For this to happen, the attachment of that person should be ended (as the result of which the CO of his parent unit then becomes his CO). Alternatively, the CO of the unit to which the person is attached may decide to complete disciplinary action and if necessary, seek to retain the offender in situ by having the relevant attachment/assignment order extended. Any decision to retain an offender in situ should be kept under constant review to ensure retention is both necessary and reasonable in the interests of justice and there should be liaison between the COs and the respective HAs²⁸.

21. **Detachments.** If a body of Service personnel is detached formally it should be formed as a unit under the command of a CO.

Embarked forces in Her Majesty's ships

22. **Force elements embarked in Her Majesty's ships.** Although a CO with full powers should not be subordinate to another CO for disciplinary purposes, sea command has unique features and requires bespoke arrangements:

a. **Embarked personnel.** Embarked personnel are singletons or sub-units and once embarked, the CO of the ship will be the CO for disciplinary purposes of all such embarked Service personnel and relevant civilians because they are borne on the ship's books - they have been attached to the ship.

b. **Embarked forces.** Embarked forces are formed units embarked in a ship *i.e.* units with their own COs. Unless Headquarters Land Forces or Headquarters Air Command notifies Navy Command Headquarters that the CO of the embarked force will exercise command for disciplinary purposes over the embarked force, the ship's CO will be the CO for disciplinary purposes of the embarked force. In summary, where Headquarters Land Forces or Headquarters Air Command has not made a

²⁶ Such as SF detachments or sub-units which require very specific legal or technical clearance from the qualified CO in their parent unit.

²⁷ This may not apply for summary hearing because of the 'two rank rule' – see paragraph 25.

²⁸ This is particularly important where the individual is attached to a unit that is not his own Service.

notification to Navy Command Headquarters, the embarked force will be attached to the ship.

23. **Exceptions – misconduct affecting the ship.** Where Headquarters Land Forces or Headquarters Air Command has made a notification to Fleet Headquarters (i.e. the unit is not attached to the ship), the CO of the embarked force will remain the CO. However, if an alleged misconduct by a member of the Embarked Force directly affects the seagoing or fighting efficiency of the ship or the incident occurs overseas where the sovereign immunity of the ship is an operative factor in determining powers of investigation and jurisdiction²⁹, the CO of the ship will be able to take jurisdiction over an accused. In this event, the accused will be temporarily attached to the ship for disciplinary purposes.

24. **Liaison.** In every case where the CO of one of Her Majesty's ships determines that he should exercise jurisdiction he will seek the advice of Fleet Headquarters. He is also to consult the CO of the embarked force to ensure that he understands the single-Service implications of disciplinary or other action against any member of an embarked force. When dealing with relevant civilians the CO of the ship should, wherever possible, consult with the employer of the civilian to examine whether they wish to take employer's action against their employee for the alleged misconduct. Other than where operational circumstances prevent it (e.g. a deployed SSBN) the CO of the ship should consult the FLC.

Two rank rule

25. For the purposes of summary hearing matters, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention), a person's CO is the same officer as for all other purposes if that officer is his superior by at least two ranks. If that officer is not his superior by at least two ranks, his CO for summary hearing matters is the next officer in the disciplinary chain of command who is his superior by at least two ranks or another officer³⁰ where a specific appointment is made.³¹

Former Service personnel

26. **Persons who have ceased to be members of the regular or reserve forces.** If a person has left the regular or reserve forces but needs a CO to exercise powers under the Act in relation to a matter arising before he left, his CO for all purposes is the officer in command of the last unit of which he was a member unless a bespoke appointment is made.

27. **Persons who are members of the ex regular reserve force.** If a member of an ex regular reserve force has been subject to an additional duties commitment and has ceased to be subject to that commitment, but still needs a CO to exercise powers under the Act in relation to a matter arising while he was subject to the commitment, his CO is the officer in command of the last unit of which he was a member before he ceased to be subject to the commitment, unless a bespoke appointment is made.

28. **Service custody or detention.** If a person who falls within either paragraph 26 or 27 above is for the time being held in Service custody or Service detention at MCTC his CO for all purposes is the officer in command of MCTC.

²⁹ For example where another state has ceded jurisdiction over a member of an embarked force for an offence committed in its territory solely on the understanding that the ship's CO only would deal with the offence.

³⁰ This officer should also be superior by at least two ranks see single-Service instructions on disciplinary chains of command. RN PLAGO, Army LF/Org/1/3/3/2/3 27 Jan 09, RAF QR 994.

³¹ See paragraph 7 for appointment of a CO for disciplinary matters in specific cases.

29. **Specific appointments.**³² A CO may be specifically appointed for a Service person (falling under paragraph 26 or 27) by the appropriate authority in each single-Service (where such an appointment is made, it overrides the arrangements described in paragraphs 26, 27 or 28 above).

Civilians subject to Service discipline³³

30. **General.** It is essential that any officer who is, or thinks he may be, the CO of a relevant civilian reads and understands, [Chapter 3](#), (Jurisdiction and time limits) which describes the categories of civilians who are subject to Service discipline. The Defence Council regulations automatically identify the CO of certain civilians subject to Service discipline. If a civilian falls within more than one paragraph of Part 1 of Schedule 15 to the Act and neither of those paragraphs is paragraph 3, the Defence Council regulations do not automatically identify a CO. In such a case a specific appointment of a CO should be made for that person.

31. **Persons in one of Her Majesty's aircraft in flight.** If a person (A), is in one of Her Majesty's aircraft in flight, and a relevant civilian by virtue only of that fact, and a person (B) is in command of the aircraft, B's CO for general purposes is also A's CO³⁴.

32. **Persons in one of Her Majesty's ships, afloat**³⁵. The CO of a person who is relevant civilian by virtue only of being in one of Her Majesty's ships afloat is the CO of that ship.

33. **Persons in Service custody.** There are a number of possibilities that can exist for a civilian who finds himself in Service custody and these are:

a. If the civilian is also subject to Service discipline for some other reason³⁶ (because, for example, they reside with a Service person stationed in Germany), by virtue of which they have a CO, their CO does not change because they have been placed in custody³⁷.

b. The CO of a civilian in custody³⁸ who was but is no longer subject to Service discipline³⁹ for some other reason, will be the officer who was his CO when he was last subject to Service discipline. For example, a civilian who was in one of Her Majesty's ships and is suspected of having committed an offence whilst in that ship, but has now disembarked. If the civilian is placed in custody for that suspected offence, his CO is the officer who was his CO when he was last subject to Service discipline.

c. A CO should be specifically appointed if a civilian finds himself subject to Service discipline⁴⁰ because he has been mistakenly arrested and placed in Service custody (e.g. he may never have been subject to Service discipline), but whilst in custody he commits a Service offence so that he cannot simply be released.

³² See paragraph 7.

³³ For Service discipline definitions see Schedule 15 and section 370 of the Act, The Armed Forces (Meaning of "Commanding Officer") Regulations 2009 and [Chapter 3](#) (Jurisdiction and time limits).

³⁴ The Armed Forces (Meaning of "Commanding Officer") Regulations 2009, regulation 7(4).

³⁵ As defined in Schedule 15 paragraph 2(3) of the Act 'Afloat' means not on shore.

³⁶ By virtue of falling within another of the paragraphs in Part 1 of Schedule 15 to the Act.

³⁷ And therefore falls into paragraph 3 of Part 1 of Schedule 15 to the Act.

³⁸ And therefore falls into paragraph 3 of Part 1 of Schedule 15 to the Act.

³⁹ By virtue of falling within one paragraph in Part 1 of Schedule 15 to the Act other than paragraph 3.

⁴⁰ By virtue of paragraph 3 of Part 1 of Schedule 15 to the Act.

34. **Crown servants in designated areas⁴¹ working in support of Her Majesty's forces.** The CO of a person in this category⁴² is, if the person is or was working in support of a particular unit, the CO of that unit. If it is not completely clear that the person is or was working in support of a particular unit, a CO should be specifically appointed.
35. **Persons working for specified military organisations⁴³.** If a civilian falls within this category, for example as a member of NATO, a CO should be specifically appointed.
36. **Persons in designated areas who are members or employees of other specified organisations.** If a civilian falls within this category, for example as a member of NAAFI, SCE, the Services Sound and Vision Corporation and SSAFA Forces Help, a CO should be specifically appointed.
37. **Persons designated by or on behalf of the Defence Council⁴⁴.** The CO of a person in this category is, if the civilian is or was working in support of a particular unit, the CO of that unit. If it is not completely clear that the person is or was working in support of a particular unit, a CO should be specifically appointed by the chain of command. If a person is designated for the purposes of this paragraph, he should be informed who his CO is.
38. **Persons residing, or staying with a person who is subject to Service law in a designated area⁴⁵.** The CO of a civilian who is subject to Service discipline by virtue of residing or staying with a Service person in a designated area is the officer in command of the unit of which that Service person is a member. If that Service person is attached to another unit (and therefore now has a new CO) then, unless a bespoke appointment is made for that civilian, the CO of that civilian will remain as the CO of the parent unit of the Service person.
39. **Persons residing or staying with persons falling within paragraphs 36 or 37 above in a designated area⁴⁶.** The CO of a person in this category is the CO of the relevant civilian with whom the person is residing or staying.
40. **Persons residing or staying with persons falling within paragraph 35⁴⁷.** The CO of a person in this category is the CO of the relevant civilian with whom the person is residing or staying.
41. **Service custody or detention.** If a civilian subject to Service discipline is for the time being held in Service custody or Service detention at MCTC his CO for all purposes is the officer in command of MCTC (and the paragraphs 31-40 above do not apply).

⁴¹ For a description of designated areas see paragraph 12 of Schedule 15 of the Act and [Chapter 3](#) (Jurisdiction and time limits).

⁴² See Paragraph 4 of Schedule 15 to the Act.

⁴³ See paragraph 5 of Schedule 15 of the Act and for more detail on specified military organisations read [Chapter 3](#) (Jurisdiction and time limits).

⁴⁴ See paragraph 7 of Schedule 15 of the Act and for more detail on designated persons read [Chapter 3](#) (Jurisdiction and time limits).

⁴⁵ See regulation 7(9) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

⁴⁶ See regulation 7(10) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

⁴⁷ See regulation 7(11) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

Chapter 3

Jurisdiction and time limits

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Chapter 3

Jurisdiction and time limits

Introduction

1. This chapter sets out who may be subject to Service jurisdiction and who may exercise it. Although the avoidance of unnecessary delay is a key driver for all involved in the administration of discipline in the Services, the Armed Forces Act 2006 (the Act) does not generally contain formal time limits on the charging of persons as long as they remain subject to Service law or subject to Service discipline. Time limits are a concern, however, in relation to reservists, those who have left the regular or reserve forces and civilians who have ceased to be subject to Service discipline.

Persons subject to Service law or Service discipline

2. The Act applies to two categories of persons; persons subject to Service law (both Service personnel¹ and ex-Service personnel) and civilians subject to Service discipline (relevant civilians). Members of the regular forces² are persons subject to Service law at all times and anywhere in the world. Reservists are subject to Service law only in the circumstances set out and explained in paragraphs 10 to 13 below. Forces of the British overseas territories are only subject to Service law when they are serving with Her Majesty's forces. Persons will become civilians subject to Service discipline only in certain limited circumstances; see paragraphs 17 to 27 below.

3. Persons who fall into either of the two categories above who are alleged to have committed a Service offence³ may be investigated. If charged, a person subject to Service law may be brought before his commanding officer (CO) at summary hearing (for certain offences) or before the Court Martial (CM). A CO cannot hear a charge against a civilian subject to Service discipline; relevant civilians may only be brought before the Service Civilian Court (SCC) or be tried before the CM.

4. Any person subject to Service law or Service discipline may be tried before the CM. This may be because the charge faced is serious enough to justify or require it, or because the facts or the law in the case are so complex. Even if none of these factors is present, any person subject to Service law (who would otherwise be tried at a summary hearing) or a civilian subject to Service discipline (who would otherwise be tried before the SCC) may elect CM trial.

Concurrent jurisdiction

5. In many cases there may be concurrent jurisdiction; this means that cases could be investigated or prosecuted by Service, UK civilian or foreign authorities. Decisions on who exercises jurisdiction will have to take into account the principles contained in relevant protocols, in Status of Forces Agreements (SOFA) or in memoranda of understanding (MOU); decisions involving foreign authorities will require prior consultation with the appropriate Service authorities⁴. Before an allegation or offence can be investigated the Service Police will need to consider jurisdiction. In some cases they may (if the necessary requirements are

¹ See Glossary for definition of a Service person.

² See definition at section 374 of the Act.

³ Service offences are those which appear in Sections 1 to 39 and Section 42 of the Act and include both Service disciplinary offences and criminal conduct offences which are charged under section 42 of the Act.

⁴ Higher authority (HA) should be consulted and the Director of Service Prosecutions (DSP) for more serious cases.

met) exercise some of their powers, such as the power of arrest before jurisdiction is confirmed. For information on arrest see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) and for charging see [Chapter 6](#) (investigation, charging and mode of trial).

6. This chapter is divided into six parts, as follows:
 - a. Part 1 - Jurisdiction as to person.
 - b. Part 2 - Jurisdiction of Service courts.
 - c. Part 3 - Choice of jurisdiction.
 - d. Part 4 - Jurisdiction as to time.
 - e. Part 5 - Double jeopardy.
 - f. Part 6 – Transitional guidance.

Part 1 – Jurisdiction as to person

Introduction

7. Part 1 deals with circumstances when the Services have jurisdiction. This does not mean it will always be appropriate to exercise that jurisdiction. There is often an alternative civilian or even alternative Service jurisdiction and such circumstances are described in each part of the chapter. In cases of doubt or where established procedures do not exist, staff legal advice should be sought.

Persons subject to Service law

8. **The regular forces**⁵. Every member of the regular forces is subject to Service law at all times. This means that whether on duty or off duty within the UK or abroad, or transiting between countries, every member of the RN, the RM, the regular Army and the RAF is subject to Service law.

9. **Officers**. Any officer who is on the active list⁶, or who has been recalled into permanent Service, is subject to Service law as a member of the regular forces. An officer who has retired from Service nevertheless retains his commission for life. That said, upon retirement he is no longer regarded as a member of the regular forces and will therefore not be subject to Service law⁷. He will only become subject to Service law if he is recalled into permanent Service⁸.

10. **The reserve forces**⁹. The reserve forces are defined as¹⁰ the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve and the Royal Auxiliary Air Force. These are broken down into:

- a. 'Volunteer reserve forces' namely the Royal Naval Reserve, the Royal Marines Reserve, the Territorial Army and the Royal Auxiliary Air Force.
- b. 'Ex-regular reserve forces' namely the Royal Fleet Reserve, the Army Reserve and the Royal Air Force Reserve. These are ex-regular personnel who have a call-out liability arising from their regular Service but also include certain categories of individuals who volunteer their Services.

11. Members of the reserve forces become subject to Service law when they are carrying out the following activities:

- a. During permanent Service on call-out (either by virtue of the statutory requirement under the Reserve Forces Act 1980 or the Reserve Forces Act 1996 or any other call-out obligation of an officer).
- b. During home defence Service on call-out¹¹.
- c. When engaged in a full-time Service commitment¹².

⁵ See section 367(1) of the Act.

⁶ See section 368(3) of the Act. The active list for each Service is defined by single-Service provisions. RN – Navy List, Army Pay Warrant 1964 Article 11, RAF Order made under section 2(1) of the Air Force (Constitution) Act 1917.

⁷ Unless proceedings are taken against him as an ex-Service person in accordance with sections 55, 57 or 61(2) of the Act.

⁸ This would not, however, prevent the Services from taking administrative action against the Service person who is no longer subject to Service law.

⁹ See section 367(2) of the Act.

¹⁰ See section 374 of the Act.

¹¹ See section 22 of the Reserve Forces Act 1980.

- d. When undertaking any duty or training (whether or not in pursuance of an obligation). This includes any additional duties commitment undertaken.
- e. When serving on the permanent staff of a reserve force.

In addition, members of the reserve forces may be tried for certain offences under Part X of the Reserve Forces Act 1996 even though not subject to Service law at the time; see paragraph 13 below.

12. A reservist undertaking service under any of paragraph 11a – c and e above will be subject to Service law during the whole period of that service whether he is travelling, physically working, resting or off duty. This is different in respect of duties undertaken under paragraph 11d above (this is likely to be most relevant to members of volunteer reserve forces attending short periods of training or duty). Broadly speaking, such a person will be subject to Service law while he is with his reserve force. So, for example, where he attends an 8 hour training period on a Saturday he will be subject to Service law during the time of the training period only and not when he is driving to the period or returning home from it. Staff legal advice should be obtained if there is any doubt as to whether a reservist was subject to Service law at the time he committed the alleged offence.

13. **Recall.** Any person who is recalled for service under the authority of a recall order made under the Reserve Forces Act 1996, or under an officer recall obligation, is for the purposes of the Act, regarded as being a member of the regular forces from the time that he is accepted into permanent service following his recall until he is discharged or released from that service.¹³ Accordingly, such persons will be subject to Service law at all times during this period of recall in the same way that Service law applies to the regular forces as described above. In addition, they may be tried by the CM for certain offences under Part X of the Reserve Forces Act 1996 even though not accepted into service at the time of the alleged offence.

14. **British overseas territories' forces**¹⁴. When any member of a British overseas territory force, i.e. any of Her Majesty's forces raised under the law of a British overseas territory, is undertaking any duty or training with United Kingdom regular or reserve forces, he becomes subject to Service law¹⁵ for the duration of the training or duty. He is treated for the purposes of the Act as having an equivalent rank or rate to a relative member of the force with which he is serving. To this extent, any member of a British overseas territory force who is serving with Her Majesty's forces also has like powers of command over the United Kingdom forces with which he is serving¹⁶.

15. **Members of foreign forces.** Members of foreign forces apart from those from Commonwealth forces will not be subject to Service law. Members of any foreign force may, however, in certain circumstances be civilians subject to Service discipline. This would be the case if, for example, such persons were on board any of Her Majesty's ships afloat or aircraft in flight or in Service custody¹⁷. Members of foreign forces are not permitted to exercise any disciplinary functions under the Act.

¹² See section 24 of the Reserve Forces Act 1996.

¹³ See section 368(2) of the Act.

¹⁴ See section 369 of the Act. For a list of these countries see section 2 of the UK Forces (Jurisdiction of Colonial Courts) Order 1965 (as amended) – SI No 1203 of 1965.

¹⁵ See section 369(1) of the Act.

¹⁶ Under section 369(3) of the Act the Secretary of State has power to modify any provisions of the Act in relation to such persons. To date no such modifications have been made.

¹⁷ Section 370 (provides the Services with the power to make persons including members of the armed forces (when they are not subject to Service law) civilians subject to Service discipline) and paragraphs 1-3 of Schedule 15 of the Act.

16. **Members of Commonwealth forces.** Service personnel from Commonwealth countries in a Service exchange or loan Service position in the UK are, for jurisdictional purposes, to be treated as any UK Service person subject to Service law¹⁸. Similarly, a Commonwealth officer on exchange is permitted to exercise any disciplinary functions under the Act in the same way as a UK officer of equivalent rank¹⁹. Commonwealth personnel attached to UK forces on operations overseas will usually be subject to their own chain of command. If members of Commonwealth forces are not subject to Service law they will be (in the same way as members of foreign forces, see paragraph 15 above) civilians subject to Service discipline (like any other person who is not at the time subject to Service law) while on board any of Her Majesty's ships afloat or aircraft in flight or in Service custody²⁰.

Civilians subject to Service discipline

17. **Introduction.** Persons will be civilians subject to Service discipline only if they are not subject to Service law and they fall into one of the categories set out in Schedule 15 to the Act. It should be noted that although the Act uses the expression 'civilian subject to Service discipline' this can cover members of the armed forces in certain circumstances, for example, a member of a foreign force or a member of the reserve forces who is not for the time being subject to Service law. Therefore, a member of the Territorial Army who is also an MOD Crown servant would be, when working abroad in support of the armed forces in his civilian capacity²¹, a civilian subject to Service discipline.

18. Where a civilian is subject to Service discipline, a CO must be allocated to him, see [Chapter 2](#) (Meaning of commanding officer). A CO should know the civilians, subject to Service discipline for whom he has responsibility. A civilian subject to Service discipline is only subject to Service jurisdiction for a limited range of offences i.e. section 42 (criminal conduct) offences, those non-criminal conduct (disciplinary) offences at paragraphs 41a - e below and other offences at paragraphs 41f - j below. A CO cannot personally decide to charge a civilian²² nor can civilians have a charge against them heard summarily by the CO. Where a CO has responsibility for any case against a civilian subject to Service discipline he has the power to refer it to the Director of Service Prosecutions (DSP), to take no action or to refer the matter to the civilian authorities see [Chapter 6](#) (Investigation, charging and mode of trial). If the DSP decides to charge, the case will be heard in either the SCC or the CM see [Chapter 6](#) (Investigation, charging and mode of trial).

19. **Categories of civilians subject to Service discipline.** Persons who can be civilians subject to Service discipline fall into a number of categories, which may be broadly described as:

- a. Civilians in Her Majesty's ships and aircraft, see paragraph 21 below.
- b. Persons in Service custody, see paragraph 22 below.
- c. Crown servants in a designated area²³ working in support of Her Majesty's forces, see paragraph 23 below.
- d. Members of specified military organisations, see paragraph 24 below.

¹⁸ Section 4(4) of the Visiting Forces (British Commonwealth) Act 1933.

¹⁹ Section 4(4) of the Visiting Forces (British Commonwealth) Act 1933..

²⁰ Section 370 and paragraphs 1-3 of Schedule 15 of the Act.

²¹ To see how and when Schedule 15 applies see both section 370 and the provisions of Schedule 15 of the Act.

²² See section 121(2) and section 52(3) and (4) of the Act.

²³ For a definition of a designated area see paragraph 20.

- e. Members of other specified organisations in a designated area²⁴, see paragraph 25 below.
- f. Persons residing or staying with certain people in a designated area²⁵, see paragraph 26 below.
- g. Persons designated by or on behalf of the Defence Council, see paragraph 27 below.

A person who falls into one of the categories c-g above will not be a civilian subject to Service discipline if that person is not a UK national and he is in a country of which he is a national or in which he is ordinarily resident.

20. Designated areas. Civilians falling into categories in paragraph 19 c, e and f above are only subject to Service discipline if they are in a designated area²⁶ (see [Annex A](#)). A designated area means an area which is outside the British Islands and has been designated as such by an order made by the Secretary of State²⁷. Some persons are only civilians subject to Service discipline while they are within a designated area and so can only commit a relevant Service offence while within a designated area. The fact that the civilian has ceased to be subject to Service discipline, for example by leaving the designated area, does not of itself, prevent the Service Police exercising their powers of arrest over that person, wherever he may be. For example, a civilian subject to Service discipline who committed an offence whilst in Germany could still be arrested by the Service Police upon his return to the UK.

21. Civilians in Her Majesty's ships and aircraft. A person who is not subject to Service law will be a civilian subject to Service discipline if he is in one of Her Majesty's ships afloat²⁸ or if he is in one of Her Majesty's aircraft in flight. Under the Act, the period that one of Her Majesty's aircraft is in flight includes the period from the moment when power is applied for the purpose of the aircraft taking off on a flight, until the moment when the landing run (if any) at the termination of that flight ends (chock to chock).

22. Persons in Service custody. A civilian in Service custody will be subject to Service discipline if his being in Service custody is lawful by virtue of any provision of or made under the Act²⁹. This includes where a person is arrested and held in Service custody in the mistaken belief that he was subject to Service discipline. Where such a mistake occurs, legal advice should be obtained as soon as practicable and if appropriate the person released from Service custody. A person will also be subject to Service discipline if he is in the course of being arrested or subject to an attempted arrest by a person who has a duty under Service law to apprehend him.

23. Crown servants. In most cases this will be an MOD civil servant, including a retired officer employed by the armed forces outside the UK. A Crown servant is within the category referred to at paragraph 19c above if:

- a. He is employed by or in the service of the Government of the United Kingdom;
- b. His sole or main role is to work in support of any of Her Majesty's forces; and

²⁴ For a definition of a designated area see paragraph 20.

²⁵ For a definition of a designated area see paragraph 20.

²⁶ These designated areas are set out in the Armed Forces (Civilians Subject to Service Discipline) Order 2009/836.

²⁷ See paragraph 12 of Part 2 of Schedule 15 of the Act.

²⁸ Means not on shore. See Schedule 15 of the Act.

²⁹ For further detail see The Armed Forces (Custody Without Charge) Regulations 2009/1097 and The Armed Forces (Custody Proceedings) Rules 2009/1098.

- c. He is in a designated area³⁰.

24. **Members of specified military organisations.** A person will be a civilian subject to Service discipline if he is employed by or in the service of a specified naval, military or air force organisation³¹. This only applies if he is so employed by reason of the UK's membership of that organisation and he is outside the British Islands. The only organisation so far in this category is NATO. There is no requirement in this category to be in a designated area.

25. **Members of other specified organisations.** A person will be within the category referred to at paragraph 19e above if he belongs to or is employed by one of a number of other specified organisations and he is in a designated area. Certain organisations may be specified by order of the Secretary of State and fall outside paragraph 19e above. However, a person belonging to or employed by one of these organisations specified by order of the Secretary of State will be a civilian subject to Service discipline when in a designated area. These organisations are currently as follows:

- a. The Navy, Army and Air Force Institutes (NAAFI);
- b. Service Children's Education;
- c. The Services Sound and Vision Corporation (SSVC); and
- d. The Soldiers, Sailors, Airmen and Families Association (SSAFA) - Forces Help.

26. **Persons residing or staying.** A person will be within the category referred to at paragraph 19f above if he is residing or staying with one of the following persons:

- a. A person who is subject to Service law who is in a designated area;
- b. A person who is a Crown servant, see paragraph 23 above, who is in a designated area;
- c. A person belonging to or employed by other specified organisations, see paragraph 25 above, who is in a designated area; or
- d. A person referred to in paragraph 24 above, who is outside the UK.

Persons residing or staying with persons in paragraph 27 below would themselves need to be specifically designated.

Case Study

If a person is residing or staying with, for example, a Service person in a designated area, e.g. Germany, but travels e.g. on holiday to another designated area, e.g. Cyprus, although he may still be residing with a Service person in Germany, he will not be subject to Service discipline in Cyprus **unless** he stays with another Service person in Cyprus. The jurisdiction of the Services does not therefore follow the person around just because he travels to another designated area.

³⁰ For a definition of a designated area see paragraph 20.

³¹ See article 2 of the Armed Forces (Civilians Subject to Service Discipline) Order 2009 SI 2009/836.

27. **Persons designated by or on behalf of the Defence Council.** A person will be within the category referred to at paragraph 19g above if he is designated by or on behalf of the Defence Council or by an officer authorised by the Defence Council (the designating officer)³² and he is outside the British Islands³³ and within the terms of the designation³⁴. Such designations can specify the particular person or description of persons so designated. They can also specify the circumstances in which the designation applies, for example, by reference to presence within an area. In addition, they can specify a period for which the designation applies. Likely examples of persons who will be designated are contractors deployed on operations in support of UK forces sometimes referred to as Contractors on Deployed Operations (CONDO) and civilian visitors to operational areas. An officer who is to be the CO of a designated person will be appointed as such by an officer authorised to do so by the Defence Council. Without such specific appointment an officer does not become a CO of such a person see [Chapter 2](#) (Meaning of commanding officer).

Principles applying to the designation of civilians under paragraph 7 of Schedule 15 of the Act

28. The following principles apply to the designation of a civilian under paragraph 7 of Schedule 15 of the Act:

- a. The decision to designate a civilian as being subject to Service discipline is not one that should be made lightly and therefore the authority ought not normally to be delegated below a CO.
- b. If a civilian, either as an individual, or as part of a class of civilians is designated and therefore becomes subject to Service discipline he must be informed of this fact. He should also be informed of who his CO will be in the event of a problem occurring.
- c. The default level for designating civilians should be at MOD, Front Line Command (FLC) or PJHQ level and wherever possible the designation should be made clear to a civilian before they deploy. All designations made this way must be recorded and reviewed at regular intervals.
- d. In the event that MOD, FLC or PJHQ require to designate a civilian as being subject to Service discipline³⁵ the officer who makes the designation must have the appropriate authorisation from the Defence Council or single-Service Board acting on its behalf³⁶.
- e. In exceptional circumstances³⁷ where a civilian is not already designated any officer who has been authorised³⁸, may designate him. The officer who makes a designation in such circumstances does so on the basis that the need has arisen due to unforeseen circumstances and this should be reported up the chain of command.

³² See Volume 3 of the MSL for the detail of Defence Council authorisations.

³³ For definition of British Islands see Schedule 1 to section 5 of the Interpretation Act 1978. It means the UK, the Channel Islands and the Isle of Man.

³⁴ For advice relating to contractors contact Dir Def Log Pol (DE&S) and for those who are not contractors contact SPPol SC.

³⁵ It should be noted that not all persons who are visiting or working with the armed forces may require to be designated. The criteria for deciding whether a designation is required is set out in paragraphs 7(2) and (3) of Schedule 15 of the Act and at paragraphs 30 and 31.

³⁶ See Volume 3 of the MSL for the detail of Defence Council authorisations.

³⁷ For example if an aircraft carrying civilians was diverted from its planned route and had to land in a country where the Captain of the aircraft believed it was desirable to designate them in case an incident occurs.

³⁸ This will require the Defence Council or single-Service Boards to consider which people in which area they require to be authorised.

29. If a person is to be designated they should be informed that the designation makes them subject to Service discipline and that Service jurisdiction is limited to the full range of criminal conduct offences (the criminal law of England and Wales) and a small number of Service offences under the Act (such as standing order offences). In the event that such a civilian is alleged to have committed such an offence, they may be tried either before the SCC or the CM.

30. **Reasons for designation.** The intention is to avoid unnecessary designations, but at the same time the Act is very flexible. The basis for designation is that a designating officer considers that a designation is desirable for one of the following reasons:

- a. In the interests of the person,
- b. To protect other people (for example, civilians or members of UK armed forces), or
- c. To maintain good order and discipline.

31. **Factors to consider when deciding whether to designate.** In arriving at his decision, the designating officer must take into account the following:

- a. The characteristics of the justice system (if any) in any country or territory where the person is likely to go;
- b. The terms of any relevant treaty or arrangement (such as a memorandum of understanding) under which such jurisdiction could be exercised; and
- c. Whether the person is likely to be subject to the law of the armed forces of a foreign country.

32. The designating officer, in considering whether to designate an individual should consider whether the individual concerned will have sufficient contact with UK armed forces to make it desirable for him to be subject to Service discipline. This view will be strengthened if, for example, the local courts are inadequate or the local police would not be interested in investigating an alleged offence by the individual against members of the UK armed forces. He may also need in certain cases to determine whether jurisdiction can effectively be exercised. If there is any doubt then whenever possible Staff Legal advice should be sought. In designating, he will need to make it clear when and in some cases in which locations the designation will apply.

33. In the event that a civilian is to be designated by a designating officer the Form JPA T-SL-DES01 at [Annex B](#) should be used. If this form is not available then the designation may be made provided the information contained in the form is recorded and the necessary information briefed to the individual(s) (see below):

(Describe individuals(s) in sufficient detail to identify them; whether collectively by reference to the contract on which they are employed, by reference to their employer or on some other basis, or individually) is/are designated under paragraph 7 of Schedule 15 of the Armed Forces Act 2006 as subject to service discipline under Section 370 of that Act. (Describe any geographic or other limitation which is to apply to the designation. This designation can only apply outside the British Islands. If the geographic area in which it applies is to be restricted to a specific area this must be described in sufficient detail to make it clear where it applies. If there are any time limits to the operation of the designation these must be clearly identified).

The designation process

34. There are three different processes for the designation of persons under paragraph 7 of Schedule 15 of the Act. The processes at MOD / PJHQ / FLC level that are to be followed in order to ensure that a civilian is designated correctly are set out below:

a. **Contractors on deployed operations (CONDO³⁹).** Such persons will be designated according to the following process:

(1) Once the designating officer has made the necessary designation the contract sponsor will inform the contractor that their personnel⁴⁰ will be subject to Service discipline and whether this applies for a specified period or in specified circumstances.

(2) It is then the responsibility of the contractor to inform his employees of the circumstances in which they will be subject to Service discipline and to ensure they understand the effect of this designation. This should form part of their pre-deployment briefing.

(3) When the designated employee arrives in Theatre he will be informed by the contract sponsor of the identity of the officer appointed to be his CO. At the same time the contract sponsor will notify the relevant CO that he is to be the CO of that particular civilian or class of civilians. The contract sponsor will ensure that the employee is notified of any relevant standing orders. The contract sponsor will also act as an adviser to the CO in the event that any issues arise.

b. **Contractors in non-operational areas.** A very similar process to that in paragraph 34a above applies.

c. **Visits**

(1) **By Crown servants and members of other specified organisations to operational areas.** UK Crown servants, i.e. a person employed by or in the service of the Government of the United Kingdom, may wish to visit operational areas for various reasons. Similarly, employees of other specified organisations such as NAAFI or SSVc may wish to make such visits. Where such visits to the Armed Forces in an operational area are necessary, and the visitors are required to be subject to Service discipline⁴¹ then it is the responsibility of PJHQ to inform them that they are to be designated, to brief them on the implications of designation, and allocate them a CO while they are in that theatre of operations. PJHQ will, at the same time, notify the nominated CO of the relevant civilian who will be arriving in Theatre, to ensure that on their arrival they are made aware of relevant standing orders.

(2) **By journalists, politicians and others to operational areas.**

(a) All correspondents on operational media assignments with UK forces will require accreditation under the provisions of the MOD's Green Book. Correspondents accompanying UK forces during an international armed conflict will need to be accredited to the armed

³⁹ For further detail on CONDO see JSP 567 and DEFCON 697.

⁴⁰ Except for Host Nation Nationals and residents of that country.

⁴¹ Using the criteria in paragraphs 30 and 31.

forces if they are to attain the special status provided for them by Article 4A(4) of the Third Geneva Convention. This will mean that they will be accredited as 'War Correspondents'. Further details on all aspects of correspondent accreditation can be found in the MOD Green Book (Practical Arrangements for Enabling Correspondents to Report on Operations).

(b) Politicians and other official visitors to operational areas; such visits are authorised by PJHQ, who will consider whether designation is appropriate, and put any designation in place. It is very unlikely, but possible, that theatre commanders may be uncertain whether such a visitor has been designated or whether such a visitor who has not been designated ought to be. Any such question should be referred to J3 at PJHQ and not to officers in theatre with powers to designate.

(3) **To non-operational areas.** If persons such as MOD Crown servants, members of other specified organisations or other individuals or groups⁴² who are not already designated⁴³ wish to visit the armed forces in a non-Operational area⁴⁴, and they are required to be subject to Service discipline⁴⁵, then it is the responsibility of the unit that they intend to visit to inform their higher authority (HA) of the visit. It is then the responsibility of the HA to inform the relevant FLC of the visit. If the decision is made that the visitors should be subject to Service discipline then the FLC should arrange for:

- (1) The designation to be made by an officer authorised by the Defence Council (a designating officer).
- (2) The visitors to be informed they are to be designated.
- (3) The visitors to be briefed on what the designation means.
- (4) The visitors to be allocated a CO during their visit.
- (5) The CO who is nominated to be responsible for them to be informed so that he can ensure that they are aware of any relevant standing orders.

35. **Designation in exceptional circumstances.** There may be cases where FLCs or PJHQ believe that they may need to be able to designate civilians as being subject to Service discipline and they cannot ensure that the normal authorising process will be flexible enough to be used. Such circumstances might be when designation has not been done in advance but an unexpected event/diversion may mean that civilians need to be designated in their own interest. They might involve a civilian arriving in a location where for some reason they have slipped through the authorising process without being designated by mistake. Officers such as aircraft captains may be appointed as designating officers in the event such designation may be necessary. The FLCs or PJHQ will need to ensure that an authorisation for individuals in a particular area is made, and that the selected officers are informed, so that they can act.⁴⁶ The following procedure is to be followed where there is a requirement to designate civilians in exceptional circumstances.

⁴² For example politicians.

⁴³ Under the Armed Forces (Civilians Subject to Service Discipline) Order 2009/836.

⁴⁴ For example Belize.

⁴⁵ Using the criteria in paragraphs 30 and 31.

⁴⁶ For example the RN might decide to authorise all their ships' Captains, the Army might give authorisation to all COs in a particular area and the RAF might authorise the Captains of passenger planes.

- a. In the event that an designating officer requires to designate a civilian he should fill in the Form T-SL-DES01 at [Annex B](#)⁴⁷ and ensure that the civilian is informed that he has been designated. He should also inform the civilian what the designation means and for how long and where it is to apply.
- b. If the designating officer has not already obtained staff legal advice he should do so as soon as is practicably possible.
- c. The designating officer should inform HA of his actions as soon as is practicable.
- d. The designating officer should keep the designation under review and if circumstances change such that his reasons for the designation no longer apply, he should terminate the designation and inform the civilian of his actions.

⁴⁷ If this is not available then he should ensure that the information is recorded and signed.

Part 2 - Jurisdiction of Service courts

Introduction

36. Not all Service offences⁴⁸ can be committed by a person subject to Service law and by a civilian subject to Service discipline. Each section of the Act that creates an offence states to whom it is applicable and whether it can be committed by a person subject to Service law or a civilian subject to Service discipline or both.

37. Section 42 (together with the supplementary provisions contained at sections 42 to 48 of the Act) is a very important section of the Act, extending the application of the criminal law of England and Wales to offences committed anywhere. It sometimes raises complex questions (upon which there is case law) as to whether conduct outside the UK is to be treated in criminal terms in the same way as it would if that conduct had occurred in the UK. This approach cannot always be interpreted literally. For example, national speed limits in Germany are different to those in the UK. A person subject to Service jurisdiction does not commit an offence under section 42 if he drives in Germany at a speed permitted in that country even if that would be illegal in the UK. Staff legal advice should be sought where issues arise concerning section 42.

38. In addition, there are certain offences created in sections 344 to 346 of the Act (aiding and abetting desertion, absence or malingering and obstructing persons subject to service law in the course of duty) which can be committed by any person and are triable by the civilian courts.

39. **Regular forces.** Regular forces personnel can commit any Service offence, except those created under the Reserve Forces Act 1996.

40. **Reserve forces.** When subject to Service law, members of the reserve forces can commit any Service offence which applies to persons subject to Service law. They can also commit certain offences created by the Reserve Forces Act 1996 when they are not subject to Service law.

41. **Civilians subject to Service discipline.** Relevant civilians can commit Service offences under section 42 of the Act. These are offences equivalent to crimes under the law of England and Wales and are referred to in this chapter as 'criminal conduct offences', see [Chapter 8](#) (Criminal conduct offences). In addition, such persons can commit non-criminal conduct (disciplinary) offences under some of sections 1 to 41 of the Act, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences), as well as certain other applicable offences created by armed forces legislation⁴⁹. The non-criminal conduct (disciplinary) offences that can be committed by relevant civilians are as follows:

- a. Looting under section 4 of the Act.
- b. Contravention of standing orders under section 13 of the Act.
- c. Obstructing or failing to assist a Service policeman under section 27 of the Act.
- d. Resistance to arrest under section 28(2) of the Act.
- e. An offence in relation to Service custody under section 29 of the Act.

⁴⁸ For Service offences see paragraph 41.

⁴⁹ See section 50(2)(b)-(g) of the Act, excluding under (e) offences contrary to section 305 of the Act, and under (f) excluding offences contrary to section 328 of the Act.

The other main offences created by armed forces legislation that can be committed by civilians subject to Service discipline are as follows:

- f. Failure to attend custody hearing under section 107 of the Act.
- g. Failure to provide a sample for testing for alcohol and drugs after a serious incident under section 306 of the Act.
- h. An offence under section 18 or 20 of the Armed Forces Act 1991 (orders for the protection of children).
- i. An offence under section 40 of the Act (encouraging and assisting) in relation to an offence mentioned at paragraph a - d (inclusive) above and f – h (inclusive) above.
- j. An attempt under section 39 of the Act to commit any of the disciplinary or other applicable offences above.

For the procedures applying to the investigation and charging of civilians see [Chapter 6](#) (Investigation, charging and mode of trial).

The Court Martial (CM)

42. The CM has jurisdiction to try any Service offence. For the purposes of the Act a Service offence⁵⁰ is:

- a. An offence that is a disciplinary offence, such as absence without leave⁵¹ or failure to attend for or perform a duty⁵², under Part 1 of the Act, other than an offence under section 42. Such an offence only exists in Service law and has no exact equivalent offence under the criminal law of England and Wales.
- b. Any criminal conduct offence under section 42 of the Act, which covers two main types of conduct. First, it covers conduct which is punishable under the criminal law of England and Wales (this generally covers conduct taking place in England or Wales). Secondly, it covers conduct outside the UK, which broadly speaking would be punishable under the criminal law of England and Wales had it been committed in England or Wales (but see paragraph 36 above).
- c. An offence (not within a or b above) that is specifically created in the Act, namely:
 - (1) Breach of requirement imposed on release from custody⁵³.
 - (2) Breach of Service restraining order⁵⁴.
 - (3) Failure to comply with a financial statement order⁵⁵.
 - (4) An offence in relation to testing for alcohol or drugs⁵⁶.

⁵⁰ See section 50 of the Act.

⁵¹ See section 9 of the Act.

⁵² See section 15 of the Act.

⁵³ See section 107 of the Act.

⁵⁴ See section 229 of the Act.

⁵⁵ See section 266 of the Act.

⁵⁶ See Chapter 1 of Part 13 of the Act.

- (5) An offence under regulations in relation to giving false answers during enlistment which is specified in the regulations to be a Service offence⁵⁷.
- d. An offence created by armed forces legislation other than the Act:
 - (1) An offence under section 18 or 20 of the Armed Forces Act 1991 (orders for the protection of children).
 - (2) An offence under any of the sections 95 – 97 of the Reserve Forces Act 1996 (reserve forces offences).
 - (3) An offence under paragraph 5(1) of Schedule 1 to the Reserve Forces Act 1996 (false answer during enlistment in a reserve force) committed by a person within paragraph 5(3) of that Schedule.

The Service Civilian Court (SCC)

43. The SCC can only sit outside the UK and has jurisdiction (where it is not a matter to be tried by the CM) to try any Service offence committed outside the British Islands by a civilian subject to Service discipline with the exception of the following:

- a. An indictable-only offence under section 42 of the Act for which the corresponding offence under the criminal law of England and Wales could only be tried before the civilian Crown Court. Therefore, an adult may not be tried in the SCC for an indictable-only offence under section 42. However, an accused aged under 18 may be tried by the SCC for any such offence, except:
 - (1) Murder.
 - (2) Manslaughter.
 - (3) Causing or allowing the death of a child⁵⁸.
 - (4) A firearms offence⁵⁹. If convicted at a CM trial for this offence, certain requirements as to the minimum sentences for firearms offences would apply.
- b. An offence under section 266 (Financial Statement Order) committed in respect of a financial statement order made by a court other than the SCC.
- c. Any Service offence under regulations made under section 328 (Enlistment) or section 343 (Service Inquiries) of the Act.
- d. An offence within section 50(2)(h) or (i) (Reserve Forces Act 1996 offences)⁶⁰.
- e. Any offence if the accused is a member of the regular or reserve forces or liable to recall⁶¹.

⁵⁷ See regulation 12 of the Armed Forces (Enlistment) Regulations 2009.

⁵⁸ See section 5 of the Domestic Violence, Crime and Victims Act 2004 (c.28)

⁵⁹ See section 227 of the Act.

⁶⁰ See section 51(3)(d) of the Act.

⁶¹ For definition of 'liable for recall' see section 51(7) of the Act.

Summary hearing

44. Only persons subject to Service law may be dealt with at a summary hearing. Offences can be heard by either the CO or an empowered subordinate commander. The offences that a CO or subordinate commander can hear depend on whether the matter is one capable of being dealt with summarily, the rank/rate of the accused, his powers of punishment as set out in [Chapter 13](#) (Summary hearing sentencing and punishments), [Chapter 2](#) (Meaning of commanding officer) and [Chapter 6](#) (Investigation, charging and mode of trial).

45. **Commanding officer.** A CO may hear a charge against a person subject to Service law if⁶²:

- a. The offence is one that may be dealt with at a summary hearing see [Chapter 6](#) (Investigation, charging and mode of trial);
- b. The accused is of the appropriate rank/rate, i.e. an officer of or below the rank of commander, lieutenant colonel or wing commander, or a person of or below the rank or rate of warrant officer;
- c. The accused is a person who (depending on paragraphs 10 -13 above and 67 to 71 below⁶³):
 - (1) From the time the offence was committed to the end of the summary hearing of the charge is subject to Service law;
 - (2) From the time the offence was committed to the end of the summary hearing of the charge is a member of a volunteer force; or
 - (3) Is a member of an ex-regular reserve force (see paragraph 10b) who is subject to an additional duties commitment. A CO has no power to hear a charge summarily once the accused has been discharged as a member of the regular or reserve forces or if he is an ex-regular reservist, once he has completed his recall Service or any additional duties commitment; and
- d. The CO is a minimum of two ranks higher than any commissioned officer who appears before him for summary hearing⁶⁴.

46. **Subordinate commander.** The same principles apply for a subordinate commander as to a CO when powers of punishment have been delegated with respect to hearing a charge summarily. A subordinate commander will have to consider his powers of punishment as they will differ from those held by the CO, see paragraph 44 above. He should determine whether he has sufficient power to hear the charge.

47. **Offences that may be heard summarily without permission.** In order for an offence to be capable of being heard by a CO it must be one of the offences specified in section 53 and Part 1 of Schedule 1 of the Act⁶⁵. This list is exhaustive and an offence not within that section is not capable of being heard summarily by the CO, however minor it may appear to be.

⁶² See section 52 of the Act.

⁶³ See also section 52(5) and (6) of the Act. Subsection (5) provides that if the offence is under section 96(1) Reserve Forces Act 1996 where the offender is subject to Service law, it is enough if he is 'liable to recall' or 'a member of the regular forces' during the period. Under subsection (6) if there is any other offence under the Reserve Forces Act 1996 he must be a member of a reserve force during this period.

⁶⁴ See [Chapter 2](#) (Meaning of commanding officer).

⁶⁵ See also Annex A to [Chapter 6](#) (Investigation, charging and mode of trial).

48. **Offences requiring the permission of HA for summary hearing.** A CO can deal summarily with certain criminal conduct offences within section 53 and Schedule 1 of the Act⁶⁶ only after having obtained permission from HA⁶⁷. These offences are listed in Part 2 of Schedule 1 of the Act and in Annex B of [Chapter 6](#) (Investigation, charging and mode of trial). Where permission is required, it must be obtained **before** the case can be dealt with summarily. However, if the officer who will hear the charge summarily is of, or above, the rank of rear admiral, major general or air vice-marshal, he can deal with these offences without permission. For the procedure on how to apply for permission, see [Chapter 6](#) (Investigation, charging and mode of trial).

Appellate courts

49. There are three appellate courts:

- a. **The Court Martial Appeal Court (CMAC).** For appeals see [Chapter 31](#) (Court Martial appeal).
- b. **The Summary Appeal Court (SAC).** The SAC has the jurisdiction to hear an appeal (this is by way of a re-hearing) from a summary hearing. See [Chapter 15](#) (Summary hearing review and appeal) for further details on appeals to the SAC.
- c. **The Court Martial (CM).** The CM has jurisdiction to hear appeals made from the SCC. See [Chapter 32](#) (Service Civilian Court).

⁶⁶ See section 54(1)(b) of the Act.

⁶⁷ For single-Services this will be their own HA and for joint units this will be their assigned HA.

Part 3 - Choice of jurisdiction

Jurisdiction inside the United Kingdom

50. Within the UK, in respect of offences committed by persons subject to Service law, jurisdiction may lie with the Service authorities under the Act or with both the Service authorities and the civilian authorities under the ordinary law of the relevant part of the UK. In the latter circumstance, there are a number of established procedures and protocols that determine the exercise of jurisdiction⁶⁸ and COs should liaise with the Service Police and seek staff legal advice on jurisdiction.

51. The Act has removed the bar that previously existed which prevented the Service authorities from having jurisdiction to prosecute certain offences (principally murder, manslaughter and rape) alleged to have occurred within the UK. Where such offences are committed in the UK by persons subject to Service law (or who were so subject at the time of the offence) the Service courts can now have jurisdiction. However, the civilian police will normally investigate and the civilian authorities with jurisdiction will normally prosecute such cases. The removal of the statutory bar provides certainty that the Service Police can conduct initial investigations.

52. **Consultation with relevant civilian authority.** Where jurisdictional issues arise in the UK, they will be handled by the Service Police or Ministry of Defence Police (MDP) (who are themselves a civilian authority) and by the Director of Service Prosecutions (DSP), where appropriate. COs should therefore liaise in the first instance with the Service Police in these cases.

a. COs should be aware that in some of these cases consultation needs to take place with the civilian authorities. Where this is not done by the Service Police or the MDP, staff legal advice should be obtained. The relevant civilian authority will be the Crown Prosecution Service. For the position in respect of Scotland and Northern Ireland see below at paragraphs 53 and 54 respectively.

b. When a CO reports a matter to the relevant civilian authority, he should request that written confirmation is provided as to whether or not the matter will be disposed of by the civilian authority. The CO as well as notifying his HA should also notify the Service Police of his actions at the earliest possible opportunity. Any written confirmation from the civilian authorities should then be retained with the other records held in respect of the case.

c. In any case where a civilian authority has consented to allow the Service authorities to deal with a case, the CO of the suspect or accused should notify the civilian authorities of the result of the case.

53. **Scotland.** In respect of criminal conduct offences committed by a person subject to Service law in Scotland, the following points should be noted:

a. It is the Procurator Fiscal for the relevant area, under the direction of the Lord Advocate, who prosecutes cases (rather than the Crown Prosecution Service (CPS) who do so in England and Wales). Therefore, in relation to offences in Scotland, 'Procurator Fiscal' should be substituted for the words "Crown Prosecution Service" and "chief officer of Home Office Police" wherever they occur in this chapter. The Procurator Fiscal will usually be the point of contact for consultation.

⁶⁸ Advice can be obtained from DDefSy-Def Policing at MOD on protocols and generally, from the staff legal adviser.

- b. The Procurator Fiscal is responsible for deciding how an alleged offender should be tried.

54. **Northern Ireland.** In Northern Ireland, allegations in relation to criminal conduct offences committed by a person subject to Service law are referred by the civilian police to the Director of Public Prosecutions and it is he and not the Chief Officer of police, who considers questions of jurisdiction.

55. **Staff legal advice.** If a CO is in any doubt as to whether an alleged offence should be reported to a relevant civilian authority under paragraph 52 above or if there is any doubt as to whether the Services have jurisdiction to deal with the case, he should seek staff legal advice.

Jurisdiction outside the United Kingdom

56. **Introduction.** The proper exercise of Service jurisdiction in a foreign country (for example, the arrest of persons subject to Service law or a civilian subject to Service discipline by Service Police) is often regulated by a treaty, MOU or ad hoc agreement⁶⁹. Without such an agreement, while the arrest or other action is still valid under UK domestic, Service and international law, the country in question may complain that its sovereignty has been infringed and may request that jurisdiction be returned (in such circumstances, advice should be sought from HA). Where the British armed forces are in belligerent occupation of the territory of any other State, Service authorities will normally have exclusive jurisdiction in that territory in respect of the investigation and prosecution of offences by persons subject to Service law or attached civilians subject to Service discipline.

57. In countries where no treaty, MOU or ad hoc agreement exists and the circumstances in paragraph 56 above do not apply, COs should be sensitive to the issue, and may need to liaise with the UK's representatives or in their absence, the local authorities, before exercising Service jurisdiction.

58. Countries other than NATO countries.

a. Where a treaty, Status of Forces Agreement or MOU is in place in non-NATO countries, sometimes the UK Service authorities will be able to exercise jurisdiction to deal with all offences committed by persons subject to Service law or civilians subject to Service discipline. However, in other countries, the Services will only be able to exercise jurisdiction to deal with offences committed whilst on duty and in other specified situations. Staff legal advice should be sought in the first instance if there is any doubt as to whether such an agreement may exist.

b. Where UK persons subject to Service law are placed at the disposal of a Commonwealth force under Defence Council Orders, jurisdiction lies with the Commonwealth Service authorities⁷⁰.

59. **NATO and partnership for peace countries.** Jurisdiction in NATO countries and the other states participating in the Partnership for Peace (PfP)⁷¹ is dealt with in Article VII of the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty (Command 9363) signed in London on 19 June 1951 (the Agreement). The full text of the

⁶⁹ Whether or not such agreements exist, COs will also be issued with mission directives for exercises or operations and port visit guidance will be provided for ships, which will detail the jurisdictional issues which apply in a particular country.

⁷⁰ See section 4(2)(ii) of the Visiting Forces (British Commonwealth) Act 1933 (as amended).

⁷¹ See Partnership for Peace Framework Document dated 10 Jan 94

Agreement is in MSL, Volume 3, but some of the main jurisdictional aspects are set out below:

a. The UK has exclusive jurisdiction to deal with offences relating to the UK's security which are punishable under UK law but not by the law of the NATO/PfP country. These offences are:

- (1) Treason against the state;
- (2) Sabotage, espionage or official secrets related offences.

b. Where the right to exercise jurisdiction lies with both the Service authorities and the local judicial authorities (for example, where the offence is against both Service law and the law of the country in which it has allegedly occurred) jurisdiction is governed by paragraph 3 of Article VII of the Agreement. The general effect is that the UK Service authorities retain jurisdiction over non-criminal conduct (disciplinary) offences under the Act when UK forces are in a NATO/PfP country. The UK Service authorities have the primary right to exercise jurisdiction to deal with the following offences:

- (1) Any Service offence other than those which are charged under section 42 of the Act.
- (2) Offences under section 42 of the Act solely against UK security or property of the UK Government.
- (3) Offences under section 42 of the Act solely against another Service person or a member of the civilian component or his property.
- (4) Offence under section 42 of the Act arising out of any act or omission in the performance of an official duty.

c. Where either the receiving state or the visiting state has the primary right of jurisdiction, they have the power to waive it.

60. **Notification.** In cases where the right to exercise jurisdiction lies with both the Service authorities and the receiving state, the state that exercises jurisdiction in a particular case must notify the other of the results of the case⁷².

61. **Germany.** The status of UK forces stationed in Germany is governed by the Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty (Command 9363) as modified by the Supplementary Agreement (Command 2191 of 1963 and Command 2479 of 1994). Broadly speaking the main effect of the Supplementary Agreement in relation to jurisdiction is that Germany has given a general waiver of its primary right to jurisdiction as regards UK forces. This general waiver may be recalled, however, in special circumstances in a specific case. Where this issue arises staff legal advice should be sought.

62. **British overseas territories**⁷³. In the British overseas territories listed in the UK Forces (Jurisdiction of Colonial Courts) Order 1965 (as amended) – SI No 1203 of 1965⁷⁴,

⁷² Article VII(6)(b) of the NATO SOFA refers.

⁷³ These include (but are not limited to): Anguilla, British Guiana, Cayman Islands, Falkland Islands, Fiji, Gibraltar, Seychelles, Virgin Islands. See section 2 of the UK Forces (Jurisdiction of Colonial Courts) Order 1965 (as amended) – SI No 1203 of 1965 for the full list of countries.

⁷⁴ See Volume 3 of the MSL.

the jurisdiction of the civil courts to try members of Her Majesty's forces (or the civilian component of those forces) in respect of offences against the law of the territory has been removed in certain circumstances. Where relevant, this Order will need to be referred to.

a. Broadly, jurisdiction in respect of offences committed arising out of and in the course of duties and in respect of certain offences committed while off duty, has been removed from the local authorities of those countries. The off-duty offences include offences against the person or property of another member of Her Majesty's forces (or of the civilian component) or against the property of a UK Government department or other UK authority or authorised Service organisation. The civilian courts may, however, proceed with a trial if the CO of Her Majesty's forces in the territory concerned, notifies the Governor that the Service authority does not propose to deal with the case.

b. Detailed instructions are issued separately and should be consulted in addition to seeking staff legal advice. The primary right of jurisdiction is not to be waived without full consultation with the appropriate HA.

c. In British overseas territories where UK forces are stationed and where the jurisdiction of the civil court has not been removed, the local legislation might also impose similar jurisdictional arrangements to those set out above, but advice should be sought from a staff legal adviser in all cases of doubt.

63. **Sovereign Base Areas (SBAs) - Cyprus.** SBAs form a special category governed by the Treaty of Establishment 1960. Differing jurisdictional arrangements exist depending on whether the events giving rise to the charge occurred within the SBAs or in the Republic of Cyprus. In the light of such complications, where such issues arise staff legal advice should always be obtained.

Part 4 - Jurisdiction as to time

Introduction

64. Generally, a person may be charged with any Service offence which applies to him if he commits that offence when he is subject to Service law⁷⁵ or he is a civilian subject to Service discipline. For the most part, the question of any time limits only arises where the individual has **ceased** to be subject to Service law or a civilian subject to Service discipline at the time it is intended to charge him. This will be the case: where a regular Service person has left the Service; where a reservist has ceased to be a member of a reserve force; where a civilian is no longer subject to Service discipline because, for example, he is no longer present in an area that resulted in him becoming subject to Service discipline. However, in relation to a small category of offences there are time limits that apply, which are unrelated to whether or not the individual was or is subject to Service law, or to whether he was a civilian subject to Service discipline, see paragraph 72 below. For the application of Service discipline to civilians generally see [Chapter 6](#) (Investigation, charging and mode of trial).

65. **Summary jurisdiction.** Paragraph 45c above deals with the requirement that, broadly, for a charge to be heard summarily the accused must be a person subject to Service law from the time the offence was committed to the end of the summary hearing of the charge, or is a member of a volunteer force or a member of an ex-regular reserve force who is subject to an additional duties commitment.

66. **CM jurisdiction.** Once the time limits, see paragraphs 67 to 71, have expired, an individual cannot be charged with a Service offence; however, where it is intended that a person be tried by the CM there is an exception under section 61 of the Act which provides a power to seek the consent of the Attorney General to charge outside the time limit. This power does not apply to the small category of offences which are set out in paragraph 72 below.

Time limits in relation to categories of personnel

67. **General.** A person must be charged with an offence within the relevant time limit and this will mean proceedings have commenced. It is not necessary for the charge to have been heard within the time limit although the longer the delay (without reasonable and justifiable excuse), the more likely it is that there could be an argument for abandoning the case as being an abuse of process. The time limits laid down in the Act relate only to Service offences committed under the Act and do not affect any statutory time limits provided for in any other legislation in respect of dealing with civil offences. Where the offence is to be dealt with by a civilian court, the civilian time limits apply rather than those under the Act.

68. **Her Majesty's regular forces.** Except with the consent of the Attorney General, once an individual has left the regular forces he cannot be charged with a Service offence that he is alleged to have committed when he was a member, if more than six months have elapsed beginning on his discharge date. This is the case even if he rejoins one of the Services, either as a regular or reservist, within that six month period⁷⁶.

⁷⁵ For additional times in relation to Reserve Force Acts offences see section 107 RFA 96 and section 62 of the Act where these offences prosecuted at the CM.

⁷⁶ See section 55 of the Act.

Case Study

A soldier who commits a Service offence on 1 Jan 10 but who subsequently leaves the Army on 31 Jan 10 could still be charged with that offence with a view to hearing it at a CM trial, provided that he is charged on or before 30 Jul 10. If he then went on to join the RAF on 1 Feb 10 he still could not be charged with any offence he may have committed on 1 Jan 10 as a soldier after 30 Jul 10. If, however, as an airman he commits another offence on 1 Mar 10, he could be charged with that Service offence as a member of the regular forces.

69. **Her Majesty's reserve forces.** The same rule as for regular forces applies to reserve forces. Once an individual has left the reserve forces, he cannot be charged with a Service offence that he is alleged to have committed when he was a member, if more than six months have expired from his discharge date. This is the case even if he rejoins one of the Services, either as a regular or reservist, within that six month period⁷⁷. A charge can only arise from an incident that occurred when the reservist was subject to Service law, see paragraphs 10 to 13 above. However, the six month time limit will run from when he ceases to be a reservist. It will not run from the end of a period during which he was temporarily subject to Service law, unless that period also happens to end with his ceasing to be a member of the reserve force. The reservist may therefore have periods when he was not subject to Service law between the incident and the charge.

70. **Former regular and reserve forces.** Those personnel who are recalled into Service are to be treated as members of the regular forces and that includes in relation to time limits for charging⁷⁸. Such a person cannot be charged with a Service offence committed during the period of his recall, if more than six months has passed since the end of the period for which they were recalled⁷⁹. Where a person who having been in the regular forces is subject to recall⁸⁰ and he undertakes an additional duties commitment⁸¹ he can be charged with an offence that is alleged to have occurred during that period if not more than six months have expired from the end of his additional duties commitment. This rule does not apply in the case of a member of the volunteer reserve forces who undertakes an additional duties commitment, because in his case, the six month time limit will only run from the date of his discharge from the reserve force as referred to above at paragraph 69 above.

71. **Civilians.** A civilian cannot be charged with a Service offence if six months have elapsed since the time he ceased to be a civilian subject to Service discipline. However, if he immediately becomes subject to Service law (for example, because he joins one of the Services) then that six month time limit will not apply. A person can be a 'civilian subject to Service discipline' intermittently. Where a civilian has ceased to be subject to Service discipline, the six months' period will generally continue to run, even if he again becomes subject to Service discipline before the end of the six months. However, where a civilian subject to Service discipline temporarily leaves a designated area, but continues to reside or stay in that designated area, for example, he will remain subject to Service discipline in his temporary absence and the time period will not begin to run.

72. **Certain categories of offences.** Besides certain Reserve Forces Act 1996 offences, there are two other Service offences to which time limits apply:

⁷⁷ Except in relation to limited cases involving the Reserve Forces Act 1996 for which see footnote to paragraph 42e.

⁷⁸ See section 55 of the Act.

⁷⁹ See definition of ex-regular reserve force at section 374 of the Act.

⁸⁰ See section 25 of the Reserve Forces Act 1996.

a. **Failing to attend a hearing at which attendance is required.** This offence is contrary to section 107(5) of the Act and the time limit for charging a person with this offence is the later of:

- (1) Expiration of six months beginning with the date of commission of the offence; or
- (2) Expiration of two months beginning with the date that the offender is apprehended.

This offence can be committed by a person who is not subject to Service law. For example, if a member of a reserve force who is not for the time being subject to Service law, is released from custody but then fails to attend a hearing in the proceedings against him that he is required to attend, he may have committed the offence under section 107(5) of the Act. The time limits stated above will apply to bringing a charge for that offence⁸².

b. **Failing to comply with a financial statement order.** This offence is contrary to section 266 of the Act and the time limit for charging a person with such an offence⁸³ is the earlier of:

- (1) Expiration of two years beginning with the date of commission of the offence; or
- (2) Director of Service Prosecutions or a prosecuting officer of his staff becomes aware of the offence.

As with the section 107 offence, the offences under section 266 can be committed by a person who is no longer subject to Service law or by a civilian who is no longer subject to Service discipline. For example, a member of the Territorial Army (whilst not on duty) may be subject to a financial statement order but fails to comply with its terms. This non-compliance is an offence under section 266 and therefore the time limit stated above will apply.

⁸² See section 59 of the Act.

⁸³ See section 60 of the Act.

Part 5 - Double jeopardy

Introduction

73. The double jeopardy rules protect accused persons from repeated prosecutions for the same offence. Generally, if an accused has already been convicted or acquitted, he can enter a plea before any subsequent court and state that the earlier conviction or acquittal should totally bar any further proceedings⁸⁴. The area is a technical one, with considerable case law. Moreover, it forms part of a wider area of law, together with related common law on abuse of process. The following paragraphs should be seen as no more than an introduction to the particular provisions on double jeopardy in the Act on which staff legal advice should be sought.

74. The Act provides for the barring of Service disciplinary proceedings owing to the outcome of Service or civilian criminal proceedings and the barring of civilian criminal proceedings owing to the outcome of Service disciplinary proceedings. The protection is particularly important in the Service context because persons subject to Service law (and civilians subject to Service discipline) may be dealt with in civilian courts for criminal offences, or in Service Courts for Service offences, which include both criminal offences (charged under section 42 of the Act) and Service discipline offences. As a general rule, section 63 of the Act protects a person convicted or acquitted of a Service offence from trial:

- a. For the same offence based on the same or substantially the same facts.
- b. For an offence all the elements of which were elements of the offence for which he was convicted or acquitted (for example, if convicted of robbery, he cannot be tried for theft in relation to the same events; if acquitted of theft, he cannot be tried for robbery in relation to the same events).
- c. Where he was convicted or acquitted by the CM or SCC for another offence for which he could have been tried as an alternative to that for which he was convicted or acquitted.

Statutory regime

75. Generally, the provisions of the Act relating to double jeopardy apply to offences which have been taken into consideration for the purposes of sentence as well as to offences for which a person has been convicted or acquitted.

- a. Sections 63 and 64 of the Act provide that acquittals and convictions of Service offences⁸⁵:
 - (1) Will bar further trial in any other Service court or a hearing by a CO in the circumstances summarised in paragraph 74 above (section 63 of the Act).
 - (2) In relation to criminal conduct offences under section 42 of the Act, will bar further trial in UK (or Isle of Man) civilian courts where trial in those courts would be barred following a conviction or acquittal by a civilian court in England or Wales of the corresponding civilian offence (section 64 of the Act).
- b. Section 66(1) of the Act, in relation to a conviction or an acquittal by a civilian court, provides that the common law rules which would bar further trial in a civilian

⁸⁴ These are known respectively as the principles of *autrefois convict* and *autrefois acquit*. Sections 63-66 of the Act.

⁸⁵ That is in the summary hearing as well as in the Service courts.

court in England or Wales apply to bar trial before the CM or the SCC or a hearing by a CO for a criminal conduct offence (under section 42 of the Act).

c. Section 66(2) of the Act provides a bar to trial by the CM or SCC, or a hearing by the CO for any other Service offence if any act forming an element of the Service offence amounts to an offence under the law of England and Wales, which could not be tried by a civilian court in England or Wales because of the common law rule of double jeopardy.

The barring of prosecutions

76. Under sections 121(5), 125(2)(g) and 126(2)(f) of the Act, the Director of Service Prosecutions (in relation to cases referred to him, charges allocated for trial by the CM or the Service Civilian Court) may make a direction under section 127 of the Act that a person is to be treated as acquitted of a specified Service offence. He may either make a direction for the purposes of barring further Service proceedings only (i.e. for the purposes of section 63 of the Act) or he may make such a direction to bar further Service proceedings and civilian proceedings (i.e. for the purposes of sections 63 and 64 of the Act).

Practical effect

77. **Service courts.** In the event of a double jeopardy issue arising before the CM or the SCC, the plea on behalf of the accused would be brought before the judge advocate who would deal with it either at a preliminary hearing or during a trial, in the absence of the lay members of the court.

78. **Summary hearing.** Whereas in a Service court it will be for an accused to prove that he has already been acquitted or convicted, the rule against double jeopardy is so fundamental that if at any stage of a summary hearing an accused suggests that he has already been dealt with in any of the ways provided for in the Act, the CO and the Service Police must seek staff legal advice (and the Service Police may if they think it appropriate seek advice from the DSP). Only if the CO is satisfied (having taken legal advice) that there is no bar should the hearing proceed. The greatest potential for double jeopardy is in relation to older incidents, incidents which occurred in another unit or those which occurred in a civilian environment.

The effect of administrative action

79. Quite separate from 'double jeopardy' is the issue of whether to prosecute where an accused has been or may be the subject of administrative action in respect of the same events. This goes to general questions of fairness and does not form part of the double jeopardy rule. For example, it may be unjust to prosecute a person for negligently performing a duty if administrative action has already been taken against him for the same failing. In such cases (which can be complex), staff legal advice should be sought.

Part 6 – Transitional guidance

Introduction

80. This Part provides a brief explanation of transitional arrangements concerning the jurisdiction of the Court Martial and the Service Civilian Court (SCC), the feature of time limits and the principle of double jeopardy. Staff legal advice should be sought when a transitional situation is identified.

Jurisdiction

81. **Jurisdiction as to person.** Jurisdiction as to person under the 2006 Act is dealt with in Part 1 of this chapter. A member of the regular forces subject to military law, air-force law or the NDA 1957 before commencement will become, on commencement, a person subject to Service law under the 2006 Act. The same transition is not necessarily the case for civilians subject to the SDAs before commencement. For example, the civilian spouse of a Service person who prior to commencement is residing with him outside the UK may or may not become, on commencement, a civilian subject to Service discipline, but this will depend on whether he is in a designated area or whether he has been specifically designated as subject to Service discipline.

82. **The Court Martial.** Jurisdiction of the CM under the 2006 Act is dealt with in Part 2 of this chapter. The CM 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). The CM is not similarly limited in its jurisdiction to try Service offences committed post-commencement.

83. **The SCC.** Jurisdiction of the SCC under the 2006 Act is dealt with in Part 2 of this chapter. The SCC has jurisdiction to try any SDA offence committed outside the British Islands by a civilian subject to the SDAs, subject to similar exceptions that applied before commencement to the jurisdiction of Standing Civilian Courts.

84. **Jurisdiction as to time.** Time limits under the 2006 Act are dealt with in Part 4 of this chapter. The time limits are essentially the same as before commencement. SDA offences that are already time-barred before commencement will continue to be time-barred after commencement unless a situation exists in which the Attorney-General's consent to bring a charge may apply. There are different time-limits applicable to offences under the RFA 1996. Those provided for by the 2006 Act will apply, on transition, to SDA offences under the RFA 1996.

85. Time starts to run against the time limits from the moment a person who has committed an SDA offence ceases to be a member of a regular or reserve force except where at that time he transferred to another regular or reserve force. In relation to civilians formerly subject to the SDAs the six month time-limit explained in paragraph 71 of this chapter applies. Where a civilian formerly subject to the SDAs ceased to be subject to the SDAs by virtue of becoming subject to military law, air-force law or the NDA 1957 (pre-commencement), or by becoming a civilian subject to Service discipline on commencement there is no time-bar.

Double Jeopardy

86. Provisions in the 2006 Act protect an individual from double jeopardy in relation to Service offences and are dealt with in Part 5 of this chapter. Where, before commencement, provisions of the SDAs or CMAA68 prevented a person from being tried by a court-martial for

an SDA offence, the Court Martial, SCC or a CO at a summary hearing are similarly barred from trying the charge⁸⁶.

⁸⁶ See article 25 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

LIST OF DESIGNATED AREAS⁸⁷

1. The following are designated areas for the categories of civilians referred to in paragraphs 23, 25 and 26b and c of this chapter:

Brunei Darussalam
The Falkland Islands
The Federal Republic of Germany
Gibraltar
The Kingdom of Saudi Arabia
The Islamic Republic of Afghanistan
The Republic of Iraq

2. The following are designated areas for the category of civilian referred to in paragraph 26a of this chapter:

Belize
Brunei Darussalam
The Falkland Islands
The Federal Republic of Germany
Gibraltar
The Kingdom of Saudi Arabia
The Republic of Cyprus
The Republic of Turkey
The Sovereign Base Areas of Akrotiri and Dhekelia
The State of Kuwait
The Sultanate of Oman

⁸⁷ These designated areas are contained in the Armed Forces (Civilians Subject to Service Discipline) Order 2009/836.

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX B TO
VOL1 CH 3
JSP 830 MSL
revised 08/09

**CIVILIAN SUBJECT TO SERVICE DISCIPLINE
FORM OF DESIGNATION** T-SL-DES01

This designation is made under paragraph 7 of Schedule 15 (Civilians Subject to Service Discipline) to the Armed Forces Act 2006.

Designating officer

Rank/Rate

Name

Appointment

Designating authority

Persons designated

Family name	Forename(s)	DoB	Place of Birth	Passport No or National insurance number & nationality	Name or post of CO*

* This form is not the instrument of appointment of the commanding officer. Where is not already a CO one must be appointed under the Armed Forces (Meaning of "Commanding Officer") Regulations 2009 Reg 3 see also paragraphs 6 and 29 of Chapter 2 (Meaning of Commanding Officer)

OR description of person(s) **

** In the case of a designation of a class of person(s), the description must be sufficient to make it possible to decide whether an individual is within the description.

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Period (if any) for which the designation applies (if there are any time limits to the operation of the designation these must be clearly identified)

From

To

Other circumstances which limit the application of designation (specify any geographic or other limitation which is to apply to the designation can only apply outside the British Islands)

Signed

Authorised by the Defence Council

On behalf of the Defence Council

NOTES

1. A person may be designated for the purpose of this paragraph only if it appears to the authorising officer that it is desirable to do so (See paragraph 7(2) of Schedule 15 to the Act):
 - a. In the interests of the person;
 - b. For the protection of other persons (whether or not members of any of Her Majesty's forces); or
 - c. For the purpose of maintaining good order and discipline.
2. In deciding whether to designate a person for the purpose of this paragraph, the authorising officer must have regard in particular to (See paragraph 7(3) of Schedule 15 to the Act):
 - a. The characteristics of the justice system (if any) in any country or territory where the person is or is likely to be;
 - b. The terms of any treaty, agreement or arrangement relating to the legal status, or the treatment, of visiting forces to which the United Kingdom and any such country or territory are parties; and
 - c. The likelihood of the person(s) being subject to the law applicable to the armed forces of any country or territory outside the British Islands.

He/she may also take into account:

 - d. The practicality of exercising Service Jurisdiction.
 - e. Any other relevant factor.
3. This form can be used to designate individuals by name or collectively by class/ by reference to the contract on which they are employed/ by reference to their employer/ on some other basis.
4. A designation on this form (or at all) cannot be made in respect of a foreign national (who is not also a UK national), who is either in a country of which he is a national or in which he is ordinarily resident (See paragraph 11 of Schedule 15 to the Act).
5. When a civilian or groups of civilians are designated the Service Police Crime Bureau (SPCB) should be informed initially by telephone on 93835 5170/5180 or 02392 285170/285180. Follow up by faxing this form to 93835 5179 or 02392 285179.

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Chapter 4

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Chapter 4

Arrest and search, stop and search, entry search and seizure, and retention

1. **General.** This chapter provides guidance on the rules and actions to be taken when a decision is made to conduct an arrest and search of persons, stop and search of persons or vehicles, entry, search and seizure of premises for the purpose of obtaining evidence and retention of items seized during a search under the Armed Forces Act 2006 (the Act). Accordingly, the guidance is divided into these five parts and is primarily targeted towards commanding officers (COs), the Service Police and other Service personnel who may be called upon to make decisions or perform any of the actions described in this chapter. Part 5 provides an overview of the transitional arrangements regarding powers of arrest, stop and search, seizure and retention applying to circumstances which occur wholly or partly before the commencement of the Regulations (ie before 31 October 2009).

Part 1 - Arrest and search

Introduction

2. Part 1 provides guidance on the rules governing arrest and search procedures under the Act. It lays out who can be arrested and by whom, in relation to a Service offence and who may authorise and carry out a search upon arrest providing guidance for the decision makers and for those involved in the process. If there is any doubt in relation to these matters, legal advice should be sought from the appropriate legal branch..

3. The Act defines and limits the powers of arrest and search in relation to particular situations. The following guidance relates firstly to the decision to be made in relation to powers under the Act (to arrest or search) and then the manner of any such arrest or search

4. Arrests and searches under the Act are normally undertaken by the Service Police but if the Service Police are not available for any reason, others, in particular the CO, may have to play a vital role in determining when an arrest, search upon arrest or stop and search may be authorised.

5. **Decision makers.** The decision makers in this context include the Service Police and COs. In addition civilian courts and judge advocates have certain powers.

6. **Those who conduct arrest or search.** The guidance that follows should assist Service policemen and other individuals (who are not as familiar with the powers and the conduct of arrest and search). This guidance is supplemented by the Service Police Codes of Practice (see JSP 397) and should be read in conjunction with other relevant chapters of this publication as indicated in the following paragraphs.

Arrest

7. Arrest involves the restriction of a person's liberty and the powers outlined in this section must only be exercised when it is appropriate and there are grounds for doing so. Those grounds are where a person is reasonably suspected of being engaged in committing, or of having committed a Service offence¹ and where a person is reasonably suspected of being about to commit a Service offence². In rare circumstances, arrest for a Service offence may also be authorised by judicial warrant³ (see paragraphs 27 – 32).

8. **Arrest of person reasonably suspected of committing or having committed a Service offence (arrest under section 67).** The following guidance illustrates who may effect an arrest under section 67 of the Act of a person reasonably suspected of committing or having committed a Service offence. The power of arrest may be exercised personally or by giving an order to another person or where the person, who is to be arrested, is subject to Service law (Service person), by ordering that person into arrest. In the case of a person who is suspected of having committed a Service offence while in the armed forces, but who is no longer serving, he is to be dealt with as if he holds the rank he last held whilst still serving. Similarly, a civilian who was subject to Service discipline (relevant civilian) when he is alleged to have committed the offence but is no longer so subject, should be treated for these purposes as if he were a civilian still so subject. The powers to charge those who have ceased to be members of the regular or reserve forces are restricted by the time period for charging, see [Chapter 3](#) (Jurisdiction and time limits), but in general no more than six months can elapse before charging, beginning with the last day of being subject to Service law. This

¹ Section 67(1) of the Act.

² Section 69(1) of the Act.

³ Section 313 of the Act.

period may be exceeded only with the consent of the Attorney General but in such a case, arrest under section 67 of the Act may only be carried out by a Service policeman⁴.

Offender	Power of arrest under section 67
Officer engaged in mutiny, quarrel or disorder. ⁶	<p>Only persons who are subject to Service law at the relevant time⁵ can make an arrest under section 67 of the Act.</p> <p>a. Service policeman⁷; or</p> <p>b. On the order of another officer, any person legally exercising authority on behalf of a provost officer⁸; or</p> <p>c. Any officer.</p>
Officer (in all other circumstances)	<p>a. Service policeman; or</p> <p>b. On the order of another officer, any person legally exercising authority on behalf of a provost officer; or</p> <p>c. An officer of superior rank (ie not an officer of the same rank, an officer who is of higher rank).</p>
Warrant officer and below.	<p>a. Service policeman; or</p> <p>b. Any person legally exercising authority on behalf of a provost officer; or</p> <p>c. Any officer; or</p> <p>d. Warrant officer or non-commissioned officer of higher rank or rate; or</p> <p>e. A member of the staff of the Officer of the Day⁹.</p>
Relevant civilian	<p>a. Service policeman; or</p> <p>b. Any person legally exercising authority on behalf of a provost officer; or</p> <p>c. Any officer.</p>

⁴ Section 68(4), Section 61(2) and section 55-58 of the Act.

⁵ Relevant time = time of arrest.

⁶ This includes any offence under section 6 of the Act.

⁷ Section 375 of the Act.

⁸ Section 374 of the Act.

⁹ For ship's company or embarked force.

Deserters and absentees (without leave)	<ul style="list-style-type: none"> a. Service policeman; or b. A Service person of a superior rank or rate who is at least a non-commissioned officer; or c. Civilian policeman.¹⁰
---	--

9. **Arrest of person reasonably suspected of being about to commit a Service offence (arrest under section 69).** Under the powers in section 69, a Service policeman may arrest a person whom he reasonably suspects of being about to commit a Service offence. The power of arrest may be exercised personally or by giving an order to another person or where the person to be arrested is a Service person, by ordering that person into arrest. Where a person is arrested under this section, the arrest must be reported to his CO as soon as practicable and he may be kept in Service custody until such time as a Service policeman is satisfied that the risk of his committing the Service offence concerned has passed.

10. Under the new power under section 69, it is envisaged that an offence will be prevented by the timely intervention of the Service Police and an arrest being made at a point before an offence is committed. Following an arrest under this section, the circumstances in which there is a need to detain the person in further custody will rarely arise, and if invoked must be proportionate and necessary. Unlike other custody provisions under the Act, responsibility, authority and conditions for custody under this section, lies with the Service Police. Procedure for authorising custody under section 69 requires various permissions and authority to be given, which are contained in the Service Police Technical Instructions. Basically, they require an arresting Service Police Officer who takes a person into custody to inform his supervisor of his decision; to keep that decision under review and record the reasons justifying the custody requirement and if that custody extends beyond 1 hour, authority must be obtained from an Authorising Service policeman (ASP) (see paragraph 81 for definition).

11. There will be circumstances where the procedure for authorising custody under section 69 cannot be followed due to operational circumstances or geographical isolation. In these circumstances the arresting Service policeman should seek authority from the highest ranking ASP available, or where this is not possible, self authorise, fully recording the reasons. When this procedure is adopted, the Service policeman should inform the CO of the actions he has taken and the reasons for keeping the person in custody.

Those who may effect an arrest

12. There are a number of categories of persons who can exercise the power of arrest as described above without specific authority. This section provides guidance as to who can make an arrest and in what circumstances.

13. **Service policeman.** A Service policeman may arrest any person¹¹ whom he reasonably suspects of one of the following:

- a. Committing a Service offence;
- b. Having committed a Service offence¹²;

¹⁰ This includes a member of any UK police force or a British overseas territory police force.

¹¹ A situation may arise whereby a person may need to be arrested who is suspected of having committed a Service offence whilst subject to Service law or Service discipline, but who is no longer so subject, having left the Service or job, and therefore does not fall into sections 67(2), (3) or (4) of the Act. Sections 68(2) and 68(3) of the Act cover these eventualities.

- c. Being about to commit a Service offence¹³; or
- d. Being unlawfully at large after a sentence of Service detention has been awarded¹⁴.

14. The arrest of a person under a – c above must be reported to his CO as soon as is practicable but under c, he may be kept in Service custody until a Service policeman is satisfied that the risk of committing a Service offence has passed. In circumstances where d applies, the person may be taken to the place in which he is required to be detained.

15. These powers may be exercised personally by giving an order for arrest to another person or, where the person is a Service person, by ordering that person into arrest. For further detail on the exercise of these powers see JSP 397 (Service Police Codes of Practice, Code G).

16. Unlike other Service personnel, a Service policeman has the additional power to arrest someone reasonably suspected of being about to commit a Service offence or having been sentenced to detention, being unlawfully at large.

17. **Other Service personnel.** The decision to arrest can be made if a person¹⁵ is reasonably suspected of:

- a. Committing a Service offence; or
- b. Having committed a Service offence.

This power may be exercised personally, by giving an order for arrest to another person or where the person is a Service person, by ordering that person into arrest.

18. **Civilian policeman.** An officer of a UK or Isle of Man police force or British overseas territory police force may arrest, without a warrant, a person who is reasonably suspected of being a Service person and of having deserted or of being absent without leave. This power also applies to a person who, having been sentenced to detention, is unlawfully at large¹⁶. A civilian policeman can also arrest any Service person committing any civilian offence as he would arrest a civilian.

The decision to arrest after charge or during proceedings

19. Apart from the categories above (paragraphs 13 – 18), there are other circumstances where the CO or a judge advocate may order or direct an arrest of a person¹⁷.

20. The CO of a person may give orders for their arrest¹⁸ if:

¹² For powers of arrest see sections 67-68 of the Act. See section 50 of the Act and [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences) for guidance on Service offences, including desertion or absence without leave.

¹³ Section 69 of the Act.

¹⁴ Section 303 of the Act. This includes those cases where a person is temporarily released from Service detention and is unlawfully at large under section 301(4).

¹⁵ See table at page 5 above.

¹⁶ Sections 314 and 318 of the Act. This includes those cases where persons temporarily released from Service detention are unlawfully at large under section 301 of the Act.

¹⁷ Those authorised or directed to effect an arrest may be Service policemen or any person directed or ordered by the CO under his command.

¹⁸ Section 110 of the Act.

- a. That person has been charged with or is awaiting sentence for a Service offence;
- b. That person is not in custody, and
- c. The CO is satisfied that taking that person into Service custody is justified (see paragraph 21 below).

21. Before taking the decision to place a person into custody, the CO must be sure that there are reasonable grounds for suspecting that, if not taken into custody, that person would:

- a. Fail to attend any hearing in the proceedings against him;
- b. Commit an offence; or
- c. Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

22. In addition, taking a person into custody may be justified if:

- a. That person has failed to attend any hearing in the proceedings against him;
- b. There are reasonable grounds for suspecting that he should be taken into custody for his own protection;
- c. If under the age of 17, there are reasonable grounds for suspecting that he should be taken into Service custody for his welfare or it is in his own interests; or
- d. There are reasonable grounds for suspecting that if not taken into Service custody he would fail to adhere to any requirements imposed on his release from custody after charge, or that he has already failed to adhere to such a requirement¹⁹.

23. Whenever a person is arrested under the power referred to in paragraph 20 above, consideration must be given to the issue of whether, and if so for how long, that person may be held in custody. If held under this power, a person must be brought before a judge advocate for the purpose of reviewing such custody²⁰. Detailed guidance on custody is at [Chapter 5](#) (Custody).

The decision to arrest during proceedings at the direction of the court

24. Apart from the categories above (paragraphs 13 – 18), there are other circumstances in which a judge advocate may order or direct an arrest of a person²¹.

25. A judge advocate may direct the arrest of a person²² if:

- a. That person has been arraigned before the Court Martial (CM) or Service Civilian Court (SCC);

¹⁹ Section 107(3) of the Act.

²⁰ Section 110(4) of the Act.

²¹ Those authorised or directed to effect an arrest may be Service policemen or any person directed or ordered by the CO under his command.

²² Section 111 of the Act.

- b. Proceedings before the court have not concluded; and
- c. The judge advocate is satisfied that taking him into Service custody is justified.

The direction to arrest can be exercised by any person with the power to arrest for a Service offence, see paragraph 12 above.

26. Directing that a person be taken into custody is justified when there are reasonable grounds for suspecting that, if not taken into custody, that person would come within one or more of the categories laid out in paragraphs 21 and 22 above. A person arrested and kept in custody²³ must be brought before a judge advocate as soon as practicable for a review of the continued requirement of that custody. Detailed guidance on custody is at [Chapter 5](#) (Custody).

The decision to issue a warrant for arrest

27. In some circumstances, application may be made to a judge advocate to issue a warrant for arrest. This may occur for example, if a Service person has been absent in excess of 24 hours and no contact has been made between him and his unit. A warrant in this context is effectively a specific authorization issued by and on behalf of the State for the arrest of that person. The decision to issue a warrant for arrest may be taken by a judge advocate²⁴ or, in very limited circumstances, by a civilian court.

28. **Application to a judge advocate for a warrant.** Where a warrant is required, application may be made to a judge advocate. This includes in addition warrants for arrest for individuals who fail to adhere to any conditions of release following arrest for desertion or being absent without leave²⁵. Although there are similar powers for civilian courts to issue warrants in relation to absence and desertion following the breach of a condition, the conduct of the hearing may be different. For guidance on the conduct of hearings at civilian courts reference should be made to the appropriate staff legal advisor.

29. An application for a warrant to arrest an individual may be made by:

- a. A Service policeman;
- b. The individual's CO;
- c. A person acting on the authority of the individual's CO; or
- d. The prosecutor.

30. During normal working hours (0830 -1700 hrs, Mon – Thu and 0830 – 1630, Fri) contact should be made with the Military Court Service (MCS) (Tel: 01980 615786/615770) /Naval Courts Administration Office (NCAO) (Tel: 02392 727279) who will be in a position to identify the most suitable judge advocate to hear the application. During silent hours contact should be made with the Operations Room of the Service Police Crime Bureau (Tel: 02392 285170/285180) who will provide the necessary contact procedures for the duty judge advocate to arrange the application. Assistance from the appropriate staff legal adviser will always be available to assist in determining whether a hearing is necessary.

²³ Section 111(4) of the Act.

²⁴ Section 313 of the Act.

²⁵ Section 317(1) of the Act & Rule 23(1)(b)(ii) of the Armed Forces (Warrants of Arrest for Service Offences) Rules 2009.

31. An application for an arrest warrant (for breach of condition see paragraph 32 below) to a judge advocate must include the following information which must be provided to the judge advocate before the hearing:

- a. The name, rank or rate, appointment and signature of the applicant;
- b. The name, date of birth and last known location of the person who is the subject of the warrant;
- c. If applicable, the rank or rate, Service number and unit of the person who is the subject of the warrant;
- d. Any other known addresses where that person may reside;
- e. The Service offence that that person is reasonably suspected of having committed; and
- f. The circumstances which have caused the applicant to consider that there are reasonable grounds for the issue of the warrant.

32. When applying for an arrest warrant to a judge advocate for failing to comply with a condition²⁶, the following information is required:

- a. The name, rank or rate and appointment of the applicant;
- b. The name, date of birth and last known location of the person who is the subject of the warrant;
- c. If applicable, the rank or rate, Service number and unit of the person who is the subject of the warrant;
- d. Details of any alleged absence;
- e. Any other known addresses where that person may reside; and
- f. The details of the condition(s) imposed and how it/they is/are alleged to have been breached.

Form of the hearing

33. **Service court.** The form of the hearing for an arrest warrant application is the same as for one for breach of condition. An application to a judge advocate for a warrant should be made in person unless he otherwise directs. The judge advocate may give permission for the hearing to be conducted over live link. If the judge advocate is persuaded that it is reasonably necessary (due to reasons of urgency, speed or geographic dislocation, for example) an application may be made:

- a. Out of hours²⁷;
- b. By facsimile;

²⁶ Condition being a 'bail' condition or a condition under which a person was previously released from custody. See also [Chapter 5](#) (Custody).

²⁷ 'Out of hours' means any day which is a Saturday, Sunday, Good Friday, Christmas or other Bank Holiday or any time outside of 0830-1700 Monday to Thursday and 0830-1630 on Friday.

- c. By telephone; or
- d. By other electronic means, including email.

34. Any application made by facsimile or email is to be transmitted to the authorities detailed at paragraph 30 above.

35. **Civilian court.** Any person who has authority in the UK or a British overseas territory to issue a warrant for the arrest of a person may do so, if satisfied that the following conditions apply:

- a. That person is within his jurisdiction;
- b. Is a Service person; and
- c. Has deserted or is absent without leave.

36. In addition if a person has previously surrendered or been arrested and then released on a condition that he appears at a specified time and place²⁸ and then fails to comply with that condition, the court may issue a warrant for his arrest. For example, where a person has been bailed to appear at a time and place to be transferred to Service custody and then fails to do so.

Conduct of arrest or surrender

37. **Service policeman.** Limitations on custody apply²⁹ where a person is arrested by a Service policeman under section 67 (arrest of person reasonably suspected of committing or having committed a Service offence) and is kept in Service custody. Additionally, the conditions and review procedures at [Chapter 5](#) (Custody) must be followed³⁰ where custody is authorised without charge. Where a person is arrested under section 69, (arrest of person reasonably suspected of being about to commit a Service offence) guidance can be found within [Chapter 5](#) (Custody).

38. A person arrested under section 110 (arrest after charge or during proceedings by order of CO) or section 111 (arrest during proceedings at direction of court) of the Act is to be brought before a judge advocate as soon as is practicable for a review of whether he should continue to be kept in Service custody. For the conduct of this hearing see [Chapter 5](#) (Custody).

39. **Other Service personnel.** A person arrested by other Service personnel under section 110 or section 111 of the Act must be treated in the way described in paragraph 14 above.

40. **Civilian policeman.** Where a person is arrested or surrenders to a civilian policeman in the UK, the Isle of Man or British Overseas Territory as being a Service person, who has deserted or is absent without leave³¹, that person must be taken to a police station. In the case of an arrest under section 314 (Arrest by civilian police of deserters and absentees without leave) of the Act, the person arrested must be brought before a magistrates court or equivalent jurisdiction. The court has powers to transfer the person to Service custody or to release him³². Where a person surrenders under section 315

²⁸ Section 98 of the Act.

²⁹ Sections 98-99 of the Act.

³⁰ Section 99-103 of the Act.

³¹ See [Chapter 10](#) (Absence and desertion).

³² Section 316 of the Act.

(deserters and absentees without leave surrendering to civilian police) of the Act, the person in charge of the police station (or someone authorised by him) may arrange for the person to be transferred to Service custody, brought before a court of summary jurisdiction or released subject to a reporting condition that enables his later transfer into Service custody. If the person is delivered back to Service custody, certificates either detailing his arrest, his appearance before a court of summary jurisdiction, a certificate of release subject to certain conditions of reporting³³ or a combination of all three will be provided to the Service person's unit. Detailed guidance concerning deserters and absentees is contained in [Chapter 10](#) (Absence and desertion).

41. The certificate(s) should be passed to the Service Police Crime Bureau whose contact details are at paragraph 30. The certificate(s) should also be passed on handover into Service custody. In addition the Service Police Crime Bureau should pass a copy of the certificate(s) to the individual's CO.

42. **Use of Force Upon Arrest.** Anyone exercising powers of arrest may, if necessary, use reasonable force.

Search upon arrest

43. Those who may search upon arrest are listed in paragraphs 44 – 46 below.

44. **Service policeman.** A Service policeman may search a person under arrest if he has reasonable grounds to believe that that person:

- a. May be a danger to himself or others;
- b. May be concealing something which may assist him to escape; or
- c. May be concealing something which may be evidence relating to a Service offence³⁴.

For further detail see JSP 397 (Service Police Codes of Practice - Code B). In the Act, and in the following paragraphs, things within b or c are referred to as things 'subject to search'.

45. **A person other than a Service policeman.** A person other than a Service policeman who is exercising the power of arrest over an individual may search him if he has reasonable grounds for believing that person may be a danger to himself or others³⁵.

46. **Authorised or ordered by a CO.** Although most searches on arrest will be conducted by a Service policeman, the CO of a person who is to be or has been arrested can order or authorise the person making the arrest to undertake a search where he has reasonable grounds for believing it is likely that the person would do one or both of the following before the assistance of a Service or UK civilian policeman could be obtained:

- a. Escape from custody; or
- b. Conceal, damage, alter or destroy evidence.

47. Moreover, if the CO orders a person to search, the CO must have reasonable grounds for believing that the person is concealing something that would assist with such an

³³ Sections 315 and 316 of the Act.

³⁴ Note that paragraph 44 c relates only to an arrest under section 67 and section 69 of the Act. See also section 70 of the Act and the details of seizure at paragraphs 79 - 90.

³⁵ Section 71(1) of the Act.

escape or be evidence relating to a Service offence. If the CO authorises a person to search, that person must also have reasonable grounds for believing that the person is concealing something that would assist with such an escape or be evidence relating to a Service offence³⁶. An example of when this may happen is where the CO authorises before arrest and needs the person carrying out the arrest to consider, on the spot, whether a search is justified.

48. **The conduct of a search.** Any search must be conducted only in so far as is reasonably required for the purpose of discovering anything that is subject to search and must not go beyond what is reasonably necessary³⁷. An arrested person may not be required to remove any clothing in public other than an outer coat, jacket, headgear³⁸ or gloves. Additionally, if reasonably necessary for the purpose of discovering anything subject to search, an arrested person's mouth may be searched.

49. A person exercising a power of search referred to in paragraphs 44a or 45 may seize and retain anything he finds if he has reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person³⁹. A person exercising a power of search referred to in paragraphs 44b or c or paragraph 46 may seize and retain anything found if he has reasonable grounds to believe that the item might be used to assist an escape or that the item is evidence of a Service offence or has been obtained as a result of the commission of a Service offence⁴⁰. Guidance on the handling of any item seized can be found in JSP 397 (Service Police Codes of Practice - Code A). If any item is found by persons other than a Service policeman, guidance from the Service Police should be sought as soon as practicable. The general principle to be applied is that the item should be secured in situ until the arrival of Service Police. If this is not practicable then the person recovering the item should retain it in his possession prior to handing it over to the Service Police.

³⁶ Section 71(6) of the Act.

³⁷ Section 72(1) of the Act.

³⁸ Section 72(2) of the Act.

³⁹ Section 73(1) of the Act.

⁴⁰ Section 73(2) of the Act. Any item subject to legal privilege may not be retained - section 73(2) of the Act.

Part 2 - Stop and search

The decision to stop and search a person or vehicle

50. **Service Police.** A Service policeman has the power to stop and search the following, if he has reasonable grounds to suspect that he will find stolen or prohibited articles⁴¹ or unlawfully obtained stores or controlled drugs⁴². These provisions apply to ships and aircraft in the same way as to vehicles⁴³:

- a. A person who is, or whom he reasonably believes to be a Service person or relevant civilian;
- b. Any vehicle in the charge of ('in the charge of' is not restricted to being 'driven by') a person who is, or whom he reasonably believes to be a Service person or relevant civilian; or
- c. Any Service vehicle⁴⁴ in the charge of any person (whether a Service person/relevant civilian or not)⁴⁵.

51. However, these powers may only be exercised:

- a. In any a place to which the public or section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission;
- b. In any other place to which people have ready access but is not a dwelling or Service living accommodation; or
- c. In any premises which are permanently or temporarily occupied or controlled by Her Majesty's forces, but are not Service living accommodation⁴⁶.

For further detail see JSP 397 (Service Police Code of Practice - Code A).

52. **CO.** The power under this section is to be used only in exceptional circumstances (see paragraph 64). Where a CO gives such an order or authorisation, he must have reasonable grounds for believing that it is likely that an offence under section 42 of the Act (criminal conduct offences) will be committed or that, having committed such an offence, the offender will avoid apprehension if the power to search cannot be exercised *before* the earliest time by which it would be practicable to obtain the assistance of a Service policeman or member of a UK civilian police force. Items discovered following such a search may be seized and retained. (See part 4).

53. COs may order or authorise a Service person, other than a Service policeman, to stop and search an individual or vehicle⁴⁷. A CO is able to use the power to stop and search only if he has reasonable grounds to believe that he will find stolen or prohibited items, unlawfully obtained stores or controlled drugs⁴⁸. Such an order can be given only in relation

⁴¹ See section 77(4) of the Act for definition of a 'prohibited article'. This includes offensive weapons or articles made, adapted or intended for use in connection with an offence (e.g. theft, burglary, criminal damage or fraud).

⁴² Constituting an offence of possession under section 42 of the Act.

⁴³ Section 82 of the Act.

⁴⁴ Section 77(5) of the Act for the definition of 'Service vehicle'. This means any vehicle owned by Her Majesty's forces or in use for the purposes of those forces. This includes hire cars being used for those purposes.

⁴⁵ Section 75 of the Act - Power of Service policeman to stop and search.

⁴⁶ Section 78 of the Act.

⁴⁷ See Section 76 of the Act. This includes detaining a person for the purposes of a search of that person or a vehicle.

⁴⁸ Section 76(4) of the Act.

to a particular person or vehicle⁴⁹. If he authorises a person to stop and search, that person may exercise the power only if he has reasonable grounds to believe that he will find such items, stores or drugs. This power of stop and search may be used only in relation to:

- a. A person under the CO's command⁵⁰ or whom the CO has reasonable grounds to believe is under his command;
- b. A person who, a person ordered or authorised to stop and search has reasonable grounds to believe, is under the CO's command; and
- c. A vehicle in the charge of a person within a or b⁵¹.

The conduct of a stop and search

54. **Service policeman.** When contemplating a search of a vehicle (other than an unattended vehicle) a Service policeman must take reasonable steps before he commences the search to inform the person in charge of the vehicle of his name, rank or rate. If not in uniform, he must also take reasonable steps to provide the person with evidence that he is a Service policeman⁵². Any other Service policeman who is not in uniform and is assisting with the search of the vehicle is not required to do so. JSP 397 (Service Police Code of Practice – Code A) provides the blueprint for the conduct of a Stop and Search.

55. The power to exercise the stop and search of persons or vehicles may be undertaken in a number of places⁵³ and broadly speaking are those places listed at paragraph 51. Any search is subject to the restriction that a person searched cannot be required to remove in public, clothing other than an outer coat, jacket, headgear or gloves⁵⁴. The search may also be carried out near the place where the person or vehicle was first detained⁵⁵ and the person or vehicle may be detained for such time as is reasonably needed for this.

56. There are restrictions on the powers above where a person is in a garden, yard or on other land occupied by a dwelling or by Service living accommodation used exclusively for a member of the armed forces (or such person and his family). If the land comes within a place to which the public has access, or to other places to which people have ready access (other than a dwelling or Service living accommodation), the person found on the land may only be stopped and searched if the person with the power of search has reasonable grounds to believe that the person does not live in the dwelling/accommodation and does not have the resident's express or implied permission to be there⁵⁶.

57. Similarly, if a vehicle is on land that comes within the parameters outlined in paragraph 56, the vehicle may only be searched if the person with the power of search has reasonable grounds to believe that the person in charge of the vehicle does not live in the dwelling/accommodation and does not have the resident's permission to be there⁵⁷.

58. A Service policeman is entitled to detain an individual or vehicle in order to carry out the search and should he discover any articles during any search which he has reasonable grounds to suspect are stolen or prohibited, unlawfully obtained stores or controlled drugs,

⁴⁹ Section 76(3) of the Act.

⁵⁰ Including a civilian subject to Service discipline who is under that CO's command. Section 76(2)(b) of the Act.

⁵¹ Section 76(2) of the Act.

⁵² The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 3(2) and (3).

⁵³ Section 78 of the Act.

⁵⁴ Section 80(2) of the Act. Except headgear worn for religious reasons section 80(3) of the Act.

⁵⁵ Section 80(1) of the Act.

⁵⁶ Section 79(1) of the Act.

⁵⁷ Section 79(3) and (4) of the Act.

he may seize and retain them⁵⁸. A person or vehicle may only be detained for the purposes of a search for such time as is reasonably necessary to undertake the search. The search is limited in the same way as search upon arrest (see paragraph 44 above).

59. When contemplating a search of a vehicle (other than an unattended vehicle) a Service policeman must take reasonable steps before he commences the search to inform the person in charge of the vehicle of his name, rank or rate and unit, the object of the search, the grounds for the search and that, upon application within 12 months, the owner or person in charge of the vehicle at the time is entitled to a copy of any record made of the search. If not in uniform, he must also take reasonable steps to provide the person with evidence that he is a Service policeman⁵⁹.

60. On completing a search of an unattended vehicle, a Service policeman must leave a notice⁶⁰ stating that he has searched the vehicle, his name, rank or rate, the name, address and telephone number of his unit and that an application for compensation for any damage caused to the vehicle by the search may be made to that unit. Unless it appears to the Service policeman that it will not be practicable to make a record at that time, the notice must also state that, upon application within 12 months, the owner or person in charge of the vehicle at the time is entitled to a copy of any record made of the search.

61. The notice should be left inside the vehicle unless it is not reasonably practicable to do so without damaging the vehicle. If this is the case, then the notice should be attached to the outside of the vehicle⁶¹.

62. A Service policeman who has carried out a search under section 75 of the Act (power of Service policeman to stop and search persons, vehicles etc) must immediately, or as soon thereafter as is practicable, make a record of the search. This record will consist of the elements described in JSP 397 (Service Police Codes of Practice - Code A) and in the regulations made under the Act⁶².

63. A Service policeman who detains a person or vehicle need not conduct a search if it appears subsequently that a search is impracticable. For further detail see JSP 397 (Service Police Codes of Practice - Code A).

64. **Other Service personnel.** An officer may order or authorise a Service person (other than a Service policeman) to conduct a stop and search under section 76 of the Act (stop and search by persons other than Service policemen) with certain provisions⁶³ broadly in line with paragraphs 65 – 70 below. Provisions equivalent to those summarised in paragraph 56 above also apply to stop and search by Service personnel under these powers⁶⁴.

65. As is the case for the Service Police, a person or vehicle may only be detained by other Service personnel for the purpose of a search for such time as is reasonably necessary to undertake the search.

66. When ordered or authorised to search a person or vehicle (other than an unattended vehicle) the person undertaking the search must take reasonable steps beforehand to inform the person to be searched of his name, rank or rate and unit, his authority for making the search, the object of the search, the grounds for the search and that, upon application within

⁵⁸ Section 75 of the Act.

⁵⁹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 3(2) and (3).

⁶⁰ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 3(5).

⁶¹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 3(6).

⁶² The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 4.

⁶³ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 5.

⁶⁴ Section 78 and section 79 of the Act for where stop and search powers may be exercised.

12 months, the owner or person in charge of the vehicle at the time is entitled to a copy of any record made of the search, see paragraph 70 below.

67. On completion of the search of an unattended vehicle, the person ordered or authorised must leave a notice specifying that he has searched the vehicle, his name, rank or rate, name address and telephone number of his unit and that upon application within 12 months, the owner or person in charge of the vehicle at the time is entitled to any record made of the search.

68. The notice should be left inside the vehicle unless it is not reasonably practicable to do so without damaging the vehicle. If this is the case, then the notice should be attached to the outside of the vehicle.

69. Where the person ordered or authorised under section 76 of the Act carries out a search, he must make a record of the search. Where it is not practicable to make a record immediately, he must do so as soon thereafter as is practicable⁶⁵. A record of a search must contain the following:

- a. The person's name to whom the search relates (if known to the ordered or authorised person) or (if his name is not known to the person ordered or authorised) a description of him;
- b. In the case of a search of a vehicle, a description of the vehicle;
- c. In the case of a search of a person or a vehicle, the object of the search;
- d. The date and time when the search was conducted;
- e. The place where the search was conducted;
- f. Whether anything was found during the search, and if so, what, was found;
- g. Whether any injury to a person or damage to property appears to have resulted from the search⁶⁶; and
- h. The name of the person ordered or authorised to make the search.

70. It will be apparent that searches conducted by those other than Service policemen follow very similar requirements regarding notification and records of searches to those by Service policemen (this also applies to unattended vehicles). The person who conducts the search should if possible and at the earliest opportunity, seek to provide to the CO a record, including the details listed at paragraph 69 above.

⁶⁵ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 5 (7).

⁶⁶ The Armed Forces (powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 5(10).

Part 3 - Entry, search and seizure

Introduction

71. Part 3 provides guidance on circumstances when premises may be entered and searched and when property may be seized. It also deals with entry for certain other purposes, in particular for purposes of arrest⁶⁷. The area is a technical one and important because it affects the human rights of individuals. It will generally be important to ensure that legal advice is sought from the relevant staff legal advisor before any action is taken under the powers referred to below.

72. **Decision makers.** The decision makers in terms of entry, search and seizure are COs, judge advocates and the Service Police. The following is guidance on the decisions they must make.

Powers of entry, search and seizure

73. **Service Police.** The Service Police have a number of different search powers as follows:

- a. When investigating a Service offence a Service policeman has an inherent power to order or conduct the entry and search of Service premises which are not Service living accommodation without a warrant⁶⁸;
- b. Entry to premises for the purpose of arrest (paragraph 74 below);
- c. Entry to premises to save life or prevent serious damage to property (paragraph 77 below);
- d. Entry, search and seizure where a person is arrested (paragraph 79 below);
- e. Entry search and seizure after arrest (paragraph 80 below);
- f. Entry and search by a Service policeman with a warrant (paragraph 96 below); or
- g. With the authorisation of the CO (paragraphs 91 – 103 below).

74. **Entry to premises for the purposes of arrest.** A UK civilian policeman has statutory authority to enter any premises to carry out certain arrests. A Service policeman does not have such wide powers. However, he does not need any specific legal powers to enter non-residential Service premises for this purpose. In addition a Service policeman has the power to enter and search certain premises for the purposes of arresting a person if he has reasonable grounds to believe that person is on the premises⁶⁹. The premises he may enter and search under this power are slightly wider than 'relevant residential premises' (RRP) as it also covers premises which the Service policeman has reasonable grounds to believe are RRP⁷⁰. If premises contain two or more separate dwellings then the power of entry is to that person's part of the premises and to any common areas or any other dwelling (within the premises) that the Service policeman reasonably believes that person to be in.

⁶⁷ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009. See also Chapter 3 of Part 3 of the Act.

⁶⁸ Section 95 of the Act.

⁶⁹ Section 90 of the Act.

⁷⁰ Section 90(2) of the Act.

75. **Relevant residential premises (RRP).** RRP⁷¹ means Service living accommodation and premises which are the residence of any Service person, or relevant civilian. It does not matter if the residence is shared with other people including civilians not subject to Service law.

76. Any search undertaken is limited to that which is reasonably required to achieve the purpose. For further guidance on this see JSP 397 (Service Police Codes of Practice - Code B).

77. **Entry to premises to save life or prevent serious damage to property.** A Service policeman is entitled to enter and search certain premises for the purposes of saving life or limb or to prevent serious damage to property. The premises are Service living accommodation and premises which are, or which the Service policeman has reasonable grounds to believe are, the residence of any Service person or relevant civilian. As with the power of entry to arrest, it does not matter if the residence is shared with other people⁷².

78. Any search undertaken is limited to that which is reasonably required to achieve the purpose. For further guidance see JSP 397 (Service Police Codes of Practice - Code B).

79. **Powers of entry search and seizure where person arrested.** The following powers apply⁷³ where a person has been arrested under section 67 of the Act for a serious Service offence see [Chapter 6](#) (Investigation, charging and mode of trial). A serious Service offence is:

- a. Any section 42 offence corresponding to an indictable criminal offence;
- b. Any disciplinary offence which is triable at CM only;
- c. Violence towards a superior officer (section 11(1) of the Act);
- d. Making a false record with intent to deceive (section 18(3) or (4) of the Act); or
- e. Causing damage to or loss of Service property (section 24(1) of the Act) (intentionally or recklessly).

In such cases a Service policeman has the power to enter and search any relevant residential premises⁷⁴ or vehicle in which the arrested person was when arrested or immediately before his arrest. The Service Police also have the power under section 96(1)(c) of the Act to open and search any locker if the locker was open at the time or immediately before arrest. The power of search is limited to seeking evidence of the offence for which the person was arrested, and the search itself must be limited to what is reasonably necessary for the purpose of discovering such evidence. Before any of these powers is exercised, the Service policeman must have reasonable grounds for believing that there is on the premises evidence which relates to the offence for which a person was arrested. If premises to which the power applies contain two or more dwellings then the power of entry applies to any common areas and to any dwelling that the Service policeman has reasonable grounds for believing that the person to be arrested is in.

80. **Powers of entry search and seizure after arrest.** Where a person has been arrested under section 67 of the Act for a serious Service offence (see paragraph 79 above)

⁷¹ Section 84(3) of the Act.

⁷² Section 90(4) of the Act.

⁷³ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 12.

⁷⁴ Service living accommodation or premises occupied as a residence by a Service person or a relevant civilian or a person who is suspected of having committed a relevant offence.

and is being held in Service custody without being charged, a Service policeman also has powers of entry, search and seizure in relation to premises occupied or controlled by that person⁷⁵. The Service policeman must have reasonable grounds for suspecting that there is, on the premises, relevant evidence. Relevant evidence here means evidence which is not subject to legal privilege see [Chapter 11](#) (Summary hearing – dealing with evidence) and which relates to the offence for which the person has been arrested or to another connected or similar serious Service offence. The search itself must be limited to what is reasonably necessary for the purpose of discovering such evidence. The Service policeman may seize any evidence for which he has power to search. An important restriction on these powers is that the Service policeman who conducts the search must have the authority of an authorising Service policeman (paragraph 81 below), but he may conduct a search without obtaining this permission if:

- a. He has reasonable grounds to believe that it is likely that, if no search could be carried out before the earliest time authorisation can be obtained, the purpose of the search will be frustrated or seriously prejudiced; and
- b. As soon as practicable after making the search, he informs an authorising Service policeman that he has done so⁷⁶.

The written authority of the authorising Service policeman must be obtained if not before the search, then as soon as practicable afterwards. A full record of the search must be made including the address of the premises searched, the date, time and duration of the search, the authority (statutory power or that obtained under a warrant) and names of the Service policemen who conducted the search, the names of people in the premises, a list of seized material and details of any damage caused or force required to effect entry. Further detail is contained in JSP 397 (Service Police Codes of Practice - Code B).

81. Authorisation by a Service policeman. An authorising Service policeman referred to in paragraph 80 means a Service policeman who is of at least the rank of naval lieutenant, military or marine captain or flight lieutenant. The authorising Service policeman should only give an authorisation if he considers that there are reasonable grounds for believing that on the premises there is evidence, which is not subject to legal privilege and which relates to:

- a. The serious Service offence (see paragraphs 79 and 80 above) for which a person has been arrested; or
- b. Some other (connected or similar) serious Service offence and which is not subject to legal privilege, see JSP 397 (Service Police Codes of Practice – Code B).

82. General powers of seizure. If a Service policeman in connection with the investigation of a Service offence is lawfully on premises searchable under paragraph 73a-g, he has the power to seize anything⁷⁷ on the premises which he has reasonable grounds to believe:

- a. Has been obtained in consequence of the commission of a Service offence and it is necessary to seize it in order to prevent it being concealed, lost, damaged altered or destroyed; or
- b. It is evidence in relation to an offence which he is investigating or any other Service offence and it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

⁷⁵ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 13.

⁷⁶ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 13 (7).

⁷⁷ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 14 (1), (2).

83. A Service policeman may require that any information or evidence stored in electronic form and accessible from the premises be produced in a form in which it can be taken away and in which it is in a visible or legible form (printed) or in a form whereby it can easily be produced in a visible or legible form (stored on a disk or data storage device)⁷⁸. This power arises if a Service policeman has reasonable grounds to believe either that it is evidence in relation to an offence or other Service offence which he is investigating, or that it has been obtained as a result of the commission of a Service offence and (in either case) that it is necessary to do so in order to prevent it from being lost, tampered with or destroyed.

84. Generally there is no power to seize an item if a Service policeman has reasonable grounds to believe that an item is subject to legal privilege⁷⁹. However, there are exceptions (see paragraphs 104, 105 and 109).

85. **Additional powers of seizure from premises.** There are two additional situations in which a power to seize may arise⁸⁰. First, a Service policeman who is lawfully searching premises (except on authorisation from a CO) may find something he has reasonable grounds to believe may be or may contain something he could search for but it is not reasonably practicable on the premises to determine whether what he has found contains something he is entitled to seize (see footnote 76 Art 19(1)). For example, data contained within a computer. The key element here is that it is not clear whether the Service policeman would be able to seize any of what he has found. In this situation, the Service policeman may remove from the premises as much of what he has found to allow it to be determined whether and how far material may be seized.

86. Second, such a Service policeman may find something on the premises which he would be entitled to seize but for the fact that it is contained in something else which he has no power to seize, and it is not reasonably practicable on the premises to separate it from the non-seizable property or item. The key point here is that it is clear that the Service policeman would not be able to seize part of what he has found. In this situation, the Service policeman may seize both the seizable property and the thing in which it is contained. Moreover, in this second situation, the restriction on seizure related to legal privilege and referred to in paragraph 84 above does not apply⁸¹.

87. It may be necessary, in exceptional circumstances, to seize items during the conduct of initial investigations in those cases where normally the Service Police should carry out the seizure. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and effect seizure. If this situation arises, the CO should be aware that he has departed from the normal procedure and should order that the item(s) be seized and secured, but that its content may not be examined. The item should be retained and passed to a Service policeman as soon as is reasonably practicable.

88. Where paragraph 86 applies, in deciding whether it would be reasonably practicable to determine or separate something on the premises, one or more of the following factors may be taken into account:

- a. How long it would take to determine whether an article is seizable or separable;

⁷⁸ Such copies (or printouts) should be, for the purposes of seizure and retention, dealt with as if they were originals.

⁷⁹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 14(6).

⁸⁰ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 19(1), (2) and (3).

⁸¹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 19(5).

- b. The number of people required to conduct the determination or separate the articles within a reasonable period;
- c. Whether the determination or separation would involve damage to the property;
- d. The equipment necessary or appropriate to determine or separate; or
- e. Whether any determination or any separation carried out by the only means reasonably practicable on the premises would be likely to prejudice the use of some or all of the property.

89. **Additional powers to seize during a search of a person.** These powers align closely with those in paragraphs 85 and 86 but relate not to premises, but to a search of a person upon arrest. Firstly, he may find something which he has reasonable grounds to believe may be or may contain something he could search for, but it is not reasonably practicable at the time and place of search to determine whether what he has found is something he is entitled to seize or the extent to which what he has found contains something he is entitled to seize. In this situation, the Service policeman may seize so much of what he has found as is necessary to remove from the place of the search to allow it to be determined:

- a. Whether it is something that he is entitled to seize; or
- b. The extent to which what he has found contains something he is entitled to seize.

Secondly, such a Service policeman may find something which he would be entitled to seize but for the fact that it is contained in something else which he has no power to seize, and it is not reasonably practicable at the time and place of the search to separate the seizable item from the non-seizable. In this situation, the Service policeman may seize both the seizable property and the thing it is contained in. Moreover, in this second situation, the restriction on seizure related to legal privilege and explained in paragraph 84 above, does not apply⁸².

90. In determining whether it would be reasonably practicable to determine or separate something at the time and place of search, only the following factors may be taken into account:

- a. How long it would take to determine whether an article is seizable or to separate articles;
- b. The number of people required to conduct the determination or separate the articles, within a reasonable period;
- c. Whether the determination or separation would involve damage to the property;
- d. The equipment necessary or appropriate to determine or separate; and
- e. Whether any separation would be likely to prejudice some or all of the property if carried out by the only means reasonably practicable on those premises.

⁸² The Armed Forces (powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 20(5).

Where a person exercises a power of seizure a notice shall be given to the occupier of the premises or the person being searched⁸³. For additional detail see JSP 397 (Service Police Codes of Practice - Code B).

COs' powers

91. Nothing in the Act precludes a CO from entering and searching any buildings for which he is responsible, including office and living accommodation, to carry out inspections for the purposes of ensuring for example, security, health & safety and hygiene⁸⁴.

92. **Authorised entry to premises for the purpose of arrest.** A CO does not need any specific legal powers to enter, or to order entry, to non-residential Service premises for the purpose of arrest. As to residential Service accommodation, entry for the purposes of arrest by a Service policeman is dealt with in paragraph 74 above. Whilst such entry and search will almost always be carried out by a Service policeman, a CO may authorise a Service person (other than a Service policeman) to enter certain Service residential premises for the purpose of arrest, but only where certain conditions are satisfied⁸⁵.

93. The power relates to Service living accommodation of persons under the CO's command and premises which are, or which the CO has reasonable grounds to believe are, the residence (whether alone or with others) of a Service person or any relevant civilian of whom he is the CO⁸⁶.

94. Additional conditions include that the CO has reasonable grounds to believe that before the assistance of a Service policeman (or where applicable a civilian policeman) is available, the person to be arrested might evade arrest, conceal, damage, alter or destroy evidence, or present a danger to himself or others or that discipline or morale among members of any of Her Majesty's forces might be undermined. The CO must have reasonable grounds to suspect that a person has committed or is committing a Service offence⁸⁷, and that the offence is a relevant offence⁸⁸. A relevant offence is:

- a. Any section 42 offence corresponding to an indictable criminal offence;
- b. Any schedule 2 disciplinary offence; or
- c. Any other Service offence if intended or likely to have the serious consequences expressed within section 84(5) of the Act.

95. A CO may also authorise a Service person (other than a Service policeman) to enter to save life or prevent serious damage to property⁸⁹. But in relation to premises which are, or which the CO has reasonable grounds to believe are the residence (whether alone or with others) of any Service person or relevant civilian, he may only do so if it is not practicable to obtain the assistance of a Service policeman in time to take the necessary action to save life or limb or prevent serious damage to property.

96. **Authorised entry for a Service policeman to search premises with a warrant.** In relation to relevant residential premises, a Service policeman will usually require a warrant from a judge advocate before searching premises unless his powers of search after arrest

⁸³ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 21.

⁸⁴ Section 95 of the Act.

⁸⁵ Sections 91(1), (2) and (3) of the Act.

⁸⁶ Section 91(2) of the Act.

⁸⁷ Section 91(3) of the Act.

⁸⁸ Section 84(2) of the Act.

⁸⁹ Section 91(5) of the Act.

are applicable (see paragraph 80 above). In making an application to a judge advocate under section 83 of the Act, the Service policeman must specify the premises for which he is seeking authority to search. The application must also take account of the need to satisfy the judge advocate that certain criteria (set out in paragraph 98 below) are met. A judge advocate may issue a warrant authorising a Service policeman to enter and search premises if he is satisfied that certain criteria are met. These relate to relevant premises, relevant offences (see paragraph 94 above), valuable investigative material not subject to legal privilege or excluded material and that other conditions relating to effecting physical entry to a premises⁹⁰ are satisfied. It is via this route that the vast majority of entry and search procedures will be conducted.

97. Authorised entry for a Service policeman to search premises without a warrant.

In certain circumstances, a CO has power to authorise a Service policeman to undertake entry, search and seizure. The power to do so only arises if the CO has reasonable grounds to believe that it is likely that the purpose of the search will be frustrated or seriously prejudiced unless the search takes place before the earliest time at which a Service policeman can obtain and execute a warrant from a judge advocate or, in a case which the UK civilian police can deal with, before the time they could obtain and carry out a search warrant.

98. When a CO authorises entry and search by a Service policeman in circumstances described in paragraph 97 above, he may only do so if he is satisfied that the following criteria have been met:

a. He must have reasonable grounds for believing that a relevant offence has been committed. A relevant offence is one of the following:

(1) An offence under section 42 of the Act of which the corresponding offence under the law of England and Wales is an indictable offence⁹¹;

(2) Certain Service offences specified in an order made by the Secretary of State⁹², see [Annex A](#); or

(3) A Service offence whose commission has led to, is intended to lead to, or is likely to lead to any of the following:

(a) Serious harm to the security of the State or to the public;

(b) Serious interference with the administration of justice or with the investigation of offences or a particular offence;

(c) The death of any person;

(d) Serious injury (including mental injury) to any person;

(e) Substantial financial gain to any person;

(f) Serious (for the person who suffers it) financial loss to any person;

⁹⁰ Section 83 and section 84 of the Act.

⁹¹ Indictable offences can be offences triable either way, as opposed to indictable only.

⁹² The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 Schedule 3.

- (g) The undermining of discipline or morale among members of any of Her Majesty's forces;
- b. There is material on the premises likely to be of substantial value to the investigation; and
 - (1) That material is likely to be admissible evidence in a trial for the offence; and
 - (2) That material does not consist of or include items subject to legal privilege, excluded material or special procedure material⁹³.
 - c. It is not practicable to communicate with any person entitled to grant access to the premises or (though practicable to communicate with a person able to grant access to the premises) it is not practicable to communicate with a person entitled to give access to the evidence; and
 - d. Entry will not be granted without a warrant; and
 - e. In the case of Service living accommodation within section 96(1)(b) or (c) of the Act, either it is not practicable to communicate with anyone for whom the accommodation is provided or no-one with whom it is practicable to communicate will agree to grant access to the accommodation without a warrant; and
 - f. That the purpose of the search may be frustrated or seriously prejudiced unless immediate entry can be secured.

99. Although a judge advocate may give a warrant to search "relevant residential accommodation", there are limitations on a CO in authorising a Service policeman to search. The two main differences⁹⁴ are: first, a CO may only authorise a Service policeman to search premises occupied by persons under his command; second, the premises do not include those premises occupied as a residence by a person who is suspected of having committed an offence in relation to which a warrant is sought, for example the private residence of a suspect who is a reservist not for the time being subject to Service law, or of a person who was, but is no longer, a member of Her Majesty's forces.

100. A Service policeman may seize and retain any articles for which the search was authorised by a CO⁹⁵, but any seizure is subject to review by a judge advocate⁹⁶.

101. **Authorised entry for a person other than a Service policeman to premises without a search warrant.** This power only applies if a CO has reasonable grounds to believe that it is likely that the purpose of a search would be frustrated or prejudiced⁹⁷. Where a CO decides that the purpose of the search would be frustrated or seriously prejudiced if the search does not take place before attendance of a Service policeman or civilian police officer can be obtained, he may authorise another Service person to conduct entry and search. The premises in this case are more limited than for a Service policeman. For example, they exclude Service families accommodation. Other considerations remain the same and are outlined in full at paragraphs 97 - 100 above.

⁹³ See section 84(4) of the Act. For example communications between a professional legal advisor and his client, confidential business records or journalistic material. For full details see PACE 1984 section 10, section 11, and section 14, which are applied by section 84(4) of the Act.

⁹⁴ Section 87(3) of the Act.

⁹⁵ But for items subject to legal privilege or excluded and special procedure items. See paragraphs 132 and 133 below.

⁹⁶ Section 89 of the Act, see also The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 34.

⁹⁷ Section 88(1)(b) of the Act.

102. The premises that a CO may authorise a person who is not a Service policeman to enter and search are as follows:

- a. A room, structure or area (whether on land or ship) provided as sleeping accommodation for one or more Service persons under his command; and
- b. Any locker which is provided (in connection with sleeping accommodation) for the personal use of that person.

103. These powers do not permit the search of accommodation of relevant civilians of whom he is the CO and they do not cover exclusive Service families' accommodation. The authorised Service person may seize and retain any articles for which the search was authorised, but any seizure is subject to review by a judge advocate.

Judge advocate

104. **Review of entry and search authorised by CO.** Where a CO has authorised entry and search, undertaken either by a Service policeman or other Service person and this has resulted in anything being seized, he must, as soon as practicable, request a judge advocate to undertake a review of the search and of the seizure and retention of anything seized and retained during the search⁹⁸. This review may be arranged through the MCS. The judge advocate has various powers and duties relating to the return or disposal of material seized. For example, he must order the return or disposal of anything which he is satisfied is legally privileged, and he must (unless he is satisfied that it would be in the interests of justice to permit retention) order the return or disposal, which he is satisfied is, or includes, excluded or special procedure material subject to him being satisfied that certain conditions⁹⁹ are met. Material seized under CO's powers is subject to fewer exceptions with regard to retention than seizures made under other powers (see paragraph 105 below).

105. **Power to grant access to excluded and certain other material.** As indicated in paragraph 98b above, a CO can never authorise a search for material which he considers will include material subject to legal privilege, excluded or special procedure material. The Service police may apply to a judge advocate for access to two of these categories of material: excluded material and special procedure material¹⁰⁰. The judge advocate may make an order if he is satisfied that one or other of the sets of access conditions laid down is established¹⁰¹. In relation to these conditions it is particularly important to note that the judge advocate will have to be satisfied that there are reasonable grounds for believing that the premises to be searched are 'relevant residential premises'¹⁰² and that the suspected offence is a 'relevant offence' (see paragraph 98a above).

106. If one or other of the two sets of conditions is fulfilled then a judge advocate may order that the person who appears to be in possession of the material either produces it to the Service policeman for him to take away or allows him access to it¹⁰³ within 7 days of the date of the order, or within such longer period as the order may specify¹⁰⁴.

⁹⁸ Section 89 of the Act. The full range of powers and procedures is laid out in The Armed Forces (Powers of Stop, Search, Seizure and Retention

⁹⁹ Section 87(3) of the Act.

¹⁰⁰ Section 84(4) of the Act; eg. confidential business records or journalistic material. See PACE 1984 section 11, section 14.

¹⁰¹ Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009.

¹⁰² Section 86(3) of the Act.

¹⁰³ If the information is stored electronically, the data must be provided in a visible and legible form.

¹⁰⁴ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 Schedule 1, paragraph 5.

The conduct of entry, search, seizure and retention

107. **Application for a search warrant.** Where a search warrant is required, if it is not reasonably practicable for a Service policeman to make a search warrant application to a judge advocate in person, then it may be conducted over live link or by telephone¹⁰⁵.

108. Where a Service policeman applies for a warrant he must state in writing:

- a. The name, rank or rate and unit of the person applying;
- b. The grounds on which he makes the application;
- c. The premises to be entered;
- d. The number of entries required and why;
- e. (As far as practicable) the articles to be sought;
- f. The legislation under which the warrant is requested; and
- g. The details of any person who is not a Service policeman accompanying the Service policeman when executing the warrant.

If the application is for a warrant to enter and search on more than one occasion he must also state in writing the ground on which he applies for such a warrant and whether he wants a warrant for an unlimited number of entries or (if not) the maximum number of entries wanted.

109. **Access to excluded material etc.** As explained more fully in paragraph 105 above, a Service policeman may apply to a judge advocate for permission to obtain access to excluded material or special procedure material. Notice of an application must usually be served on the subject person who appears to be in possession of the material. If the service of a notice will seriously prejudice the investigation, in very limited circumstances an application may be made for a warrant without a notice being required¹⁰⁶.

110. Notice of an application for access to special or excluded material may be served by delivering it to the subject person or by sending it by registered or recorded delivery to his address. In the case of a Service person, his address is that of the unit to which he belongs or (if he is on attachment) the unit to which he is attached¹⁰⁷. Where a notice has been served¹⁰⁸, the person must not conceal, destroy, alter or dispose of the material without permission from a judge advocate or the written permission of a Service policeman until the application has been dismissed or abandoned or until he has complied with an order to produce or grant access to the material¹⁰⁹.

111. **Execution of warrants.** A warrant¹¹⁰ may be executed by any Service policeman. A warrant may authorise the Service policeman to be accompanied by other persons and those

¹⁰⁵ This includes normal section 83 search warrants and applications for access to excluded or special procedure materials under Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 7.

¹⁰⁶ The Armed Forces (Powers of Stop, Search, Seizure and Retention) Order 2009 Schedule 1 paragraphs 12(a) and 14.

¹⁰⁷ In cases of persons with no unit the proper address is the usual or last known place of residence.

¹⁰⁸ Service on a person can be by delivering the notice of application to him, leaving it at his proper address or by sending it by post in a registered letter or by recorded delivery.

¹⁰⁹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 Schedule 1 paragraph 11.

¹¹⁰ Under section 83 of the Act and Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009.

persons, whilst in the company and under the supervision of a Service policeman, will have the same powers as the Service policeman in relation to the execution of the warrant and the seizure of any articles to which the warrant relates¹¹¹.

112. Entry and search under a warrant must be executed within 3 months of its issue and the time of the entry must be at a reasonable hour unless the Service policeman executing the warrant believes that the search may be frustrated on entry at a reasonable hour. No premises may be entered or searched for the second or any subsequent time under a warrant which provides for multiple entries unless an authorising Service policeman (see paragraph 81) has authorised that entry to those premises in writing¹¹².

113. Where the occupier is present when the warrant is executed, upon entry to the premises a Service policeman must:

- a. Identify himself as a Service policeman and if not in uniform, produce documentary evidence that he is a Service policeman;
- b. Produce the warrant¹¹³; and
- c. Provide a copy of the warrant.

114. On completion of the entry and search, a Service policeman executing a warrant must endorse upon it whether the articles sought were found and whether any articles were seized, other than the articles sought. Following execution or (if not executed) upon expiry of 3 months from its issue, the warrant should be sent to the Judge Advocate General.

115. Where the occupier is not present then the actions above must be undertaken in relation to the person who appears to be in charge of the premises. If no person appears to be in charge of the premises then the Service policeman must leave a copy of the warrant at the premises in a prominent location. The scope of any search under a warrant is limited to what is required for the purpose of the warrant. For further detail see JSP 397 (Service Police Codes of Practice - Code B).

116. **Entry and search where person arrested.** As explained in paragraph 79 above, where a person has been arrested under section 67 of the Act for a serious Service offence a Service policeman has power to enter and search certain premises and vehicles¹¹⁴.

117. A search referred to in paragraph 116 above must be limited to the extent which is reasonably required for the purpose of discovering evidence relating to the offence for which the person was arrested. No search may be made unless the Service policeman has reasonable grounds for believing that there is such evidence where the search is to be made. Any search of premises which comprises two or more separate dwellings is limited to the dwelling in which the arrested person was immediately before his arrest, or common parts of the premises. For further detail see JSP 397 (Service Police Codes of Practice - Code B).

118. **Entry and search after arrest.** As explained in paragraphs 79 and 80 above, where a person has been arrested under section 67 for a serious Service offence and is being held in Service custody without being charged, a Service policeman also has, subject to authorisation where required, powers of entry, search and seizure in relation to premises

¹¹¹ See also the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 9.

¹¹² The Armed Forces (Stop and Search, Search, Seizure and Retention) Order 2009 article 9(5).

¹¹³ Unless the Service policeman has reasonable grounds for believing that the search would be frustrated if he waited to have physical possession of the warrant itself. In these circumstances a fax or emailed copy of the warrant should be used and a certified true copy provided as soon as is practicable.

¹¹⁴ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 12.

occupied or controlled by that person¹¹⁵. The Service policeman must limit his search to the extent reasonably necessary to discover evidence of the sort described in paragraph 80 above. He may seize and retain any evidence for which he is empowered to search.

119. **Authorising Service policeman.** An authorising Service policeman who authorises a search or is informed of a search must make a written record of the grounds for the search and the nature of the evidence sought, see JSP 397 (Service Police Codes – Code B).

120. **Actions after search of premises.** After a search by the Service Police, the person conducting it should make the following record in accordance with JSP 397 (Service Police Codes of Practice – Code B):

- a. Address and location of the search;
- b. Object of the search;
- c. The date and time of the search;
- d. Whether anything, and if so what was found;
- e. Whether any injury to a person or damage to property has occurred as a result of the search; and
- f. Details of the officer conducting the search.

121. Where a CO authorises a search of premises by persons other than Service policemen, the Service Police codes will not apply. However, the person who conducts the search should if possible and at the earliest opportunity, seek to provide to the CO a record, including the details listed at paragraph 120 above.

122. If, on completion of a search of premises, a Service policeman has seized any article(s) under the powers referred to in paragraph 80, he must give the occupier of the premises (or person in charge of them at the time) a written notice¹¹⁶ detailing the following¹¹⁷:

- a. What has been seized;
- b. The grounds for seizure;
- c. Their right to apply to a judge advocate for return of the articles, the grounds for the application and the effects of such application¹¹⁸;
- d. The name and address of the person to whom a notice of intention to apply for return can be given; and
- e. The name and address of the person to whom an application to attend the initial examination of the articles can be made.

123. **Action after search of a person.** If, on completion of a search under a power referred to in paragraph 89 above, a Service policeman has seized any article(s), he must

¹¹⁵ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 13.

¹¹⁶ If there is no-one at the premises then the notice must be left in a prominent place.

¹¹⁷ The Armed Forces (Stop and Search, Search, Seizure and Retention) Order 2009 article 21.

¹¹⁸ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 28 to 30.

give a written notice to the person detailing the same information as is referred to in paragraph 120 above.

124. In relation to anything seized under any power of seizure dealt with in this chapter, upon the request by the occupier of the premises or the person who is in charge of the premises immediately prior to the search, the person (not limited to searches by Service Police) conducting the search shall, within a reasonable time, provide a record of what was seized¹¹⁹.

125. **Access and copying.** A person who had custody or control of anything seized (or someone acting on their behalf), shall upon request to the person in charge of the investigation, be allowed supervised access to it or the opportunity to copy or photocopy it or be provided with a copy or photocopy of it¹²⁰, unless that person has reasonable grounds to suspect that to do so would prejudice the investigation of any offence or prejudice any criminal or Service proceedings which may be brought as a result of the investigation¹²¹.

¹¹⁹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 28 to 30.

¹²⁰ Copies or photocopies must be provided within a reasonable time.

¹²¹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 16.

Part 4 – Retention and disposal

Introduction

126. This part deals with the retention and disposal of property which has come into the possession of the Service Police or COs. Regulations concerning the retention and disposal of such property are found in a number of places: the Armed Forces (Powers of Stop and Search, Seizure and Retention) Order 2009, the Armed Forces (Court Martial) Rules, and the Armed Forces (Disposal of Property) Regulations 2009. The first of these concerns property seized by Service Police from a person or from premises. The second concerns property exhibited in evidence at trials. Property that has come into the possession of the Service Police that is not covered by either the Armed Forces (Powers of Stop and Search, Seizure and Retention) Order 2009 or the Armed Forces (Court Martial) Rules is covered by the Armed Forces (Disposal of Property) Regulations 2009.

127. The Armed Forces (Disposal of Property) Regulations 2009 provide a regime that permits applications to be made to a CO or a judge advocate, but does not make this compulsory in all cases. The intention is that such applications should be made in cases where the property in question is disputed, of high value or controversial; otherwise it is anticipated that property will be dealt with by the Service Police as they see fit. Particular care is to be taken in cases of disposal or sale.

Dealing with seized items

128. **Examination and return of property.** This paragraph applies to articles seized by a Service policeman under a power of seizure referred to in paragraphs 85 to 87. The person in possession of the property shall ensure:

- a. That an initial examination of the property is undertaken by a Service policeman as soon as is reasonably practicable;
- b. That the examination is confined to whatever is necessary to determine how much of the property can be retained or is property which is not seizable, but which it is not reasonably practicable to separate from that which is;
- c. That anything found which may not be retained is returned as soon as is reasonably practicable after the examination of all the seized property has been completed; and
- d. That until the examination of all the property is complete and all of the seized property which cannot be retained has been returned, the seized property is kept separate from any property seized under any other power.

129. **Retention of seized items.** The powers relating to retention are contained within the relevant order¹²². This relates to the retention of anything which has been seized or taken away by a person under the powers in or under Part 3 of the Act. Very broadly, these powers relate to powers under the Police and Criminal Evidence Act 1984. Retention may generally be for so long as is necessary in all the circumstances¹²³. Without prejudice to this, things seized for the investigation of an offence may generally be retained for use as evidence in Service proceedings or a trial or for forensic examination or for investigation in connection with the offence. Anything may be retained to establish its lawful owner, where there are reasonable grounds to believe that it has been obtained in consequence of the

¹²² The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 17.

¹²³ Copies or photocopies must be provided within a reasonable time.

commission of a Service offence. However, where material is seized on the grounds that a person may have used it to cause injury or to assist in an escape from Service custody, it may no longer be retained when the person from whom it was seized is no longer in Service custody¹²⁴.

130. These provisions are extended¹²⁵ to property seized under the powers¹²⁶ which permit retention of property to be taken away for the purpose of determining whether seizable property can be separated from the rest of the material seized (so-called search and sift provisions, for which see paragraphs 85 - 87). It is important to note that none of the powers under article 19 of the order can apply to seizures ordered or authorised by a CO. Article 20 of the order relates to lawful searches of a person by a Service policeman.

131. The powers of search and sift relate to powers under the Criminal Justice and Police Act 2001. The interaction of the provisions based on this Act and those based on the Police and Criminal Evidence Act 1984 can require detailed analysis. If in any doubt as to powers of retention legal advice should be sought.

132. Provision is made for the retention of seized items in a number of special situations¹²⁷. These are:

- a. Article 22, governing the examination and return or retention of property seized under article 19 or 20;
- b. Article 23, which defines the extent of the obligation to return items subject to legal privilege where, at any time after seizure, it becomes apparent that the property seized is, or includes, such an item; or
- c. Article 24, which defines the extent of the obligation to return excluded and special procedure material where, at any time after seizure, it becomes apparent that the property seized is, or includes such material.

133. The effect of each of the articles in paragraph 132 above is referred to further at paragraphs 134 to 137 below. However, it should be noted that:

- a. Nothing in articles 22 to 25 authorises retention if retention would not be authorised under article 17; and
- b. Where anything in Part 3 of The Armed Forces (Stop and Search, Search, Seizure and Retention) Order 2009 requires something to be returned, article 17 does not permit retention¹²⁸.

134. **Application to a judge advocate for return of property.** Where material is seized under a relevant power certain people may make an application to a judge advocate¹²⁹ for the return of the whole or part of the seized property. The relevant powers are those dealt with in Part 3 of this chapter, except the powers of seizure where a CO authorises the search of premises. That is because where the search is authorised by the CO, there is instead a review of the seizure by a judge advocate as described in paragraph 104. Those who may apply for the return of items are the persons from whom the material was seized, anyone with an interest in what was seized and anyone else who had custody or control of the

¹²⁴ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 17(3) and (4).

¹²⁵ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 26.

¹²⁶ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 19 and 20.

¹²⁷ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 22, 23 and 24.

¹²⁸ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 17(2) and (3).

¹²⁹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 28.

property immediately before it was seized. The following are, broadly speaking, the grounds upon which such an application may be made:

- a. There was no power to make the seizure;
- b. The property is or contains an item subject to legal privilege which can be separated from the whole without prejudicing the lawful use of the remainder of the property;
- c. That the seized property is or contains excluded or special procedure material which can be separated from the whole without prejudicing the lawful use of the remainder of the property; and
- d. That the seized property comprises excluded or special procedure material which was seized under the 'seize and sift' powers (paragraphs 129 and 130 above) and it is reasonably practicable to separate it from property for which there was a power to search or the retention of which is authorised.

135. If the judge advocate is satisfied as to any of the grounds stated above in relation to any of the property received, he must generally order its return. Otherwise he must dismiss the application. There are exceptions to the requirement to return, broadly speaking where, if the property were returned, it would immediately be appropriate to give a warrant allowing its seizure or an order requiring it to be produced¹³⁰. Where an application referred to in paragraph 134 above is made, a judge advocate may also make such directions as he thinks fit as to the examination, retention, separation or return of the whole or any part of the property¹³¹.

136. **Obligation to return items subject to legal privilege.** Where, after seizure, it appears to the person in possession that the property seized is or contains an item to which legal privilege extends¹³², the item must be returned as soon as reasonably practicable unless¹³³:

- a. The property was not seized under a power of a CO to authorise a seizure;
- b. The whole or part of the rest of the property can be retained; and
- c. In all the circumstances, it is not reasonably practicable to separate the item protected by legal privilege without prejudicing the use of the rest of the property.

137. **Obligation to return excluded or special procedure material.** Where a seizure has been made in execution of a search warrant and it appears to the person in possession of a seized item that it is or contains excluded or special procedure material then it must be returned¹³⁴ as soon as is reasonably practicable unless:

- a. It is not reasonably practicable to separate the excluded or special procedure parts from the whole without prejudicing the use of the property which may be retained;

¹³⁰ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 28(7).

¹³¹ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 28(5).

¹³² Even if the item or information is only partly that to which legal privilege extends.

¹³³ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 23.

¹³⁴ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 24.

b. There are reasonable grounds for believing that the property has been obtained in consequence of the commission of a Service offence and its retention is necessary to prevent its being concealed, lost, damaged, altered or destroyed; and

c. There are reasonable grounds for believing that the property is evidence in relation to a Service offence and its retention is necessary to prevent its being concealed, lost, damaged, altered or destroyed.

Again, it is important to note that material subject to legal privilege or excluded or special procedure material cannot be retained as a result of a search authorised by the CO.

138. Persons to whom seized property is returned. If an item has been seized and should not be retained there is an obligation to return it to the person from whom it was seized unless the person obliged to return it is satisfied that someone else has a better right to that property. Where different persons claim to be entitled to the return of the property, the property may be kept for as long as is reasonably necessary for a determination to be made as to who has a better, or best, right to the property¹³⁵.

139. Duty to secure items. This duty only arises where the power of seizure was made under Article 19 or 20 of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009. Where items have been seized under these articles, and they are subject to an ongoing application to a judge advocate under the power referred to in paragraph 100 above (for example in relation to return as wrongly seized) a duty to secure that item arises. This power requires an application under articles 28 and 29 of the order; therefore, the duty to secure does not relate to property seized under a power of the CO to authorise a search of premises (which will be subject to review by a judge advocate referred to at paragraph 104 above). The duty only arises in certain circumstances which include requirements that the application is brought on grounds which include that property is or contains legally privileged, special procedure or excluded material¹³⁶. The duty to secure includes ensuring that, except with the permission of the judge advocate or the applicant:

- a. The item is not examined or copied; or
- b. The item is not put to any use which, as seized material, it could otherwise be put.

140. Use of inextricably linked property. Inextricably linked property is seized property which could not, under the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009, be retained but for the fact that it is not reasonably practicable to separate it from property which can be retained¹³⁷.

141. Inextricably linked property cannot be put to any use (including examination and copy) except where it is necessary for facilitating the use in any investigation or proceedings of property within which the inextricably linked property is comprised¹³⁸. However, property seized under section 87 or section 88 of the Act (COs powers to authorise search of premises) cannot comprise such property. Further, property seized under section 76(1)(c) of the Act (CO authorisation of stop and search) cannot be inextricably linked property.

¹³⁵ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 27.

¹³⁶ For full details of when the duty arises see articles 28 and 29 of The Armed Forces (Powers of Stop, Search, Seizure and Retention) Order 2009.

¹³⁷ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 31.

¹³⁸ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 31.

Disposal under the disposal of property regulations

142. **Disposal of property by order of a judge advocate.** This situation arises when either the DSP has directed a charge to be allocated for the Court Martial or the Service Civilian Court, or a notice of appeal to the SAC has been served on a CO¹³⁹. Furthermore, the property must have come into the possession of the Service Police in connection with the investigation of a Service offence¹⁴⁰. The regulations allow an application to be made by either a Service policeman, a person claiming to be the owner, a person in whose possession the property was before it was seized, or a person charged with a Service offence. The form at [Annex B](#) should be used. It should be borne in mind that although the Service Police can make an application for an order at any time after the DSP has directed a charge to be allocated to the Court Martial, in most cases the Service Police will want to wait until proceedings are completed.

143. The judge advocate may make orders for: the delivery of the property to the person appearing to be the owner; if the owner cannot be found, disposal of the property by destruction, retention or sale as appears appropriate; or, if the owner is known but does not wish to have the property back, disposal as above¹⁴¹. (This last contingency is illustrated by a purchase by soldiers of DVDs from Amazon. The DVDs were stolen by a postal clerk; substitutes were sent out and received. Amazon were notified that the originals had been recovered, but wrote them off and were not, therefore, interested in their return. The property had nevertheless to be disposed of somehow.) The judge advocate can also order that the property is retained by the Service Police for their own purposes (see paragraph 153 below).

144. Where the judge advocate makes such an order, then the right of any person to take proceedings for the recovery of that property through the civil courts expires six months after the order¹⁴².

145. The accused person or any other person in the proceedings may make representations, before any order for destruction or sale is made, that the property concerned be retained¹⁴³. The CAO will send a copy of the application to interested parties. Should the judge advocate reject the representations made, and order that the property be sold or destroyed in spite of them, the accused or other party would have to appeal against that decision under regulation 8 (see paragraph 156 below).

146. The question may arise as to how Service Police deal with property seized which turns out to be of no practical use in the investigation. In this case, the Service Police retain their normal initiative. Such items should in any event be returned to the owner since they may only be retained 'as long as is necessary in all the circumstances'¹⁴⁴.

147. **Property in possession of Service Police or CO of a person charged with a Service offence.** This situation arises where a person has been charged but the charge has not been allocated for the Court Martial or the Service Civilian Court¹⁴⁵. An application may be made by a Service policeman, a person claiming to be the owner of the property, a person in possession of the property before it was seized, or the person charged. Again, it is unlikely that the Service Police will want to make an application until after any proceedings

¹³⁹ The Armed Forces (Disposal of Property) Regulations 2009, regulation 3(1)(a) and (b).

¹⁴⁰ The Armed Forces (Disposal of Property) Regulations 2009, regulation 3(1).

¹⁴¹ The Armed Forces (Disposal of Property) Regulations 2009 regulation 3(2)(a) and (b). Note that in the Court Martial the default position is that where property becomes an exhibit it shall be retained with the record of proceedings, unless the judge advocate otherwise directs (The Armed Forces (Court Martial) Rules 2009, rule 24(3)). Therefore where this is not the desired outcome, an application should be made to the judge advocate during the case. If that is not done an application under regulation 3 would have to be made afterwards.

¹⁴² The Armed Forces (Disposal of Property) Regulations 2009, regulation 3(4).

¹⁴³ The Armed Forces (Disposal of Property) Regulations 2009, regulation 3(5).

¹⁴⁴ The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009, article 17(1).

¹⁴⁵ The Armed Forces (Disposal of Property) Regulations 2009, regulation 4.

have finished. The form at [Annex B](#) should be used. A CO exercising these powers must send a copy of any order made to the applicant, or the person appearing to him to be the owner, if that is not the applicant¹⁴⁶. This will enable any interested party to appeal against the order made. The order will not take effect until the time limit for an appeal under regulation 8 (14 days) has expired without an appeal being lodged¹⁴⁷.

148. The CO may order delivery of the property to the person appearing to him to be the owner. If no owner can be found, or if one can be found but they disclaim any right in the property, the CO can order that the property be delivered to the Service Police for destruction, retention or sale¹⁴⁸. His determination will be recorded on the form at [Annex C](#).

149. **Property in possession of Service Police or CO in other circumstances.** In situations not covered by paragraphs 142 and 147 above, the powers of the CO are limited to returning the property to either the person from whom it was seized or the person claiming to be the owner¹⁴⁹. An application to the CO may be made by a Service policeman, a person claiming to be the owner, or a person in possession of the property before it was seized.¹⁵⁰ The form at [Annex B](#) should be used. Again, the CO must send a copy of his determination to the applicant, or the person appearing to him to be the owner, if that is not the applicant and the order will not take effect until time limits for an appeal have expired¹⁵¹. His determination should be recorded on the form at [Annex C](#), noting that the only determination he can make in this case is to deliver the property to the person listed.

150. The situation may arise where a case is sent to the DSP but is not proceeded with. In this case, the appropriate method of dealing with such property is for the relevant CO to make a decision as to disposal or retention under regulation 5. Because the DSP has declined to proceed, he has no further interest in the matter, and the property comes into the CO's possession.

151. With regard to CO's investigations, property seized by persons other than the Service Police (eg. RP staff or coxswains) is seized on behalf of the CO, and therefore comes into his possession.

152. Retention does not necessarily mean retention by the Service Police. So, for example, in relation to such items such as ammunition, blood-soaked clothing, used condoms etc., retention might include retention in storage that preserves their utility and is adequate to meet any danger to life or health etc. that they pose.

153. **Retention for police purposes.** If the judge advocate or CO considers that the property can be used for police purposes, he can order that the property is to be retained by the Service Police¹⁵². This may arise where property that could be useful to the Service Police has been seized and it appears that the owner can have no legitimate claim to it. It can then, at the discretion of the judge advocate or CO, be ordered to be retained by the Service Police and become their property.

154. **Sale of property.** The judge advocate may order or the CO determine that the property be sold¹⁵³. Such an order or determination is only appropriate where an owner cannot be identified. The conduct of the sale is a matter for the CO, but the proceeds of the

¹⁴⁶ The Armed Forces (Disposal of Property) Regulations 2009, regulation 4(1)(b).

¹⁴⁷ The Armed Forces (Disposal of Property) Regulations 2009, regulation 4(4).

¹⁴⁸ The Armed Forces (Disposal of Property) Regulations 2009, regulation 4(2)(a) and (b).

¹⁴⁹ The Armed Forces (Disposal of Property) Regulations 2009, regulation 5(2).

¹⁵⁰ The Armed Forces (Disposal of Property) Regulations 2009, regulation 5(3).

¹⁵¹ The Armed Forces (Disposal of Property) Regulations 2009, regulation 5(4).

¹⁵² The Armed Forces (Disposal of Property) Regulations 2009, regulation 6(1).

¹⁵³ The Armed Forces (Disposal of Property) Regulations 2009, regulation 7(1).

sale must be paid into a Service Fund Sub Account maintained for charitable purposes¹⁵⁴. The obvious fund might be the regimental welfare fund, ship's welfare fund etc., but again is a matter for the CO.

155. **Delegation.** The Act does not permit a CO to delegate his functions under these regulations.

156. **Appeals.** Appeal from the order of a judge advocate or determination of a CO lies under regulation 8¹⁵⁵. The forms at Annex [D](#) and [E](#) respectively should be used. The judge advocate has wide powers to uphold the appeal and make another order, or dismiss the appeal (with or without a hearing)¹⁵⁶. It is notable that the Judge Advocate General may make any order in respect of the property that a judge advocate may make under regulation 3(2), even when judging an appeal from the determination of a CO¹⁵⁷. If the Judge Advocate General dismisses the appeal without a hearing under regulation 8(5)(b), the appellant must be notified of this decision in writing by the CAO¹⁵⁸. If the appellant requires a hearing of the appeal, he must give the CAO written notice of that fact within 14 days of the notice from the CAO¹⁵⁹. The form at [Annex F](#) should be used to require a hearing of an appeal against a CO's determination; the form at [Annex G](#) to require a hearing of an appeal against a judge advocate's order. That appeal would then be heard by a judge advocate designated by the Judge Advocate General. Should the appeal be against a judge advocate's order, then a different judge advocate must hear the matter¹⁶⁰.

¹⁵⁴ The Armed Forces (Disposal of Property) Regulations 2009, regulation 7(2).

¹⁵⁵ The Armed Forces (Disposal of Property) Regulations 2009, regulation 8(1).

¹⁵⁶ The Armed Forces (Disposal of Property) Regulations 2009, regulation 8(5).

¹⁵⁷ The Armed Forces (Disposal of Property) Regulations 2009, regulation 8(5)(a)(ii).

¹⁵⁸ The Armed Forces (Disposal of Property) Regulations 2009, regulation 8(6).

¹⁵⁹ The Armed Forces (Disposal of Property) Regulations 2009, regulation 8(7).

¹⁶⁰ The Armed Forces (Disposal of Property) Regulations 2009, regulation 8(9).

Part 5 – Transitional arrangements

157. This part outlines the main transitional provisions related to Part 3 of the Act contained in the section 380 Order and the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 (the “Stop and Search etc Order”). The basic aim of the transitional arrangements for Part 3 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie. before 31 October 2009).

158. Transitional provision under the section 380 Order.

- a. Under the section 380 Order any reference in Part 3 of the Act to a ‘Service offence’ includes an offence committed under any of the Service Discipline Acts (SDAs). So, for example, the power of arrest in section 67 of the Act also applies to offences committed before commencement under the SDAs.
- b. Similarly the section 380 Order extends relevant provisions of Part 3 of the Act which refer to things done under that Act, so that they also relate to things done under the related provisions of the SDAs.

Example. Section 70 of the Act gives a Service policeman power to search ‘an arrested person’ following his arrest. Under section 70 ‘an arrested person’ means a person arrested under specified provisions of the Act. The section 380 Order extends this so that section 70 also applies to a person who has been arrested before commencement under the related provisions of the SDAs.

159. **The transitional provisions in the Stop and Search etc Order.** Schedule 4 to the Stop and Search etc Order makes further provision (in line with the general aim mentioned in paragraph 1 above) as to the detailed operation of the provisions of that Order with respect to events occurring before commencement. In slightly more detail, the general effect of Schedule 4 is to enable those provisions:

- a. To operate after commencement with respect to events occurring before commencement, and
- b. To operate after commencement with respect to the incomplete exercise before commencement of the related powers and duties under the AFA01.

The transitional arrangements in Schedule 4 to the Stop and Search etc Order are summarised below¹⁶¹.

160. Part 2 – Stop and search. The conduct of a stop and search:

- a. In paragraph 60 a search is deemed to have been completed when it is conducted under the 2003 Order if a notice has not been previously been left (see Schedule 4 paragraph 2(3)).
- b. In paragraph 62 a search is deemed to have been carried out when it is conducted under the 2003 Order if a record of the search has not previously been made (see Schedule 4 paragraph 3(3)).
- c. In paragraph 64 an order given by an officer under section 4(1)(a) of the 2001 Act is deemed to have been given under section 76(1) of the Act (see Schedule 4 paragraph 4(2)).

d. In paragraph 67 a search carried out under articles 4 and 5 of the 2003 Order is deemed to have been carried out under section 76 of the Act if a notice has not previously been left (see Schedule 4 paragraph 4(3)).

e. In paragraph 69 a search carried out under section 4(1)(a) of the 2001 Act is deemed to have been carried out under section 76(1) of the Act if a record of the search has not previously been made (see Schedule 4 paragraph 4(4)).

161. **Part 3 – Entry, search and seizure.**

a. **Entry to premises for the purposes of arrest.** In paragraph 74 an arrest made under section 74 of the 1955 Acts or section 45 of the 1957 Act is deemed to have been made under section 67 of the Act (see Schedule 4 paragraph 8(1)(a)).

b. **Powers of entry search and seizure where person arrested.** In paragraph 79 a 'serious Service offence' includes a serious SDA offence, and an arrest made under section 74 of the 1955 Acts or section 45 of the 1957 Act is deemed to have been made under section 67 of the Act (see Schedule 4 paragraph 8(1)).

c. **Powers of entry search and seizure after arrest.** In paragraph 80 a 'serious Service offence' includes a serious SDA offence, and an arrest made under section 74 of the 1955 Acts or section 45 of the 1957 Act is deemed to have been made under section 67 of the Act. An authorisation in writing given by an authorising officer under article 13 of the 2003 Order will be valid in order to enter and carry out a search under section 90(1) of the Act (see Schedule 4 paragraph 8(1) and (2)).

d. **General powers of seizure.** In paragraph 82 (and paragraphs 125 and 127) the references to a Service offence include an SDA offence (see Schedule 4 paragraph 9).

e. **Additional powers of seizure from premises.** In paragraph 85 property seized from premises under article 19 of the 2009 Order includes property found on premises before commencement other than by someone authorised under section 7 of the 2001 Act, and the powers of seizure to which article 19 applies includes powers conferred by or under Part 2 of the 2001 Act, except section 2, 4 and 7 of that Act (see Schedule 4 paragraph 12(2)(3)).

f. In paragraph 90 a power of seizure includes a power of seizure conferred by article 4 of the 2006 Order if article 5(4) of that Order has not been complied with respect to the seizure (see Schedule 4 paragraph 13(3)).

g. **Review of entry and search authorised by CO.** In paragraph 104 a review by a judge advocate of searches and seizure includes a request made to a judicial officer to undertake a review under section 8 of the 2001 Act if the judicial officer has not yet determined whether to make an order for the return or disposal of any of the property to which the review relates (see Schedule 4 paragraph 25(2)).

162. **The conduct of entry, search, seizure and retention.**

a. **Execution of warrants.** In paragraph 111 a warrant which authorises a Service policeman to be accompanied by other persons includes a pre-commencement warrant which authorises a person to accompany a Service policeman executing the warrant (see Schedule 4 paragraph 6(3)).

b. **Entry and search where person arrested.** In paragraph 116 a person arrested under section 67 of the Act for a serious Service offence includes a person arrested under section 74 of the 1955 Acts or section 45 of the 1957 Act for a serious SDA offence (see Schedule 4 paragraph 8(1)).

c. **Entry and search after arrest.** In paragraph 118 a Service policeman may conduct a search if an authorising officer within the meaning of article 13 of the 2003 Order has authorised him in writing to enter and search (see Schedule 4 paragraph 8(2)).

d. **Actions after search of premises.** In paragraph 122 the requirement to give the occupier a written notice also applies when a Service policeman has exercised a power of seizure under article 3 of the 2006 Order and has not complied with article 5(1),(2) or (3) of that Order with respect to the seizure (see Schedule 4 paragraph 13(2)).

e. **Access and copying.** In paragraph 125 the requirement to allow supervised access to anything seized, or the opportunity to copy or photocopy it, applies also to anything seized under Part 2 of the 2001 Act if a person entitled to supervised access has not, either before or after commencement, been provided with an opportunity to inspect the property or to copy or photocopy it (see Schedule 4 paragraph 10(2)(3)).

Retention of seized items

163. Part 4 – Retention.

a. In paragraph 128 anything seized under Part 3 of the Act includes anything seized under Part 2 of the 2001 Act, and the power to retain seized items under section 54(4)(a) of PACE, as applied by section 113(1) of that Act, includes items seized under:

- (1) Section 54(4)(a) as applied to the 1955 Acts or the 1957 Act, and
- (2) Section 10(10) or (11) of the 2001 Act (see Schedule 4 paragraph 11(3)(4)).

b. In paragraph 129 the power to retain property seized from premises or persons includes property seized from premises or persons under article 3 or 4 of the 2006 Order (see Schedule 4 paragraph 18). An authorisation under section 87 or 88 of the Act includes an authorisation given under section 7 of the 2001 Act, and the additional powers of seizure apply to anything found before commencement. The powers of seizure under Chapter 1 or 3 of Part 3 of the Act include the powers of seizure conferred under Part 2 of the 2001 Act, except sections 2, 4 and 7 of that Act (see Schedule 4 paragraph 12(2)(3)).

c. In paragraph 130 property which is seized under the additional powers of seizure from premises or persons includes property seized under article 3 or 4 of the 2006 Order if either the initial examination of that property, or anything required to be returned under article 6(2) of the 2006 Order, has not been completed (see Schedule 4 paragraph 14(2)).

d. In paragraph 132 the obligation to return items subject to legal privilege does not apply to property seized under section 2(7) of the 2001 Act, exercised under section 4 of that Act by a person other than a Service policeman. The powers of seizure in Part 3 of the Act include the powers of seizure in:

- (1) Articles 3 and 4 of the 2006 Order;
- (2) Part 2 of the 2001 Act, and
- (3) The 2003 Order (see Schedule 4 paragraph 15(2) (3)).

e. In paragraph 132 the obligation to return excluded and special procedure material which has been seized pursuant to a warrant granted under section 83 of the Act includes material seized under section 5 of the 2001 Act (see Schedule 4 paragraph 16).

f. In paragraph 133 property which cannot be retained under article 17 includes property which has been seized under Part 2 of the 2001 Act (see Schedule 4 paragraph 11(2)).

164. Application to a judge advocate for return of property.

a. In paragraph 134 an application to a judge advocate includes an application made to a judicial officer (as defined in Part 2 of the 2001 Act) before commencement (see Schedule 4 paragraph 20(2)).

b. In paragraph 135 a judge advocate may also make directions in relation to property seized under articles 3 or 4 of the 2006 Order, and the relevant powers of seizure include powers conferred under:

- (1) Articles 3 and 4 of the 2006 Order;
- (2) Part 2 of the 2001 Act (except the power in section 7 of that Act); and
- (3) The 2003 Order, except the power under its article 15 to the extent that it relates to section 7 of the 2001 Act (see Schedule 4 paragraph 20(5)(6)).

165. Obligation to return items subject to legal privilege. In paragraph 136 the obligation to return items subject to legal privilege includes property which has been seized under articles 3 and 4 of the 2006 Order or Part 2 of the 2001 Act (except property which has been seized under:

- a. Section 2(7) of the 2001 Act by someone other than a Service policeman acting under section 4 of that Act, or
- b. Section 7(3) of the 2001 Act (see Schedule 4 paragraph 15(2)(3)).

166. Obligation to return excluded or special procedure material. In paragraph 137 seized property includes property seized under a search warrant granted under section 5 of the 2001 Act (see Schedule 4 paragraph 16).

167. Property to whom seized property is returned. In paragraph 138 property which has been seized includes property seized under:

- a. Article 3 or 4 of the 2006 Order;
- b. Part 2 of the 2001 Act; or
- c. The 2003 Order (see Schedule 4 paragraph 19).

168. Duty to secure items.

a. In paragraph 139 the duty to secure items seized under article 19 of the 2009 Order does not apply to anything found on premises by someone authorised under section 7 of the 2001 Act but does include anything otherwise found before commencement. The powers of seizure conferred by or under Chapter 1 or 3 of Part 3 of the Act includes the powers of seizure conferred by or under Part 2 of the 2001 Act, except sections 2, 4 and 7 of that Act (see Schedule 4 paragraph 12(2)(3)).

b. In paragraph 139 an application under article 28 includes an application made under article 12(2) of the 2006 Order (see Schedule 4 paragraph 20(3)(a)).

169. Use of inextricably linked property.

a. In paragraph 140 property seized under the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 includes property seized under:

- (1) Article 3 or 4 of the 2006 Order;
- (2) Part 2 of the 2001 Act, except the power under section 7 of that Act; or
- (3) The 2003 Order, except the power under its article 15 in so far as it relates to section 7 of the 2001 Act (see Schedule 4 paragraph 23(2)).

b. In paragraph 141 inextricably linked property includes property seized under:

- (1) Article 3 or 4 of the 2006 Order,
- (2) Part 2 of the 2001 Act, except the power under its article 15 in so far as it relates to section 7 of the 2001 Act, or
- (3) The 2003 Order, except the power under its article 15 in so far as it relates to section 7 of the 2001 Act (see Schedule 4 paragraph 23(2)).

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RELEVANT OFFENCES – SCHEDULE 2 DISCIPLINARY OFFENCES

1. Section 1 of the Act - assisting an enemy
2. Section 2 of the Act - misconduct on operations
3. Section 3 of the Act - obstructing operations
4. Section 4(1) or (2) of the Act - looting
5. Section 6 of the Act - mutiny
6. Section 7 of the Act - failure to suppress mutiny
7. Section 8 of the Act - desertion (with intention of avoiding a period of active service)
8. Section 31 of the Act - hazarding a ship
9. Section 33 of the Act - dangerous flying
10. Section 39 of the Act - attempts to commit any of the above offences
11. Section 40 of the Act - encouraging or assisting any of the above offences other than attempts

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MINISTRY OF DEFENCE

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**APPLICATION NOTICE UNDER REGULATIONS
3(2), 4(2) AND 5(2)** T-SL-AS1

Armed Forces (Disposal of Property) Regulations 2009

- This application is made for an order under Regulation 3(2)
- This application is made for an order under Regulation 4(2)
- This application is made for an order under Regulation 5(2)

1. I make this application in respect of the following property

I make this application in respect of the following property:

Description of property

Attach continuation sheet if necessary

2. Status of applicant

Applicant is Owner Service police Person in possession before seizure Person charged with Service offence

3. I am applying for the property to be

- Delivered to me at address (Unit)
- Delivered to the Service police at address (Unit)
- Destroyed
- Retained by the Service Police Criminal Property Custodian at address (Unit)
- Person charged with Service offence

Address (Unit)

Signed

Date

Name

Rank

Service number

Unit / Ship / establishment address

Civilian address

This form should be sent to the Court Administration Officer if made under Regulation 3(3), and the applicant's CO if made under Regulation 4(3) or 5(3).



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ANNEX C TO
VOL1 CH 4
JSP 830 MSL
revised 08/09

COMMANDING OFFICER'S DETERMINATION UNDER REGULATIONS 4(2) AND 5(2)

T-SL-AS2

Armed Forces (Disposal of Property) Regulations 2009

To: The Criminal Property Custodian

Unit

1.

- This determination is made in response to an application (attached) under Regulation 4(3)
- This determination is made in response to an application (attached) under Regulation 5(3)

From

Name

Service number

Unit / ship / establishment

Date of application

2.

Exhibit no / Identifying mark	Description

Attach continuation sheet if necessary

3.

You are to dispose of the above items as follows

- Deliver the items listed to this Person/address
- Destroy the items listed (specify method if necessary)
- Retain the items listed in suitable storage until further notice
- Sell the items listed
- Other (specify)

Name

Address

Contact number

Other

4.

- This determination is made in response to an application under Regulation 4(3) of the Armed Forces (Disposal of Property) Regulations 2009
- This determination is made in response to an application under Regulation 5(3) of the Armed Forces (Disposal of Property) Regulations 2009

Signed

Date

Commanding Officer

Unit

Rank

Unit

This determination will not take effect until 14 days from the date that the determination was made or was conveyed to the parties, whichever is later.

Any appeal must be sent to the Court Administration Officer within this period.

Note on distribution: On completion, the CO is to forward a copy of this form to:

- a. the Service Police
- b. the person claiming to be the owner
- c. a person charged in the proceedings



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PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX D TO
VOL1 CH 4
JSP 830 MSL
revised 08/09

NOTICE OF APPEAL FROM JUDGE ADVOCATE'S ORDER UNDER REGULATION 8(2)

T-SL-AS3

Armed Forces (Disposal of Property) Regulations 2009: Regulation 8(2)

1.

Details of order:

Judge Advocate

Date

State terms of order

2.

I hereby give notice that I wish to appeal against this order.

3.

My reasons for appealing are:

(Attach continuation sheet if necessary)

PROTECT - PERSONAL DATA (WHEN COMPLETE)

1-4-D-1

4.

I seek the following order (state order sought)

5.

Status of Appellant: Service police Person claiming to be the owner Person in possession before seizure
 Person charged with a Service offence in the proceedings

Signed

Date

Name

Family name

Service number

Rank

Unit / ship / establishment address

Civilian address

The Applicant should send this form to the Court Administration Officer.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX E TO
VOL1 CH 4
JSP 830 MSL
revised 08/09

NOTICE OF APPEAL FROM CO's DETERMINATION UNDER REGULATION 8(2)

T-SL-AS4

Armed Forces (Disposal of Property) Regulations 2009: Regulation 8(2)

1.

Date

Rank (Commanding Officer)

Name (Commanding Officer)

Unit (Commanding Officer)

On the above date the above Commanding Officer made the following determination:

State terms of determination

2.

I hereby give notice that I wish to appeal against this determination.

3.

My reasons for appealing are

Attach continuation sheet if necessary

PROTECT - PERSONAL DATA (WHEN COMPLETE)

1-4-E-1

4.

I seek the following order (state order sought)

5.

Status of appellant:

- Service police
- Person claiming to be the owner
- Person in possession before seizure
- Person charged with a Service offence in the proceedings

6.

Signed

Date

Name

Family name

Service number

Rank

Unit / ship / establishment address

Civilian address

The Applicant should send this form to the Court Administration Officer.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX F TO
VOL1 CH 4
JSP 830 MSL
revised 08/09

NOTICE OF REQUIREMENT FOR THE HEARING OF AN APPEAL (CO)

T-SL-AS5

Armed Forces (Disposal of Property) Regulations 2009: Regulation 8(7)

1.

Details of commanding officer:

My appeal against the determination of the commanding officer named below has been dismissed without a hearing by the Judge Advocate General.

Rank

Name

Unit

Date of determination

Details of determination

Details of Judge Advocate General's dismissal:

Date of appeal

Date of dismissal

(Attach continuation sheet if necessary)

PROTECT - PERSONAL DATA (WHEN COMPLETE)

1-4-F-1

2.

I hereby give notice that I require a hearing of my appeal under Regulation 8(7)

3.

I wish to address the judge advocate at the appeal hearing

I do not wish to address the judge advocate at the appeal hearing

4.

Status of appellant:

Service police

Person claiming to be the owner

Person in possession before seizure

5.

Signed

Date

Name

Family name

Service number

Rank

Unit / ship / establishment address

Civilian address

The Applicant should send this form to the Court Administration Officer.

The Court Administration Officer must notify the appellant's Commanding Officer of the hearing date of the appeal, and his right under Regulation 8(10)(b) to make written representations to the judge advocate or to seek leave to address the judge advocate.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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Print Form

ANNEX G TO
VOL1 CH 4
JSP 830 MSL
revised 08/09

NOTICE OF REQUIREMENT FOR THE HEARING OF AN APPEAL (JUDGE ADVOCATE)

T-SL-AS6

Armed Forces (Disposal of Property) Regulations 2009: Regulation 8(7)

1.

My appeal against the order of the judge avocate named below has been dismissed without a hearing by the Judge Advocate General.

Name of Judge Advocate

Date of order

Order

Details of Judge Advocate Genral's dismissal:

Date of appeal

Date of dismissal

2.

I hereby give notice that I require a hearing of my appeal under Regulation 8(7) of the Armed Forces (Disposal of Property) Regulations 2009

3.

I wish to address the judge advocate at the appeal hearing

I do not wish to address the judge advocate at the appeal hearing

1-4-G-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

4.

Status of appellant:

- Service police
- Person claiming to be the owner
- Person in possession before seizure

5.

Signed

Date

Name

Family name

Service number

Rank

Unit / ship / establishment address

Civilian address

The Applicant should send this form to the Court Administration Officer.

Chapter 5

Custody

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Chapter 5

Custody

Part 1 - Introduction

General principles

1. This chapter provides guidance on the rules governing Service custody under the relevant provisions of the Act. These rules concern both custody without charge (pre-charge custody) and custody after charge (post-charge custody). They do not relate to an offender serving a custodial sentence at MCTC Colchester¹ (or other Service detention facility) or a sentence of imprisonment in one of Her Majesty's prisons having been convicted of a Service offence. Also included is an overview of the transitional arrangements regarding the authorisation of pre-charge custody and custody without charge without charge applying to circumstances which occur wholly or partly before the commencement of the Regulations (31 October 2009).
2. Service custody in this context means the physical deprivation of a person's liberty either following arrest on suspicion of having committed a Service offence see [Chapter 6](#) (Investigation, charging and mode of trial) or following charge. This chapter does not deal with the arrest of a person by a Service policeman in anticipation of the commission of a Service offence under section 69 of the Armed Forces Act 2006 (the Act), which is covered in [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention). In those circumstances, the arrest must be reported as soon as practicable to the arrested person's commanding officer (CO), but the CO and his staffs have no role in determining the arrest or custody. It is, however, perfectly proper for a CO to satisfy himself that the arrested person is being dealt with correctly and to raise any concerns with the arresting officer or his superiors.
3. This chapter is principally aimed at the CO and his administrative staff in order to provide them with guidance as to the principles and processes that they need to follow in the event that they need to deprive someone of their liberty.
4. As custody represents a deprivation of a person's liberty, it must be for the minimum period necessary and must not exceed the given time limits. Accordingly, it is essential that there is a close examination of the need for any period of custody and any sensible and practical alternatives must be considered during such an examination. As can be seen below there are very strict criteria which must be applied in each case. Custody is not a punishment and is never to be used as such. In addition, it is essential that the relevant time (the time of arrest or surrender - see footnote 2 and paragraph 79) is properly recorded, as this information will be required by the person in custody's CO or a judge advocate should they be required to review custody at any stage. Legal advice should always be sought if, having read this guidance, a unit is in any doubt as to what action to take in respect of Service custody, especially at the 12 hour review point (see paragraph 21).
5. In broad terms, a CO may authorise custody without charge up to a maximum of 48 hours after the arrest or surrender of the person in custody (referred to in accordance with the legislation as the 'relevant time'², see also paragraph 79), subject to a regime of periodic reviews which must be conducted at no more than 12 hourly intervals. Thereafter, an

¹ With the exception of the isolated circumstances set out in section 98(4) of the Act, persons unlawfully at large.

² Time begins to run from the 'relevant time', defined in the Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 2.

application must be made to a judge advocate who may authorise custody without charge up to a maximum of 96 hours after the relevant time. Following charge, only a judge advocate may authorise custody and this is also subject to periodic review. These general principles, and any exceptions to them, are explained in detail in the remainder of this chapter.

Pay and allowances

6. As a general rule, Service personnel retained in Service custody (other than at MCTC) will continue to be paid. Certain allowances may be affected by Service custody. See [Chapter 10](#) (Absence and desertion), JSP 752 (Tri-Service Regulations for Allowances) and 754 (Tri-Service Regulations for Pay and Charges).

Part 2 – Custody without charge

The arresting officer's decision and reporting action

7. **Grounds for keeping a person in custody.** A person who has been arrested on reasonable suspicion of being engaged in committing or having committed a Service offence³, or in anticipation of committing a Service offence (see paragraph 40 below) may be kept in Service custody without charge but only if it is reasonable to do so and strict criteria are met. (The following provisions also apply in most other circumstances in which a person is in custody without charge, for which see paragraph 39 below.) A person may be kept in custody only if the person who made the arrest has reasonable grounds for believing that keeping the person in custody without being charged is necessary⁴:

- a. To secure or preserve evidence relating to a Service offence for which the suspect is under arrest; or
- b. To obtain such evidence by questioning the suspect (in accordance with JSP 397 (The Service Police Codes of Practice)).

The decision as to whether either of these conditions exists lies with the arresting officer who should complete the Record of arrest by Service Police under Section 69 AFA06 (T-SL-CUS03(3)) at Appendix 3 to [Annex A](#).

8. Once the arresting officer has decided that keeping the person in custody is necessary for the reasons in paragraph 7 above, authorisation to keep the person in Service custody without charge lies with the CO. The arresting officer must therefore report the matter of the arrest and any grounds on which the person is being kept in Service custody to the CO in accordance with the following paragraphs as soon as practicable⁵ (see [Chapter 2](#) (Meaning of commanding officer) for the meaning of CO in relation to Service custody).

9. 'As soon as practicable' is not defined in the Act. It will depend upon all the circumstances prevailing at the time but will generally mean at the first reasonable opportunity. Until the report is made to the CO the arresting officer may keep the person in Service custody⁶. The Record of arrest and custody decision/review (T-SL-CUS03(1)) ([Appendix 1 to Annex A](#)) form should be used for reporting the fact of a person's arrest and any grounds on which he is being kept in Service custody. It is the responsibility of the authorising officer to ensure the accuracy and completeness of the Record of arrest and custody decision/review (T-SL-CUS03) ([Annex A](#)) and to ensure that any paper copy is signed and dated accordingly.

10. There may be other circumstances when a suspect may need to be kept in custody (see paragraph 39 below).

11. The report that a person is being held in Service custody may be made to and received by a CO or the officer to whom the CO's functions have been delegated in respect of custody without charge (see paragraphs 28 to 31 below).

³ Section 67 of the Act also see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

⁴ Section 99(2) of the Act.

⁵ Section 99(1) of the Act.

⁶ Section 99(2) of the Act.

The rights of a person placed in Service custody

12. Where the intention is to retain the person in Service custody, the arresting officer should as soon as practicable notify the person in custody of the following matters:

- a. The offence (or anticipated offence if arrested under section 69 of the Act) for which he was arrested;
- b. The date, location of the arrest and relevant time of arrest;
- c. That the person is to be retained in custody; and
- d. His rights, by giving him the 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#) (Investigation, charging and mode of trial) or by informing him verbally that he:

(1) May nominate an officer, warrant officer or senior non-commissioned officer of his choice to assist him (the assisting officer) and that, in the event that nobody of his choice is available, he may request the assistance of the CO in finding an assisting officer, who will provide him with the names of at least two people available to be nominated (see [Annex B](#) – Guidance on the role of the assisting officer);

(2) Has the right to make representations, orally or in writing, to the arresting officer or to the CO, requesting his release and giving reasons why he should be released; or making any other representations regarding his confinement in custody; and where such representation is made orally or in writing a CO or arresting officer must make a detailed record of the reasons given. Where practicable that record will be read and signed by the person in custody to confirm its accuracy.

Commanding officer's decision

13. Following the receipt of a report that a person is being held in Service custody, the CO (or his delegated representative (see paragraph 28 below)) is responsible for determining, as soon as is practicable, whether to authorise that custody⁷. In making this decision the CO (or his delegated representative) must satisfy himself that there are reasonable grounds for believing that the following two conditions have been met⁸:

- a. The keeping of the person in Service custody without being charged is necessary to:
 - (1) Secure or preserve evidence relating to the offence for which he is under arrest; or
 - (2) Obtain such evidence by questioning him; and
- b. The investigation is being conducted diligently and expeditiously.

14. Only if both criteria at sub-paragraphs 13a and 13b above are met may the CO exercise his discretion and authorise custody. Therefore, if the CO is not satisfied that the investigation is being conducted diligently and expeditiously, the person in custody must be

⁷ Section 99(3) of the Act.

⁸ Section 99(4) of the Act.

either charged or released. In making his decision, the CO must consider carefully whether the investigation could be carried out just as effectively without the person being held in custody. It is permissible for the person to be kept in custody whilst the CO gathers sufficient information to make his decision⁹.

15. Where a CO decides to authorise custody, that authorisation may not be for any longer than 12 hours at a time, subject to the maximum of 48 hours custody¹⁰. However, a CO should not authorise the maximum period of 12 hours unless there is good reason to do so. Twelve hours is an absolute limit and a CO should not routinely authorise such a period of custody. When considering an application, a CO should be prepared to question the reasons given for custody and authorise only such period as appears to him to be reasonable and necessary in all the circumstances. Service policemen or others holding persons in Service custody should be fully prepared in all respects to present sound argument and sufficient reasons justifying the retention of an individual in custody (and any subsequent extensions of that custody on review). This does not require the CO to make a detailed examination of the evidence gathered thus far or of the direction of the investigation, but the arresting officer should be able to explain the relevance of the evidence that may be obtained if custody is authorised.

16. The CO's discretion means that, even if grounds for custody do exist, the CO does not have to place the person in custody. The CO may wish to put in place administrative measures as an alternative to imposing custody without charge. Examples might be ordering a suspect not to return to the scene of the alleged offence or to speak with the alleged victim. There is always a strong presumption that a person will be allowed his liberty and only where custody is necessary should it be authorised. Therefore, when a person is being kept in custody without charge, a CO must¹¹ order his immediate release from custody if, at any time, he:

- a. Becomes aware that the grounds for keeping the person in Service custody no longer apply; and
- b. Is not aware of any other grounds which could justify keeping the person in Service custody.

However, a CO does not have to exercise this power where the person was unlawfully at large at the time of his arrest¹². In such circumstances he should review the matter in light of all the available information. For example, if the person in custody had been apprehended after escaping from custody it may be unwise to release him even if other circumstances relating to his continuing custody have changed.

Notification, representation and nomination of an assisting officer following the decision by the CO

17. Notwithstanding that some of the information contained below may have already been given to the person in custody (see paragraph 12 above) where the intention is to keep the person in custody, the officer authorising custody must as soon as practicable notify the person of the following matters, in writing, and should sign and date the documents¹³:

- a. The name and rank or rate of the authorising officer;

⁹ Section 99(3) of the Act.

¹⁰ Section 99(5) of the Act.

¹¹ Section 98(2) of the Act.

¹² Section 98(3) of the Act.

¹³ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 6(1).

- b. The reason why the person was arrested (the offence or anticipated offence if arrested under section 69 of the Act for which he was arrested);
- c. The date and location of the arrest and relevant time of arrest;
- d. That the person is to be retained in custody;
- e. The grounds for keeping the person in custody under section 99(4)(a) of the Act;
- f. The period of custody authorised;
- g. That he may nominate an officer, warrant officer or senior non-commissioned officer of his choice to assist him (the assisting officer) and that, in the event that nobody of his choice is available, he may request the assistance of the CO in finding an assisting officer, who will provide him with the names of at least two people available to be nominated¹⁴; and
- h. That he has a right to make representations, orally or in writing, to the arresting officer or to his CO, requesting his release and giving reasons why he should be released; or making any other representations regarding his confinement in custody; and where such representation is made orally or in writing a CO or arresting officer must make a detailed record of the reasons given. Where practicable that record will be read and signed by the person in custody to confirm its accuracy.

18. For this purpose, Custody information for person held in custody without charge (T-SL-CUS01) ([Annex C](#)) form should be completed and a copy handed to the person in custody. A copy of this record must be retained by the arresting officer or CO who created it, noting the requirement to retain the records for at least 6 years after the person's release from custody¹⁵. The person in custody is also to be handed a copy of 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#) (Investigation, charging and mode of trial)¹⁶. Sub-paragraph 17g above sets out the right of the person in custody to appoint an assisting officer who will, amongst other things, assist him in preparing any representations he wishes to make about his continuing custody. [Annex B](#) sets out guidance for individuals appointed to perform the role of assisting officer for a person held in custody.

19. The person in custody must be invited to sign to acknowledge receipt of the notices in paragraph 17 above and any refusal to do so is to be noted¹⁷. In addition the CO or person authorising custody must make a note of anything the person in custody says about his arrest or the alleged offence and any comment made in respect of the decision to keep him in custody¹⁸, but must not invite that person to make any such comment.

Review

20. Where Service custody has been authorised, the CO (or his delegated representative) must review that custody no later than the end of the period for which it has been authorised¹⁹. However, the person in custody must be afforded the means and opportunity

¹⁴ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 7(4)(a).

¹⁵ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(5).

¹⁶ This can be found at Annex F to [Chapter 6](#) (Investigation, charging and mode of trial).

¹⁷ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 6(4).

¹⁸ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(2)(k).

¹⁹ Section 100(1) of the Act.

to make any representations²⁰ and where a person in custody makes representations to an arresting officer, the arresting officer must immediately forward those representations to the CO. In these circumstances the CO may decide to conduct an early review of custody. In any event, the review must be conducted before the expiry of the period of custody already authorised. When conducting a review of whether a person is to remain in Service custody without charge, the same test as that set out in paragraph 13 above is to be applied²¹ and any representations of the person in custody should be taken into consideration. The person in custody is to be notified of the CO's decision about any representations made to him and the Arresting officer's or CO's decision on representations. T-SL-CAO01 ([Annex D](#)) form should be used for this purpose.

21. At each review, a CO may authorise only up to a maximum of 12 hours' further custody²². Furthermore, a CO must bear in mind that the maximum period for which a person may be kept in custody without charge on his authorisation is 48 hours from the time of arrest²³. The Record of arrest and custody decision/review (T-SL-CUS03(2)) ([Appendix 2 to Annex A](#)) form should be completed for each review.

22. To accommodate the exigencies of Service life, and also the requirements of the investigative process, there are certain limited circumstances²⁴ in which the review may be temporarily delayed. A review may be postponed at the expiry of an authorised period of Service custody if:

- a. In all the circumstances prevailing at that time, it is not practicable to conduct a review at that time;
- b. The person in custody is being questioned, and the CO is satisfied that an interruption of questioning in order to carry out a review would prejudice the investigation; or
- c. The CO is not readily available.

23. However, whilst recognising that there are circumstances where it may not be practicable to carry out the review at the nominated time, the review must be carried out as soon as practicable thereafter²⁵. It is permissible for the person to be held in custody until such time as the postponed review is conducted²⁶.

24. Where a person, whilst being kept in Service custody without charge for a Service offence (offence A), is arrested²⁷ for another Service offence (offence B), the process described at paragraphs 7 to 11 above must be followed afresh in relation to offence B²⁸. That said, in applying to offence B the test laid down at paragraph 13, the CO is also entitled to take into account any continuing need to secure or preserve evidence, or to question the person, in relation to offence A²⁹. Where a person is arrested for offence B whilst in custody without charge for offence A, the original time limit of 48 hours in respect of offence A will stand³⁰. This means that, on the CO's authorisation, a person may be held in custody

²⁰ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 8.

²¹ Section 100(2) of the Act.

²² Section 100(2) of the Act.

²³ Section 99(6) of the Act.

²⁴ Sections 100(3) and (4) of the Act.

²⁵ Section 100(6)(a) of the Act.

²⁶ Section 100(6)(b) of the Act.

²⁷ In accordance with section 67 of the Act.

²⁸ Section 99(7)(a) of the Act.

²⁹ Section 99(7)(b) of the Act.

³⁰ Section 99(7)(c) of the Act.

without charge for offence B only within the 48 hour maximum permitted from the time of arrest for offence A.

25. The CO's authorisation of custody without charge in respect of offence B does not trigger a new 48 hour cycle of custody without charge. Where a CO decides to authorise custody without charge in respect of offence B, any previous authorisations in respect of offence A cease to have effect³¹. Thus, the next review of the person's custody will fall due at a time not later than 12 hours after custody without charge for offence B has been authorised, depending on the period of custody without charge which has been authorised. When the 48 hour point is reached after the person's arrest for offence A, the person must be released unless his continued custody, either without charge or after charge, is authorised by a judge advocate.

26. To illustrate the way in which these rules operate, the following example is given. A person is arrested for offence A at 0830 hrs on 12 January. The maximum period for which he may be held in custody without charge, on the authority of his CO, is 48 hours and he must therefore be released by 0830 hrs on 14 January at the latest unless his continued custody, either without charge or after charge, is authorised by a judge advocate. If, following the person's arrest for offence A, the CO authorises custody without charge at 0900 hrs on 12 January, the CO must review that custody no later than 2100 hrs on 12 January, assuming he has authorised the maximum of 12 hours' custody. Where the person held in custody without charge for offence A is subsequently arrested for offence B at, say, 1900 hrs on 12 January, his CO may authorise his custody without charge in respect of offence B. If that authorisation takes place at 1930 hrs, there is no requirement for the CO to carry out the review of custody for offence A at 2100 hrs on 12 January. Assuming the CO had authorised the full period of 12 hours in relation to offence B, the next occasion on which a review of custody without charge will fall due is 0730 hrs on 13 January.

27. Subsequent reviews of custody without charge will fall due at intervals of no more than 12 hours in respect of both offences A and B. Unless the CO applies to a judge advocate for an extension of custody without charge (see paragraph 32 below) or the person is charged and held in custody after charge (see paragraph 42 to 59 below), the person must be released by 0830 hrs on 14 January at the latest, which is 48 hours after his arrest for offence A.

Delegation of commanding officer's function

28. The CO may delegate his functions in relation to custody without charge, but there are limits on such delegation³²:

- a. The delegation (including any variation or revocation) must, wherever practicable, be in writing, such as unit routine orders, or on the Delegation of custody powers (T-SL-CUS02) ([Annex E](#)) form designed for this purpose;
- b. The delegate must be:
 - (1) An officer under the CO's command and who is not below the rank of naval lieutenant, military or marine captain or flight lieutenant who is not the arresting officer;
 - (2) A Service policeman of no lower rank than naval lieutenant, military or marine captain or flight lieutenant who is not the arresting officer; or

³¹ Section 99(7)(d) of the Act.

³² The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 3.

(3) If an officer at (1) or (2) is not reasonably available, a Service policeman of any rank/rate who is not the arresting officer.

29. To whom delegation under paragraph 28b(1) may be appropriate will vary from unit to unit and is entirely at the discretion of the CO. Subject to the rank restriction it would, for example, be appropriate for a delegation to be made to a person exercising a command function on behalf of the CO: in Royal Navy units delegation may be to the Executive Officer, Duty CO or Officer of the Day; in Army units delegation may be to the 2IC, sub-unit commanders and duty field officers; and in RAF units delegation may be to the Orderly Officer or one of the station executives.

30. In addition to the general restrictions on delegation at paragraph 28 above as to person, the CO may impose further restrictions as to the limits of delegation having regard to the rank or rate and experience of the person to whom the power has been delegated³³. For example, a CO may limit a delegated officer's power to authorise custody without charge to, say, 12 hours and state that retention in custody beyond this period must be authorised by the CO personally.

31. Where a person with delegated powers exercises any of those powers he must follow the same procedure as for a CO acting in person. On completion he must as soon as practicable and after each exercise of a delegated power, provide a written report to his CO detailing how the powers have been exercised and ensuring that his name, rank or rate are noted on all the records made with regard to custody without charge³⁴. This report should be made on the Commanding officer's decision on custody without charge (T-SL-CUS03(2)), [Appendix 2 to Annex A](#).

Extension by judge advocate of custody without charge

32. A person should not be kept in Service custody for a period over 48 hours unless he has been charged (in which case see paragraphs 42 to 59 below) or the CO has first obtained the authorisation of a judge advocate for extension of Service custody without charge using (T-SL-CAO02) ([Annex F](#)) and with the aid of the form Information to assist commanding officer's application for custody after charge (T-SL-CUS03(3)) At [Appendix 3 to Annex A](#). The CO's application for the extension of Service custody without charge may be made³⁵:

- a. At any time before the end of 48 hours after arrest; or
- b. If not practicable before the end of the 48 hour period, as soon as practicable thereafter but not more than 96 hours after arrest.

33. In those rare circumstances in which sub-paragraph 32b above applies (eg. it is not practicable for an application to be heard by a judge advocate because of the unit's involvement in operations), a CO may authorise continued custody himself³⁶. However, he is under a continuing obligation to review the need for custody and, in this situation, is placed under a more stringent requirement that authorisations may not be for any longer than 6 hours at a time³⁷. In any event, custody without charge cannot be authorised for a period in

³³ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 4.

³⁴ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 5.

³⁵ Section 102(1) of the Act.

³⁶ Section 102(2) of the Act .

³⁷ Section 102(2)(a) of the Act.

excess of 96 hours from the time of arrest³⁸. Should the 96-hour mark be reached, a person in custody must either be charged or released.

34. The ability of the CO to exceptionally authorise continued custody himself does not relieve him of the requirement to seek an extension of custody without charge from a judge advocate. Moreover, where an application is made for an extension of custody without charge after the 48 hours limit has been passed and it appears to the judge advocate that it would have been reasonable for the CO to make the application before the end of that period, the judge advocate *must* refuse the application³⁹. It is therefore particularly important for Service Police investigating offences to keep the timelines for custody under review.

35. Under normal circumstances, where an application can be made within the timescale prescribed and a CO considers that further custody is required, he should make an application to a judge advocate using the Application for a custody hearing – person arrested and in custody without charge form (T-SL-CAO02) ([Annex F](#)), see also paragraph 67. The judge advocate may grant the application if he believes that there are reasonable grounds to justify continued Service custody without charge. In considering whether to authorise continued Service custody, the judge advocate will apply the same test as that set out in paragraph 13 above⁴⁰. See also paragraphs 67 to 95 below for procedural matters for hearings before a judge advocate.

36. A judge advocate may either refuse custody or authorise custody up to a maximum period of 96 hours after the time of arrest⁴¹. Where a person is kept in custody without charge for a Service offence (offence A) and is then arrested for another offence (offence B), the original custody without charge time limit of 96 hours running from the time of arrest for offence A will stand⁴². This means that a person may be held in custody without charge for offence B only within the 96 hour maximum permitted from the time of arrest for offence A.

37. A judge advocate is not permitted to hear an application for continued custody without charge unless the person in custody has been informed in writing of the grounds of the application⁴³. The person in custody must also be brought before the judge advocate⁴⁴. This need not be in person; it may be by means of live link. The person in custody is also entitled to legal representation (see sub-paragraph 75a) and to an adjournment to seek such representation⁴⁵. During such an adjournment, he may continue to be kept in Service custody⁴⁶. The CO is also entitled to legal representation (see paragraph 75b). It is the responsibility of the CO, or his representative, to ensure that he has gathered the relevant information to support the representations which he wishes to make to the judge advocate demonstrating that the test at paragraph 9 above has been met.

38. Where a judge advocate does not authorise continued custody without charge he has no power to impose conditions related to the release of the person in custody.

Custody without charge - other cases

39. The guidance set out in the preceding paragraphs on the procedures to be followed in cases of custody without charge also applies in the following circumstances⁴⁷:

³⁸ Section 102(2)(b) of the Act.

³⁹ Section 102(3) of the Act.

⁴⁰ Section 101(6) of the Act.

⁴¹ Section 101(4) of the Act.

⁴² Section 101(5) of the Act.

⁴³ Section 101(2)(a) of the Act.

⁴⁴ Section 101(2)(b) of the Act.

⁴⁵ Section 101(3) and the Armed Forces (Custody Proceedings) Rules 2009/1098, regulations 18 and 36(1).

⁴⁶ Section 101(3)(b) of the Act.

⁴⁷ Section 103 of the Act.

- a. Where a person is transferred to or taken into Service custody:
 - (1) Having been arrested by the civilian police under a warrant issued by a judge advocate⁴⁸;
 - (2) Having surrendered himself to the civilian police as a deserter or absentee without leave⁴⁹;
 - (3) Having appeared in proceedings before a civilian court where he is suspected of illegal absence⁵⁰; or
 - (4) Having been arrested under a warrant because of a failure to comply with the conditions of his release imposed by the police or civilian court before which he appeared⁵¹; or
- b. In any other case where a person arrested by a member of a UK police force or overseas police force is transferred into Service custody⁵².
- c. Where a judge advocate issues a warrant for the arrest of a witness, where a witness summons would probably not procure witness attendance or the witness has failed to comply with a witness summons. See [Chapters 29](#) (Court Martial proceedings) and [32](#) (Service Civilian Court).

40. There is, however, one exception where the CO takes no part in the authorisation of custody without charge. This concerns section 69 of the Act; arrest in anticipation of a commission of a Service offence. In these circumstances the test that needs to be applied by the Service Police is that the person in Service custody can be kept in custody until such time as the policeman is satisfied that the risk of him committing the offence has passed. It is the arresting Service policeman's responsibility at all times to keep under review the need and if necessary, the continuing need, to hold a person arrested under section 69, in custody. Detailed guidance on the responsibilities and procedures are contained in [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention). The role of the CO in these circumstances is different in that he plays no part in determining whether the person should be held in custody. However, the CO should satisfy himself that JSP 837 (Service Code of Practice for the Management of Personnel in Service Custody and Committal to Service Custody Premises and Civil Prisons) is being observed at all times (see paragraph 96 below).

Records

41. A written record must be made and signed on every occasion that custody or continuation of custody without charge is authorised and when the person is released from custody⁵³. The commanding officer's decision on custody without charge (T-SL-CUS03(2)) at Appendix 2 to [Annex A](#) should be used for this purpose where authorisation for custody is given by the CO or someone acting on his delegated authority. A judge advocate authorising custody should record this decision in writing and provide a copy to the CO. The record must be retained for at least 6 years after release⁵⁴ and a copy must be given to the

⁴⁸ Section 313 of the Act.

⁴⁹ Section 315 of the Act.

⁵⁰ Section 316 of the Act.

⁵¹ Section 317 of the Act.

⁵² Section 103(b) of the Act.

⁵³ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(2)(l).

⁵⁴ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(5).

person or his legal representative on request as soon as practicable when the person leaves custody or is taken before a judge advocate or a court⁵⁵.

⁵⁵ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(4).
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Part 3 - Custody after charge

42. Once a person has been charged the CO may decide that he should be released from Service custody and impose administrative conditions on the Service person (see paragraph 57) (using T-SL-CAO04 [Annex G](#)). Where, however, a person (the accused) is kept in Service custody after being charged⁵⁶ with a Service offence, the CO is to ensure that the accused is brought before a judge advocate as soon as practicable⁵⁷ for authorisation (Using T-SL-CAO03 [Annex I](#)).

43. Where the accused is brought before a judge advocate he may order that the accused is kept in Service custody, but only if the judge advocate is satisfied that one or more of the following three conditions are met⁵⁸:

a. There are substantial grounds for believing that the accused, if released from Service custody, would:

- (1) Fail to attend any hearing in the proceedings against him; or
- (2) Commit an offence while released; or
- (3) Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or

b. The accused should be kept in Service custody for his own protection or, if he is under 17 years of age, for his own welfare or in his own interests; or

c. Because of lack of time since the accused was charged, it has not been practicable to obtain sufficient information for the purpose of deciding whether condition a. or b. above is met.

44. It follows that in deciding whether to apply for custody after charge a CO must be satisfied that there is sufficient evidence to support at least one of these conditions, having regard also to the matters in paragraph 46 below. It is the responsibility of the CO, or his representative, to ensure that he has gathered the relevant information to support the representations which he wishes to make to the judge advocate that any of the conditions at paragraph 43 above have been met. See also paragraph 56 below in relation to a CO needing to consider the requirements which should be imposed by a judge advocate on an accused's release where a judge advocate decides not to authorise that person's custody after charge.

45. It should be noted that the requirement to show 'substantial grounds' for holding an accused in custody after charge is a heavier burden to satisfy than the requirement to demonstrate 'reasonable grounds' for holding a person in custody without charge. There is therefore a presumption that an accused will be released unless there are good reasons, supported by a properly argued case, for keeping him in custody.

46. When deciding whether or not any of the conditions set out at sub-paragraph 43a are met, the judge advocate is required⁵⁹ to take into account any of the following conditions which appear to be relevant:

⁵⁶ For these purposes a person is to be treated as charged with an offence when a charge is brought by the CO in accordance with section 120(2) of the Act (at his own discretion) or section 122(1) (on the direction of the DSP). See the Armed Forces (Custody Proceedings) Rules 2009/1098, rule 25(3). For conditions required in order to bring a charge see [Chapter 6](#) (Investigation, charging and mode of trial).

⁵⁷ Section 105(1) of the Act.

⁵⁸ Section 106 of the Act.

- a. The nature and seriousness of the offence with which the accused is charged (and the probable method of dealing with him for it);
- b. The character, antecedents, associations and social ties of the accused;
- c. The accused's behaviour on previous occasions while charged with a Service offence and released from Service custody or while on bail in criminal proceedings; and
- d. The strength of the evidence that the accused committed the offence.

The judge advocate is also required to take into account any other considerations which appear to be relevant.

47. Having considered the evidence placed before him and applied the criteria set out at paragraph 43 above, a judge advocate may authorise custody for a period not exceeding 8 days after the day on which the order was made⁶⁰. Whilst 8 days is set as the maximum, the judge advocate will order only such period of custody as seems to him to be merited in all the circumstances.

48. Special rules apply where an accused has been charged with murder, rape or manslaughter, or with an attempt to commit either of the first two offences. In these cases, where representations have been made concerning the conditions at sub-paragraph 43a above and the judge advocate decides not to authorise Service custody, he must state the reasons for his decision and have them included in the record of proceedings⁶¹.

49. An order made by a judge advocate authorising the keeping of the accused in Service custody will cease to have effect⁶²:

- a. If the accused is subsequently released from Service custody; or
- b. Once the accused has been sentenced in respect of the offence with which he is charged.

Review

50. A judge advocate must review an order authorising an accused to be kept in Service custody before the end of the period for which custody has been authorised⁶³. However, at all times, including between reviews by a judge advocate, it is incumbent upon the accused's CO to consider whether the continuation of custody is necessary. If at any time it appears to the accused's CO that the grounds on which an order authorising custody was made no longer exist, he must either release the accused from Service custody or request a review⁶⁴. An accused may at any time communicate to his CO any change in circumstances which may render his continuing custody unnecessary, and the person in charge of the custody facility in which the accused is held must report to the CO as soon as possible any such circumstances when he becomes aware of them. Where the change of circumstances is absolutely clear, such that continued retention in custody is not required, the CO shall release the accused. However, if in any doubt and in the normal course, the CO should

⁵⁹ Section 105(4) of the Act.

⁶⁰ Section 105(3) of the Act.

⁶¹ Section 105(5) of the Act.

⁶² Section 105(6) of the Act.

⁶³ Section 108(1) of the Act.

⁶⁴ Section 108(2) of the Act.

request a review by a judge advocate using the Request for a review of Service custody after charge (T-SL-CAO04) ([Annex G](#)) form. The CO should make any representations about the review hearing on the Representations to judge advocate about the requirement for a review of custody after charge by way of a hearing (T-SL-CAO05) ([Annex H](#)) form. If a CO makes such a request the review must be carried out as soon as practicable⁶⁵. In reviewing the continuing need for custody, the judge advocate is required to apply the same test as that set out at paragraph 43 above⁶⁶.

51. At the first review in front of a judge advocate following the authorisation of custody after charge, the accused or his legal representative may advance any argument of fact or law against his continuing custody, whether or not that argument has been advanced previously⁶⁷. At the second and subsequent reviews, the judge advocate need not hear arguments as to fact or law which have been heard previously⁶⁸.

52. When conducting a review of custody after charge, a judge advocate will normally be able to authorise a period not exceeding 8 days after the day on which the order is made⁶⁹. However, at a review conducted as a hearing, the judge advocate may authorise the keeping of the accused in Service custody for a period not exceeding 28 days⁷⁰, but only if:

- a. The accused consents; and
- b. The accused is legally represented.

Release from custody after charge

53. If at an initial hearing of an application for custody after charge (see paragraph 43 above), or at a subsequent review, a judge advocate does not authorise the keeping of the accused in Service custody, the accused must be released from Service custody without delay⁷¹. This release may be unconditional or subject to requirements (see paragraph 54 below).

Release from custody subject to requirements

54. In the civilian courts where a defendant is not remanded in custody he will be released on bail. This bail may be unconditional or subject to certain bail conditions ordered by the court. These bail provisions are mirrored in the Act. Where the judge advocate releases an accused from Service custody after charge or decides not to place him in custody after charge he may, nevertheless, require the accused to comply with such requirements as he considers necessary⁷²:

- a. to secure the attendance of the accused at any hearing in the proceedings against him;
- b. to secure that he does not commit an offence while released from custody;
- c. to secure that he does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or

⁶⁵ Section 108(3) of the Act.

⁶⁶ Section 108(4) of the Act.

⁶⁷ Section 108(5) of the Act.

⁶⁸ Section 108(6) of the Act.

⁶⁹ Section 108(4) of the Act.

⁷⁰ Section 108(7) of the Act.

⁷¹ Section 107(2) of the Act.

⁷² Section 107(3) of the Act.

d. for his own protection or, if he is under the age of 17, for his own welfare or in his own interests.

55. When a judge advocate imposes requirements on releasing a person from custody after charge the unit which made the application is to report those requirements to the Service Police Crime Bureau.

56. When a CO is to make an application for an accused to be held or kept in custody after charge he will need to take into account that a judge advocate has the power to release an accused from custody subject to his compliance with certain requirements. A CO should therefore consider what conditions he would wish to be applied to the accused's release in the event that the judge advocate is minded not to authorise custody after charge. It may, for example, be appropriate to invite the judge advocate to impose a requirement that the accused does not go within a specified distance of the home address or the unit of a witness where the CO considers that there is a substantial risk of the accused interfering with that witness. Similarly, if the CO considers that there is a substantial risk of a person charged with AWOL offences failing to attend future hearings he may wish to invite the judge advocate to impose a requirement that the accused does not leave his unit and/or surrenders his ID card or passport.

57. If a person is to be released from custody there is nothing to prevent the CO imposing conditions on an administrative basis by ordering that the accused complies with certain requirements or refrains from particular activities. However, a CO may wish a judge advocate to impose the sort of conditions set out at paragraph 56 above where he does not consider that ordering an accused to do, or not do, something would achieve the desired effect or where the accused is a relevant civilian and the CO has no power to give such an order. Where the accused fails to attend a hearing to which the requirement relates he will commit an offence and where an accused may fail or has failed to comply with a requirement imposed by a judge advocate, the CO may order his arrest⁷³ (see paragraph 61 below).

58. There is no equivalent provision for the imposition of conditions where a person is released from custody without charge.

59. An accused, anyone acting on his behalf or his CO may make an application for any requirement of the type set out at paragraph 54 above to be varied or discharged by a judge advocate⁷⁴ using the Request for judge advocate to review release conditions (T-SL-CA007) at [Annex K](#). An accused who is the subject of such a requirement commits an offence if, without reasonable excuse, he fails to attend any hearing to which the requirement relates⁷⁵. In the event the accused commits one of these offences the advice of a staff legal adviser is to be sought, both as to charge and procedure.

⁷³ Section 110(3)(c) of the Act.

⁷⁴ Section 107(4) of the Act.

⁷⁵ Section 107(5) of the Act.

Part 4 - Custody during proceedings of Court Martial or Service Civilian Court

60. During the proceedings of the Court Martial (CM) or the Service Civilian Court (SCC), the grounds for custody and method of review are, in essence, unchanged from the pre-trial procedures which are applicable to an accused considered for custody after charge⁷⁶. However, the judge advocate has an additional power in these circumstances. As well as the grounds on which he may authorise custody at paragraph 43 above, the judge advocate is also entitled to make an order for custody if it appears to him that, where a case has been adjourned for inquiries or a report, it would be impracticable to complete the inquiries or make the report without keeping the accused in Service custody⁷⁷.

Arrest after charge or during proceedings

61. **By order of commanding officer.** The CO of an accused who has been charged with, or is awaiting sentence for, a Service offence and is not in Service custody, may order the arrest of that accused if he is satisfied that taking the accused into custody is justified⁷⁸. Taking an accused into custody is justified⁷⁹ if there are reasonable grounds for suspecting that, if not taken into Service custody, he would:

- a. Fail to attend any hearing in the proceedings against him; or
- b. Commit an offence; or
- c. Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

What constitutes reasonable grounds for suspecting the accused will do one or more of these things will vary from case to case and person to person. An accused who has cooperated with an investigation and attended all hearings to date, but has threatened not to turn up for a further hearing may well have been speaking under emotional strain. The CO should consider whether there is a real danger that he will not appear at the hearing. Conversely, an uncooperative repeat offender on a charge of violence who has expressed dissatisfaction with the disciplinary process and already threatened a witness is more likely to interfere with that witness again or otherwise obstruct the course of justice. These are matters for the CO's judgement.

62. Taking a person into Service custody is also justified, under the power set out at paragraph 61 above, if⁸⁰:

- a. The accused has failed to attend any hearing in the proceedings against him (but see below); or
- b. There are reasonable grounds for suspecting that he should be taken into Service custody:
 - (1) For his own protection; or

⁷⁶ Section 109(1) of the Act.

⁷⁷ Section 109(2) and section 106(4) of the Act.

⁷⁸ Section 110(1) of the Act.

⁷⁹ Section 110(2) of the Act.

⁸⁰ Section 110(3) of the Act.

(2) Where the accused is under the age of 17, for his own welfare or in his own interests; or

c. There are reasonable grounds for suspecting that:

(1) If not taken into Service custody, he would fail to comply with a requirement imposed by a judge advocate in accordance with paragraph 54 above; or

(2) He has failed to comply with such a requirement.

63. The condition at sub-paragraph 62a above should only be used as justification to take an accused into custody in limited circumstances. The accused may have a good reason for having failed to attend a hearing. That a person has failed to attend a hearing is not usually sufficient on its own to justify orders for his arrest. Such failure may, however, result in a CO having reasonable grounds to suspect that, if not taken into custody, he will fail to attend another hearing in the proceedings, or satisfy one or more of the other criteria at sub-paragraphs 61 a to c above. The condition at sub-paragraph 62b(1) above will require a clear threat to the person, and should usually be tackled by removing the threat, if possible, rather than by taking the person into custody. A threat that the accused may commit suicide or other self-harm may be sufficient if the threat is reasonably believed to be genuine. The condition at sub-paragraph 62b(2) above may exist, for example, where a person under 17 is known not to have a home to return to and there is a real danger that he may run away to avoid disciplinary action.

64. An accused who is arrested and kept in custody under the power outlined at paragraph 61 above must be brought before a judge advocate as soon as practicable for a review of whether he should remain in Service custody⁸¹. The review in these circumstances should be carried out in accordance with the procedure for reviewing custody after charge (see paragraph 43 above)⁸². Application for the review should be made using the Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form.

65. **At the direction of a court.** If a judge advocate is satisfied that taking an accused into custody is justified, he may direct the arrest of the accused at any time between the accused being arraigned before the CM or the SCC and the conclusion of proceedings before that court⁸³. Any person with the power to arrest the accused for a Service offence may also arrest an accused in pursuance of such a direction from a judge advocate⁸⁴.

66. Where a judge advocate exercises the power described at paragraph 65 above, he must apply the same test as that which a CO is required to apply at paragraphs 61 and 62 above⁸⁵. An accused who is arrested and kept in custody under the power outlined at paragraph 65 above must be brought before a judge advocate as soon as is practicable for a review of whether he should remain in Service custody⁸⁶. The review in these circumstances should be carried out⁸⁷ in accordance with the procedure for reviewing custody after charge (see paragraph 43 above).

⁸¹ Section 110(4)(a) of the Act.

⁸² Section 110(4)(b) of the Act.

⁸³ Section 111(1) of the Act.

⁸⁴ Section 111(2) of the Act.

⁸⁵ Section 111(3) of the Act.

⁸⁶ Section 111(4)(a) of the Act.

⁸⁷ Section 111(4)(b) of the Act.

Part 5 - Custody hearings before judge advocates

Matters applying to all custody hearings

67. There are broadly six situations in which a custody hearing before a judge advocate is required:

- a. On application of the CO for an extension of custody without charge;
- b. On application for authorisation of custody after charge;
- c. Where an accused has been arrested and taken into custody after charge;
- d. Where an accused has been arrested and taken into custody during proceedings;
- e. On request by the CO for a review of custody after charge; and
- f. On an application for variation of the 'release' conditions (see paragraph 59).

68. Each separate situation attracts varying notification and request requirements to the court administration officer (CAO), person in custody (or his legal representative) or CO as appropriate, as outlined below.

69. In all situations, a notification or request for a review may initially be made orally. This enables a CO to request the CAO to make arrangements for a custody hearing before raising the necessary paperwork, and therefore may expedite the process. Staff administering custody arrangements are encouraged to contact the CAO by telephone in the first instance (up to date telephone numbers, addresses and contact details are included on the relevant forms). When doing so, care must be taken to provide accurate information as to the reason why a hearing is required (custody without or after charge) and the timescale in which the hearing must take place.

70. Where written notification is also required, this may be effected by⁸⁸:

- a. Sending it to that person's CO;
- b. Delivering it to him personally;
- c. If the person is a Service person or relevant civilian, leaving it at his usual place of abode;
- d. By post in a letter addressed to his unit;
- e. By post to a person's legal representative; or
- f. By Document Exchange (DX), fax or email to the person's legal representative, where a DX box, fax number or email address has been provided and the legal representative has not refused service by that means.

71. On receipt of the relevant notification the CAO will arrange a custody hearing⁸⁹ before a judge advocate, appointing a court recorder and interpreter (if required) for the hearing and

⁸⁸ The Armed Forces (Custody Proceedings) Rules 2009/1098, rules 4 to 7.
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notifying the CO and the person to whom the proceedings relate. If a court reporter is not appointed the judge advocate will keep a written record of the proceedings⁹⁰. The time and place of the hearing will be determined after consultation with the Office of the Judge Advocate General.

Live link

72. Custody hearings may be conducted by live link⁹¹. Such a live link will usually be a television link, but may be by telephone or similar e.g. IP, as long as the judge advocate, the accused and the CO (or their legal representatives), any interpreter and any witness giving evidence can both hear and be heard by one another.

73. In addition to this general ability to conduct custody hearings by live link, witnesses may with the permission of the judge advocate give evidence through a live link where it is not reasonably practicable for the witness to attend the hearing or if it is in the interests of justice⁹². An application for permission for a witness to give evidence by live link must be made by the person wishing to call him as soon as he believes that the person is likely to be able to give material evidence and it is not reasonably practicable for the witness to attend the hearing⁹³. The application must be made in writing, copied to the CO or the person to whom the proceedings relate⁹⁴. The application must be served on the CAO and state:

- a. The grounds of the application;
- b. The name and, where applicable, the Service number, rank or rate and unit of the witness;
- c. Where the witness is under 18, the date of birth of the witness;
- d. The country and place from where the witness will be giving evidence; and
- e. The name, occupation and relationship to the witness of any person proposed to accompany the witness and the grounds for believing that person should accompany the witness whilst giving evidence.

74. The judge advocate must not decide whether the application should be granted without first giving the opposing party (CO or accused as the case may be) an opportunity to make representations about the application⁹⁵, and may give permission for the live link subject to conditions such as to place of giving evidence and presence of anyone with the witness when giving evidence⁹⁶.

Legal representation

75. Both the accused and the CO have the right to be legally represented at a custody hearing⁹⁷. Broadly speaking 'legal representative' means a practising barrister or solicitor⁹⁸.

⁸⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 14.

⁹⁰ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(5).

⁹¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 16.

⁹² The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 16(1).

⁹³ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁵ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁷ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 18(1).

⁹⁸ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 2(1).

a. **Legal representation of person held in custody.** The person may wish to be represented by a civilian lawyer and legal aid or the duty solicitor scheme may be available to the accused for this purpose. Alternatively the accused may choose to be represented by a Service lawyer where one is available. For legal aid, see JSP 838 (Armed Forces Legal Aid Scheme). The right to be legally represented imposes no obligation on the accused to instruct a lawyer and an accused may represent himself.

b. **Legal representation of the commanding officer.** It will be normal for the CO to be represented at a custody hearing by a Service lawyer.

Procedure

76. The strict rules of evidence do not apply to custody hearings⁹⁹. Both the CO and the accused (or their legal representatives) must be heard, but otherwise the judge advocate can use any procedure that appears to him best to serve the interests of justice¹⁰⁰. Where oral evidence is given it must be given on oath or affirmation¹⁰¹. Proceedings may be adjourned in order for an unrepresented accused to seek legal representation¹⁰².

Witnesses and summonses¹⁰³

77. A judge advocate may issue a witness summons requiring the witness to attend before a judge advocate and give evidence or produce a document or thing, the Summons to witness (T-SL-CUS06) ([Annex J](#)) form is to be used for this purpose. Any party may apply for a witness summons and must do so as soon as practicable after becoming aware of the grounds for doing so. Judge advocates may also issue witness summonses of their own motion. Special rules apply to applications for a witness to produce a document or give evidence about information apparently held in confidence where the document or information relates to another person. Such applications must be in writing and contain the same declaration of truth as a witness statement. In such circumstances all parties must have at least 7 days to make representations as to whether the issue of the summons is appropriate, and a hearing to determine the application may be ordered¹⁰⁴.

Application for an extension of custody without charge

78. An application for an extension of custody without charge may be made by the CO¹⁰⁵ or someone acting on his behalf using the Application for a custody hearing – person arrested and in custody after charge (T-SL-CAO02) ([Annex F](#)) form. This form is to be sent to the CAO as soon as possible and this may be carried out by fax or e-mail, or by delivering it to him, leaving it at his address or by post. A copy of the form at [Annex F](#) is to be sent to the accused or his legal representative, and this may be done by:

- a. Delivering it to the person under arrest, his legal representative or CO;
- b. Leaving it at or posting it to the notified address of the legal representative¹⁰⁶;

or

⁹⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(1).

¹⁰⁰ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(2).

¹⁰¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 21.

¹⁰² The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 36(1).

¹⁰³ The Armed Forces (Custody Proceedings) Rules 2009/1098, Schedule 1.

¹⁰⁴ Detailed provisions are in the Armed Forces (Custody Proceedings) Rules 2009/1098, Schedule 1.

¹⁰⁵ CO for this purpose includes a person with delegated authority to authorise custody in accordance with paragraphs 27 to 30.

¹⁰⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 4(1).

c. Fax or e-mail unless the accused or his legal representative as appropriate has indicated, in writing, that he is not willing to regard a document as duly served on him if transmitted by fax or e-mail as appropriate¹⁰⁷.

79. The information to be provided to the CAO is¹⁰⁸:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the person arrested and, where applicable, his rank/rate, Service number and ship/unit/establishment;
- c. The name and address of the legal representative of the person arrested, if known;
- d. The nature of the offence(s) for which the person arrested has been arrested;
- e. The relevant time (see note below);
- f. The general nature of the evidence on which the person arrested has been arrested;
- g. What inquiries relating to the offence have been made and what further inquiries are proposed; and
- h. The CO's reasons for believing the continued keeping of the person arrested in custody is justified.

Note: 'relevant time' means; in relation to a person arrested under section 67 (the general power of arrest) or section 69(1) of the Act or arrested by a civilian policeman and subsequently transferred into custody under sections 313(4), 316(3) or 317(4) of the Act, the time of the arrest; or in relation to a person delivered into custody following surrender under section 315 of the Act, the time of the surrender.

80. On receipt of this notification the CAO will arrange a custody hearing in accordance with the Armed Forces (Custody Proceedings) Rules 2009, rule 19.

Notification to the person arrested

81. The person arrested must be notified¹⁰⁹:

- a. That an application for an extension of custody without charge¹¹⁰ is to be made;
- b. Of the matters at sub-paragraphs 79 f to h above; and
- c. If the person arrested has not appointed a legal representative, of the entitlement to legal representation at the hearing of the application.

¹⁰⁷ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 4(1).

¹⁰⁸ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 24(2).

¹⁰⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 24(1)(b).

¹¹⁰ Section 101(1) of the Act.

The Application for a custody hearing – person arrested and in custody without charge (T-SL-CAO02) ([Annex F](#)) form should be used for this purpose.

Notification to CAO of custody after charge

82. Where an accused is being kept in custody after charge the CO or someone acting on his behalf must as soon as practicable notify the CAO of that fact and inform the accused in writing that he is to be brought (this term includes by live link) before a judge advocate as soon as practicable. The Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form should be used for this purpose. The information required by the CAO and the accused is the same, namely:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, his rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date and time that the accused was charged; and
- f. The CO's reasons for believing that the continued keeping of the accused in custody is justified.

Documents can be served on a person's legal representative by document exchange (DX), fax or email, if that legal representative has given a DX or fax number or email address and has not refused to accept service by that means. If a document is served electronically, a hard copy need not be sent.

83. On receipt of this notification the CAO will arrange a custody hearing before a judge advocate¹¹¹.

Notification that the accused has been arrested and taken into custody after charge or during proceedings

84. Where an accused has been arrested on the orders of the CO¹¹² or on the order of the judge advocate during proceedings,¹¹³ the CO or someone acting on his behalf must as soon as practicable notify the CAO of that fact. He must also notify the accused, in writing, that, as soon as practicable, he is to be brought before a judge advocate. In each case the information to be provided, ideally using the Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form, is as follows¹¹⁴:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, his rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;

¹¹¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 25(4).

¹¹² Section 110(1) of the Act (Arrest on the orders of the CO).

¹¹³ Section 111(1) of the Act (arrest on the order of the judge advocate during proceedings).

¹¹⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(2).

- d. The charge(s);
- e. The date, time and place that the accused was arrested pursuant to the order or direction; and
- f. If the arrest was made¹¹⁵, the CO's reasons for believing that the keeping of the accused in custody is justified.

This provision as to notification does not apply where the accused is arrested in the presence of a judge advocate¹¹⁶.

85. On receipt of this notification the CAO will arrange a custody hearing before a judge advocate¹¹⁷. If the accused is already before a judge advocate when arrested, the judge advocate will usually immediately carry out a review of the necessity for custody.

Request by CO for a review of custody after charge

86. Where a CO considers that the grounds for keeping an accused in custody after charge have ceased to apply, and he decides to seek a review by a judge advocate rather than immediately releasing the accused¹¹⁸, the CO should request for such a review to the CAO. Where such a request for review is made, the CO or someone acting on his behalf must inform the accused in writing that the review has been requested, and of the matters at sub-paragraphs f and g below. For these purposes, the Request for a review of Service custody after charge (T-SL-CAO04) ([Annex G](#)) form should be used. The information to be supplied with the application for review is as follows¹¹⁹:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, his rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date on which the extant order under section 105(2) of the Act was made and the period of custody authorised by it;
- f. The circumstances which have caused the CO to consider that the grounds on which that order was made have ceased to apply; and
- g. If it appears to the CO that release conditions should be imposed by the judge advocate¹²⁰.

87. If such a situation arises during the accused's trial by the court and on a day when the court is sitting, the request must be made to the judge advocate at the trial. The application should be made in writing (but may be done initially orally) and this will be done by the DSP, at the request of the CO.

¹¹⁵ Section 110(1) of the Act.

¹¹⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(3).

¹¹⁷ In accordance with the Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(4).

¹¹⁸ Section 108(2) of the Act.

¹¹⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 27(1).

¹²⁰ Section 107(3) of the Act.

Application for variation of release conditions

88. Where the accused or a CO wishes to apply to vary the requirements placed upon the accused when released from custody after charge (see paragraph 59 above), the person applying for a variation must make an application to the CAO, supported by the following information¹²¹:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, his rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date of the hearing¹²²;
- f. The circumstances which have caused the applicant to consider that any such requirement should be varied or discharged; and
- g. The variation or discharge sought.

89. Where the application is made by the CO, he or someone acting on his behalf must inform the accused that the application is being made and of the information at paragraphs 88 f and g above¹²³. Likewise, if the accused is the applicant then he or someone acting on his behalf (usually his legal representative) must inform the CO¹²⁴. If the application for review is made orally (eg. over the telephone in order to expedite a hearing) written notification must follow¹²⁵ using the Request to judge advocate to review release conditions (T-SL-CUS07) ([Annex K](#)) form.

90. If such a situation arises during the accused's trial by a court and at a time when the court is sitting, the request must be made to the judge advocate at the trial. The application should be made in writing (but the initial request may made orally) and this will be done by the Director of Service Prosecutions (DSP), at the request of the CO.

Reviews

91. Where a judge advocate makes an order for custody after charge¹²⁶ reviews of custody by a judge advocate are required¹²⁷. The judge advocate when making the initial order for custody will specify the date for review, but may decide to carry out a review on a different date when requested to do so by the CO¹²⁸ (in which case, if it is reasonably practicable to do so, the review will take place before the previously determined date) or it is not practicable or in the interests of justice for the review to take place on the previously determined date¹²⁹.

¹²¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(1).

¹²² Section 105(1) and any requirements imposed under Section 107(3) of the Act (including any such requirement as previously varied or discharged under s 107(4)).

¹²³ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(2).

¹²⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(3).

¹²⁵ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(4).

¹²⁶ Section 105(2) of the Act.

¹²⁷ Under sections 108(1), 110(4), 111(4) and 171(2) of the Act.

¹²⁸ Under section 108(2) of the Act.

¹²⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 30(2).

92. A judge advocate may dispense with the requirement for a hearing to review custody, but the review must take place at a hearing if:

- a. It is the first review in relation to the accused;
- b. It has been requested by the CO because it appears to the CO that the grounds on which the order for custody was made have ceased to exist¹³⁰; or
- c. The review takes place at any time whilst the accused is before the CM (i.e. during the trial)¹³¹.

93. Other than the mandatory requirements for a hearing in paragraph 92 above, reviews may be conducted on the basis of written representations by the CO or the accused where¹³²:

- a. The judge advocate is satisfied on the basis of representations made by the CO that the grounds on which the order for custody after charge was made continue to exist;
- b. Any representations by the accused do not advance any arguments of fact or law on his behalf which have not been heard previously; and
- c. The judge advocate is satisfied that there is no other cause for carrying out a review at a hearing.

94. The judge advocate cannot make this determination unless the CO makes the representation required by paragraph 93a above. It is therefore essential if an accused is to be kept in custody that the CO make appropriate representations. Both the accused and the CO are entitled to make written representations, and such representations may be with respect to¹³³:

- a. The need for a hearing to carry out the review; and
- b. Whether the judge advocate should make an order authorising the continued keeping of the accused in custody.

Where the CO and/or accused makes representations as to review they must serve a copy on the other party and on the CAO. When the judge advocate reviews custody without a hearing he will notify the CAO of his decision, who will in turn notify the CO and the accused¹³⁴.

95. A judge advocate may not on a review impose any 'release conditions'¹³⁵ (see paragraph 54 above) other than at an oral hearing¹³⁶.

¹³⁰ Section 108(2)(b) of the Act.

¹³¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(2).

¹³² The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(3).

¹³³ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 32(2).

¹³⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 34(2).

¹³⁵ Section 107(3) of the Act.

¹³⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(4).

Part 6 - Custody - Miscellaneous matters

General procedures

96. Persons authorised to be held in Service custody should normally be kept in licensed custodial facilities where the provisions of JSP 837 (Code of Practice for the Management of Personnel in Service Custody) apply and, where applicable, the Service Custody and Service of Relevant Sentences Rules 2009 are observed. Where, due to the exigencies of Service life, such custodial facilities are not available (for example, onboard Her Majesty's ship/submarine away from base port) other secure accommodation may be used, preferably in Service premises. In these circumstances, close supervision will be required to reduce the risk of self-harm and escape, and JSP 837 (Service Code of Practice for the Management of Personnel in Service Custody and Committal to Service Custody Premises and Civil Prisons) is to be followed as far as practicable. Where licensed Service custody facilities are not used, it is advisable to keep a record of what efforts were made to secure such facilities and why they were not available.

Personnel taken into Service custody abroad

97. Reference should be made to JSP 837 (Code of Practice for the Management of Personnel in Service Custody) in all situations in which personnel are held in custody abroad.

Individuals under medical care

98. When an individual who it is necessary to retain in custody is sent to a Service hospital or other establishment within the Defence Secondary Care Agency as a patient, his CO is to ensure that the grounds for retention in custody are stated in writing to the CO of the facility under whose command the individual may now lie. The hospital is to be given as much advance warning of the arrival of such a patient as is practicable.

99. Where a Service person is admitted to a Service hospital whilst in custody or undergoing a sentence of detention, it is the responsibility of the unit sending the person in custody to the hospital to provide guards throughout the full period of hospitalisation. Where a person is held in Service custody or detention at MCTC and requires to be sent to a Service medical facility for treatment, MCTC will request guarding assistance from his parent unit.

100. Where it is necessary to retain someone in custody while undergoing treatment at a civil hospital, his CO is to make the arrangements necessary for his custody in liaison with the hospital management. Where a person is held in Service custody or detention at MCTC and requires to be sent to a civil hospital MCTC will request guarding assistance from his parent unit.

Escorts

101. Escorts provided for persons held in Service custody are to be given written orders setting out their duties in accordance with JSP 837 (Code of Practice for the Management of Personnel in Service Custody).

Transport of persons in Service custody

102 Transport of persons in Service custody is to be carried out in accordance with the details contained in JSP 837 (Code of Practice for the Management of Personnel in Service Custody).

Part 7 - Transitional guidance

103. This part outlines the main transitional provisions related to Part 3 of the Act contained in the section 380 Order the Armed Forces (Custody Proceedings) Rules 2009 and the Armed Forces (Custody Without Charge) Regulations 2009. The basic aim of the transitional arrangements for Part 3 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie before 31 October 2009).

Authorisation of pre-charge custody and custody without charge

104. Where pre-charge custody had been authorised before commencement in accordance with sections 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957 and that person is in custody on commencement, the custody remains valid and shall be treated as if the person was arrested under section 67 of AFA 2006 and was custody authorised under section 98(1) of that Act¹³⁷ (custody without charge).

105. Where authorisation of custody has been made under the Custody and Summary Dealing (Army) Regulations 2006, the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000 or Naval Custody Regulations 2000, that authorisation remains valid on commencement¹³⁸ and a delegation of a CO's powers and functions under the previous regulations will be treated as a valid delegation under the 2009 Regulations¹³⁹.

106. Any further periods of custody without charge must be granted in accordance with the 2009 Regulations and care should be taken to ensure that a person who was a delegated officer under the old regulations remains so under the new. It should also be noted that the coming into force of the Armed Forces (Meaning of Commanding Officer) Regulations 2009 may, in certain very limited circumstances, mean that the CO has changed on commencement.

107. The maximum periods of custody without charge that may be authorised remain the same. A judge advocate has the power under section 101(1) of the 2006 Act to extend custody without charge of a person arrested under the SDAs in the same way that he can for a person arrested after commencement¹⁴⁰.

108. The flow diagram below should provide assistance and in cases of doubt, staff legal advice should be sought.

Applications to a judge advocate

109. Where, after commencement, it is necessary to apply to a judge advocate (previously a judicial officer) for an extension of custody without charge or for post charge custody, this should be done in accordance with the Armed Forces (Custody Proceedings) Rules 2009 (SI 2009/1098), irrespective of whether the individual was arrested under the 2006 Act or the SDAs.

Authorisation of post charge custody and custody after charge

110. Any order by a judicial officer under sections 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957 authorising post charge custody remains valid on

¹³⁷ Article 35 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

¹³⁸ Article 36(2) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

¹³⁹ Paragraph 3 to the Schedule to the Armed Forces (Custody Without Charge) Regulations 2009/1097.

¹⁴⁰ Article 37 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

commencement and will be treated as an order under section 105(2) of the 2006 Act¹⁴¹ (custody after charge).

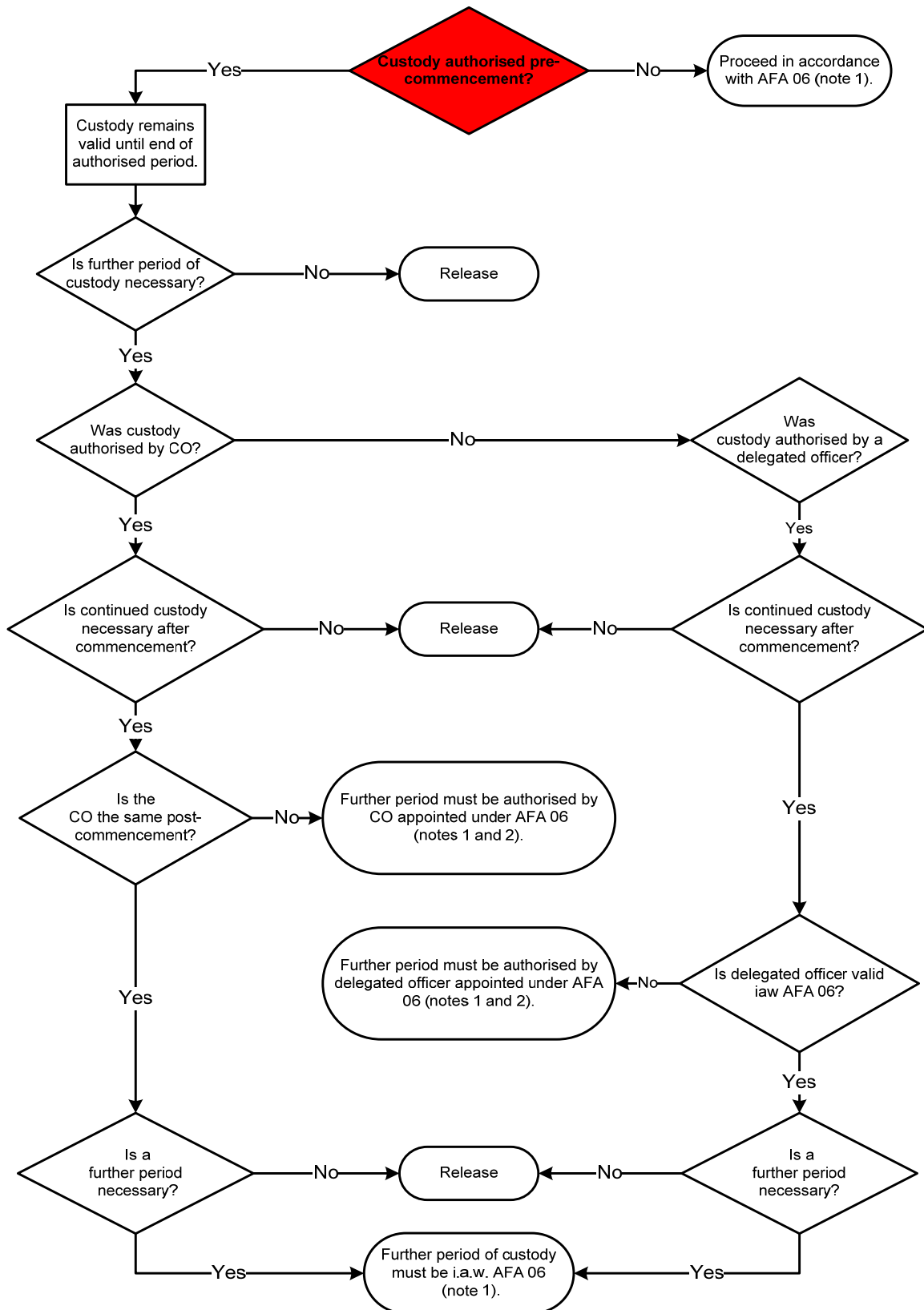
Certificates of transfer from civilian authorities

111. A certificate issued under section 187(4A) of the Army Act 1955 or the Air Force Act 1955 or section 109(4) of the Naval Discipline Act 1957([3]) will be valid as if made under the 2009 Regulations¹⁴².

¹⁴¹ Article 40(2) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

¹⁴² Regulation 4 of the Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

Transitional guidance - authorisation of pre-charge custody and custody without charge



Notes:

1. The Armed Forces (Custody Without Charge) Regulations 2009 SI 2009/1097.
2. The Armed Forces (Meaning of Commanding Officer) Regulations 2009 SI 2009.

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MINISTRY OF DEFENCE

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VOL1 CH 5
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RECORD OF ARREST AND CUSTODY

T-SL-CUS03

A separate record is to be completed each time a person is arrested. The Commanding Officer of the person arrested should ensure that the record of arrest and custody (T-SL-CUS-03) and supporting appendices (T-SL-CUS03 (1), (2), (3) and (4)) are completed and maintained as soon practicable.

Details of Commanding Officer (of arrested person)

Rank/Rate

First name

Family name

Ship/unit/establishment

Details of arrested person

Rank/Rate

First name

Family name

Ship/unit/establishment

Service number

Location of person held in custody

Unit custody facility or Service Police establishment

Appendices	Page
Appendix 1 – Record of arrest under Section 67 AFA06 – T-SL-CUS03(1)	1-5-A1-1
Appendix 2 – Commanding officer’s decision for custody without charge – T-SL-CUS03(2)	1-5-A2-1
Appendix 3 – Information to assist commanding officer’s application for custody after charge - T-SL-CUS03(3)	1-5-A3-1
Appendix 4 – Record of arrest by Service Police under Section 69 AFA06 – T-SL-CUS03(4)	1-5-A4-1

Delegation

- Record of any delegation made (T-SL-CUS02, Annex E)

Information

- Confirmation of provision of information and documents to person in custody (T-SL-CUS01, Annex C)
- Signed receipt by person in custody for information and documents (T-SL-CUS01, Annex C)

Representations

- Record of any representations made
- Record of decision on representations (T-SL-CA001, Annex D)

Other relevant information/documentation



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PROTECT - PERSONAL DATA (WHEN COMPLETE)

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Appendix 1 to ANNEX A TO VOL1 CH 5 JSP 830 MSL revised 08/09

RECORD OF ARREST UNDER SECTION 67 AFA 06

T-SL-CUS03(1)

A separate record is to be completed each time a person is arrested.

The arresting officer should send a copy of this report as soon as practicable to the commanding officer of the person arrested. The original is to be retained on the investigation file.

Part 1 - arrest and investigation information (to be completed by the arresting officer)

1. Details of Commanding Officer of arrested person (If the Commanding Officer has delegated his custody powers you should satisfy yourself that the delegation has been made in writing)

Rank/Rate

First name

Family name

Ship/unit/establishment

2. Details of arrested person

Rank/Rate

First name

Family name

Ship/unit/establishment

Date of birth

Place of birth

3. Location of person in arrest (Unit custody facility or Service Police establishment)

4. Arrested by

Rank/Rate

First and family name

Contact Telephone number

Ship/unit/establishment

5. Reason and grounds for arrest

6. Place of arrest/surrender

7. Date of arrest/surrender

8. Time of arrest/surrender

9. What steps have been taken to investigate the allegation?

10. What further investigation is required?

11. How long is it estimated that it will take to complete the further investigation?

Part 2 - Risk Assessment for arrested person (to be completed by Arresting Officer)

1. Medical

Physical/psychiatric condition

Does the arrested person have any medication issued?

Location of medication

Special needs

2. Security

Violence/concealed weapons

Risk of escape

Racial motivation/sex offence/stalker/harasser/hostage taken

3. Other

Drugs/alcohol

Suicide/self harm/vulnerable

Injuries

Force/restraint/CS spray (civpol) used

Other considerations eg seriousness of alleged offence

Further information about risk and recommendations by arresting officer at time of handing over or release

4. Having conducted a risk assessment of the arrested person in accordance with the guidelines outlined above I consider that there is:

- No known risk to him
- known risk to him

Signed by arresting officer

Date/Time

Part 3 - Custody without charge (to be completed by the Arresting Officer)

Complete Part 3 para 1 and forward to the Commanding Officer or his delegated officer if you believe it is necessary to retain the arrested person in custody. If the arrested person is to be released or if there are no grounds for continued custody without charge go straight to Part 5.

1. Arresting Officer's Reason(s) for keeping arrested person in custody without charge

Custody is necessary in order to secure or preserve evidence relating to the offence(s) for which the person was arrested (give reasons).

and/or

Custody is necessary in order to obtain further evidence about the offence(s) by questioning him (give reasons)

NB Commanding Officer's/Delegated Officer's decision on custody without charge must be recorded on Appendix 2 to this Annex (T-SL-CUS03(2)).

Additionally the arresting officer is to be informed of all decisions regarding custody.

Part 4 - Handing over certificate for arrested person in custody (to be completed by Arresting Officer)

The arrested person has been handed over in custody.

Details of person receiving arrested person in custody

Rank/Rate

Name

Service number

Ship/unit/establishment

I acknowledge the receipt of the named person into custody.

I have been made aware of the contents of the Risk Assessment for Arrested Persons at Part 2 above.

Signed

Date/Time

Location

Part 5 - Release certificate for arrested person in custody

The following is to be completed by the person making the release

The arrested person has been released on Date

The arrested person has been released at Time

The arrested person has been released at the location

Signed

Date/Time

Releasing Officer's signature



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Appendix 2 to ANNEX A TO VOL1 CH 5 JSP 830 MSL revised 08/09

COMMANDING OFFICER'S DECISION FOR CUSTODY WITHOUT CHARGE

T-SL-CUS03(2)

This form may be completed by any person holding information which may affect the Commanding Officer's decision to apply for custody without charge.

Part 1 - Details of Arrest

1. Details of arrested person.

Rank/Rate

First name

Family name

Ship/unit/establishment

Date of birth

Place of birth

2. Location of person in arrest. (Unit custody facility or Service Police establishment)

3. Date of arrest

4. Time of arrest

5. The Commanding Officer or delegated officer cannot authorise retention of the arrested person in

custody beyond Date

custody beyond Time

48 hours from time of arrest

Part 2 - Custody decisions

6. Initial Custody Decision - to be completed by Commanding Officer or his delegated officer.

I have considered the information provided to me in Appendix 1 to Annex A, to Vol 1, Chap 5 JSP 830 MSL and noted the comments at Part 3.

a. The named person is to be retained in Service custody AND I have authorised retention

in Service custody until Date

in Service custody until Time

not more than 12 hours from the time that the CO was informed of the arrest

OR

b. The named person is to be released from Service custody

* Complete either a or b above.

Signed

Date & Time

Commanding Officer's/delegated officer's signature

NB The Arresting officer is to be kept informed of all custody decisions

7. Review 1 - to be completed by Commanding Officer or his delegated officer.
(Not more than 12 hours from the time of the initial custody decision at para 6a above).

a. I have authorised further detention in Service custody until

Date

Time

AND

b. The grounds for keeping the arrested person in custody are

OR

c. The named person is to be released from Service custody

Signed

Date & Time

Commanding Officer's/delegated officer's signature

NB The Arresting officer is to be kept informed of all custody decisions

8. Review 2 - to be completed by Commanding Officer or his delegated officer.
(Not more than 12 hours from the time of Review 1 at para 7a above).

a. I have authorised further detention in Service custody until

Date

Time

AND

b. The grounds for keeping the arrested person in custody are

OR

c. I have not authorised keeping him in Service custody and have ordered his release.

Signed

Date & Time

Commanding Officer's/delegated officer's signature

NB The Arresting officer is to be kept informed of all custody decisions

9. Review 3 - to be completed by Commanding Officer or by the delegated officer.
(Not more than 12 hours from the time of Review 2 at para 8a above).

a. I have authorised further detention in Service custody until

Date

Time

AND

b. The grounds for keeping the arrested person in custody are

OR

c. I have not authorised keeping him in Service custody and have ordered his release.

Signed

Date & Time

Commanding Officer's/delegated officer's signature

NB The Arresting officer is to be kept informed of all custody decisions

Application to a Judge Advocate for continued custody without charge beyond 48 hours from the time of arrest should be made on T-SL-CAO02

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Appendix 3 to ANNEX A TO VOL1 CH 5 JSP 830 MSL revised 08/09

INFORMATION TO ASSIST COMMANDING OFFICER'S APPLICATION FOR CUSTODY AFTER CHARGE

T-SL-CUS03(3)

This form may be completed by any person holding information which may affect the Commanding Officer's decision to apply for custody after charge.

Part 1 - Details of Accused

Rank/Rate

First name

Family name

Ship/unit/establishment

Date of birth

Place of birth

Date of arrest

Time of arrest

Part 2 - Relevant information for keeping in custody after charge

1. Grounds

The person named above has been charged with a service offence and is in custody. Application must be made to a Judge Advocate to authorise the keeping of him in custody. The following information is provided to assist in that application (complete all relevant considerations):

a. There are substantial grounds for believing that the accused, if released from Service custody, would fail to attend any hearing in proceedings against him (give reasons)

This should include any previous instances of absence or desertion and where he has failed to comply with bail or release conditions.

1-5-A3-1

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b. There are substantial grounds for believing that the accused, if released from Service custody, would commit an offence while released (give reasons).

c. There are substantial grounds for believing that the accused, if released from Service custody, would interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person (give reasons).

d. It is believed the accused should be kept in Service custody for his own protection or, if he is under 17 years of age, for his own welfare (give reasons).

e. It has not been practicable to obtain sufficient information for the purpose of taking required decisions for want of time since the accused was charged with the offence(s) (give reasons).

2. Relevant factors

In coming to this view it is considered that the following factors are relevant (complete all relevant considerations):

a. The nature and seriousness of the offence for which the accused was arrested (give reasons).

b. The circumstances of the accused's arrest (give reasons).

c. The evidence in relation to the offence(s) (give reasons).

Person completing this form

Rank/Rate

First name

Family name

Contact Telephone number

Appointment

Signed

Date

Time



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Appendix 4 to ANNEX A TO VOL1 CH 5 JSP 830 MSL revised 08/09

RECORD OF ARREST BY SERVICE POLICE UNDER SECTION 69 AFA 06

T-SL-CUS03(4)

A separate record is to be completed each time a person is arrested

Part 1 - Service police arrest and custody information (to be completed by the Arresting Officer)

1. Details of arrested person.

Rank/Rate

First name

Family name

Service number

Date of birth

Place of birth

Ship/unit/establishment

2. Location of person in arrest

3. Person arrested by.

Rank/Rate

First name

Family name

Ship/unit/establishment

Service number

Contact Telephone number

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4. Reason for arrest

5. Place of arrest

6. Date of arrest

7. Time of arrest

8. Supervisor's details

Rank/Rate

First name

Family name

Ship/unit/establishment

Service number

Contact Telephone number

Date informed

Time informed

Part 2 - Risk Assessment for arrested person (to be completed by the Arresting Officer)

1. Medical

Physical/psychiatric condition

Does the arrested person have any medication issued?

Location of medication

Special needs

2. Security

Violence/concealed weapons

Risk of escape

Racial motivation/sex offence/stalker/harasser/hostage taken

3. Other

Drugs/alcohol

Suicide/self harm/vulnerable

Injuries

Force/restraint/CS spray (civpol) used

Other considerations

Further information about risk and recommendations by arresting officer at time of handing over or release.

4. Having conducted a risk assessment of the arrested person in accordance with the guidelines outlined above I consider that there is:

No known risk to him Known risk to him

Signed

Arresting Officer's signature

Date & Time

Part 3 - Details of continued custody (to be completed by the Arresting Officer)

Complete Part 3 if you believe it is necessary to retain the arrested person in custody beyond 1 hour. If the arrested person is to be released or if there are no grounds for continued custody, go straight to Part4.

1. ASP's initial review.

Justification

Rank/Rate

First name

Family name

Service number

Contact Telephone number

Signature

Date & Time

Time of next review

How authority was obtained: (eg by phone, fax/in person)

2. ASP's subsequent review (if applicable)

Justification

Rank/Rate

First name

Family name

Service number

Contact Telephone number

Signature

Date & Time

Time of next review

How authority was obtained: (eg by phone, fax/in person)

3. ASP's subsequent review (if applicable)

Justification

Rank/Rate

First name

Family name

Service number

Contact Telephone number

Signature

Date & Time

Time of next review

How authority was obtained: (eg by phone, fax/in person)

Part 4 - Release of arrested person to be completed by Arresting Officer

1. The arrested person was released at (place/date/time)

2. Reason for release

3. Released to (if applicable)

4. If released at a location other than that of arrest provide reason

5. Supervisor's details

Rank/Rate

First name

Family name

Service number

Date & Time informed

Contact Telephone number

Part 5 - Notification to arrested persons Commanding Officer of arrest and release

Rank/Rate

First name

1. Arrest reported to (Commanding Officer of arrested person)

Family name

Service number

Arrest reported by

Rank/Rate

First name

Family name

Service number

2. Release reported to (Commanding Officer of arrested person)

Rank/Rate

First name

Family name

Service number

Release reported by

Rank/Rate

First name

Family name

Service number

A copy of this form must be sent to the Commanding Officer of the arrested person as soon as practicable after that person's release from arrest.

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GUIDANCE ON THE ROLE OF THE ASSISTING OFFICER

1. An 'assisting officer' will be appointed to assist an individual held in custody without or after charge.

Role

2. **Custody without charge.** An assisting officer is appointed to assist a person who is retained in custody without charge in all matters relating to that custody. His duty is to represent the best interests of the person held in custody and he should not be influenced by the chain of command. In particular, he is to ensure that the person in custody is aware of his rights as outlined in 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#) (Investigation, charging and mode of trial). While in custody without charge, a person in custody may make representations to the arresting officer (before he reports the arrest to the CO) and later to the CO (where the report has been made) to request his release and state the reasons for believing he should be released. He may also make any other representations regarding his confinement in custody. These representations will be in writing and it is an important role of the assisting officer to help the person in custody to prepare these representations. The person in custody may request that he be permitted to make oral representations to the CO, the CO may refuse the request. A CO may also require a person in custody to make any representations in person even though the person in custody has not requested to do so. It is for the assisting officer to help the person in custody in these matters and safeguard his interests. Where a person in custody is required to appear before a judge advocate, it is very likely that the suspect will have appointed a legal representative to advise him and represent him at a hearing in front of the judge advocate. Where a person appoints a legal representative the assisting officer may, if required, act as a liaison between that representative and the Service. He should secure any publications or regulations required by the representative with prior reference to the relevant unit staff. With the permission of the judge advocate, the assisting officer may attend a hearing in front of that judge advocate; however, he is not to take part in any proceedings unless directed to by the judge advocate.

3. **Custody after charge.** If an assisting officer has not already been appointed then he could be appointed to assist a person in custody who is retained in custody after charge or at the time of charge. The judge advocate may authorise further custody for periods no longer than eight days between reviews, however if the person in custody is legally represented and consents the judge advocate may authorise a person to be kept in custody for up to twenty-eight days between reviews. Where a hearing to consider a review of custody is not required (the person in custody does not have to appear in person in front of the judge advocate) written representation will be required and it is for the assisting officer to aid the person in custody in preparing the representations. Where a person in custody is required to appear before a judge advocate, it is very likely that he will have appointed a legal representative to advise him and represent him at a hearing in front of the judge advocate. Where a person in custody appoints a legal representative, the assisting officer may act as a liaison between that representative and the Service. He should secure any publications or regulations required by the representative with prior reference to the relevant unit staff. With the permission of the judge advocate, the assisting officer may attend a hearing in front of that judge advocate; however, he is not to take part in any proceedings.

Appointment of an assisting officer

4. In accordance the Armed Forces (Custody without Charge) Regulations 2009 a person in custody is entitled to the appointment of an assisting officer to advise him and to represent him at a custody hearing. The assisting officer is an important role and can provide valuable assistance to the person in custody. He is to perform his duties entirely independently of the CO. The unit is to do everything it can reasonably do to facilitate the assisting officer's functions.

5. Subject to the exclusions outlined in paragraph 7 below, the person in custody may ask for any suitable person to assist him (see paragraph 4). However, that person is under no obligation to help if he does not wish to do so. Where the person in custody has difficulty in finding a suitable person to represent him, he may request the assistance of the CO. In this event, the CO is to provide a pool of at least 2 potential nominees for this purpose and allow the person in custody a free choice from the pool. The person in custody is under no obligation to nominate an individual from the pool. It will be the duty of the CO to arrange for the release of the requested individual from his normal duties unless there are operational reasons not to do so.

6. A person may not be an assisting officer unless he:

- a. Is a Service person;
- b. Is of at least the rank or rate of petty officer or military, marine or air-force sergeant; and
- c. Consents to be nominated.

7. It would be inappropriate for people in the following categories to consent to be nominated as assisting officers:

- a. Subordinate commanders who have previously heard the evidence against the accused.
- b. Members of the Unit's administrative staff who have been personally involved in advising the CO or Subordinate commander about the case.
- c. A person who has participated in the investigation and is likely to be called as a witness for the CO or for the accused.
- d. Lawyers. The only circumstances in which a lawyer would appear at a summary hearing is a RN lawyer in his capacity of a Divisional Officer.

Note: Professionally qualified officers such as doctors, padres and chaplains are not automatically excluded from acting as assisting officers. It is for them to decide whether to do so would compromise their professional duties. Service Police may act as an assisting officer with the same proviso.

Brief for an assisting officer

8. You have been asked to act as an assisting officer for a person in custody. In accepting the responsibility of becoming the assisting officer, your task is to advise and assist the person in custody in preparing. You may seek advice from any source. However, you will not be given access to any privileged correspondence in relation to the case

between the unit and HA, or the DSP or staff legal advisers. The conversations you have with the person in custody and/or his legal adviser are confidential and you should normally not disclose any of the information to the chain of command or anyone else without the person in custody's permission. If in doubt seek legal advice.

9. Your individual tasks and responsibilities are as follows:

a. **Understand the charge.** You should identify the offence under investigation or the charge(s) that is being brought against the person in custody and read about it in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) or [Chapter 8](#) (Criminal conduct offences).

b. **Understand the procedures.** You will need to be sufficiently aware of the hearing procedures in order that you can concentrate on what is being said rather than the mechanics of the hearing. You will need to read Part 5 of [Chapter 5](#) (Custody).

c. **Before the hearing.**

(1) **Procedure.** Ensure the person in custody understands the procedure. Advise the person in custody that he may seek legal advice before the hearing. Details of the duty solicitors' scheme should be available from unit staffs. Legal advice from Service lawyers may also be available. The assisting officer is to advise the person in custody whether he is able to get free legal advice by contacting a staff lawyer if he himself requires guidance in this respect. A legal adviser may be present during the hearing itself.

(2) **Grounds for custody.** Ensure that the person in custody understands on what basis an application for custody is being made.

(3) **Grounds for opposing application.** Ask the person in custody if he opposes the application and what reasons he has for doing so, ensure that where the person in custody believes that the proper grounds for custody do not exist that these reasons are brought to the attention of the judge advocate (via his legal representative if he has one).

d. **After the hearing.** After the hearing, ensure that the person in custody understands the outcome and in particular any conditions of his release.

Intentionally left blank



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ANNEX C TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

CUSTODY INFORMATION FOR A PERSON HELD IN CUSTODY WITHOUT CHARGE

T-SL-CUS01

To (the person held in custody)

Rank/Rate/Title

Name

Service number

Ship/unit/establishment

Details of arrest/s

Date

Time

Location

Arrested by

In accordance with the Armed Forces (Custody without charge) Regulations 2009 you are hereby notified:

1. You were arrested for the following reason(s).

1-5-C-1

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1. The relevant time for the purpose of the custody provisions of the Armed Forces Act 2006 and the Armed Forces (Custody Without Charge) Regulations 2009 is

Date

Time

(insert details from paragraph 1.c of the 'Record of arrest and custody decision/review' (T-SL-CUS03). If two sets of times/dates are recorded in that paragraph, insert earlier of the two here)

2. You are to be retained in Service custody on the grounds in paragraph 4.

3. I have reasonable grounds to believe that

a. keeping you in Service custody is necessary to secure or preserve evidence relating to the offence(s) for which you were arrested.

and/or

b. keeping you in Service custody is necessary to obtain evidence relating to an offence for which you were arrested by questioning you.

4. I have reasonable grounds for believing that the investigation is being conducted diligently and expeditiously.
(Check this paragraph if this form is completed by the Arresting Officer).

5. Your continued retention in Service custody has been authorised until

(Insert date and time if this form is completed by the Commanding Officer)

6. You have the right to make representations orally or in writing to the arresting officer or your CO:

a. Requesting your release and giving reasons why you should be released from custody

and/or

b. Any other representations regarding your confinement in custody

Guidance on this and general matters is contained in the booklet entitled 'Your rights if you are accused of an offence under the Service Justice System'.

Signed

Name

Rank/Rate

Appointment

Date

Time

For completion by the person held in custody

1. I acknowledge receipt of this form and the booklet 'Your rights if you are accused of an offence under the Service Justice System'.

2. I wish to be assisted by

insert that person's Service details or if no-one of your choice is available or willing you may request the CO nominates at least two people who are available

3. I do not wish the assistance of an officer, warrant officer or senior non-commissioned officer.

Signed

Rank/Rate

First name

Family name

Date

Time

Intentionally left blank



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ANNEX D TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

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ARRESTING OFFICER'S OR COMMANDING OFFICER'S DECISION ON REPRESENTATION

T-SL-CAO01

The Armed Forces (Custody Without Charge Regulations 2009), regulation 6

To (the person held in custody)

Rank/Rate/Title

First name

Family name

Service number

Ship/unit/establishment

Located at (Complete if not held at parent unit)

Date and time representation received

1. Date

Time

2. Attached is a completed copy of the 'Custody information for person held in custody without charge' (T-SL-CUS01).

3. I have considered your representation. It is attached as Annex A or where made orally your representation is

The above is an accurate record of my representation.

Signed

Date

1-5-D-1

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4. My decision on your representation is

Signed

Date

Rank/Rate

First name

Family name

Appointment (if applicable)



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ANNEX E TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

DELEGATION OF CUSTODY POWERS

T-SL-CUS02

In accordance with regulation 3 of the Armed Forces (Custody Without Charge) Regulations 2009

Part 1

Rank/Rate/Title

First name

Family name

Service number

Ship/unit/establishment

Hereby delegates, in exercise of the powers conferred on me by regulation 3 of the Armed Forces (Custody Without Charge) Regulations 2009 in relation to Service custody and power to act under AFA 06 sections 98 - 102 to the following person(s)

Part 2

These delegations are made subject to the following restrictions and conditions

1-5-E-1

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Part 3

If exercised, the exercise of that power and the general circumstances shall be reported to me on 'Record of arrest and custody decision/review' (T-SL-CUS03).

Signed

Date

Rank/Rate/Title

First name

Family name

Service number

Ship/unit/establishment

Part 4

I hereby revoke, add to the delegations and/or change the restrictions, conditions, and other matters in paragraph 2 with immediate effect (delete/complete as applicable and then set out below the revocations, etc. Alternatively, if preferred all may be revoked and a new form used.)

Signed

Date

Rank/Rate/Title

First name

Family name

Service number

Ship/unit/establishment



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ANNEX F TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

**APPLICATION FOR A CUSTODY HEARING –
PERSON ARRESTED AND IN CUSTODY
WITHOUT CHARGE**

T-SL-CAO02

To

<p>For Army and RAF COs only Court Administration Officer, Military Court Service, Building 59, Trenchard Lines, Upavon, PEWSEY Wilts SN9 6BE</p> <p>Fax: Mil: 94344 5903 Civ: (01980) 615903</p> <p>Tel: Mil: 94344 5786 Civ: (01980) 615786</p> <p>Out of Hours: (07760) 171159</p>	<p>For RN/RM COs only Court Administration Officer, Military Court Service, 1st Floor Hardy Block, HMS Nelson, PORTSMOUTH PO1 3HH</p> <p>Fax: Mil: 9380 24604 Civ: (02392) 724604</p> <p>Tel: Mil: 9380 27279 Civ: (02392) 727279</p> <p>Out of Hours: (07760) 171159</p>
--	---

Part 1

In accordance with Rule 9 of the Armed Forces (Custody proceedings) Rules 2009 application is to be made for authorisation by a Judge Advocate of Service Custody without charge for more than 48 hours from the relevant time (see paragraph 2.e. For the relevant time).

Part 2

The necessary information in accordance with Rule 9 is set out below

a. Commanding Officer's details

Rank/Rate <input type="text"/>	First name <input type="text"/>
Family name <input type="text"/>	Ship/Unit/Establishment <input type="text"/>
Location (where documents are to be sent) <input type="text"/>	
Telephone number <input type="text"/>	Fax number <input type="text"/>

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b. Person arrested's details

Rank/Rate

First name

Family name

Service number

Date of birth

Ship/Unit/Establishment

Location

For civilians specify only, name, location and DOB

c. The arrested person's legal representative

Name

Address

Fax number (also if available)

d. The offence(s) for which the person was arrested

e. The relevant time (to include date, see 'Custody information for a person held in charge without custody' (T-SL-CUS01))

f. The general nature of the evidence on which the person was arrested is set out below (briefly summarise the evidence which supported the arrest. Evidence gathered after the arrest goes in paragraph g).

g. The inquiries about the offence already made and the further inquiries proposed are set out below (say what has been done after arrest, and what needs to be done, to investigate. Liaise with the Service Police if they are involved).

h. The commanding officer's reasons for believing the continued Service custody of the person arrested is necessary are set out below (consider the grounds and reasons contained in the 'Record of arrest and custody decision/reviews' (T-SL-CUS03) for the decision still current at the time this form is completed and liaise with a staff legal adviser).

Part 2

The legal representative of the officer at paragraph 2.a. and his contact details are set out below

Name

Address

Appointment

Fax number

Fax number

This will be a staff legal adviser

Signed (by or on behalf of the CO)

Date & Time

This includes any officer holding delegated custody powers who is acting in accordance with that delegation

Service number

Rank/Rate

First name

Family name

Appointment

Ship/Unit/Establishment

Copy to (insert person details from paragraph 2.b. above)

You are to note that your commanding officer will ask a judge advocate to authorise your continued retention in Service custody without charge for more than 48 hours beyond the relevant time (paragraph 2.e. above) on the grounds set out in paragraph 2.h. above. You will be brought before a judge advocate as soon as practicable. You will be notified by the CAO of the date, time and location of the hearing. You have the right to be legally represented at that hearing and to be advised and represented under the relevant legal aid or other similar schemes, applying to Service personnel and civilians subject to Service discipline, in your area. More information is contained in the booklet 'Your rights if you are accused of an offence under the Service Justice System' which has been given to you.



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ANNEX G TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

REQUEST FOR A REVIEW OF SERVICE CUSTODY AFTER CHARGE

T-SL-CAO04

To

For Army and RAF COs only

Court Administration Officer,
Military Court Service,
Building 59,
Trenchard Lines,
Upavon, PEWSEY
Wilts SN9 6BE

Fax: Mil: 94344 5903
Civ: (01980) 615903
Tel: Mil: 94344 5786
Civ: (01980) 615786
Out of Hours: (07760) 171159

For RN/RM COs only

Court Administration Officer,
Military Court Service,
1st Floor Hardy Block,
HMS Nelson,
PORTSMOUTH
PO1 3HH

Fax: Mil: 9380 24604
Civ: (02392) 724604
Tel: Mil: 9380 27279
Civ: (02392) 727279
Out of Hours: (07760) 171159

Part 1

1. In accordance with Rule 12 of the Armed Forces (Custody proceedings) Rules 2009 request for a review of service custody after charge to be made under AFA 06 section 108(2)b is hereby made*.

*Applies where a judge advocate has already authorised Service custody after an individual was charged and the commanding officer considers that the grounds for that authorisation may have changed or ceased to apply. If, unusually, a review is to be requested in the course of a Court Martial, send this form to the CAO, and a copy to the DSP together with the relevant custody file/folder if it is not already with him.

Part 2

The necessary information in accordance with Rule 12 is set out below

a. Commanding Officer's details

Rank/Rate

First name

Family name

Ship/Unit/Establishment

Location (where documents are to be sent)

Telephone number

Fax number

1-5-G-1

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b. Person arrested's details

Rank/Rate

First name

Family name

Service number

Date of birth

Ship/Unit/Establishment

Location

For civilians specify only, name, location and DOB

c. The arrested person's legal representative

Name

Address

Fax number (also if available)

d. The charge(s) are set out in the copy charge sheet attached.

e.

A Judge Advocate authorised service on Date

Custody after charge under s.105(2) AFA 06 until Date

f. The circumstances which have caused the Commanding Officer to consider that the grounds on which that order (see paragraph 2.e.) was made have ceased to exist are (continue in an Annex if necessary).

g. Requirements that the Commanding Officer suggests should be imposed by the judge advocate under s.107(3) AFA 06.

Part 3

The legal representative of the officer at paragraph 2.a. and his contact details are set out below

Name

Address

Appointment

Fax number

Fax number

This will be a staff legal adviser

Signed (by or on behalf of the CO)

Date & Time

This includes any officer holding delegated custody powers who is acting in accordance with that delegation

Service number

Rank/Rate

First name

Family name

Appointment

Ship/Unit/Establishment

Copy to (insert person details from paragraph 2.b. above)

You are to note that your commanding officer will ask a judge advocate to review your continued keeping in Service custody after charge on the grounds set out in paragraph 2.f. above. You will be notified of the result of the review request. If there is to be a hearing, you will be notified by the CAO of the date, time and location of the hearing. You have the right to be legally represented at that hearing and to be advised and represented under the relevant legal aid or other similar schemes applying to Service personnel and civilians subject to Service discipline in your area. More information is contained in the booklet 'Your rights if you are accused of an offence under the Service Justice System' which has been given to you.



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ANNEX H TO
VOL1 CH 5
JSP 830 MSL
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**REPRESENTATIONS TO THE JUDGE ADVOCATE
ABOUT THE REQUIREMENT FOR A REVIEW
OF CUSTODY AFTER CHARGE BY THE WAY
OF A HEARING**

T-SL-CAO05

To

<p>For Army and RAF COs only Court Administration Officer, Military Court Service, Building 59, Trenchard Lines, Upavon, PEWSEY Wilts SN9 6BE</p> <p>Fax: Mil: 94344 5903 Civ: (01980) 615903</p> <p>Tel: Mil: 94344 5786 Civ: (01980) 615786</p> <p>Out of Hours: (07760) 171159</p>	<p>For RN/RM COs only Court Administration Officer, Military Court Service, 1st Floor Hardy Block, HMS Nelson, PORTSMOUTH PO1 3HH</p> <p>Fax: Mil: 9380 24604 Civ: (02392) 724604</p> <p>Tel: Mil: 9380 27279 Civ: (02392) 727279</p> <p>Out of Hours: (07760) 171159</p>
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Part 1

In accordance with rules 16 and 17 of the Armed Forces (Custody proceedings) Rules 2009 the following representations to the Judge Advocate about the requirement for a review of custody after charge by the way of a hearing under s.108(2) AFA 06 is hereby made.

*Applies where a judge advocate has already authorised Service custody after an individual was charged and the CO or the accused considers that the grounds for that authorisation may have changed or ceased to apply. If, unusually, a review is to be requested in the course of a Court Martial, send this form to the CAO, and a copy to the DSP together with the relevant custody file/folder if it is not already with him.

Part 2

The necessary information in accordance with Rules 16 and 17 is set out below

a. Commanding Officer's details

Rank/Rate

First name

Family name

Ship/Unit/Establishment

Telephone number

Fax number

Location (where documents are to be sent)

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Part 3

My representations relate to
Accused's details

Rank/Rate

First name

Family name

Service number

Ship/Unit/Establishment

Part 4

a. I believe that the grounds for service custody in the judicial order to be reviewed continue to exist

OR

b. I do not believe that the grounds for Service custody in the Judicial order to be reviewed continue to exist

Part 5

a. (If paragraph 4.a. applies) I believe that a review can take place without a hearing (insert reasons)

b. (If paragraph 4.a. applies) I believe that a review can take place without a hearing (insert reasons)

Part 6

I believe that there are grounds for service custody (insert reasons if the grounds in the order no longer exist but other grounds justifying custody have arisen. Delete if there are no grounds justifying custody)

Part 7

The Legal Representative of the Officer at paragraph 2.a. and his contact details are set out below

Name

Address

Appointment

Fax number (also if available)

Telephone number

This will be a staff legal adviser

Signed (by or on behalf of the CO)

Date & Time

This includes any officer holding delegated custody powers who is acting in accordance with that delegation

Service number

Rank/Rate

First name

Family name

Appointment

Ship/Unit/Establishment

Copy to (insert person details from paragraph 3 above)

You will be notified by the CAO about what is decided. More information is contained in the booklet 'Your rights if you are accused of an offence under the Service Justice System' which has been given to you. You have the right to make representations in writing about how the review should be carried out (at a hearing or by review of the case papers) and about why you should be released. If you want to make written representations they should be sent to the CAO whose address is shown at the top of the page overleaf. A copy of what you write should be sent to the officer at paragraph 2. If you need writing materials you should obtain these from the staff where you are held.



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ANNEX I TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

APPLICATION FOR AUTHORISATION FOR KEEPING AN ACCUSED IN CUSTODY AFTER CHARGE

T-SL-CAO03

To

For Army and RAF COs only

Court Administration Officer,
Military Court Service,
Building 59,
Trenchard Lines,
Upavon, PEWSEY
Wilts SN9 6BE

Fax: Mil: 94344 5903
Civ: (01980) 615903
Tel: Mil: 94344 5786
Civ: (01980) 615786
Out of Hours: (07760) 171159

For RN/RM COs only

Court Administration Officer,
Military Court Service,
1st Floor Hardy Block,
HMS Nelson,
PORTSMOUTH
PO1 3HH

Fax: Mil: 9380 24604
Civ: (02392) 724604
Tel: Mil: 9380 27279
Civ: (02392) 727279
Out of Hours: (07760) 171159

Part 1

In accordance with rules 10 and 11 of the Armed Forces (Custody proceedings) Rules 2009 you are hereby notified that a person in service custody has been charged under section 105 of AFA06.

Part 2

The necessary information in accordance with Rule 10/11 is set out below

a. Commanding Officer's details

Rank/Rate

First name

Family name

Ship/Unit/Establishment

Telephone number

Fax number

Location (where documents are to be sent)

b. Accused charged and retained in Service custody

Rank/Rate

First name

Family name

Service number

Ship/Unit/Establishment

Date of birth

Location

for civilians specify only, name, location and DOB

c. Accused's legal representative

Name

Address

Fax number (if available)

d. The charge(s) are set out in the copy charge sheet attached

e. The date and time that the accused was charged and if arrested after charge the date, time and place of that arrest

f. The commanding officer's reasons for believing that continued retention in Service custody is justified are set out below (insert applicable grounds). Those set out in Part 4 of the 'Record of arrest and custody decision/review' (T-SL-CUS03) may be consulted for reference but the grounds applying when this form is filled in are the ones, with reasons, which should be inserted here. Use an Annex if necessary.

g. Requirements that the commanding officer suggest should be imposed by the judge advocate under s.107(3) AFA 06.

Part 3

- Authorisation by a Judge Advocate has been given previously for service custody without charge
- Authorisation by a Judge Advocate has not been given previously for service custody without charge

(if it has, attach a copy of the most recent order made by a Judge Advocate).

Part 4

The Legal Representative of the Officer at paragraph 2.a. and his contact details are set out below

Name

Address

Appointment

Fax number

This will be a staff legal adviser

Signed (by or on behalf of the CO)

Date & Time

This includes any officer holding delegated custody powers who is acting in accordance with that delegation

Service number

Rank/Rate

First name

Family name

Appointment

Ship/Unit/Establishment

Copy to (insert person details from paragraph 3 above)

You will be brought before a Judge Advocate as soon as practicable. Your attention is drawn to paragraph 2.f. above. You will be notified by the CAO of the date, time, and location of the hearing. You have the right to be legally represented at that hearing and to be advised and represented under the relevant legal aid or other similar schemes applying to Service personnel and civilians subject to Service discipline in your area. More information is contained in the booklet 'Your rights if you are accused of an offence under the Service Justice System' which has been given to you.



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ANNEX J TO
VOL1 CH 5
JSP 830 MSL
revised 08/09

SUMMONS TO WITNESS

T-SL-CUS06

Proceedings under section *101 *105(1)/ *108(1) of the Armed Forces Act 2006.

To (name)

ship/unit/establishment/address

You are hereby summoned to appear on Date

You are hereby summoned to appear at Time

You are hereby summoned to appear at location

to give evidence, and/or produce the document(s) or thing(s) specified in Part 1 of the attached Schedule

at the hearing of this matter at which the judge advocate will consider whether to make an order authorising the keeping of the below mentioned individual in custody.

Rank/Rate

Name

or

You are hereby summoned to appear on Date

You are hereby summoned to appear at Time

to produce the document(s) or thing(s) specified in Part 2 of the attached Schedule.

You are to sign, detach and return the receipt slip on the attached Schedule.

Signed

Date

Judge Advocate

Schedule of documents or things to be produced

Part 1 - Documents etc. to be produced only at the hearing

Part 2 - Documents etc. to be produced to the CAO (address below) prior to the hearing as well as at the hearing:



Acknowledgement of receipt of summons to a witness

In the matter of (name of person held in custody)

I (full name of witness)

Acknowledge receipt of the summons to me to attend at (location)

on Date

at Time

Signed

Date

Return to: Court Administration Officer: (CAO to delete address as appropriate)

For Army and RAF COs only

Court Administration Officer,
Military Court Service,
Building 59,
Trenchard Lines,
Upavon, PEWSEY
Wilts SN9 6BE

Fax: Mil: 94344 5903
Civ: (01980) 615903
Tel: Mil: 94344 5786
Civ: (01980) 615786
Out of Hours: (07760) 171159

For RN/RM COs only

Court Administration Officer,
Military Court Service,
1st Floor Hardy Block,
HMS Nelson,
PORTSMOUTH
PO1 3HH

Fax: Mil: 9380 24604
Civ: (02392) 724604
Tel: Mil: 9380 27279
Civ: (02392) 727279
Out of Hours: (07760) 171159



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ANNEX K TO
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JSP 830 MSL
revised 08/09

REQUEST FOR JUDGE ADVOCATE TO REVIEW RELEASE CONDITIONS

T-SL-CAO07

To

For Army and RAF COs only

Court Administration Officer,
Military Court Service,
Building 59,
Trenchard Lines,
Upavon, PEWSEY
Wilts SN9 6BE

Fax: Mil: 94344 5903
Civ: (01980) 615903
Tel: Mil: 94344 5786
Civ: (01980) 615786
Out of Hours: (07760) 171159

For RN/RM COs only

Court Administration Officer,
Military Court Service,
1st Floor Hardy Block,
HMS Nelson,
PORTSMOUTH
PO1 3HH

Fax: Mil: 9380 24604
Civ: (02392) 724604
Tel: Mil: 9380 27279
Civ: (02392) 727279
Out of Hours: (07760) 171159

Part 1

In accordance with rule 14 the Armed Forces (Custody proceedings) Rules 2009 application for a review of conditions for release from custody after charge to be made under s.107(4) AFA 06 is hereby made.

Part 2

The necessary information in accordance with Rule 14 is set out below

a. Commanding Officer's details

Rank/Rate

First name

Family name

Ship/Unit/Establishment

Telephone number

Fax number

Location (where documents are to be sent)

b. Accused's details

Rank/Rate

First name

Family name

Service number

Ship/Unit/Establishment

Date of birth

Location

for civilians specify only, name, location and DOB

c. The Accused's Legal Representative

Name

Address

Fax number (if available)

d. The charge(s) are contained in the document attached

(attach a copy of the charge report or other document setting out the charge(s))

e. a judge advocate imposed release conditions under s.107/(3) AFA 06 on Date

If applicable these requirements were varied at a hearing on

that variation was

g. The reason this variation or discharge is sought is

h. The variation or discharge sought is

Part 3

The Legal Representative of the Officer at paragraph 2.a. and his contact details are set out below

Name

Address

Appointment

Fax number

This will be a staff legal adviser

Signed (by or on behalf of the CO)

Date & Time

This includes any officer holding delegated custody powers who is acting in accordance with that delegation

Service number

Rank/Rate

First name

Family name

Appointment

Ship/Unit/Establishment

Copy to (insert person details from paragraph 3 above)

You will be notified of the result of the review request. If there is to be a hearing, you will be notified by the CAO of the date, time and location of the hearing. You have the right to be legally represented at any hearing. For accused only; you have the right to be advised and represented under the relevant legal aid or other similar schemes applying to Service personnel and civilians subject to Service discipline in your area. More information is contained in the booklet 'Your rights if you are accused of an offence under the Service Justice System'.

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Chapter 6

Investigation, charging & mode of trial

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Chapter 6

Investigation, charging and mode of trial

Introduction

1. The purpose of this chapter is to provide those responsible for administering discipline with guidance on the investigation of Service offences, the selection, drafting and bringing of a charge and deciding on the appropriate forum for trial.
2. The disciplinary system in the Armed Forces Act 2006 (the Act), creates a two tier procedure, the aim of which is to support the chain of command and retain the role of the Commanding Officer (CO) at the centre of Service discipline. There are two ways in which a Service offence can be dealt with in the first instance; either summarily or by a Service court (the Court Martial (CM) or Service Civilian Court (SCC)). How a charge is dealt with will depend upon the nature of the offence and also whether the accused is a Service person (i.e. a person subject to Service law¹) or a relevant civilian (i.e. a civilian subject to Service discipline)².
3. Disciplinary action³ is action taken by the chain of command using statutory powers. It may be taken where criminal or non-criminal conduct offences are alleged and where it is considered to be in the Service interest to proceed with disciplinary action, for the purpose of maintaining Service discipline.
4. In the interest of brevity, the term CO will be used throughout this chapter to include the CO and subordinate commander, unless there is a reason to specify one or the other. In rare instances, there may be a need to make a bespoke appointment of a CO for a particular case, see [Chapter 2](#) (Meaning of a commanding officer). This will need to happen, for example, if the CO is a witness or there is not the necessary two rank separation between the CO and the accused. If a bespoke appointment is made then everyone connected to the case should be made aware of whom the relevant CO is.
5. **The use of the term Service person for this chapter only.** The term Service person is used in this chapter to cover a reference to both:
 - a. A member of the regular forces at all times or reserve forces⁴ who falls into the categories described in the glossary and therefore is subject to Service Law; and
 - b. A member of the reserve forces who does not fall into the categories described in the glossary (for example the person is not training or on operations).
6. When considering a reference in this chapter to a Service person, it will be necessary to check the related provisions of the legislation as to whether that reference applies to a member of a regular and reserve force (see paragraph 5a above) or whether it applies to a member of the reserve forces, for example who is not training or on operations, see paragraph 5b above. If in doubt, staff legal advice should be sought. Also see [Chapter 3](#) (Jurisdiction and time limits).

¹ Section 367, 368 & 369 of the Act.

² See [Chapter 3](#) (Jurisdiction and time limits).

³ Major and minor administrative action may be considered instead of disciplinary action. Minor administrative action is dealt with under JSP 833. You should refer to single-Service guidance for major administrative action.

⁴ Section 367 of the Act.

7. **Chapter structure.** This chapter is divided into 7 Parts as follows:
- a. **Part 1 – General principles.** Provides general guidance to all users of this chapter.
 - b. **Part 2 – Offences overview.** Provides an overview of the categories of Service offences to help the CO correctly identify the category of offence and decide on the appropriate method of investigation.
 - c. **Part 3 – Investigation.** Provides guidance on how an investigation should be conducted. This will depend upon whether the investigation is undertaken by the Service Police or a CO.
 - d. **Part 4 - Offences capable of being heard summarily.** Provides guidance in relation to offences that may be heard summarily, which are listed in Annexes [B](#) and [C](#).
 - e. **Part 5 - Offences triable by CM or SCC.** Provides guidance in relation to the procedure which should be followed when a charge is to be tried at CM. This might be because:
 - (1) The offence is not one which can be tried summarily (in other words, it is not an offence listed in Annexes [B](#) and [C](#));
 - (2) The accused is a relevant civilian and so cannot be tried by a CO;
 - (3) The accused elects trial by CM;
 - (4) The CO refers the charge to the DSP; or
 - (5) The accused is of or above the rank of commander, lieutenant-colonel or wing commander.
 - f. **Part 6 - Offences listed in Schedule 2 or committed in prescribed circumstances.** Provides guidance in relation to offences listed in Schedule 2 of the Act (see [Annex D](#)) or committed in prescribed circumstances⁵ (see [Annex E](#)).
 - g. **Part 7 - Administrative and welfare responsibilities.** Provides general guidance on administrative and welfare responsibilities for victims and the accused.
8. **Statutory provisions.** The statutory provisions relating to investigation and charging can be found at sections 113 -128 of the Act, which are supplemented by the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. These can be found with the Act in [Volume 3](#) of the MSL.

⁵ Regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

Part 1 - General principles

Investigation

9. The purpose of an investigation is to establish the facts and gather all available evidence in order to determine whether and by whom an offence may have been committed. In all circumstances, a CO must investigate the incident appropriately⁶ (see paragraph 30). An investigation should be conducted diligently and without undue delay.

10. Where an allegation is made or an incident comes to light, a CO, at the outset, is to consider whether he is under a legal obligation to ensure that the Service Police are made aware of the matter⁷. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that an offence listed in Schedule 2 to the Act ([Annex D](#) and paragraph 23d) has or may have been committed by a person under his command, or that prescribed circumstances exist (see Annex E and paragraph 23e), the CO must ensure that the Service Police are made aware as soon as reasonably practicable.

11. A CO has a duty to ensure that all offences are investigated appropriately. The CO will have to decide what investigation is appropriate. Whether there should be an investigation and (if so) whether it should be by the Service Police or by means of a CO's investigation depends on a number of factors, including (in addition to those mentioned in paragraph 10 above):

- a. The possible seriousness of the matter investigated.
- b. The possible complexity of the facts.
- c. Whether an offence, which may have been committed, may be heard summarily or tried by a Service court⁸.

The CO's responsibility can always be satisfied by ensuring that the Service Police are aware. This list is not exhaustive and paragraph 30 provides more detail.

12. On conclusion of an investigation by the Service Police, a report will be provided. If a charge or charges are recommended they will be contained in a Service Police report. The Service Police report will be sent to the CO and/or the Director of Service Prosecutions (DSP) depending on the offence(s) for which there is evidence to bring a charge. Any case in which there is enough evidence to charge an offence, and that offence is either listed in Schedule 2 to the Act or is one in relation to which prescribed circumstances exist, must be sent directly to the DSP. Other offences will be sent to the CO of the suspect or suspect(s). Service Police reports, other than those where there is enough evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances, should be sent to the CO.

13. On conclusion of a CO's investigation the officer conducting the investigation may suggest a charge. The CO will then decide whether he should bring a charge, involve the Service Police in the case, refer the case to the DSP, deal with the matter administratively or take no action.

Representation

⁶ Section 115 of the Act.

⁷ Section 113 and 114 of the Act.

⁸ See paragraph 2.

14. The accused is entitled to the appointment of an accused's assisting officer (AAO) to advise and represent him at a summary hearing. The AAO fulfils an important role and can provide valuable assistance to the accused. He is to perform his duties entirely independently of the CO. The unit is to do everything reasonably possible to facilitate the AAO's functions. The accused may nominate an AAO see Annexes F and G to [Chapter 9](#) (summary hearing and activation of suspended sentences of Service detention). An individual may only be nominated as an AAO if:

- a. He is a Service person⁹ and remains as such while carrying out this function.
- b. He is of at least the rank or rate of petty officer or military, marine or air force sergeant.
- c. He consents to the nomination.

Service victims' code of practice

15. The CO, DSP and Service Police need to be aware of, and comply with, the policy requirements contained within the Code of Practice on Services to be provided by the Armed Forces to Victims of Crime (see DIN 200801-212) which is modelled on the equivalent Home Office code. The Services' code is tailored to meet the requirements of the armed forces (for further detail see paragraph 200).

Mode of trial

16. Where a CO has received an investigation report and a charge is likely, the CO should consider the most appropriate forum for the case to be heard. This will either be a summary hearing or CM trial¹⁰. This forms part of the process of deciding the mode of trial.

17. A number of factors may be relevant in reaching such a decision, but broadly speaking, the CO will usually need to consider:

- a. The adequacy of his powers of punishment;
- b. The seriousness of the alleged offence; and
- c. The complexity of the case.
- d. If it is part of an incident where some other offences have been referred to the DSP

18. If he decides to hear the case summarily, the CO will go on to complete the charging procedure. Once a charge has been brought by the CO, he should bear in mind that he has the power to refer any charge to the DSP at any time before a finding has been recorded at summary hearing. For example, during the course of the hearing, the CO may decide that he has insufficient powers to deal with the charge, or unforeseen legal complexities may arise.

Charging

19. A charge is brought when a charge sheet has been signed by the CO of the accused and a copy of the signed charge sheet handed to the accused. The charge should reflect the

⁹ Subject to Service law.

¹⁰ For relevant civilians see Part 5 of this chapter.

seriousness of the conduct alleged and be accurately stated in the charge sheet (see paragraphs 100 and 101).

Local acting ranks or rates (RN), local ranks (Army and RAF) and acting ranks or rates

20. When an offender who holds a local acting or acting rate or rank is to be charged he must be treated as holding the substantive rate or rank as that acting rate or rank which he holds at the time of the summary hearing. Local ranks simply hold the next higher rank but are not paid at that rank. Therefore for disciplinary purposes they will be treated as holding their substantive rank¹¹.

¹¹ See RN BR 1066, Army QR (1975) paragraph 6.151 and RAF AP 3392 Volume 2.

Part 2 - Offences overview

21. For the purposes of this chapter, offences are divided into several categories and depending on the category, the investigation and the subsequent actions to be taken may differ. The category of the possible offence affects who will investigate¹² it and also whether it can be dealt with summarily or whether it has to be tried by CM¹³ or SCC¹⁴. Further explanatory notes on individual offences, including sample charges are to be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

22. It is important that a CO considers the possible offence and the category into which it falls at the outset, so that the appropriate investigation can be initiated. The CO must ensure that the Service Police are made aware as soon as reasonably practicable of a potential Schedule 2 offence and of the existence of prescribed circumstances. In other cases, the CO may choose to initiate an investigation into the matter or refer it to the Service Police. Where a CO's investigation has been initiated, if new evidence comes to light that indicates a more serious offence may be involved than first thought, the CO should reconsider whether to make the Service Police aware. When he does so, the Service Police have control of the case until the investigation is completed.

23. **Categories of offences.** The following categories will affect the decision on charge and the mode of trial:

a. **Offences that can be heard summarily¹⁵.** Offences that may always be heard summarily by the CO are listed at [Annex B](#). There are a small number of more serious offences which can be heard summarily by a CO, if he has permission from HA. These offences are listed at [Annex C](#) (see Part 4).

b. **Offences (other than those at sub-paragraphs d and e) that cannot be heard summarily.** Any offence can be tried by CM¹⁶. Offences that cannot be heard summarily must be tried at CM. There are criminal conduct offences which cannot be heard summarily but which do not fall within the list contained in Schedule 2 of the Act ([Annex D](#)) or offences committed in prescribed circumstances ([Annex E](#)), for example; burglary or section 20 wounding (see Part 5).

c. **Offences committed by relevant civilians.** Offences committed by a relevant civilian can only be tried by the SCC or, if an 'indictable-only' offence¹⁷, by CM. The procedure for dealing with a relevant civilian is the same as for a CM only offence (see (b) above and Part 5).

d. **Schedule 2 offences.** These offences are inherently serious disciplinary offences and are listed at [Annex D](#) and can only be tried by CM (see Part 6); for example, mutiny and desertion, and serious criminal offences, such as murder, manslaughter and certain sexual offences.

e. **Offences committed in prescribed circumstances.** The prescribed circumstances in which offences may be committed are detailed in [Annex E](#). Broadly

¹² Schedule 2 offences and offences which fall within prescribed circumstances must be referred to the Service Police.

¹³ The CM has jurisdiction to try any Service offence see section 50(1) of the Act.

¹⁴ The SCC has jurisdiction to try any service offence committed outside the British Islands by a civilian unless it is an indictable only offence which can only be dealt with by CM. See section 51 of the Act and [Chapter 3](#) (Jurisdiction and time limits).

¹⁵ Where it is alleged that the accused attempted to commit an offence listed in Annex B, the CO may hear the case summarily, provided it is not an attempt to commit a criminal conduct matter. Any attempt to commit an offence listed in Annex C may be dealt with summarily with permission.

¹⁶ Section 50(1) of the Act.

¹⁷ Within the special meaning under section 51(4) of the Act.

speaking this includes death in custody, bullying or abuse of position. The individual incidents may themselves only amount to an offence capable of ordinarily being heard summarily, but the circumstances in which it was committed mean that the case must be referred to the DSP for a decision on the charge and the mode of trial (see Part 6).

Part 3 – Investigation

Introduction

24. The starting point of any investigation is the point at which an allegation or incident comes to light. Preliminary enquiries will assist the CO in considering whether an offence may have been committed which may warrant disciplinary action, whether the Service Police should be informed or whether the matter would be more suitably dealt with by his own investigation. In less serious cases, the CO may decide that administrative action is appropriate or that the matter requires no action.

25. The CO is under a legal duty to ensure that the Service Police, as soon as is reasonably practicable, are aware of an offence or a suspected offence under Schedule 2 or of the existence¹⁸ of prescribed circumstances¹⁹. In all other cases, the CO is under a duty to ensure that the matter is investigated appropriately²⁰, whether by the Service Police, by a CO's investigation or by a referral to the civil authorities. The latter will depend upon the issue of jurisdiction see [Chapter 3](#) (Jurisdiction and time limits). In relation to relevant civilians it is recommended that the Service Police conduct the investigation.

26. If the CO has to or wishes to contact the Service Police, a person may be authorised to contact the Service Police on his behalf for this purpose, but responsibility for ensuring that the Service Police are made aware remains with the CO²¹. It is then a matter for the Service Police as to whether they investigate the allegation or circumstances and what form the investigation should take.

27. Once the Service Police, civilian police or MOD police are investigating any allegation or incident, the CO has no power to dispose²² of the case. This will include those circumstances where the Service Police are investigating because the CO chose to refer the case to the Service Police or because he was under a duty to ensure that they were aware of it. In such cases, a CO cannot require the Service Police to stop or suspend the investigation and he cannot at this stage bring a charge or refer the case to the DSP.

Jurisdiction

28. Within the United Kingdom jurisdiction in respect of offences committed by Service persons may lie with the Service authorities under the Act or with both the Service authorities and the civilian authorities under the ordinary law of the relevant part of the United Kingdom. In the second case, there are a number of established procedures that apply²³. In cases where such issues arise, COs should liaise with the Service Police and seek staff legal advice.

29. **Concurrent jurisdiction.** In many cases there may be concurrent jurisdiction; this means that cases could be investigated or prosecuted by Service, UK civilian or foreign authorities. Decisions on who exercises jurisdiction will have to take into account the principles contained in relevant protocols, in Status of Forces Agreements (SOFA) or in memoranda of understanding (MOU). Decisions involving foreign authorities will require prior consultation with the appropriate Service authorities²⁴. The Service Police will need to

¹⁸ Which does not all depend on whether it is likely that an offence has been committed

¹⁹ Sections 113 and 114 of the Act.

²⁰ Section 115(4) of the Act.

²¹ A CO is able to delegate any of his functions under Part 5 of the Act to a subordinate commander see regulation 16 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

²² See paragraph 76 for the meaning of dispose.

²³ Copies of the extant protocols can be obtained from DDefSy-Def Policing at MOD.

²⁴ HA should be consulted and the Director of Service Prosecutions (DSP) for more serious cases.

consider jurisdiction before an allegation or offence can be investigated. In some cases they may (if the necessary requirements are met) exercise some of their powers, such as the power of arrest, before jurisdiction is confirmed. For information on arrest see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) and for detailed guidance on jurisdiction see [Chapter 3](#) (Jurisdiction and time limits).

Deciding who should investigate

30. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that a Schedule 2 offence may have been committed by someone whose CO he is, or if he becomes aware of any of the prescribed circumstances referred to in [Annex E](#), he must ensure that the Service Police are made aware as soon as is reasonably practicable. Once the Service Police have been notified in these circumstances, the CO may take no further disciplinary action²⁵ in relation to the allegation or circumstances unless it is referred back to him by the Service Police or the DSP. In all other cases, the CO may conduct his own investigation, see paragraph 32 below, or ensure that the Service Police are made aware of the matter as soon as is reasonably practicable²⁶ so that they can investigate, see paragraph 40 below. In relation to those other cases, when reaching his decision as to what would be an appropriate investigation, the CO should take into account a number of factors including:

- a. The apparent seriousness of the matter investigated; for example, whether a criminal conduct offence may be appropriate see [Chapter 8](#) (Criminal conduct offences). If so, consideration should be given to referring the matter to the Service Police for investigation, as soon as reasonably practicable;
- b. The complexity of the alleged conduct; for example, whether it is a simple and straight-forward case, as is likely in cases of AWOL or conduct to the prejudice of good order and discipline. If so, the CO may wish to direct the investigation. If, however, identification is an issue, the investigation is likely to involve a search for evidence, or the investigation may require a multi-agency approach such as is necessary in cases involving children, the SP should investigate if at all possible;
- c. Whether it is likely that any which may be charged can be tried only by CM/SCC; for example, where the suspect is a relevant civilian, or it involves an allegation of burglary (section 9 of the Theft Act 1968) or an offence contrary to the Air Navigation Order (section 49 of the Act), which are triable at CM only. As the rules of evidence apply in any Service court, the Service Police should investigate the matter; and
- d. The complexity of investigating two or more incidents or the alleged conduct of two or more suspects, each person's conduct in relation to each incident is to be regarded as giving rise to a separate case²⁷.

31. It may be necessary, in exceptional circumstances, to conduct initial investigations in those cases where normally the Service Police should carry out the investigation. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and investigate, for example, an SSBN on patrol. If this situation arises, the CO should be aware that he has departed from the normal procedure

²⁵ He may however feel it appropriate to take some form of administrative action or posting if appropriate. If he does so he should be careful to ensure that he does not prejudice any disciplinary action in relation to that offence. In in doubt advice should be sought.

²⁶ Section 115(4) of the Act.

²⁷ Section 117(2) of the Act.

and should bring the Service Police into the investigation as soon as is reasonably practicable.

CO's investigation

32. A CO may direct anyone under his command to investigate a matter on his behalf, subject to the limits at [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) on powers of investigation which apply in the absence of the Service Police. There will be occasions when it would be essential or at least preferable for the matter to be investigated by those who have specific training; however, there may be occasions when it may be sufficient to rely on other trained personnel, especially RN coxswains. Guidance on the conduct of a CO's investigation is contained at [Annex F](#). If the investigation reveals a potential Schedule 2 offence or the existence of prescribed circumstances then the CO must ensure that the Service Police are made aware. If the suspected offence is triable only at CM or SCC then subject to operational constraints, consideration should be given to referring the investigation to the Service Police. They should take over the investigation as soon as is reasonably practicable.

33. **Rights of the suspect.** These are outlined in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to a suspect's attention as soon as reasonably practicable at the commencement of the investigation, to ensure that he is aware of his rights.

34. **Dealing with evidence.** If evidence comes to light that suggests that an offence under Schedule 2 may be involved or that prescribed circumstances exist, the Service Police must be notified as soon as is reasonably practicable. Once the Service Police have been notified in these circumstances, the CO may take no further disciplinary action²⁸ in relation to the allegation unless it is referred back to him by the Service Police or the DSP (see paragraph 87). A CO may authorise any other person to notify the Service Police where an investigation is required²⁹. If during the course of a CO's investigation the Service Police inform the CO that they are investigating the matter, the CO has no further power to investigate the matter or take any further action, unless and until the case is referred to him³⁰.

35. **Advice during investigation.** Personnel conducting CO's investigations may consult the Service Police and may seek advice from the relevant staff legal adviser or HA staffs. RN coxswains should, however, seek advice from the relevant Naval Provost Marshal in the first instance.

36. **Findings of a CO's investigation.** The findings of the investigation are to be provided to the CO and should normally contain:

- a. All witness statements;
- b. All other records of evidence;
- c. A list of all exhibits and details as to where these exhibits are held and can be inspected;
- d. All documentary exhibits;

²⁸ He may however feel it appropriate to take some form of administrative action or posting if appropriate. If he does so he should be careful to ensure that he does not prejudice any disciplinary action in relation to that offence. If in doubt advice should be sought.

²⁹ Section 113 of the Act.

³⁰ Section 119 of the Act.

- e. The suspect's disciplinary records; and
- f. A suggested charge³¹, if appropriate.

37. **Action by CO after CO's investigation.** Where the findings of an investigation indicate that an identified person in his command may have committed a Service offence, the CO will decide whether to charge, refer the case to the DSP, or to make the Service Police aware:

- a. If the CO proposes to bring a charge and it is capable of being dealt with summarily, and c. below does not apply the CO should follow the procedure at Part 4 (Offences capable of being heard summarily) of this chapter;
- b. If the CO considers that an appropriate charge may be one that is triable only at CM/SCC and c. below does not apply, the CO should follow the procedure at Part 5 (Offences triable by CM or SCC) of this chapter; or
- c. If the result of the investigation is that the CO has a duty in respect of a Schedule 2 offence or prescribed circumstances, the CO must inform the Service Police and then follow the procedure at Part 6 (Offences listed in Schedule 2 or committed in prescribed circumstance) of this chapter.

38. Where the result of the investigation is that there is insufficient evidence or no evidence to charge a Service offence and the CO does not propose to involve the Service Police, the CO should notify the former suspect of the outcome of the investigation. When doing so, the CO should, if appropriate, take care not to preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Having taken appropriate advice, the CO may wish to consider administrative action.

39. Whether disciplinary action is to be taken or not, the Victims Code should be complied with, as appropriate (see paragraph 200).

Investigation by Service Police

40. When conducting an investigation the Service Police act independently of the chain of command. At the conclusion of the investigation, the Service Police report to the DSP or a CO. The Service Police may consult the DSP on any case and they should consult with the DSP when investigating possible Schedule 2 offences and offences committed in prescribed circumstances.

41. An investigation by the Service Police can be initiated:
- a. Having independently received a complaint or information;
 - b. On receiving information from a CO;
 - c. Having been notified by a CO of under his duties relating to a Schedule 2 offence or the existence of prescribed circumstances;
 - d. Having witnessed an offence being committed;
 - e. When directed to investigate by HA; or

³¹ This is not binding on the CO. The CO makes the final decision on what summary charge, if any, should be brought.

f. On receipt of any report made by the civil police. Such reports should be forwarded to the Service Police, who will prepare a Service Police report.

42. **Conduct of the investigation.** Investigations by the Service Police must comply with the relevant provisions of the Act, subordinate legislation under the Act and other applicable legislation (such as the Police and Criminal Evidence Act 1984 (Application to the Armed Forces) Order 2009). In addition, the Service Police should also comply with the JSP 397 (Codes of Practice for the Service Police), governing, among other things, the manner in which investigations are conducted. The codes deal with the exercise by the Service Police of their powers to stop and search, to arrest and to search premises and with the treatment, questioning, and identification of suspects and the recording of interviews. Detailed guidance on arrest, stop and search is contained in [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention).

43. **Advice during investigation.** Whether the relevant advice should be sought from the DSP or the staff legal adviser depends on the subject matter of the advice. On matters which may be referred to the DSP by the Service Police, they should normally obtain legal advice from the DSP.

44. **Rights of accused.** The rights of a person arrested or charged with an offence are outlined in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to the attention of a person arrested or charged as soon as reasonably practicable. If a person is being held in custody³², or is to be interviewed under caution, free legal advice³³ may be available under the legal advice scheme or from Service lawyers (see JSP 838 Armed Forces Legal Aid Scheme).

45. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of questions put to him or of his replies, an appropriate adult should be present during questioning. This may be:

- a. A relative, guardian or other person responsible for his care or custody;
- b. Someone who has experience of dealing with mentally disordered or mentally incapable persons (such as an approved social worker as defined by the Mental Health Act 1983 or a specialist social worker), but is not a Service policeman or employed by the Service Police; or
- c. Failing either of the above, some other responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

46. **Suspect 17 years old or of a lower age.** Where a suspect is 17 years old or of a lower age, he is to be treated as a juvenile for the purposes of investigation. An appropriate adult should be notified of the investigation and accompany the juvenile when being questioned or interviewed. Appropriate adult³⁴, in the case of a juvenile means:

- a. A parent or guardian (or, if he is in care, the care authority or voluntary organisation);

³² See [Chapter 5](#) (Custody).

³³ The suspect is handed MOD form 811A entitled 'Notice to suspect', which sets out his right to legal advice and how it is obtained. Further guidance is also contained in JSP 838 (Armed Forces Legal Aid Scheme).

³⁴ The meaning is taken from the JSP 397 (Service Police Codes of Practice).

- b. A social worker; or
- c. Failing either of the above, another responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

47. A person, including a parent or guardian, is not an appropriate adult if he is suspected of involvement in the offence in question, if he is the victim or a witness, if he is involved in the investigation or if he is a person to whom the suspect has admitted the offence prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.

48. **Multiple suspects/incidents.** When investigating two or more incidents or the alleged conduct of two or more suspects, each person's conduct in relation to each incident is to be regarded as giving rise to a separate case³⁵. Where there are two related cases against an accused where one requires referral to the DSP and the other is referred to the CO, the CO should refer the lesser case to the DSP as well.

49. **Evidence given at a Service Inquiry.** For guidance on evidence given, see [Chapter 11](#) (Summary hearing – dealing with evidence).

50. **Criminal Procedure and Investigations Act 1996 and disclosure.** Provision equivalent (subject to modifications) to Parts 1 and 2 of the Criminal Procedure and Investigations Act 1996 (CPIA) is applied to the armed forces³⁶. Part 1 applies after charge to all cases dealt with by the CM, the SCC or the SAC, and Part 2 applies to all Service Police investigations. The CPIA (Codes of Practice) (Armed Forces) place a duty on the Service Police to record and retain relevant material recovered during the course of an investigation. The evidence gathered during the investigation is to be held by the Service Police. Further guidance on CPIA 96 is contained in JSP 890 (Service Codes of Practice for Disclosure).

51. **Sufficient evidence to charge an offence.** On completion of an investigation, the Service Police must consider whether there is sufficient evidence to charge a person with an offence. The evidential test to be applied by the Service Police is as follows:

'There is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted³⁷.'

52. If there is sufficient evidence to charge an offence but it is not listed in Schedule 2 and the Service Police are not aware of prescribed circumstances in relation to the offence, the Service Police must refer the case to the CO and must³⁸ state the service offence(s) they consider there is sufficient evidence to charge. (Where the matter investigated had given rise to a duty on the CO in relation to Schedule 2 offences or prescribed circumstances, the Service Police must consult the DSP before referring the case to the CO³⁹.)

³⁵ Section 117(2) of the Act.

³⁶ The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009 and the Criminal Procedure and Investigations Act 1996 (Code of Practice)(Armed Forces) Order 2009.

³⁷ Section 116(5) of the Act.

³⁸ See regulation 7(2)(a) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

³⁹ In other words the Service Police investigation has not found evidence of either a Schedule 2 offence or an offence committed in prescribed circumstances.

53. If there is sufficient evidence to charge an offence listed in Schedule 2 or, an offence committed in prescribed circumstances, the Service Police must refer the results of the investigation to the DSP, recommend a charge and inform the CO.

54. The following is a summary⁴⁰ of the prescribed circumstances which require the Service Police to refer a case to the DSP:

a. the evidence of a Service offence is that a Service person has been the victim of:

(1) A course of conduct by a Service person, involving on at least two occasions an assault; or

(2) A Service offence corresponding to an offence under section 4 of the Protection from Harassment Act 1997⁴¹.

b. The evidence of a Service offence is that a Service person has been the victim of an assault causing serious injury⁴², inflicted by a Service person of superior rank or rate while the assailant was otherwise carrying out his duties.

c. The evidence of a Service offence is that a person:

(1) Inflicted (or participated in inflicting) serious injury on a relevant person⁴³ in a relevant place⁴⁴;

(2) Was under a duty to safeguard a relevant person in a relevant place and failed to prevent an assault inflicting serious injury on that person; or

(3) Failed to prevent the death being caused of any person whom he was under a duty to safeguard while that person was in a relevant place.

d. The evidence of a Service offence is evidence that the death of a person was caused (directly or indirectly), or contributed to, by the misconduct of a Service person or a relevant civilian and the misconduct occurred while the deceased was in a relevant place⁴⁵ in Service custody.

In the above circumstances, the Service Police must refer⁴⁶ the case to the DSP.

⁴⁰ These prescribed circumstances are set out in full in regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁴¹ A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions (s.4 Protection from Harassment Act 1997). Legal advice should be sought whenever it is believed that this offence might apply.

⁴² 'Serious injury' is defined in regulation 2(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. Serious injury means 'a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of a bodily function'.

⁴³ See regulation 6(1) Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009: 'relevant person' means – (a) a person who is not a member of the regular or reserve forces; or (b) a person who is a member of the regular or reserve forces and (i) is under 18 yrs old (ii) has enlisted in the regular or reserve forces and has not completed Phase 1 and Phase 2 Training, (iii) is an officer or officer cadet and has not completed Phase 1 Training, or (iv) is in service custody within the meaning of the Act.

⁴⁴ See regulation 6(2) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009: 'relevant place' means – (a) any premises or other place which at the time of the death or serious injury was in use for the purposes of Her Majesty's forces, and (b) any vehicle, aircraft or vessel which at the time of the death or serious injury was in use for the purposes of Her Majesty's forces.

⁴⁵ A 'relevant place' means any premises or other place which at the time of the suspected misconduct was permanently or temporarily occupied by Her Majesty's forces, or any vehicle, aircraft or vessel used for the purposes of Her Majesty's forces. See regulation 6(3) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁴⁶ Section 116(2)(b) of the Act.

55. **Referral of a case by Service Police.** When referring a matter either to the CO or the DSP, the Service Police must provide a written statement⁴⁷ or an oral statement, specifying the Service offence which the Service Police consider there is sufficient evidence to charge and why the Service Police consider that there is sufficient evidence to charge an offence. While the regulations are permissive as to making oral statements when referring the matter, reports should be in writing except in the most exceptional circumstances.

56. **Case papers.** If there is sufficient evidence to charge a person the Service Police must compile the case papers⁴⁸, which consist of:

- a. All reports prepared by the Service Police (which will usually contain a written recommended charge for the CO to consider);
- b. All witness statements;
- c. All other records of evidence, including a summary or transcript of all tape-recorded interviews;
- d. A list of all exhibits and a statement of where any that are not documentary exhibits are held;
- e. All documentary exhibits;
- f. All formal disciplinary records of the suspect; or
- g. In the case of relevant civilians if no formal disciplinary record of the suspect is maintained and held by any of Her Majesty's forces, a list of his convictions (if any) for a Service offence or an offence under any of the Service Discipline Acts and of his convictions (if any) by a civilian court;
- h. All documents to be provided to a person involved in the prosecution of Service offences⁴⁹; and
- i. All equivalent papers prepared by a UK police force or an overseas police force and provided by that force to a Service Police force.

57. The case papers are to be provided to the CO or the DSP, as appropriate. If the case papers⁵⁰ cannot be provided to the CO or the DSP (as appropriate) at the time of referral, the Service Police must provide them as soon as reasonably practicable after referring the case. If the referral is direct to the DSP, the CO must⁵¹ be notified of the referral and provided with a copy of the Service Police report⁵².

58. Once the case has been referred to the CO or the DSP as applicable, if the recommended charge is:

- a. Capable of being dealt with summarily, the procedure at Part 4 is to be followed;

⁴⁷ Regulation 7 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁴⁸ Regulation 2(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁴⁹ In accordance with a code of practice made under section 78(2)(b) of the Criminal Procedure and Investigations Act 1996.

⁵⁰ Regulation 7 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁵¹ Section 118 (2) of the Act

⁵² Regulation 8(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

- b. Triable only at CM/SCC, the procedure at Part 5 is to be followed; or
- c. For an offence under Schedule 2 or an offence committed in prescribed circumstances, the procedure at Part 6 is to be followed.

59. **Situations in which the Service Police should not refer a case to the DSP following an investigation.** It is important to note that the Service Police cannot refer all of the matters they have investigated to the DSP. Where the Service Police consider there is sufficient evidence to charge a person with a Service offence but it is not a Schedule 2 offence or an offence which has been committed in prescribed circumstances they must refer the case to the CO of the person whom it is believed has committed a Service offence.

60. If the Service Police have carried out an investigation and:

- a. The allegation or circumstances which were the subject of the investigation gave rise to a duty to ensure that the Service Police were aware (because of a possible Schedule 2 offence or prescribed circumstances); and
- b. The Service Police propose not to refer the case to the DSP,

the Service Police must consult the DSP as soon as reasonably practicable and before referring the case to a person's CO⁵³. This is to ensure that the DSP is satisfied that there is insufficient evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances. In deciding whether there is sufficient evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances, the Service Police should give weight to the DSP's view. In some cases the DSP will need to consider a report from the Service Police and any evidence which has been gathered before giving its view. In such cases the Service Police should provide a report and any other documents and information requested by the DSP.

61. **Insufficient evidence to charge any Service offence.** If there is insufficient evidence to charge any Service offence, the Service Police should provide the CO with a written summary of the investigation and the reason why they consider that there is insufficient evidence to charge. When notifying the former suspect of the outcome of the investigation, the CO should take care not to preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Having taken appropriate advice the CO may wish to consider administrative action. The Victim's Code should be complied with, if appropriate (see paragraph 200).

⁵³ See Section 116(4) of the Act.

Part 4 - Offences capable of being heard summarily

Jurisdiction to hear charges

62. Before taking any action to bring a charge the CO must first be satisfied he has jurisdiction to bring a charge in accordance with [Chapter 2](#) (Meaning of a commanding officer) and [Chapter 3](#) (Jurisdiction and time limits)

63. The offences that may be dealt with summarily by a CO are set out in [Annex B](#)⁵⁴. Offences that may be heard summarily only with permission of HA or by a CO if he is of or above the rank of rear admiral, major-general or air vice-marshal⁵⁵ are listed at [Annex C](#). Further details and specimen charges for these offences are contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

64. A flow chart of the procedure to be followed is at [Annex A](#).

Legal advice

65. Where a CO is considering whether to hear a criminal conduct offence⁵⁶ summarily, he should be aware that staff legal advice will be necessary in all but the simplest and most straightforward cases. Offences, the complexity of which necessitate that staff legal advice should be sought before proceeding summarily, are:

- a. All those offences listed at [Annex C](#);
- b. Low flying (section 34 of the Act);
- c. Annoyance by flying (section 35 of the Act); and
- d. Possession of a controlled drug (contrary to section 5(2) of the Misuse of Drugs Act 1971).

Delegation of a CO's powers

66. A CO, see [Chapter 2](#) (Meaning of commanding officer), may delegate to a subordinate commander not below the rank of naval lieutenant, military or marine captain or flight lieutenant⁵⁷ any or all of his functions⁵⁸ listed below, subject to such conditions as he considers appropriate⁵⁹:

- a. The referral of a case⁶⁰ to the DSP;
- b. Bringing a charge (including bringing a charge as a result of a direction from the DSP);
- c. Amending or substituting a charge, or bringing an additional charge;
- d. The referral of a charge⁶¹ to the DSP; and

⁵⁴ Section 53 of the Act.

⁵⁵ Section 54 and Schedule 1 Part 2 of the Act.

⁵⁶ Section 42 of the Act.

⁵⁷ This applies to acting and substantive rank only.

⁵⁸ See Part 5 of the Act and regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁵⁹ See regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁶⁰ Cases are referred where an allegation has been made but no suspect has been charged.

⁶¹ Charges are referred where a suspect has been charged.

- e. Discontinuing proceedings on a charge.

67. **Notifying the Service Police.** Although the functions of the CO that can be delegated include ensuring that the Service Police are aware of a matter where an offence under Schedule 2 may have been committed or where there are prescribed circumstances, as a matter of policy, it is a function that should not be delegated. This does not mean that the CO cannot instruct someone else to notify on his behalf, however, the obligation to ensure the Service Police are aware remains with the CO. When the notification is given by someone other than the CO, the authority under which this has taken place is to be recorded, for example as the duty officer.

68. **Delegations to more than one person.** The CO can delegate to more than one subordinate commander at the same time the functions of:

- a. Referral of a case to the DSP; and
- b. Bringing a charge (including bringing a charge as a result of a direction from the DSP) in respect of the same case.

However, once a subordinate commander exercises either of these delegated functions, in relation to a particular case⁶², no other subordinate commander can exercise either of these functions in relation to that particular case.

69. **Delegations after a charge has been brought.** After a charge has been brought any or all of the following functions can only be delegated to one subordinate commander at a time:

- a. Amending or substituting the charge, or bringing an additional charge;
- b. The referral of the charge to the DSP; and
- c. Discontinuing proceedings on the charge.

For example, where in relation to a charge a CO has delegated any of these functions to a subordinate commander (A), the CO cannot exercise those functions himself unless he revokes the delegation. Similarly, if a CO wants a different subordinate commander (B) to exercise any of the above functions in relation to a particular charge, he should revoke the delegation to subordinate commander (A) and delegate the function(s) to subordinate commander (B).

70. **Delegation to hear a charge.** Delegations to hear a charge⁶³ are dealt with in [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). However, when a subordinate commander is given powers to hear a charge, he must also be given the powers to:

- a. Amend or substitute the charge, or bring an additional charge;
- b. Refer the charge to the DSP; and
- c. Discontinuing proceedings on the charge.

⁶² Section 120 of the Act sets out the initial powers referred to in paragraph 68 a. and b.

⁶³ Part 6 of the Act.

71. **Limitation to CO's delegation.** Because a subordinate commander does not have power to exercise the relevant function, the CO cannot⁶⁴ delegate to a subordinate commander the authority to:

- a. Apply for extended powers of punishment including those in relation to activation orders, see the preliminary procedures section of [Chapter 9](#) (Summary hearing and activation of suspended sentences of service detention);
- b. Apply for permission from HA to hear a charge relating to an offence outlined in [Annex C](#)⁶⁵;
- c. Hear a charge relating to an offence that requires HA permission (see paragraph 71b above); or
- d. Hear a charge relating to an offence alleged to have been committed during the operational period of a suspended sentence of detention.

72. In addition the following limitations on delegation apply:

- a. A subordinate commander of or above the rank of lieutenant commander, major and squadron leader can only hear a charge brought against a person of or below the rank or rate of chief petty officer, marine colour sergeant, military staff sergeant, or flight sergeant; and
- b. A subordinate commander of the rank of naval lieutenant, military or marine captain or flight lieutenant can only hear a charge brought against a person of or below the rank or rate of leading rate, military or marine corporal or air force corporal⁶⁶.

73. **Conditions for CO's delegation.** When delegating any relevant disciplinary functions to subordinate commanders, a CO may make conditions on such delegations. For example, the CO may limit the type of charge that the subordinate commander can bring by excluding any offences of criminal conduct, or charges that relate to particular offences. Wherever possible, notice of officers who have disciplinary functions delegated to them, and any limitations on those delegations, should be promulgated in the ship, unit or establishment.

74. **Revocation of delegation.** The delegation will endure until it ends in accordance with its terms or when the CO expressly revokes it. A CO should revoke a delegation orally or in writing.

Procedure for offences capable of being heard summarily

75. The procedure for offences capable of being heard summarily is outlined in the 6 steps below.

Step 1 – Deciding whether CO has initial powers to dispose of a case

76. Where a Service policeman has referred a case to the CO (following investigation by Service or civilian police), where a CO's investigation has been completed or where a case

⁶⁴ As set out at rule 3 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

⁶⁵ Section 54 of the Act.

⁶⁶ Rule 3(4) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

has been referred to him by the DSP⁶⁷, the CO will need to satisfy himself that he has initial powers⁶⁸. If the CO does have initial powers he may dispose of the case in one of the following ways:

- a. Bringing a charge which can be heard summarily;
- b. Referring a case to the DSP;
- c. Taking no disciplinary action (the CO may decide that administrative action should be taken instead); or
- d. Referring a case to civilian authorities.

77. If a CO decides to take action to hear the case summarily or refer the case to the DSP the procedure to be followed is set out at Step 2 below.

78. If the CO decides not to bring a charge or refer the case to the DSP, he may wish to consider administrative action (see paragraphs 215 - 221). However, where the Service Police have investigated and found there is sufficient evidence to charge, the CO should not take this course of action without first obtaining appropriate advice, which may include staff legal advice.

79. If the CO considers that it would be appropriate to refer the matter to the civilian authorities he should first obtain advice from the staff legal adviser/HA. In the case of a relevant civilian where a decision is made not to take action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

Step 2 – Deciding mode of trial before charge

80. A CO with initial powers with respect to a case may only bring a charge which is capable of being heard summarily, which means:

- a. It is an offence listed in [Annex B](#), or [Annex C](#) where permission has been given, unless permission is not required because the CO is a 2* CO⁶⁹.
- b. The accused is a Service person of or below the rank or rate of warrant officer, or the accused is an officer of or below the rank of commander, lieutenant colonel or wing commander (see paragraph 4 above regarding two rank rule).

81. All cases must be considered for suitability for summary hearing or for trial by CM before any charge is brought. This is part of the process referred to as deciding the mode of trial.

82. A CO should consider the seriousness and the complexity of the case and whether, if he brings a charge and hears it, his powers of punishment are likely to be adequate, see [Chapter 13](#) (Summary hearing sentencing and punishments). For example, if a weapon is used in an assault, the CO may decide that this is an aggravating feature, for which his powers of punishment are likely to be insufficient. In serious or complex cases, it may be appropriate for the CO to refer the case to the DSP. A complex case may be one in which,

⁶⁷ Section 121(4) of the Act.

⁶⁸ The initial powers referred to are those of bringing a charge or referring a case to the DSP (section 120 of the Act).

⁶⁹ A 2* CO is of, or above, the rank of rear admiral, major-general or air vice-marshal.

for example, there are legal or evidential issues, more than one accused or where witnesses may have to give evidence in foreign languages. If in doubt staff legal advice should be sought.

83. Additional factors which the CO should consider and may be relevant in particular cases are:

- a. Whether vulnerable victims or vulnerable witnesses are involved, who would be better examined and cross examined by professional advocates;
- b. Whether his powers of compensation are sufficient see [Chapter 13](#) (Summary hearing sentencing and punishments);
- c. Whether a civilian witness⁷⁰ is involved;
- d. The effect of delay if the case is referred to the DSP and dealt with by the CM;
- e. Whether the offence is alleged to have been committed during the operational period of a suspended sentence imposed by a CM. A CO cannot activate a suspended sentence imposed by a CM. It may be preferable that the CM considers the activation⁷¹ of the suspended sentence, and for this purpose that the CM should also deal with the new offence, indicating that the charge ought to be referred for CM. Staff legal advice should be sought in these circumstances;
- f. Whether the offence is alleged to have been committed during the operational period of a suspended sentence imposed by a CO or Summary Appeal Court (SAC). If so, when hearing the new offence and activating the suspended sentence the CO⁷² is limited in his powers of punishment. For example, if the suspended sentence is for 60 days detention, provided the CO has obtained permission to use extended powers of punishment in relation to the new offence he may award up to a maximum punishment of 30⁷³ days detention for the new offence, (the total period of detention would be 90 days including the 60 days of the suspended sentence). If the CO is not satisfied that his powers of punishment are sufficient, then he may decide to refer the case to the DSP.

This list is not exhaustive. If in doubt seek staff legal advice.

Referral of case to the DSP before charge

84. When referring a case to the DSP following a CO's investigation, the CO should send all relevant material (see paragraph 36 above) and his reasons as to why he is referring the case. The Service person who is the subject of the referral should be notified of such a referral.

85. When a case investigated by the Service Police is referred to the DSP by the CO:

- a. If the Service Police provided the CO with a written statement the CO must provide a copy of it to the DSP;

⁷⁰ Civilian witnesses cannot be compelled to attend a summary hearing to give evidence.

⁷¹ The CO may proceed to hear the charge and subsequently notify the CAO of the finding so that the CM can consider whether to activate the suspended sentence. See [Chapter 13](#) (Summary hearing sentencing and punishments).

⁷² A subordinate commander may not activate a suspended sentence of detention, this may only be done by the CO. For detailed guidance see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention).

⁷³ Only if permission to use extended powers of punishment has been granted by HA.

b. If the Service Police made an oral statement to the CO, the CO should ensure that as soon as practicable the Service Police provide the DSP with a written statement or make an oral statement to the DSP, specifying the Service offence with which the Service Police considers there is sufficient evidence to charge and why he considers there is sufficient evidence;

c. When the CO refers the case to the DSP or as soon as reasonably practicable afterwards, he must provide the DSP with a copy of the case papers (see paragraph 56 above)⁷⁴;

d. The CO should provide a brief statement of his reasons for the referral; and

e. The CO should notify the Service person who is the subject of the referral.

86. Once the case has been referred, the CO has no powers in relation to the case unless the case is referred back to the CO by the DSP.

87. **Referral of a case by the DSP back to the CO.** Where the DSP refers the case back to the CO, the DSP cannot direct the CO to bring a charge but may advise the CO of a suitable summary charge.

88. Where a case is referred to a CO, he will have initial powers in relation to the case⁷⁵. As a result, the CO should reassess the evidence in the case and decide on the appropriate way to dispose of the case (see step 1). If the CO considers that there is sufficient evidence (see paragraph 93 below) to charge a Service offence which is capable of summary disposal, he may bring a charge. When the DSP refers a case back to the CO, the DSP may (although he is not required to) advise the CO of a suitable (summary) charge that may be brought. Where this occurs the CO is not compelled to follow the DSP's advice. However, a CO should take this advice into account when deciding on the appropriate method of disposal or appropriate charge. When selecting a charge in these circumstances a CO may wish to obtain staff legal advice.

89. If after reviewing the case, the CO does not consider that a charge should be brought, the person who was investigated should be advised that disciplinary action will not be taken. Care should be taken when notifying the former suspect that the notification does not preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Further, it should not preclude any administrative action that may be taken against the former suspect.

90. Having taken staff legal advice, the CO may wish to consider whether administrative action should be taken.

Step 3 - Decision whether to charge

91. Having decided that the case can be heard summarily, the CO should go on to consider whether:

a. To charge;

b. Not to charge but to take administrative action; or

c. Not to charge and not to take any administrative action.

⁷⁴ See regulation 9 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁷⁵ Section 119(5) of the Act.

92. If the CO decides to charge he should also consider the appropriate level at which the charge should be heard taking into account:

- a. The type of charge;
- b. The seriousness of the offence;
- c. Powers of punishment of subordinate commanders (for example a subordinate commander cannot award a Service compensation order⁷⁶ for personal injury therefore charges relating to offences of violence should be given careful consideration);
- d. Delegations;
- e. The accused's disciplinary record and in particular whether he is under a suspended sentence of Service detention⁷⁷; and
- f. Any other factors he considers relevant.

93. **The evidential test.** Generally a CO should not charge a person with a service offence if it is plain that either there is no basic evidence against the suspect or the evidence is clearly outweighed by evidence in the suspect's favour.

94. **The Service interest test.** Where there is evidence to support the bringing of a charge, a CO should also consider whether there are any factors that would make disciplinary action inappropriate. He should, however, be careful to ensure that any exercise of his discretion not to take disciplinary action is consistent with justice and with the fair and efficient maintenance of discipline and operational effectiveness.

95. A CO should also note that there are Service policies that provide for administrative action being used as an alternative to discipline (see paragraphs 215 - 221 as to where administrative action may be appropriate). If the offence appears complex or serious or if the CO is in doubt, he should seek staff legal advice.

Charging

96. Having decided to charge, the CO should bring an appropriate charge.

97. **Selecting a charge.** A charge should be selected which is appropriate taking into account the circumstances, particularly the seriousness of the offence.

98. When an investigation⁷⁸ has taken place and a charge is recommended/suggested, if the CO decides to deal with the matter summarily, it is for him to decide the most appropriate charge.

99. Where a CO wishes to charge an offence, the charge(s) should be prepared using the specimen charges contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences). Where no such specimen charges are provided,

⁷⁶ See Armed forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) rules 2009 and [Chapter 13](#) (Summary hearing sentencing and punishments).

⁷⁷ Subordinate commanders cannot hear a charge relating to an offence alleged to have been committed during the operational period of a suspended sentence of detention.

⁷⁸ Service Police or CO's investigation.

staff legal advice should be sought on the correct wording and any other advice on the law relating to the offences.

100. **Contents of a charge.** The charge is to be set out in a charge sheet (see [Annex H](#)) and must contain⁷⁹:

- a. Full name of the accused;
- b. Service number, rank or rate;
- c. The name of the ship, establishment or unit of which he is a member⁸⁰;
- d. A statement in ordinary language of the offence charged, identifying the precise statutory provision creating the offence⁸¹. When a person is charged with a criminal conduct offence, the charge must specify the offence under the law of England and Wales as well as that it is an offence contrary to section 42 of the Act⁸². A charge of assault occasioning actual bodily harm will therefore include in the statement that the offence is one under section 42 of the Act and under section 47 of the Offences Against the Person Act 1861 (see [Chapter 8](#) (Criminal Conduct Offences)); and
- e. Such particulars of the conduct constituting the commission of the offence as are necessary to make clear what is alleged against the accused.

101. Care must be taken to ensure that each charge does in fact disclose enough information to establish an offence under the Act and for offences charged under section 42 of the Act the corresponding offence under the law of England and Wales is specified. Each separate charge must allege only a single offence. For example, if a Service person misses a number of duties, each duty missed must be subject to a separate charge. It is important not to overload a charge sheet. Additionally where there are serious offences it may not be appropriate to charge additional minor offences. If in doubt, seek staff legal advice.

102. **Multiple accused.** Where there is more than one accused each individual should be charged on a separate charge sheet. More than one charge can be set out on each individual's charge sheet⁸³. The cases of multiple accused can be heard at the same summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). If one of the accused elects CM trial then the CO must decide whether or not to refer the charges or charges against the non-electing offender to the DSP.

103. **Charging of accomplices and accessories.** This is a complex area of the law and in such cases staff legal advice should be sought. A person who aids, abets, counsels or procures⁸⁴ the commission by another of any Service offence may be convicted of that offence. For example, A searches and removes a watch from a soldier detained in the course of an operation. If A does not have a reasonable excuse for his actions, he may have committed an offence of looting contrary to section 4 of the Act. If B agrees to keep a look out for A whilst he is committing the act, B may be charged under section 4 of the Act.

⁷⁹ Full details as to what should be contained in a charge can be found in the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁸⁰ This includes his parent unit and attached unit.

⁸¹ Unless it is an offence contrary to common law, see [Chapter 8](#) (Criminal conduct offences).

⁸² See para 5(a) in the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁸³ See paragraph 48 for guidance on multiple suspects/incidents. Also see the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 for contents of a charge and Annex H on the format of a charge sheet.

⁸⁴ In accordance with section 41 of the Act.

104. The same applies when a Service person or relevant civilian aids, abets, counsels or procures the commission of a criminal offence by another person; Section 42⁸⁵ applies to those who aid, abet, counsel or procure the commission of a criminal offence in the same way as to the principal offender. Whilst it is proper to charge an accessory as if he were a principal offender, it may sometimes be more appropriate to charge him as an accessory (e.g. when it is clear at the outset that he did not actually commit the offence himself). The words aid, abet counsel and procure may all be used together to charge a person who is alleged to have participated in the offence in some way, but not as the principal offender.

105. By contrast, if a Service person encourages or assists another person to commit any offence, he is guilty not of the main offence, but of the separate offence of encouraging or assisting. If the encouraging or assisting is to commit criminal conduct which would be an offence under the law of England and Wales, the encouraging or assisting will be an offence under section 42 of the Act. If the encouraging or assisting is to commit an offence under the Act (other than a criminal conduct offence)⁸⁶, the relevant offence will be under section 40 of the Act. For example, if A encourages or assists B to make a false record (contrary to section 18 of the Act), B should be charged with an offence under section 40, as A did not himself make the false record.

106. Specimen charges for involvement as a secondary party under section 41 of the Act are set out in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and specimen charges for aiding, abetting, counselling or procuring are set out in [Chapter 8](#) (Criminal conduct offences).

107. **Charging procedure.** Once the charge sheet has been raised, the CO should proceed to charge the suspect. The procedure set out below must be followed:

- a. The CO (or a subordinate commander) must sign⁸⁷ the charge sheet (ie. the person who it is intended is to hear the charge); and
- b. A copy of the signed charge sheet must be served by hand⁸⁸ on the accused. Service of a charge can be carried out by the CO, or by anyone authorised⁸⁹ by the CO. The charge sheet should also be signed and dated when service is carried out.

108. The charge is brought once a copy of the charge has been served on (handed to) the accused. The original charge sheet must be retained on file⁹⁰. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits might apply.

109. Once a charge is brought, the charge is allocated for summary hearing⁹¹. A summary hearing⁹² cannot take place before at least 24 hours have elapsed from the time all the case papers⁹³ were served. The time of service should be recorded.

Amending, substituting or bringing an additional charge

⁸⁵ Section 42 of the Act.

⁸⁶ Section 40 of the Act.

⁸⁷ Regulation 11(1)(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁸⁸ Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁸⁹ Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁹⁰ This is necessary in the event that the charge, and therefore the original charge sheet, is subsequently needed to be sent to the DSP.

⁹¹ Section 120(4) of the Act.

⁹² See [Chapter 9](#) (Summary Hearing and Activation of Suspended Sentences of Service detention).

⁹³ See paragraphs 56 for a list of case papers.

110. A CO may amend, substitute or bring an additional⁹⁴ charge at any time before the summary hearing or during the course of the summary hearing prior to the finding being recorded, provided the amended, substituted or additional charge is capable⁹⁵ of being heard summarily. The hearing will need to be adjourned in order for the preliminary procedures to be carried out in relation to that charge see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). If the CO decides to refer a charge to the DSP, that charge and any other charge brought in respect of the same case are to be regarded as allocated for CM trial. A CO may not amend, substitute or bring an additional charge, where the case has been allocated for CM trial. A CO should refer all related charges to the DSP.

111. **Amending a charge before summary hearing.** If the CO amends⁹⁶ a charge before the summary hearing, the following process must be followed:

- a. The CO should sign the charge sheet as amended;
- b. The amended charge sheet should then be personally served by hand on the accused together with a notification of amendment, by the officer who signed the amended charge sheet or by a person authorised by him;
- c. A written record should be kept of the time and date of service of the amended charge; and
- d. The accused must be given a minimum of a further 24 hours from the time of service before the summary hearing can commence.

112. **Amending a charge during a summary hearing.** Where a charge is amended after the start of a summary hearing, the hearing will need to be adjourned in order for the preliminary procedures paragraph 107 above to be carried out in relation to that charge. The CO shall immediately serve a copy of the amended charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given a further 24 hours and the option to elect CM trial on the amended charge.

113. **Correcting a charge sheet.** The CO may, at any time, correct a minor typographical error in the charge sheet that has no bearing on the case, such as a mistake in the accused's Service number. However, if the CO corrects an error of substance or fact, e.g. the date of the offence, that correction would amount to an amendment and guidance at paragraph 111 above should be followed. The CO is to adjourn to take legal advice on this issue if he is in any doubt as to the status of the correction.

114. **Substituting a charge before summary hearing.** A charge is substituted⁹⁷ when an existing charge is replaced with another charge that alleges a different Service offence. For example, a charge of assault might be substituted for a charge of assault occasioning actual bodily harm. Where a charge is substituted before the hearing the following process must be followed:

- a. The CO should sign the charge sheet containing the substituted charge;
- b. The original charge should be discontinued, see paragraph 118 below;
- c. The new charge sheet (containing the substituted charge) should then be served by hand on the accused together with a notice to that effect. Service of these

⁹⁴ Section 123 (2) of the Act.

⁹⁵ Section 123 (4) of the Act.

⁹⁶ See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁹⁷ See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

papers may be carried out by the officer who signed the charge sheet or a person authorised by him;

d. As is the case with bringing a charge, a written record should be kept of the time and date of service. For this purpose the person serving the charge should sign and date the charge sheet accordingly; and

e. The accused must be given a minimum of a further 24 hours from the time of service before the summary hearing can commence.

115. Substituting a charge during a summary hearing. If the CO substitutes a charge after the summary hearing has commenced⁹⁸, the CO must immediately serve a copy of the substituted charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given 24 hours and he must also be given the option to elect for CM trial on the substituted charge.

116. Bringing an additional charge before summary hearing. This occurs where an additional charge⁹⁹ is added to a charge or charges that have already been brought against the accused. Where an additional charge is brought before the hearing, the following process must be followed:

a. The CO should sign the new charge sheet that will contain the original charge and the additional charge that is to be brought. It is important to ensure that it is clear what charges have been brought against the accused and what charges are being heard by a CO at a summary hearing, especially when additional charges are brought or a charge is discontinued. All of the charges brought against an accused should therefore be set out on one charge sheet; and

b. The new charge sheet should then be served by hand on the accused. Service of these papers may be carried out by the officer who signed the charge sheet or a person authorised by him.

117. Bringing an additional charge during a summary hearing. If the CO brings an additional charge after the summary hearing has commenced¹⁰⁰, the CO must immediately serve a copy of the additional charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given 24 hours and he must also be given the option to elect for CM trial on the additional charge.

Discontinuing a charge

118. A CO has a power to discontinue¹⁰¹ a charge which has been allocated¹⁰² for summary hearing at any time up to the start of summary hearing and during the course of the summary hearing itself. A charge may be discontinued where:

a. It is no longer appropriate to take disciplinary action against the accused;

b. A more appropriate charge has been substituted;

c. The case is to be handed over to the civilian authorities;

⁹⁸ See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁹⁹ See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁰⁰ See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁰¹ The effect of doing so is that the matter remains unresolved. The CO should only use this power with staff legal advice.

¹⁰² Section 120(4) of the Act.

- d. A fresh charge is to be brought in order to rectify an error in the conduct of the hearing; or
- e. A witness cannot be located but it is possible that he will be in future.

The accused is to be notified that a charge is being discontinued using the form of notice at [Annex I](#).

Dismissal of a charge

119. The CO may dismiss¹⁰³ the charge at any stage of the hearing, unless he determines that the charge has been proved. He may not determine that the charge has been proved unless, on the basis of all the evidence heard, he is sure that the accused committed the offence charged. For the CO to be sure, he must believe that the charge is proved beyond reasonable doubt; this is the criminal standard of proof, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

Action to be taken when a charge is brought

120. As soon as practicable after the charge has been brought, the CO or a person authorised by him must¹⁰⁴:

- a. Prepare a summary of the evidence (the case summary) relevant to the charge, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention);
- b. Inform the accused in writing¹⁰⁵ of his right to:
 - (1) Elect CM trial¹⁰⁶;
 - (2) Be represented by an AAO¹⁰⁷;
 - (3) Question witnesses whose evidence is requested by the CO¹⁰⁸;
 - (4) Give evidence¹⁰⁹;
 - (5) Provide evidence of witnesses¹¹⁰; and
 - (6) Appeal to the Summary Appeal Court (SAC)¹¹¹;
- c. If appropriate, provide the accused with information about the activation of suspended sentences of detention¹¹², see [Chapter 9](#) (summary hearing and activation of suspended sentences of Service detention) and Part 4 below;
- d. Provide the accused with¹¹³:

¹⁰³ Section 131(2), of the Act.

¹⁰⁴ Rule 8 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹⁰⁵ All of the information in this paragraph will be contained within the booklet 'Your rights if you are accused of an offence under the Service justice system' (Annex G),¹ therefore providing the accused with a copy of this booklet will discharge the CO's duty under this paragraph.

¹⁰⁶ Section 129, of the Act.

¹⁰⁷ Rule 10 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹⁰⁸ Rule 15 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹⁰⁹ Rule 16 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹¹⁰ Rule 17 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹¹¹ Section 141, of the Act.

¹¹² Section 193 of the Act.

- (1) A copy of the charge sheet;
 - (2) A copy of the Case Summary¹¹⁴;
 - (3) A copy of the written evidence relevant to the charge;
 - (4) Details of exhibits that form part of the evidence relevant to the charge and where and when they may be inspected;
 - (5) A copy of unused material gathered as part of the investigation of the charge;
 - (6) Written details of any unused exhibits gathered as part of the investigation and where and when unused exhibits may be inspected; and
 - (7) A copy of any disciplinary record of the accused; and
- e. Fix a time for the hearing and notify the accused.

121. In addition, the CO or a person authorised by him should inform the accused that he may consider seeking legal advice and that this may be a matter that he discusses with his AAO, if he has nominated one (see paragraphs 206 - 208 on availability of legal advice within the Services).

122. If the CO is satisfied that the accused already has a copy of a document listed in paragraph 120 above, he need not provide a further copy¹¹⁵, for example, where the charge has been amended but the evidence in support of that charge remains the same.

123. Where the CO does not require permission from HA to hear the charge or does not consider that he might require extended powers of punishment, he should proceed to hear the charge, see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention). If an application to HA is required, proceed to step 5 below.

Step 4 - Applications to HA

124. If the charge brought is one of those listed in [Annex C](#), the CO must seek permission from HA to hear the charge summarily (see paragraph 126 below). If the CO considers he requires extended powers of punishment, he must make an application to HA (see paragraph 129 below). The application for permission to hear a charge may be made in conjunction with an application for extended powers of punishment. Neither of these functions can be delegated to a subordinate commander, see paragraph 71.

125. In either circumstance the CO should consult staff legal/HA advice before bringing a charge. This consultation does not negate the requirement to submit an application to hear a charge, but may assist in preventing nugatory staff work.

126. **Application to hear certain charges summarily.** A CO below the rank of rear admiral, major-general or air vice-marshal who considers that any of the serious criminal

¹¹³ Rule 8(1)(c) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹¹⁴ Rule 8(1)(c)(ii) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹¹⁵ Rule 8(2) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

conduct offences¹¹⁶ listed below should be heard summarily¹¹⁷, must apply to HA for permission to do so. A template of a letter of application for this purpose is at [Annex A of Chapter 9](#) (Summary Hearing and activation of suspended sentences of Service detention):

- a. Assault occasioning actual bodily harm (Section 47 of the Offences against the Person Act 1861);
- b. Possession in a public place of an offensive weapon (Section 1 of the Prevention of Crime Act 1953);
- c. Abstracting of electricity (Section 13 of the Theft Act 1968);
- d. Possession in public place of point or blade (Section 139 of the Criminal Justice Act 1968);
- e. Dishonestly obtaining electronic communications services, e.g. using MOD telephones for private calls (Section 125 of the Communications Act 2003);
- f. Possession or supply of apparatus for obtaining electronic communications services (Section 125 of the Communications Act 2003);
- g. Fraud (Section 1 of the Fraud Act 2006);
- h. Dishonestly obtaining services (Section 11 of the Fraud Act 2006); or
- i. Attempting to commit one of the indictable¹¹⁸ offences above¹¹⁹.

127. The application to HA must be made as soon as is reasonably practicable after the charge is brought¹²⁰ and must contain¹²¹:

- a. The CO's reasons for considering that the charge should be heard summarily;
- b. A copy of the charge sheet;
- c. A copy of the written evidence relevant to the charge;
- d. A copy of any unused written evidence gathered as part of the investigation of the charge;
- e. A copy of any disciplinary record of the accused; and
- f. Any other material that may, in the opinion of the CO, be relevant to the application.

128. Whether or not the application to hear the charge is granted the CO must provide¹²² the accused with a copy of the notification from HA and proceed to Step 5.

¹¹⁶ Section 54(2) of the Act.

¹¹⁷ This cannot be delegated.

¹¹⁸ See glossary of terms.

¹¹⁹ Section 43 of the Act.

¹²⁰ In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

¹²¹ Rule 5(3) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹²² Rule 5(4) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

129. **Application for extended powers in relation to punishment.** If the CO is below the rank of rear admiral, major-general or air vice-marshal and considers that a charge against a person should be dealt with summarily and that his powers of punishment might be insufficient to deal with the accused if the charge were proved, he must apply to HA for extended powers¹²³. A template letter of application for this purpose is at [Annex B of Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). In order to make the decision to apply for extended powers, the CO should consider a number of factors including:

- a. The nature of the charge;
- b. The CO's basic powers of punishment (i.e. without extended powers);
- c. The sentencing guidelines for such an offence, see [Chapter 13](#) (Summary hearing sentencing and punishments);
- d. The accused's disciplinary record; and
- e. All the evidence presented in the case papers.

130. The application must be made as soon as is reasonably practicable after the charge is brought¹²⁴ (which may be after the CO has complied with the preliminary procedures) and must contain¹²⁵:

- a. The CO's reasons for considering his powers of punishment might be insufficient should the charge be found proved unless he has extended powers;
- b. A copy of the charge sheet;
- c. A copy of the written evidence relevant to the charge;
- d. A copy of any unused written evidence gathered as part of the investigation of the charge;
- e. A copy of any disciplinary record of the accused;
- f. Specific details of all provisions for the purpose of which the CO considers he needs extended powers¹²⁶. This should include details of the punishment for which he is asking for extended powers (e.g. loss of seniority for officers or more than 28 days detention for other ranks) (see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention)); and
- g. Any other material that may, in the opinion of the CO, be relevant to the application.

Where the CO's application to HA for extended powers has been granted, the CO must provide the accused with a copy of the notification from HA, see paragraph 132 below¹²⁷.

¹²³ Section 133(1) of the Act for the extended powers that are available.

¹²⁴ In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

¹²⁵ Rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹²⁶ Rule 6(2)(a) of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009.

¹²⁷ Rule 6(3) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

131. In the exceptional event that the CO considers it necessary to apply for extended powers after he has complied with the preliminary procedures, but before he proceeds to hear the charge summarily (ie. before he has offered the accused the right to elect CM trial), the CO must notify the accused if the application has been granted and provide the offender with a copy of the notification from HA to this effect. Further, if an application is made after a time is fixed for the hearing, a new time must be fixed. If the application is granted, the new time must be fixed at not less than 24 hours after a copy of the notification is given to the accused. This situation should arise only rarely, for example, when new information (that could not have been known beforehand) emerges that makes such an application for extended powers necessary. Whether the application for extended powers is granted or not, the CO should proceed to Step 5.

Step 5 – Action by CO following HA decision

132. **CO application to hear a charge and/or extended powers granted.** When permission has been granted, and if the CO decides to proceed to hear the charge, then he should ensure that the actions detailed at paragraph 120 above have been carried out. In addition the accused is to be provided with:

- a. A copy of any permission from HA to deal with the matter summarily¹²⁸; and
- b. A copy of any authority to use extended powers¹²⁹.

Exceptionally the CO may decide that the charge should no longer be proceeded with (if, for example, further evidence/information came to light).

133. The CO or a person authorised by him should inform the accused that he may consider seeking legal advice and that this may be a matter that he discusses with his AAO. If the CO is satisfied that the accused already has a copy of a document mentioned in paragraph 120d, he need not provide a further copy¹³⁰ e.g. where the charge has been amended but the evidence in support of that charge remains the same. Once these actions have been carried out the CO should proceed to summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention).

134. **CO's application to hear the charge denied.** If a charge has been brought and the HA decides against the CO's application for permission to hear the charge, the charge must either be referred to the DSP (see paragraph 137) or (exceptionally) discontinued if the CO considers that the charge should no longer be proceeded with (if, for example, further evidence/information comes to light). Following discontinuance it is open to the CO to review the case and where necessary bring a fresh charge against the accused.

135. **CO's application for extended powers denied.** If a charge has been brought and the HA decides against the CO's application for extended powers, the CO should review the decision to hear a charge in the light of the HA's decision. The CO can either:

- a. Hear the charge without extended powers; or
- b. Refer the charge to the DSP (see paragraph 137).

¹²⁸ See rule 5 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹²⁹ See rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

¹³⁰ Rule 8(2) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

136. In addition, the CO may, between bringing the charge and the hearing itself, review his decisions in the light of changes in other relevant circumstances, for example:

- a. The accused has committed further offences whilst waiting to be dealt with;
- b. New information comes to light which suggests that the offence with which the accused is charged needs to be changed to a more serious offence, which cannot or ought not to be dealt with summarily;
- c. New information comes to light, which indicates that the powers of punishment available to the CO are likely to be inadequate (for example, because the circumstances are more aggravating than they were originally viewed to be); or
- d. The CO may need to review previous decisions if, during the hearing¹³¹ and before a finding has been reached, there has been a failure to comply with any part of the summary hearing procedure. This may involve adjourning the procedure and considering whether it is possible or necessary to start the procedure again.

137. **Referring a charge to the DSP.** When referring a charge to the DSP following the HA decision on an application to hear/for extended powers, the CO should send all relevant material (see paragraph 175) to the DSP. The Service person who is the subject of the referral should be notified of such a referral. Once the charge has been referred, the CO has no powers in relation to the charge. Charges referred to the CO by the DSP are dealt with in paragraphs 174 to 176.

¹³¹ See [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) for action to be taken during a summary hearing.

Part 5 - Offences triable by CM or SCC

Introduction

138. This Part deals with offences that can be tried at CM or SCC. A Service person committing any Service offence that is not listed at Annexes [B](#) and [C](#) can only be tried by CM. Part 6 (below) deals with charges in respect of a Schedule 2 offence or an offence in relation to prescribed circumstances. Additionally Part 5 deals with cases referred to the DSP and charges referred to the DSP where the accused elects for CM trial or the CO chooses to refer a charge to the DSP.

139. Relevant civilians can only be tried by SCC or CM. However, the jurisdiction of the SCC to deal with Service offences is limited, see [Chapter 3](#) (Jurisdiction and time limits). For example, a SCC cannot deal with indictable-only¹³² offences. A CO¹³³ will be appointed for disciplinary purposes in respect of all relevant civilians, for example, to bring a charge on the direction of the DSP. For further guidance refer to [Chapter 2](#) (Meaning of commanding officer).

140. The procedure to be followed for an offence which may be tried by CM or before the SCC is set out below. A flow chart of the procedure to be followed is at [Annex A](#).

141. The procedure for referring a case to the DSP is at paragraphs 142 - 173. The procedure for referring a charge to the DSP is at paragraphs 174 - 176.

Procedure for referring a case to the DSP

142. **Preliminary considerations.** Before a CO takes any action to refer a case to the DSP he should consider the matters at Part 4 steps 1 and 2 (whether he has initial powers to dispose of the case and deciding the mode of trial.) The CO should also ensure he has jurisdiction to bring a charge in accordance with [Chapter 2](#) (Meaning of commanding officer).

143. **Time limits.** Time limits may apply in certain situations (for example former members of the regular or reserve forces or civilians formerly subject to Service discipline). Detailed guidance can be found in [Chapter 3](#) (Jurisdiction and time limits) and COs should seek staff legal advice.

144. **Criminal Procedure and Investigations Act 1996 and disclosure.** All charges allocated for CM or SCC trial are governed by the Criminal Procedure and Investigations Act (CPIA) 1996 (Application to the Armed Forces) Order 2009, which make provision equivalent (with modifications) to provisions of Part 1 of the CPIA. They include provision which places a duty: on the DSP to disclose certain documents and material to the accused; on the Service Police to record the details of the officer in charge of the investigation (OCI) and the disclosure officer (DO); and requiring the accused to provide a defence statement to the CAO and the prosecutor. The Service Police are required, under the CPIA code of practice for the armed forces to record and retain material which may be relevant to an investigation¹³⁴.

145. The DSP may disclose by sending material to an accused's CO. Where he does so, the CO will be required by the DSP to serve the accused with any material or written statements or documents, as soon as practicable. Once the information has been served,

¹³² These offences may only be tried by CM and have a special meaning under section 53 of the Act.

¹³³ See [Chapter 2](#) (Meaning of a CO) and regulation 6 of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

¹³⁴ The Code of Practice set out in the Schedule to the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009.

the CO must notify the DSP in writing of the date on which the accused received it. Further guidance on CPIA is contained in JSP 890 (Armed Forces Code of Practice for Disclosure).

146. Where the findings of an investigation indicate that an offence triable only at CM/SCC should be charged (and the requirements relating to possible Schedule 2 offences or to offences committed in prescribed circumstances do not apply) the procedures below should be followed.

Step 1 – Decision to refer to the DSP

147. A CO should take legal advice before deciding not to refer a case to the DSP.

148. If after taking legal advice the CO considers that an offence capable of being dealt with summarily may be brought, he should follow the procedure at Part 4.

149. If the CO decides not to take disciplinary action he may wish to consider administrative action (see paragraphs 215 - 221); however, where the Service Police have investigated and found there is sufficient evidence to charge, the CO should not take this course of action without obtaining staff legal advice.

150. In the case of a relevant civilian where a decision is made not to take disciplinary action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

Step 2 - Referring a case¹³⁵ to the DSP

151. In some instances where a CO has undertaken an investigation he may decide to refer the case to the DSP. In this unlikely event, when referring a case to the DSP following a CO's investigation, the CO should send all relevant material (see paragraph 36 above) and his reasons as to why he is referring the case. The Service person who is the subject of the referral should be notified of such a referral.

152. When a case investigated by the Service Police is referred to the DSP:

- a. If the Service Police provided the CO with a written statement the CO must provide a copy of it to the DSP;
- b. If the Service Police made an oral statement to the CO, the CO should ensure that as soon as practicable the Service Police provide the DSP with a written statement or make an oral statement to the DSP, specifying the Service offence with which the Service Police considers there is sufficient evidence to charge and why he considers there is sufficient evidence;
- c. When the CO refers the case to the DSP or as soon as reasonably practicable afterwards, he must provide the DSP with a copy of the case papers (see paragraph 56 above)¹³⁶; and
- d. The CO should provide a brief statement of his reasons for the referral.

153. The Service person or relevant civilian against whom an allegation has been made should be notified of such a referral as soon as reasonably practicable. The CO should comply with the Victim's Code¹³⁷ where that applies, see paragraph 200 below.

¹³⁵ This is where a suspect has not yet been charged.

¹³⁶ See regulation 9 of the Armed Forces (Part 5 to the Armed Forces Act 2006) Regulations 2009.

154. Once the case has been referred, the CO has no powers in relation to it. (Cases referred to a CO by the DSP in respect of Service personnel are dealt with at paragraphs 87 - 90 above). In the case of a relevant civilian where a case has been referred, the CO may consider whether to inform that person's employer (if applicable). In these circumstances, staff legal advice should be sought.

Step 3 - DSP powers in respect of cases referred to the DSP

155. The DSP may take one of the following courses of action in relation to a case referred to the DSP:

- a. **Direction to bring a charge.** The DSP may direct that the CO bring a specified charge(s) for CM trial or SCC trial (if the DSP has allocated the charge for trial by SCC) (see [Annex K](#));
- b. **Service personnel only.** The DSP may refer the case to the accused's CO without giving a direction as to which charge or charges should be brought¹³⁸ (see [Annex L](#)). It is then for the CO to decide whether any charges capable of being dealt with summarily should be brought against the accused. In these circumstances, as no charge has been brought as yet, the CO will regain his initial powers¹³⁹ in relation to the case and follow the procedure set out in Part 4 (step 3), offences capable of being heard summarily;
- c. **Relevant civilians only.** The DSP may allocate the charge for SCC trial once the DSP has made a direction to the CO to bring a charge against a relevant civilian (see [Annex K](#)). If a civilian is jointly charged with a Service person both will be tried by the CM. Relevant civilians cannot be dealt with summarily;
- d. **Direction barring further proceedings.** The DSP may issue a direction barring¹⁴⁰ either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offence (see Annexes [M](#) and [N](#) for specimen directions). The DSP may make such a direction¹⁴¹ in respect of any Service offence as to which he could make a direction under paragraph 155a above. A direction barring¹⁴² further proceedings is a direction that the person specified is to be treated as acquitted of the offence specified¹⁴³. This means that the CO may not take any further disciplinary action in the case. The CO must notify¹⁴⁴ the accused as soon as reasonably practicable of the direction barring further proceedings. The CO may, however, consider whether administrative action is appropriate; or
- e. **Take no action.** This may arise if the DSP considers that the case would be better dealt with by the civilian authorities.

156. If it is decided to prosecute, that decision will be kept under review. If subsequently there is reason to change that decision, for example, through the receipt of fresh evidence

¹³⁷ See paragraph 201 on the Victim's Code.

¹³⁸ Section 121(4) of the Act.

¹³⁹ Initial powers are defined in section 120 of the Act.

¹⁴⁰ Sections 121(5) and 127 of the Act and note regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

¹⁴¹ Sections 121(5) and 127 of the Act.

¹⁴² Section 63 relates to service proceedings; section 64 relates to civilian proceedings for a criminal conduct offence under section 42 of the Act.

¹⁴³ For the purposes of sections 63 and 64 of the Act.

¹⁴⁴ Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

which means that the case no longer meets the evidential test, those proceedings will be discontinued (see Annexes [O](#) and [P](#)).

Step 4 - Charging

157. **Action by CO on a DSP charge.** If the DSP has directed a CO to bring a charge, the DSP will provide the CO with a charge sheet specifying the charges (see Annexes [K](#) and [Q](#)). The CO must bring the charge(s) specified in the charge sheet as directed¹⁴⁵. In these circumstances, the case is not referred back to the CO and a CO does not therefore have initial powers¹⁴⁶. The DSP remains responsible for those cases in which he has directed a CO to bring a charge.

158. **Charging procedure.** The charging procedure is as follows:

- a. The CO¹⁴⁷ of the accused must sign¹⁴⁸ the charge sheet; and
- b. A copy of the signed charge sheet ([Annex Q](#)) and a copy of the DSP's direction to bring the charge ([Annex K](#)) must be served by hand¹⁴⁹ on the accused. Service of a charge sheet can be carried out by the CO, or by anyone authorised¹⁵⁰ by the CO.

159. When the accused is served with the charge sheet, the name of the person serving it should be recorded in addition to the date and time of service. A copy of the charge sheet should be retained on file. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits may apply.

160. Once a copy of the charge has been served on the accused the charging procedure is complete¹⁵¹. The original charge sheet (signed by the CO) must be returned to the DSP as soon as reasonably practicable¹⁵².

161. **Appointment of a defendant's assisting officer.** As soon as reasonably practicable after a charge is brought, a defendant's assisting officer (DAO) may be appointed to assist the defendant with the preparations for and during the trial. A defendant may ask for any suitable person to assist him subject to certain restrictions. Further details in relation to a DAO are set out in [Chapter 29](#) (Court Martial proceedings). A brief for the DAO is also contained in [Chapter 29](#) (Court Martial proceedings).

162. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of the charging procedure, an appropriate adult should be present. This may be:

- a. A relative, guardian or other person responsible for his care or custody;
- b. Someone who has experience of dealing with mentally disordered or mentally incapable persons (such as an approved social worker as defined by the Mental

¹⁴⁵ Section 122(1) of the Act.

¹⁴⁶ Section 119(5) of the Act.

¹⁴⁷ Guidance on delegation of the COs powers under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 is dealt with in paragraphs 66 to 74.

¹⁴⁸ Regulation 11(1) (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁴⁹ Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁵⁰ Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁵¹ For the circumstances when the accused can be interviewed about an offence after he has been charged see the Code of Practice for the Treatment and Questioning of Persons by the Service Police (Code C).

¹⁵² Regulation 12(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

Health Act 1983 or a specialist social worker), but is not a Service policeman or employed by the Service Police; or

c. Failing either of the above, some other responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

163. Suspects 17 years old or of a lower age. Where a suspect is 17 years old or of a lower age, he is to be treated as a juvenile for the purposes of charging. An appropriate adult should be notified of the intention to charge and accompany the juvenile when being handed the charge sheet and the booklet entitled 'Your rights if you are accused of an offence under the Service justice system (T-SL-accused) see [Annex G](#). Appropriate adult¹⁵³, in the case of a juvenile, means:

a. His parent or guardian (or, if he is in care, the care authority or voluntary organisation);

b. A social worker; or

c. Failing either of the above, another responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

164. A person, including a parent or guardian, should not be an appropriate adult if he is suspected of involvement in the offence in question, the victim, a witness, or is involved in the investigation or has received admissions prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.

165. Charging and custody. The issue of custody after charge is dealt with in detail in [Chapter 5](#) (Custody). The CO does not have the power to bring a charge that can only be tried by the CM or to charge a relevant civilian; only the DSP¹⁵⁴ has the power to direct the CO to bring such a charge.

DSP powers after charge¹⁵⁵

166. Charges allocated for CM trial. Once the CO has brought a charge in accordance with a direction from the DSP, that charge is allocated for CM trial unless the DSP has allocated it for SCC trial. The DSP may, prior to arraignment at trial:

a. Amend the charge;

b. Substitute for the charge another charge against the accused;

c. Bring an additional charge against the accused;

d. Discontinue the charge. In these circumstances the CO must as soon as reasonably practicable, give written notification of the discontinuance to the accused, see [Annex O](#);

¹⁵³ The meaning is taken from the JSP 397 (Service Police Codes of Practice Part 2 paragraph 1.4(c)).

¹⁵⁴ A duty prosecutor will be available to direct a charge in such circumstances. See [Chapter 5](#) (Custody) for further information and guidance on how and when to consult the Duty Prosecutor.

¹⁵⁵ Section 125 of the Act.

e. Refer the charge to the accused's CO¹⁵⁶ (if the accused is a Service person), but only if the charge is capable of being heard summarily (see [Annex L](#));

f. Allocate¹⁵⁷ the charge for trial by the SCC, but only if the charge is one that the SCC has jurisdiction to try; or

g. Make a direction barring further proceedings in respect of the offence charged or any offence that could be charged under paragraph 166c above¹⁵⁸ (see [Annex N](#)). If a direction is made, the accused's CO must be notified as soon as reasonably practicable and the CO must write to the accused without delay notifying him of the direction.

167. In order to carry out the actions at paragraphs 166a, b or c above¹⁵⁹, the DSP must prepare and sign the charge sheet and ensure that a copy of the signed charge sheet is served by hand on the accused¹⁶⁰. The DSP must also provide a copy of the charge sheet to the CAO.

168. If the amended substituted or additional charge is brought less than 24 hours before the hearing, the DSP must provide a copy of the charge sheet to the judge advocate.

169. CM rules¹⁶¹ may restrict the exercise of powers under paragraphs 166a - g above after arraignment by the CM or after referral of the charge to the CM¹⁶² or where the accused has elected CM trial. See [Chapter 29](#) (Court Martial proceedings).

170. **Charges allocated for SCC trial.** The DSP may prior to SCC trial¹⁶³ :

a. Amend the charge;

b. Substitute for the charge another charge against the accused;

c. Bring an additional charge against the accused;

d. Discontinue proceedings on the charge (see [Annex P](#)). In these circumstances the CO must, as soon as reasonably practicable, give written notification of the discontinuance to the accused;

e. Allocate the charge for trial by the CM; or

f. Make a direction barring further proceedings (see [Annex N](#)) in respect of the offence charged or any offence that could be charged under paragraph 170c above (If a direction is made the accused's CO must be notified as soon as reasonably practicable and the CO must write to the accused without delay notifying him of the direction)¹⁶⁴.

171. In order to carry out the actions at paragraphs 170a, b or c above¹⁶⁵, the DSP must prepare and sign the charge sheet and ensure that a copy of the signed charge sheet is

¹⁵⁶ Section 125 of the Act: these powers are available after arraignment subject to restrictions in Court Martial rules.

¹⁵⁷ Section 125(2)(f) of the Act.

¹⁵⁸ Section 121(5) of the Act.

¹⁵⁹ See the requirements of regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁶⁰ This is not required to be done by a CO. Amended, substituted or additional charges will be served by a Service Prosecutor or by someone authorised by him.

¹⁶¹ See the Armed Forces (Court Martial Rules) 2009 Rule 60.

¹⁶² See section 279(4) or 280(3) (referral by the SCC) of the Act.

¹⁶³ Section 126 of the Act.

¹⁶⁴ Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁶⁵ See the requirements of regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

served by hand on the accused¹⁶⁶. The DSP must also provide a copy of the charge sheet to the CAO.

172. If the amended, substituted or additional charge is brought less than 24 hours before the hearing, the DSP must provide a copy of the charge sheet to the judge advocate.

173. SCC rules¹⁶⁷ may restrict the exercise of powers under paragraphs 170a - f above after a decision by the SCC¹⁶⁸ as to whether it should try the charge see [Chapter 32](#) (Service Civilian Court).

Procedure for referring a charge to the DSP

174. A CO will refer a charge to the DSP in two situations:

- a. Where the accused has elected CM trial the CO must refer the charge to the DSP; and
- b. Where the CO has decided that it would be more appropriate that the matter be dealt with by CM trial; see Part 4 and [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

175. When referring a charge to the DSP, the CO should forward:

- a. The original charge sheet;
- b. The case summary¹⁶⁹;
- c. All papers relating to that charge prepared by the Service Police or during a CO's investigation including: all reports prepared by the Service Police; all witness statements; all other written records of evidence including a summary or transcript of all tape recorded interviews; a list of all exhibits and a statement of where any which are not documentary exhibits are held; all documentary exhibits; all disciplinary records of the suspect; if no formal disciplinary record of the suspect is maintained and held a list of his convictions for a Service offence or an offence under any of the SDAs and all equivalent papers prepared by a UK police force or an overseas police force and provided by that force to the Service Police; all documents to be provided, in accordance with the CPIA 1996 (Application to the Armed Forces) Order 2009, to a person involved in the prosecution of Service offences (the case papers¹⁷⁰);
- d. Any notification from HA that permission to hear the charge has been granted;
- e. Any notification from HA that extended powers have been granted; and
- f. A covering letter explaining why he is referring the charge to the DSP including whether the accused elected CM trial.

176. When the CO refers any charge to the DSP that charge is regarded as allocated for CM trial, including where the accused elects CM trial¹⁷¹. The DSP will then consider whether the matter should proceed to CM trial or whether he should exercise any of his powers to

¹⁶⁶ Regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁶⁷ Armed Forces (Service Civilian Court) Rules 2009.

¹⁶⁸ See section 279 of the Act.

¹⁶⁹ Rule 8(1)(c)(ii) Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) 2009.

¹⁷⁰ Regulation 2(1)(a) and (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁷¹ Section 129(2)(b) of the Act.

amend, substitute, bring additional charges or discontinue the charge or to refer a charge back to the CO. Some of these powers would require the accused's consent where he has elected CM trial. The DSP will provide directions as to any action the CO may take in relation to these matters.

Part 6 - Offences listed in Schedule 2 or committed in prescribed circumstances

Introduction

177. Schedule 2 offences and circumstances of a prescribed description are listed in Annexes [D](#) and [E](#) respectively. Further details and specimen charges are contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

178. Once a case has been referred to the DSP following a Service Police investigation (see paragraph 55 above), the procedure to be followed is set out below. See Appendix 2 to Annex A.

Preliminary considerations

179. When, or as soon as reasonably practicable after, making the referral, the Service Police must provide the DSP with a copy of the case papers¹⁷² and must provide the CO with a copy of all reports relating to the case¹⁷³. This is necessary to ensure that the CO is made aware of matters relating to personnel under his command. This will also allow the CO to bring to the attention of the DSP¹⁷⁴ any other information that he considers relevant to the case, for example, matters relating to the operational context within which the offence is alleged to have been committed.

180. If a CO considers that there is information relevant¹⁷⁵ to the case which ought to be drawn to the attention of the DSP, he must bring it to the attention of the DSP as soon as reasonably practicable. COs should confine themselves to providing factual information relevant to any potential charge and should not express any opinion on whether anyone under command should be charged with a Service offence. A CO should bear in mind that any information he provides to the DSP will be, in most cases, disclosed to an accused as unused material in the event that the DSP decides to direct the bringing of a charge.

181. **Delegation of a CO's powers.** A CO, see [Chapter 2](#) (Meaning of a commanding officer), may delegate to a subordinate commander not below the rank of naval lieutenant, military or marine captain or flight lieutenant any or all of his functions¹⁷⁶, subject to such conditions as he considers appropriate¹⁷⁷. For the purpose of this Part, his functions are:

- a. The requirement to notify the Service Police of an offence under Schedule 2 or an offence committed in prescribed circumstances; and
- b. The bringing of one or more charges specified in a direction from the DSP.

182. **Time limits.** Time limits may apply in certain situations (for example former members of the regular or reserve forces or civilians formerly subject to Service discipline). Detailed guidance can be found in [Chapter 3](#) (Jurisdiction and time limits) and COs should seek staff legal advice.

¹⁷² Regulation 7(1) (b) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009 see paragraph 56 above.

¹⁷³ Regulation 8(1) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

¹⁷⁴ "Relevant information" is information that the CO believes the DSP should be aware of including any health problems, whether property has been recovered, or a civilian has returned to the UK and the time limits for dealing with the matter have changed.

¹⁷⁵ Regulation 8(2) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

¹⁷⁶ See Part 5 of the Act and regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁷⁷ See regulation 16 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

183. **Criminal Procedure and Investigations Act 1996 and disclosure.** All charges allocated for CM trial are governed by the Criminal Procedure and Investigations Act (CPIA)1996 (Application to the Armed Forces) Order 2009 which make provision equivalent (with modifications) to provisions of Part 1 of the CPIA. They include provision which places a duty: on the DSP to disclose certain documents and material to the accused; on the Service Police to record the details of the officer in charge of the investigation (OCI) and the disclosure officer (DO); and requiring the accused to provide a defence statement to the CAO and the prosecutor. The CPIA code of practice for the Armed Forces includes a requirement on the Service Police to record and retain material which may be relevant to an investigation¹⁷⁸.

184. The DSP may disclose by sending material to an accused's CO. Where he does so, the CO will be required by the DSP to serve the accused with any material or written statements or documents, as soon as practicable. Once the information has been served, the CO must notify the DSP in writing of the date on which the accused received it. Further guidance on CPIA is contained in JSP 890 (Armed Forces Code of Practice for Disclosure).

DSP powers

185. Once a case has been referred by the Service Police to the DSP, the DSP will decide whether or not to allocate the case for CM/SCC trial, whichever is appropriate. In making that decision the DSP will apply the principles laid out in the Code for Service Prosecutors¹⁷⁹.

186. The DSP may take one of the following courses of action:

a. **Direction to bring a charge.** The DSP may direct that the CO bring a specified charge(s) for CM trial or SCC trial (if the DSP has allocated the charge for trial by SCC) (see [Annex K](#));

b. **Service personnel only.** The DSP may refer the case to the accused's CO without giving a direction as to which charge or charges should be brought¹⁸⁰ (see [Annex L](#)). It is then for the CO to decide whether any charges capable of being dealt with summarily should be brought against the accused. In these circumstances, as no charge has been brought as yet, the CO will regain his initial powers¹⁸¹ in relation to the case and follow the procedure set out in Part 4 (step 3), offences capable of being heard summarily;

c. **Relevant civilians only.** The DSP may allocate the charge for SCC trial once the DSP has made a direction to the CO to bring a charge against a relevant civilian (see [Annex K](#)). If a civilian is jointly charged with a Service person both will be tried by the CM. Relevant civilians cannot be dealt with summarily;

d. **Direction barring further proceedings.** The DSP may issue a direction barring¹⁸² either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offence (see Annexes [M](#) and [N](#) for specimen directions). The DSP may make such a direction¹⁸³ in respect of any Service offence as to which he could make a direction under paragraph 186a above.

¹⁷⁸ In accordance with the Code of Practice set out in the Schedule to the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2008.

¹⁷⁹ This can be found in Volume 3 of the MSL

¹⁸⁰ Section 121(4) of the Act.

¹⁸¹ Initial powers are defined in section 120 of the Act.

¹⁸² Sections 121(5) and 127 of the Act and note regulation 15(5) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

¹⁸³ Sections 121(5) and 127 of the Act.

A direction barring¹⁸⁴ further proceedings is a direction that the person specified is to be treated as acquitted of the offence specified¹⁸⁵. This means that the CO may not take any further disciplinary action in the case. The CO must notify¹⁸⁶ the accused as soon as reasonably practicable of the direction barring further proceedings. The CO may, however, consider whether administrative action is appropriate; or

e. **Take no action.** The DSP may decide to take no action under his statutory powers in relation to a Service person or a relevant civilian. This is most likely to occur where the DSP decides to refer the case to the civilian authorities in the UK or abroad. In such circumstances the DSP will notify the CO of his decision (eg to refer the case to the specified civilian authorities).

187. If it is decided to prosecute, that decision will be kept under review. If there is reason subsequently to change that decision, for example, through the receipt of fresh evidence which means that the case no longer meets the evidential test, those proceedings will be discontinued, see Annexes [Q](#) and [P](#).

Charging

188. **Action by CO on a DSP charge.** If the DSP has directed a CO to bring a charge, the DSP will provide the CO with a charge sheet specifying the charges. The CO must bring the charge(s) in the charge sheet as directed¹⁸⁷. In these circumstances, the case is not referred back to the CO and a CO does not therefore have initial powers¹⁸⁸. The DSP remains responsible for those cases in which he has directed a CO to bring a charge.

189. **Charging procedure.** The charging procedure¹⁸⁹ is as follows:

- a. The CO¹⁹⁰ of the accused must sign the charge sheet; and
- b. A copy of the signed charge sheet ([Annex Q](#)) and a copy of the DSP's direction to bring the charge ([Annex K](#)) must be served by hand on the accused. Service of a charge sheet can be carried out by the CO, or by anyone authorised by the CO.

190. When the accused is served with the charge sheet, the name of the person serving it should be recorded in addition to the date and time of service. A copy of the charge sheet should be retained on file. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits may apply.

191. Once a copy of the charge has been served on the accused, the charging procedure will be complete¹⁹¹. The original charge sheet (signed by the CO) must be returned to the DSP as soon as reasonably practicable¹⁹².

192. **Appointment of a defendant's assisting officer.** As soon as reasonably practicable after a charge is brought, a defendant's assisting officer (DAO) may be appointed to assist the defendant with the preparations for and during the trial. A defendant may ask

¹⁸⁴ Section 63 relates to service proceedings; section 64 relates to civilian proceedings for a criminal conduct offence under section 42 of the Act.

¹⁸⁵ For the purposes of sections 63 and 64 of the Act.

¹⁸⁶ Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁸⁷ Section 122(1) of the Act.

¹⁸⁸ Section 119(5) of the Act.

¹⁸⁹ Regulation 11(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

¹⁹⁰ Guidance on delegation of the COs powers under Part 5 of the Act are dealt with in paragraphs 66 – 74.

¹⁹¹ For the circumstances when the accused can be interviewed about an offence after he has been charged see the Code of Practice for the Treatment and Questioning of Persons by the Service Police (Code C).

¹⁹² Regulation 12(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

for any suitable person to assist him subject to certain restrictions. Further details in relation to a DAO are set out in [Chapter 29](#) (Court Martial proceedings). A brief for the DAO is also contained in [Chapter 29](#) (Court Martial proceedings). A copy of the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#), should be provided (if it has not already been done).

193. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of the charging procedure, then an appropriate adult should be present. An appropriate adult is defined at 162 above.

194. **Suspects 17 years old or of a lower age.** Where a suspect is 17 years old or of a lower age, he is to be treated as a juvenile for the purposes of charging. An appropriate adult should be notified of the intention to charge and should accompany the juvenile when being handed the charge sheet and the copy of the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). Appropriate adult¹⁹³, in the case of a juvenile is given the same meaning as in paragraphs 163 and 164 above.

195. **Charging and custody.** The issue of custody after charge is dealt with in detail at [Chapter 5](#) (Custody). The CO does not have the power to bring a charge in relation to a Schedule 2 offence or offence committed in prescribed circumstances, only the DSP¹⁹⁴ has the power to direct the CO to bring a specified charge.

196. In those cases where an application for custody after charge is likely to be made, the CO should be aware that he has no power to charge a Schedule 2 offence or an offence committed in prescribed circumstances, unless directed by the DSP.

197. In these circumstances, the DSP should be asked without delay to consider directing an appropriate charge. The DSP will consider the available evidence and apply the realistic prospect of conviction test¹⁹⁵. If the DSP directs the CO to bring a charge, the normal charging procedure should then be followed¹⁹⁶. If the matter arises outside normal working hours, the Duty Prosecutor must be contacted¹⁹⁷.

198. The CO should obtain staff legal advice in respect of the application for custody.

¹⁹³The meaning is taken from the Service Police Codes of Practice.

¹⁹⁴ A duty prosecutor will be available to direct a charge in such circumstances. See [Chapter 5](#) (Custody) for further information and guidance on how and when to consult the duty prosecutor.

¹⁹⁵ Code for Service Prosecutors found on the SPA website.

¹⁹⁶ Where custody after charge is applied for out of normal duty hours the duty/orderly officer must be a subordinate commander with delegated authority to refer a case to the DSP.

¹⁹⁷ Duty Prosecutor contact telephone number 07554 114229.

Part 7 - Administrative and welfare responsibilities

Introduction

199. In disciplinary matters, it is essential in the interests of fairness and justice that matters are dealt with diligently and without undue delay. Delay can be particularly stressful to both victims and the accused and such pressure can cause difficulty in their personal lives as well as an inability to focus on routine work, decision making, key career courses and decisions. Delay can also impact on an investigation and fairness of the proceedings because over time, witnesses' recollections of an event may be affected or evidence may be lost. Once an investigation has been completed, the resulting report should be acted upon as soon as reasonably practicable. Discipline case files should be carefully maintained, with accurate record keeping and file management.

Code of practice on services to be provided by the armed forces to victims of crime

200. The code of practice set out in DIN 200801-212 lists specific duties for the CO, DSP, MCS, CAO and Service Police in respect of a victim of a Service offence. This is a tri-Service policy on the treatment of victims, which should be brought to the attention of any victim of crime within the Service, including relevant civilians. The requirements contained within the code are mandatory and govern the minimum level of service to be provided to:

- a. Victims of relevant criminal conduct which occurred in the United Kingdom; and
- b. Victims of relevant criminal conduct which occurred outside the United Kingdom when those victims were Service personnel or relevant civilians.

201. A person entitled to receive support under the code is a person who has made a complaint to the ship/unit/establishment or Service Police in relation to an allegation of violence, interference with property (including theft and criminal damage), an offence of a sexual nature, ill treatment, conduct of a cruel kind and any other matter the CO decides requires support. The DIN must be consulted as the authoritative document.

Publications

202. Information on the disciplinary system is to be found in a number of publications, which should be brought to the attention of the suspect/accused at the appropriate stage of proceedings. These are:

- a. Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#)¹⁹⁸;
- b. Brief for accused's assisting officer¹⁹⁹;
- c. Defendant's assisting officer guide²⁰⁰; and
- d. JSP 838 (Armed Forces Legal Aid Scheme) and see Form JPA T002.

¹⁹⁸ This publication provides information to a Service personnel or relevant civilians on their rights whilst being investigated, charged heard summarily or by Service court.

¹⁹⁹ See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) which contains instructions to the AAO.

²⁰⁰ See [Chapter 29](#) (Court Martial proceedings) which contains the DAO instructions.

203. There is a well established system under which Service personnel who are under investigation or charged with an offence are supported. This may include:

- a. Comprehensive information and guidance on the disciplinary system²⁰¹;
- b. Access to legal advice and assistance, see paragraphs 206 - 208 below and JSP 838 (Armed Forces Legal Aid Scheme);
- c. Continuing employment and sensitive career management while the case progresses²⁰²;
- d. The appointment of assisting officers from the individual's ship/unit/establishment²⁰³;
- e. The normal range of welfare support (welfare officers, padre, medical, family support); and
- f. Protection from media attention where appropriate²⁰⁴.

Direct welfare support

204. In all cases, welfare support should be provided. An accused and their family have access to the full range of welfare support, including pastoral and medical care that is tailored to meet the needs of the individual.

205. It is important that welfare support is open to all on an equal basis. The Services have issued specific guidance covering support to accused personnel²⁰⁵. COs and line management have ready access to welfare expertise and subject matter experts to call upon if required, especially if the accused has just landed from a ship or been transferred from his unit for disciplinary reasons.

Legal aid

206. **Interview.** A suspect who is being interviewed by the Service Police is entitled to free legal advice during the interview in accordance with JSP 397 (Service Police Codes of Practice). This may be provided under the duty solicitor legal aid scheme or from a Service lawyer if overseas.

207. **CM and SCC.** If an individual is charged with an offence likely to result in a CM/SCC trial, they may apply for legal aid²⁰⁶ from the Armed Forces Criminal Legal Aid Authority (AFCLAA) and should refer to JSP 838 (Armed Forces Legal Aid Scheme) for further guidance. See [Annex R](#) for a quick reference flow chart on applying for legal aid.

208. **Summary hearing.** Legal advice to the accused is ordinarily at the accused's expense, but there are many potential sources of free legal advice from firms of solicitors who offer a free initial consultation. Advice may be available from a Service lawyer. The AAO may be in a position to advise the accused whether he is able to get free legal advice

²⁰¹ Your rights if you are accused of an offence under the Service justice system (Annex G).

²⁰² Removal from post or suspension considered under QRs or single-Service administrative instructions, RN: PLAGO 0803 and FLAGO Chapter 16, Army; AGAI 67 and QRs Chapter 6, RAF: QRs 1027 and AP 3392 Vol 5 Leaflet 127.

²⁰³ See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) for a full brief to the Accused Assisting Officer.

²⁰⁴ See Tri-Service Guidance on contact with the media (DIN 2007 03-006).

²⁰⁵ RN: PLAGO article 0101; Army: AGAI 81 paragraph 081.035 and RAF: AP3392 Vol 4.

²⁰⁶ Legal aid application JPA 002T.

contacting a staff lawyer if he himself requires guidance in this respect. A legal adviser is not allowed to be present during the summary hearing. Legal aid is not available for summary hearings by the CO; however, an individual is entitled to obtain legal advice prior to a summary hearing at his own expense, or from a Service lawyer if available.

Legal advice to the CO and the Service Police

209. **During investigation.** The DSP and staff legal advisers can provide legal advice to the Service Police during the course of an investigation. Once an investigation report has been submitted by the Service Police to the CO, the CO should obtain legal advice from a staff legal adviser; this will include any application for Service custody, whether before charge or after charge.

210. RN coxswains should seek advice during the course of an investigation from the relevant Naval Provost Marshal in the first instance. In the other Services, personnel conducting CO's investigations should seek advice from a staff legal adviser or HA.

211. **Following investigation.** The CO should seek legal advice from a staff legal adviser in relation to charging, referral to the DSP, custody matters, extended powers, and applications to hear any of the offences listed in [Annex C](#). This list is not exhaustive.

212. General guidance on disciplinary action may be also sought from HA.

Employment during an investigation and/or while awaiting trial

213. A CO may suspend a suspect/accused from duty during the investigation of an alleged offence or any matter, if he considers that such action is necessary in the interests of the Service or individual. Full guidance on suspension²⁰⁷ and removal from post²⁰⁸ is contained in single-Service instructions. Staff legal advice should be taken.

214. The potential impact on the accused of an investigation and charge should be addressed during the disciplinary process. Consideration should be given to whether a specialised medical assessment is required (particularly psychiatric) for those employed in a safety critical area or who have access to firearms.

Administrative action

215. There may be times when administrative action should be considered instead of, or in addition to, formal disciplinary action. The distinction between disciplinary action and administrative action is important. As a general rule, disciplinary action should be used where there is evidence that an offence has been committed, where the application of Service law is appropriate and where an individual should, if convicted, be punished. Minor administrative action is intended to correct professional and personal shortcomings. It should not be used as a substitute for disciplinary action in clearly criminal matters (unless it is following a criminal conviction). When minor administrative action is taken, the sanction should fit the professional failing, and be clearly designed to correct it, not to punish the individual. Major administrative action, which includes discharge from the Service, may be taken in conjunction with or following disciplinary action.

²⁰⁷ Suspension from duty pending investigation is dealt with under single-Service policy. RN: PLAGO 0803; Army: QRs paragraph 6.015; and RAF: AP 3392 Volume 5 leaflets 127 to 130.

²⁰⁸ See single-Service guidance on removal from post RN: PLAGO 0803; Army: AGAI 67; and RAF AP 3392 Volume 5 leaflet 127 to 130.

216. Guidance on major administrative action is set out in the single-Service publications²⁰⁹. JSP 833 (Minor Administrative Action) addresses minor administrative action. In addition, legal advice may be sought from a staff legal adviser.

217. Where harassment or bullying is alleged, reference should be made to JSP 831 (Redress of individual grievance: Service complaints) and if necessary, JSP 763 (The MOD Harassment Complaints Procedure), when considering how to proceed.

218. A CO should be aware that an allegation of harassment or bullying may amount to a prescribed circumstance²¹⁰. It may not be immediately apparent whether a disciplinary offence has been committed and whilst proceeding with his preliminary enquiries a CO²¹¹ should be aware of the possibility.

219. If at any point during his enquiries, it appears that prescribed circumstances do or may exist, the CO is under a duty to immediately inform the Service Police. If the matter is reported to the Service Police, the CO may not take any further action to investigate the allegation under JSP 831 or JSP 763, until the Service Police either refer the matter back to him or inform him that there is insufficient evidence to charge an offence. If the CO is unsure whether prescribed circumstances exist he should seek staff legal advice.

220. Although relevant civilians are not subject to the Services' provisions on administrative action, civilians are allowed certain privileges such as bringing a vehicle onto camp or are entitled under a licence to occupy a married quarter. Accordingly such privileges or licences may be revoked if the misconduct warrants it. For example, where a civilian is found to have contravened standing orders by driving without insurance, the CO may wish to consider revoking the civilian's vehicle pass to enter the unit/establishment. Staff legal advice should be sought in these cases.

221. In the case of a relevant civilian where a decision is made not to take disciplinary action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

Administrative considerations

222. When despatching case papers, the normal postal system can incur protracted delays. Case papers should be unclassified unless they contain classified information, but must have the appropriate privacy marking²¹². They are to be passed by the fastest possible means and optimum use should be made of e-mail, fax and couriers. Service duty vehicles and existing contracted courier services are to be used and all packages clearly marked with a label containing the following text:

²⁰⁹ Single-Service guidance on major administrative action can be found in PLAGO for the RN, AGAI 67 for the Army and QRs paragraph 1028 for the RAF.

²¹⁰ Under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (see Annex E).

²¹¹ The CO does not have discretion to investigate circumstances of a prescribed description (see section 114 of the Act), even if the complainant does not wish to make a formal complaint to the Service Police. In such cases the matter must be referred to the Service Police. If the case has been investigated and referred back to the CO, then administrative action may be taken, if appropriate. This will also apply to any allegation made in the form of a redress of grievance, in which prescribed circumstances arise.

²¹² See JSP 440 (The Defence Manual of Security).

PRIORITY - DISCIPLINE CASE PAPERS

This package contains papers relating to a discipline case. Service policy requires that on the day of receipt an authorised person opens it and takes the necessary action.

Note: this label is to be retained with the case papers for future audit purposes.

Date of Despatch:

Date of Receipt:

From:

Name (BLOCKS):

To:

Rank:

Signature:

Reporting of deaths to Service Police (where no Service offence is suspected)

223. Where a death occurs overseas of a Service person or a relevant civilian, the Service Police should be notified, even when no Service offence is suspected. The Service Police have certain obligations when an unexpected death occurs, even though no offence is suspected.

Part 8 – Transitional guidance

224. This Part outlines the main transitional provisions related to Part 5 of the Act contained in the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. The basic aim of the transitional arrangements for Part 5 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie before 31 October 2009).

Application of AFA06 to SDA offences

225. Paragraphs 227 to 233 set out how, for the purposes of transitional arrangements, AFA 06 will apply to SDA offences. This annex specifically identifies those SDA offences which may be dealt with at a summary hearing and those SDA offences which will count as 'Schedule 2' offences for the purposes of AFA 06.

226. Offences committed before commencement must be charged as offences under AA55, AFA55 or NDA57 as the case may be, *not* as the corresponding offence under AFA06. This annex explains:

- a. Which offences under AA55, AFA55 and NDA57 may be dealt with at a summary hearing under AFA06; and
- b. Which offences under AA55, AFA55 and NDA57 count as Schedule 2 offences for the purposes of Part 5 of AFA06.

This annex is 'transitional' only in a technical sense. It will continue to be relevant whenever offences committed before commencement come to light after commencement.

Offences which may be dealt with at a summary hearing²¹³

227. In addition to the offences listed at Annexes [B](#) and [C](#), a number of offences under AA55, AFA55 and NDA57 may be dealt with at a summary hearing under AFA06.

228. **AA/AFA55 offences.** Offences under the following sections of AA/AFA55 may be dealt with at a summary hearing under AFA06:

- a. Section 29 (offences by or in relation to sentries, persons on watch etc);
- b. Section 29A (failure to attend for duty, neglect of duty etc);
- c. Section 30(c) (taking vehicle, equipment or stores abandoned by the enemy);
- d. Section 33 (insubordinate behaviour);
- e. Section 34 (disobedience to lawful commands);
- f. Section 34A (failure to provide a sample for drug testing);
- g. Section 34B (failure to provide sample after serious incident);
- h. Section 35 (obstruction of provost officer);

²¹³ See article 15 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

- i. Section 36 (disobedience to standing orders);
- j. Section 38 (absence without leave);
- k. Section 39 (failure to report or apprehend deserters or absentees);
- l. Section 42(1)(a) (falsely pretending to be suffering from sickness or disability);
- m. Section 43 (drunkenness);
- n. Section 43A (fighting, threatening words etc);
- o. Section 44 (damage to, or loss of, public or Service property etc);
- p. Section 44A(1)(c), (d) or (e) (damage to, and loss of, HM aircraft or aircraft material);
- q. Section 44B(2) (conduct likely to impair efficiency or effectiveness of public or Service equipment etc);
- r. Section 45 (misapplication and waste of public or Service property);
- s. Section 46 (offences relating to issues and decorations);
- t. Section 50 (inaccurate certification);
- u. Section 51 (low flying);
- v. Section 52 (annoyance by flying);
- w. Section 54(2) (releasing prisoner or allowing escape);
- x. Section 55 (resisting arrest);
- y. Section 56 (escape);
- z. Section 60 (unauthorized disclosure of information);
- aa. Section 61 (false statements on enlistment);
- ab. Section 62 (false documents);
- ac. Section 65 (ill-treatment);
- ad. Section 66 (disgraceful conduct of a cruel, indecent or unnatural kind);
- ae. Section 68 (attempt, where the offence attempted is one of those above);
- af. Section 69 (conduct to prejudice of military or air-force discipline);
- ag. Section 75J (failure to attend hearing after release from custody).

This includes an offence under one of the above sections which was committed because AA/AFA55 section 68A (aiding and abetting, and inciting) applied.

229. An offence under AA/AFA55 section 70 (criminal conduct) may be dealt with at a summary hearing if the corresponding civil offence is one of those listed at Schedule 1 to AFA06. However if the corresponding civil offence is listed at Part 2 of Schedule 1 to AFA06 it may not be heard summarily without the permission of higher authority, unless the CO hearing the charge is a 2* or above.

230. **NDA offences.** Offences under the following sections of NDA57 may be dealt with at a summary hearing under AFA06:

- a. Section 5(c) (taking vehicle, equipment or stores abandoned by the enemy);
- b. Section 6 (offences by or in relation to sentries, persons on watch etc);
- c. Section 7 (failure to attend for duty, neglect of duty etc);
- d. Section 11 (insubordinate behaviour);
- e. Section 12 (disobedience to lawful commands);
- f. Section 12A (failure to provide a sample for drug testing);
- g. Section 12B (failure to provide sample after serious incident);
- h. Section 13 (fighting, threatening words etc);
- i. Section 14 (obstruction of provost officer);
- j. Section 14A (disobedience to standing orders);
- k. Section 17 (absence without leave);
- l. Section 18 (failure to report or apprehend deserters or absentees);
- m. Section 21 (low flying);
- n. Section 22 (annoyance by flying);
- o. Section 25 (inaccurate certification);
- p. Section 27 (malingering), but only if the offence is one of falsely pretending to be suffering from sickness or disability, or failing to do anything whereby any sickness or disability is prolonged or aggravated;
- q. Section 28 (drunkenness);
- r. Section 29 (damage to, or loss of, public or Service property etc);
- s. Section 29A(1)(c), (d) or (e) (damage to, and loss of, HM aircraft or aircraft material);
- t. Section 29B(2) (conduct likely to impair efficiency or effectiveness of public or Service equipment etc);
- u. Section 30 (misapplication and waste of public or Service property);

- v. Section 31 (offences relating to issues and decorations);
- w. Section 33A(2) (releasing prisoner or allowing escape);
- x. Section 33B (resisting arrest);
- y. Section 33C (escape);
- z. Section 34 (unauthorised disclosure of information);
- aa. Section 34A (false statements on entry);
- ab. Section 35 (false documents);
- ac. Section 36A (ill-treatment);
- ad. Section 37 (disgraceful conduct of a cruel, indecent or unnatural kind);
- ae. Section 39 (conduct to prejudice of naval discipline);
- af. Section 40 (attempt, where the offence attempted is one of those above);
- ag. Section 47K (failure to attend hearing after release from custody).

This includes an offence under one of the above sections which was committed because NDA57 section 41 (aiding and abetting, and inciting) applied.

231. An offence under NDA57 section 42 (criminal conduct) may be dealt with at a summary hearing if the corresponding civil offence is one of those listed at Schedule 1 to AFA06. However if the corresponding civil offence is listed at Part 2 of Schedule 1 to AFA06 it may not be heard summarily without the permission of higher authority, unless the CO hearing the charge is a 2* or above.

232. **AWOL under RFA96.** An offence of AWOL under RFA96 section 96 or 97 may be dealt with at a summary hearing under AFA06 even if committed before commencement²¹⁴.

233. **Charges capable of being heard summarily.** Appendix 4 to [Annex A](#) explains the conditions that must be met before a charge is 'capable of being heard summarily' under AFA06. In the case of an SDA offence, section 52(4) of AFA06 is *also* met if the accused:

- a. Was subject to military or air-force law or to NDA57 from the time of the offence to commencement, and
- b. Has been subject to Service law since commencement.

Schedule 2 offences²¹⁵

234. In addition to the offences listed at [Annex D](#), the following SDA offences count as 'Schedule 2 offences' for the purposes of Part 5 of AFA06:

²¹⁴ Where a period of AWOL began before commencement and continued until after commencement, legal advice should be sought.

²¹⁵ See article 42 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

- a. An offence under AA/AFA55 section 24 or NDA57 section 2 (misconduct in action);
- b. An offence under AA/AFA55 section 25(1)(a), (b), (c), (d) or (f) or NDA57 section 3(1)(a), (b), (c), (d) or (f) (assisting the enemy);
- c. An offence under AA/AFA55 section 26(1) or NDA57 section 4(1) (obstructing operations);
- d. An offence under AA/AFA55 section 30 or NDA57 section 5 (looting);
- e. An offence under AA/AFA55 section 31 or NDA57 section 9 (mutiny);
- f. An offence under AA/AFA55 section 32 or NDA57 section 10 (failure to suppress mutiny);
- g. An offence under AA/AFA55 section 37 or NDA57 section 16 (desertion) where the accused intends to avoid active service²¹⁶;
- h. An offence under AA/AFA55 section 44A(1)(f) or NDA57 section 29A(1)(f) (causing sequestration etc of aircraft) where the offender acts wilfully or with wilful neglect;
- i. An offence under AA/AFA55 section 48A or NDA57 section 19 (loss or hazarding of ship);
- j. An offence under AA/AFA55 section 49 or NDA57 section 20 (dangerous flying etc) where the offender acts wilfully or with wilful neglect;
- k. An offence under AA/AFA55 section 68 or NDA57 section 40 of attempting to commit any of the offences above;
- l. An offence under AA/AFA55 section 70 or NDA57 section 42 (criminal conduct) where the corresponding civil offence is:
 - (1) An offence listed in paragraph 12 of Schedule 2 to AFA06;
 - (2) An offence under the Sexual Offences Act 1956, sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 or 32;
 - (3) An offence under the Mental Health Act 1959, section 128;
 - (4) An offence under the Indecency with Children Act 1960, section 1;
 - (5) An offence under the Sexual Offences Act 1967, section 4 or 5;
 - (6) Attempt, conspiracy or incitement to commit any of the offences above;
 - (7) An offence under Part 2 of the Serious Crime Act 2007 of assisting or encouraging the commission of an offence within (1) above.

²¹⁶ For the meaning of 'active service' in this context, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) section 8(3).

Offences discovered post-commencement and cases in progress at commencement

235. Paragraphs set 236 to 262 out how, for the purposes of transitional arrangements, SDA offences which are discovered post-commencement or matters which are ongoing at commencement are to be dealt with.

Situation 1 - SDA offences discovered post-commencement

236. This situation will occur where an offence is committed pre-commencement but does not come to light until after commencement. Offences which are committed before 31 Oct 09 must be charged under one of the SDAs. Where, post-commencement, it appears that an offence might have been committed pre-commencement, it will generally be handled in the same way as a Service offence. For this reason the AFA 06 arrangements and therefore the [Chapter 6](#) guidance will apply. The transitional guidance in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences) should be read to confirm the arrangements for SDA offences post-commencement.

237. **Situation 2 - Where a CO is aware that a SDA offence has been committed but a suspect has not been charged pre-commencement.** The circumstances in which a CO will have 'initial powers' in relation to a case (such as the power to bring a charge) because of events which occurred before commencement²¹⁷ are explained at paragraphs 241 to 244 below

238. **Situation 3 - Where an accused has been charged with an SDA offence but the charge has not been disposed of pre-commencement.** The circumstances in which a CO has powers under AFA06 in relation to a charge brought under the SDAs before commencement are explained in paragraphs 245 to 262 below.

239. Situations 2 and 3 outlined above are matters which will be ongoing at commencement and the transitional arrangements that apply are complicated. COs should take not take action without staff legal advice.

240. This guidance should be read in conjunction with the flow diagrams at [Annex S](#) starting at the 'Transitional guidance - Overview' flow diagram.

Situation 2 - Where a CO is aware that a SDA offence has been committed but a suspect has not been charged pre-commencement

241. If no charge was brought before commencement²¹⁸, the CO may have initial powers under AFA06 section 119(2), (4) or (5). If so, he can bring a charge or refer the case to the DSP, under section 120.

242. The CO has initial powers under section 119(2) if:

- a. At commencement, he is aware²¹⁹ of an allegation or circumstances indicating that a person under his command has or may have committed an SDA offence;

²¹⁷ The question whether a CO has 'initial powers' will normally arise only where no charge was reported to him before commencement and no charge has yet been brought under AFA06. However, it is also possible that a CO might need 'initial powers' in respect of a case where a charge was reported to him before commencement, e.g. because the proceedings were stayed but the CO now wishes to bring another charge.

²¹⁸ The CO may also have initial powers if a charge was brought before commencement but no charge is 'current at commencement', see footnote 1 above.

²¹⁹ See article 43(4) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, which modifies the words 'becomes aware' in section 119(2).

- b. The case has not been investigated by Service Police;
- c. If the case has been investigated by civilian police, it is not likely to be referred to the Service Police; and
- d. The CO is not required by AFA06 section 113 or 114 to ensure that the Service Police are aware of the matter²²⁰.

243. The CO has initial powers under section 119(4) if, before commencement, the Service Police made a deemed referral for the purposes of section 116(3)²²¹, see paragraph 259 below.

244. The CO has initial powers under section 119(5) if, before commencement, the PA referred *part* of a case back to him, and no charge relating to that part of the case is 'allocated for Court Martial trial' or 'allocated for summary hearing'²²². If the PA referred the *whole* case back, the summary charge will be 'allocated for summary hearing', so the CO does not need initial powers: he already has the section 123 powers in relation to the existing charge. If the PA only referred *part* of the case back, however, it may be that the summary charge relates to the part which the PA retained. In these circumstances there may be no summary charge which relates to the part of the case that was referred back; but in that case the CO has initial powers.

Situation 3 - Where an accused has been charged with an SDA offence but the charge has not been disposed of pre-commencement

245. **Possible outcomes.** Where a charge was reported to the accused's CO before commencement and has not been disposed of before commencement, it *may* be possible for the CO to hear it, or exercise the section 123 powers in relation to it, under AFA06. The main possibilities are as follows:

- a. The charge is 'allocated for Court Martial trial'. That is, the DSP has the section 125 powers in relation to the charge, and the CO has no powers.
- b. The charge is 'allocated for summary hearing', and the CO may hear it. Note that 'allocated for summary hearing' is a technical term. It means only that the CO has the section 123 powers in relation to the charge. It does *not* necessarily mean that the charge will in fact be heard summarily, or even that it *can* be heard summarily. Hence the third possibility:
- c. The charge is 'allocated for summary hearing', *but the CO may not hear it* (or may not *yet* hear it); or
- d. No further steps may be taken on the charge²²³.

246. **Charges preferred by the PA.** In paragraph 245, 'the charge' means the charge reported to the CO under AA/AFA55 section 76 or NDA57 section 52B, or any charge that the CO may have substituted for that charge before commencement. Where a charge has

²²⁰ AFA06 sections 113 and 114 apply not only where a CO 'becomes' aware (after commencement) of a possible Schedule 2 offence or of prescribed circumstances, but also where he was already aware of the matter *before* commencement, Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 43(1) to (3). For SDA offences which count as Schedule 2 offences, see paragraph 234.

²²¹ Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 50.

²²² Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 51.

²²³ But it may be possible to bring another charge, see footnote 1 above.

been reported to the CO and the case has been referred to the PA, the PA may have preferred a new charge (possibly identical to the one originally reported) with a view to court-martial trial. In these circumstances the SPA should be consulted as to whether the charge preferred by the PA is 'allocated for Court Martial trial'. If it is, the CO will have no powers in relation to *that* charge unless and until the DSP refers it back; and the CO will also have no powers in relation to *the charge originally reported to him*.

Determining possible outcomes

247. In the rest of this Part:

- a. It is assumed either that no charge has been preferred by the PA, or that any charge preferred by the PA is not 'current at commencement' (e.g. because the PA has discontinued proceedings on it); and
- b. 'The summary charge' is short for 'the charge reported to the CO under AA/AFA55 section 76 or NDA57 section 52B, or any charge that the CO may have substituted for that charge before commencement'. The expression 'summary charge' should *not* be read as implying that the charge can or should be heard summarily.

Note that the summary charge will in certain circumstances be 'allocated for Court Martial trial', even though it is by definition a charge which under the SDAs could not be tried by court-martial (because a court-martial could only try charges preferred by the PA).

Question 1 - Is the summary charge 'current at commencement'?

248. The summary charge will be 'current at commencement' if the conditions set out at article 46(4) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 are met. Those conditions are summarised in the flow diagram at [Appendix 1 to Annex S](#) entitled 'Summary charge current?' and in paragraphs 249 and 250 below.

249. **Was a finding recorded before commencement?**

a. **Yes.** If so, the summary charge cannot be current: it has been superseded by the finding. If the summary charge was found proved and punishment was not awarded before commencement, punishment must be awarded (under the SDAs, *not* AFA06) if this has not yet been done, see the transitional guidance in [Chapter 13](#) (Summary hearing sentencing and punishments).

b. **No.** If no finding was recorded on the summary charge before commencement:

(1) Was the charge dismissed without a hearing, under AA 1955 section 76(5)(a) or NDA 1957 section 52B(5)(a)?

(2) Were further proceedings on the charge stayed under AA/AFA55 section 76(4) or NDA57 section 52B(4)?

(3) Did higher authority refer the charge back to the CO under AA/AFA55 section 76A(2) or NDA57 section 52C(2) with a direction to dismiss it or to stay further proceedings on it?

If the answer to any of these questions²²⁴ is *yes*, the summary charge is not 'current at commencement'²²⁵. If the answer to all of these questions is *no*, then ...

250. Was the case referred to the PA before commencement?

a. **No.** If not, the summary charge is 'current at commencement'. Go to paragraph 251 below.

b. **Yes.** If so, the status of the summary charge depends on the action (if any) that the PA took before commencement.

(1) If the PA preferred a charge, the summary charge is *not* 'current at commencement' *unless* the PA also referred the case back to the CO or the ASA under AA/AFA55 section 83B(2) or 83BB(2A) or NDA57 section 52I(2) or 52II(2A)²²⁶. If the PA did not refer the case back, the charge preferred by the PA will normally be 'allocated for Court Martial trial', and the summary charge falls away.

(2) If the PA did not prefer a charge, the summary charge *is* 'current at commencement'²²⁷ *unless* the PA informed the CO before commencement that the PA had decided to take no action, i.e. that he had decided *neither* to prefer a charge *nor* to refer the case (or a part of the case to which the charge relates) back to the CO.

Question 2 - Is the summary charge 'allocated for summary hearing'?

251. A summary charge which is 'current at commencement' is not necessarily 'allocated for summary hearing' immediately after commencement²²⁸. It may be 'allocated for Court Martial trial' instead, so that it is the DSP rather than the CO who has powers in relation to it (even though it was not the PA who preferred it). The allocation of the charge will depend on the factors in paragraphs 252 to 254.

252. Did the accused elect court-martial trial of the charge?

a. **Yes.** If so (and he did not withdraw the election with leave before commencement)²²⁹, the summary charge is 'allocated for Court Martial trial' immediately after commencement. The CO need not formally refer it, but should pass the details to the SPA if they are not already aware of the matter.

b. **Declined.** If the accused *declined* the opportunity to elect court-martial trial before commencement (or did elect but withdrew the election with leave before commencement), special rules apply, see paragraph 262 below.

²²⁴ There is one further case in which a summary charge is not 'current at commencement', viz. where the time limit for court-martial trial has already expired. The time limit applicable for this purpose is defined in article 48 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009. This situation is very unlikely to arise.

²²⁵ Article 46(4)(e) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 also provides that a charge is not 'current at commencement' if another charge has been substituted for it, because the new charge takes the place of the original one. In these circumstances the questions in the flowchart and the text must be considered in relation to the *new* charge.

²²⁶ If the PA preferred a charge and referred *part* of the case back, the summary charge is not 'current at commencement' unless it relates to the part that was referred back.

²²⁷ But 'allocated for Court Martial trial', see paragraph 253 below.

²²⁸ Even if it is 'allocated for summary hearing' immediately after commencement, it will become 'allocated for Court Martial trial' if the CO refers it to the DSP. Conversely, if the charge is initially 'allocated for Court Martial trial' it will become 'allocated for summary hearing' if the DSP refers it back to the CO.

²²⁹ If the case was referred to the PA following the election, a withdrawal of the election with leave does not prevent the charge from being 'allocated for Court Martial trial' unless the PA referred the case back.

c. **Not given the opportunity.** If the accused was *not given the opportunity to elect court-martial trial* before commencement, the summary charge is 'allocated for summary hearing' immediately after commencement unless it is an 'excluded' charge (as defined by article 47 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), in which case it is initially 'allocated for Court Martial trial'. The factors which determine whether a charge is 'excluded' are summarised in the flow diagram at [Appendix 2 to Annex S](#) entitled 'Excluded charge?' and paragraphs 253 and 254 below.

253. **Was the case referred to the PA before commencement?**

a. **Yes and case was not referred back.** If so, and the case (including any part of the case to which the charge relates) *was not referred back* before commencement, the summary charge is 'allocated for Court Martial trial' immediately after commencement. The CO need not refer it.

b. **Yes but case was referred back.** If the case was referred to the PA, but the case (or any part of the case to which the charge relates) *was referred back* before commencement, the summary charge is 'allocated for summary hearing' immediately after commencement. As to whether it can be *heard* summarily, see paragraphs 256 to 261 below.

c. **No.** If the case was not referred to the PA before commencement, then ...

254. **Was the summary charge referred to higher authority before commencement?**

a. **Yes.** If so, and the summary charge was not referred back to the CO (or to the ASA) before commencement, the summary charge is automatically 'allocated for Court Martial trial' immediately after commencement²³⁰. The CO need not formally refer it, but should pass the details to the SPA.

b. **No.** If the summary charge was not referred to higher authority, or was referred back to the CO (or to the ASA), it is 'allocated for summary hearing' immediately after commencement if it is '*capable of being heard summarily*'. See the flow diagram at [Appendix 3 to Annex S](#) entitled 'Charge capable of being heard summarily?'. If any of the requirements shown in that flow diagram are *not* met, the summary charge is 'allocated for Court Martial trial' immediately after commencement²³¹. The CO need not formally refer it, but should pass the details to the SPA.

Consequences of summary charge being 'allocated for summary hearing'

255. If the summary charge is 'allocated for summary hearing', the CO has the powers conferred by AFA06 section 123. That is, he may:

- a. Amend the charge,
- b. Substitute another charge which is 'capable of being heard summarily',
- c. Bring an additional charge which is 'capable of being heard summarily',

²³⁰ This is so even if the charge was referred to higher authority with a view to its being heard by the ASA.

²³¹ Unless the accused was given the opportunity to elect court-martial trial before commencement, see paragraph 262 below.

- d. Discontinue proceedings on the charge, or
- e. Refer the charge to the DSP.

If the CO has made a delegation under the Armed Forces (Part 5 of the AFA06) Regulations 2009, it is the subordinate commander who has the section 123 powers.

256. However, the summary charge cannot necessarily be *heard* by the CO (or the subordinate commander) even if it is 'allocated for summary hearing'. There are two main reasons for this:

- a. **Summary charges not 'capable of being heard summarily'**. First, a charge may not be heard summarily if it is *not 'capable of being heard summarily'*²³² (see [Appendix 3 to Annex S](#)). For the circumstances in which a charge is 'capable of being heard summarily', see paragraph 254b above. A charge which is not 'capable of being heard summarily' may be 'allocated for summary hearing' if the case was referred back by the PA before commencement (see paragraph 253). In these circumstances the CO may either substitute a charge which *is* 'capable of being heard summarily', and hear that charge²³³, or discontinue the proceedings.
- b. **Further restrictions on the power to hear a charge.** Second, article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 imposes restrictions on the power to *hear* a charge, even if it is 'allocated for summary hearing' *and* 'capable of being heard summarily'. These restrictions are summarised in the flow diagram at [Appendix 4 to Annex S](#) entitled 'Allocated for summary hearing' and paragraphs 257 to 261 below.

257. Article 49 applies if:

- a. The Service Police have investigated the case; or
- b. A civilian police force has investigated the case and may refer it to the Service Police; or
- c. The CO is aware of:
 - (1) An allegation or circumstances suggesting that a Schedule 2 offence²³⁴ may have been committed by a person under his command, or
 - (2) Circumstances prescribed by the Armed Forces (Part 5 of the AFA06) Regulations 2009 for the purposes of AFA06 section 114.

258. If the summary charge is 'allocated for summary hearing' and 'capable of being heard summarily', and article 49 does not apply, the charge may be heard summarily.

259. If article 49 applies, the position *immediately after commencement* is that the summary charge may not be heard summarily unless:

- a. The case, or a part of the case to which the charge relates, was referred back by the PA before commencement; or

²³² Unless the accused was given the opportunity to elect court-martial trial before commencement, see paragraph 262 below.

²³³ Article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, discussed below, will not apply because the case has been referred back.

²³⁴ For SDA offences which count as Schedule 2 offences, see paragraph 234.

b. The Service Police made a ‘deemed referral’ for the purposes of AFA06 section 116(3) before commencement, which was not countermanded before commencement. A deemed referral is a report to a person’s CO, before commencement, that:

(1) There is sufficient evidence to charge²³⁵ the person with an offence, but *not* sufficient evidence to charge him with a Schedule 2 offence²³⁶; and

(2) The Service Police are not aware of any circumstances prescribed by the Armed Forces (Part 5 of the AFA06) Regulations 2009 for the purposes of AFA06 section 116(2)(b). See the flow diagram at [Appendix 3 to Annex A](#) for the procedure for a CO to determine whether circumstances of a prescribed description exist when he has become aware of an allegation or circumstances.

260. If either of those exceptions applies, the summary charge may be heard summarily despite article 49.

261. If neither of those exceptions applies, the summary charge may not *yet* be heard summarily. It may be heard summarily if, *after* commencement, the Service Police refer the case to the accused’s CO under AFA06 section 116(3). If section 116(2) applies, however, it will never be possible to hear the charge summarily, because the Service Police will not be able to refer the case under section 116(3). In these circumstances the CO should refer the charge to the DSP.

Opportunity to elect court-martial trial declined before commencement

262. If the accused was given the opportunity to elect court-martial trial before commencement but declined to elect (or did elect but withdrew the election with leave before commencement), and the summary charge is current at commencement, special rules apply, see the flow diagram at [Appendix 5 to Annex S](#) entitled ‘Right to elect offered’.

a. If, after giving the accused the opportunity to elect, the CO referred the summary charge to higher authority, and higher authority did not refer it back, the summary charge is ‘allocated for Court Martial trial’.

b. If the CO did not refer the summary charge to higher authority (or he did, but higher authority referred it back), the summary charge is ‘allocated for summary hearing’. If the charge was brought under NDA57, and was within the CO’s jurisdiction under that Act, it does not matter that the charge is not ‘capable of being heard summarily’ under AFA06. Permission to hear the charge is not required.

c. Even if the summary charge is ‘allocated for summary hearing’, however, article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 may prevent it from being *heard* summarily, see paragraphs 256b to 261 above. If article 49 applies, the charge may not be heard summarily unless:

(1) One of the exceptions in paragraph 259 applies, or

(2) The Service Police refer the case to the CO under AFA06 section 116(3) after commencement.

²³⁵ ie a prima facie case, not necessarily a ‘realistic prospect of conviction’, section 116(5).

²³⁶ For SDA offences which count as Schedule 2 offences, see paragraph 234.

d. If article 49 does not apply, or one of the exceptions in paragraph 259 applies, or the Service Police refer the case to the CO under AFA06 section 116(3), the summary charge may be heard summarily. If a hearing of the charge began before commencement, evidence heard before commencement need not be reheard; but the remainder of the hearing must be conducted as a fresh hearing under AFA06 and in accordance with the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009. See the transitional guidance in [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

This annex contains the following flowcharts to assist in the process of investigation, charging and mode of trial. They should be read in conjunction with the relevant paragraphs of this chapter.

Appendix 1- Investigation procedure	1-6-A1-1
Appendix 2 – Charging and mode of trial	1-6-A2-1
Appendix 3 – Existence of prescribed circumstances	1-6-A3-1
Appendix 4 – Procedure to determine if a charge is capable of being heard summarily	1-6-A4-1
Appendix 5 – Procedure to be followed when amending, substituting or bringing an additional charge	1-6-A5-1
Appendix 6 – Procedure to determine whether higher authority permissions required	1-6-A6-1

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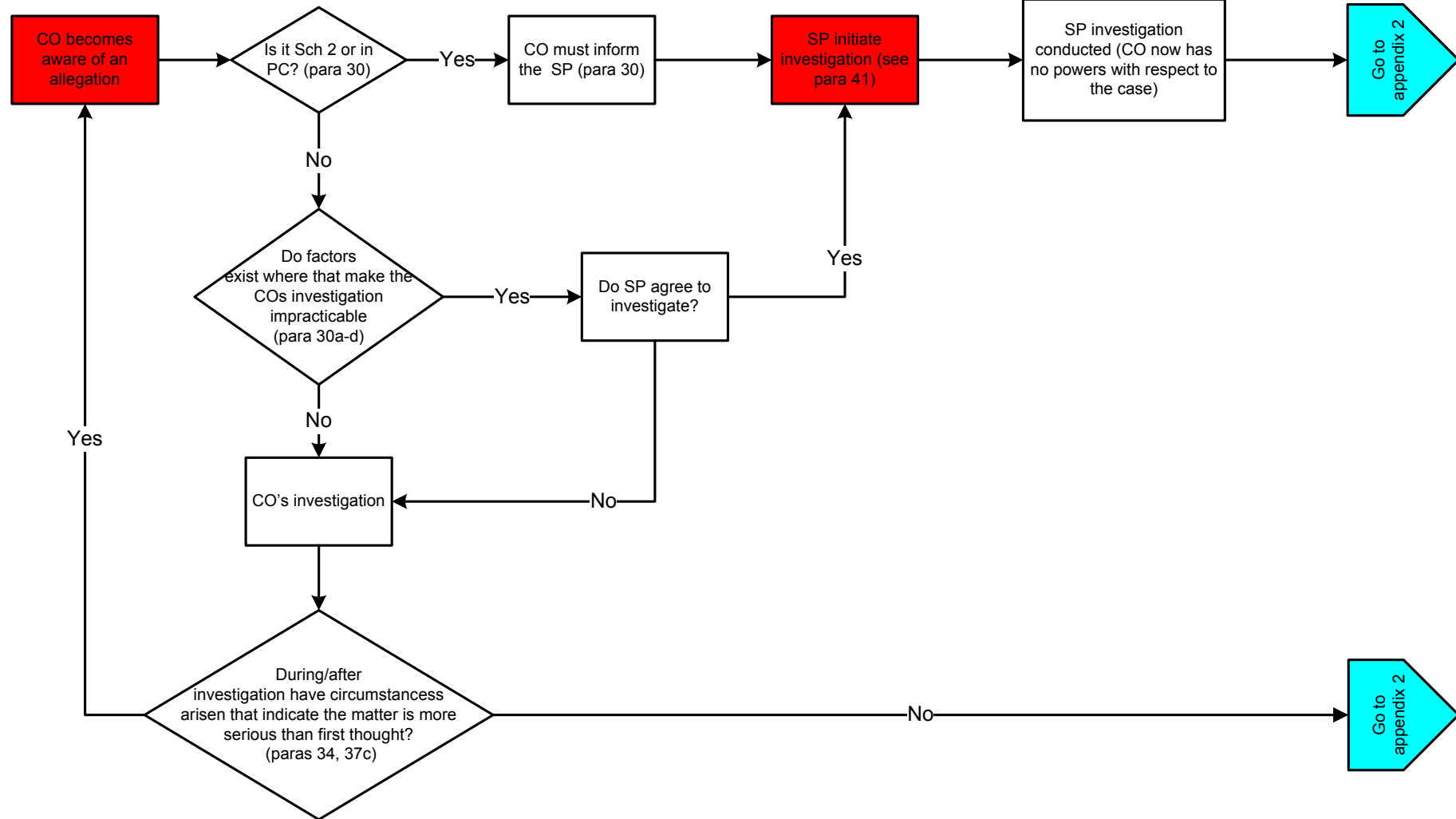
PC = Prescribed Circumstances
SP = Service Police
Sch 2 = Schedule 2 AFA06 (Annex C)

 Start point

To determine whether circumstances of a prescribed description (PC) exist go to appendix 3

INVESTIGATION PROCEDURE

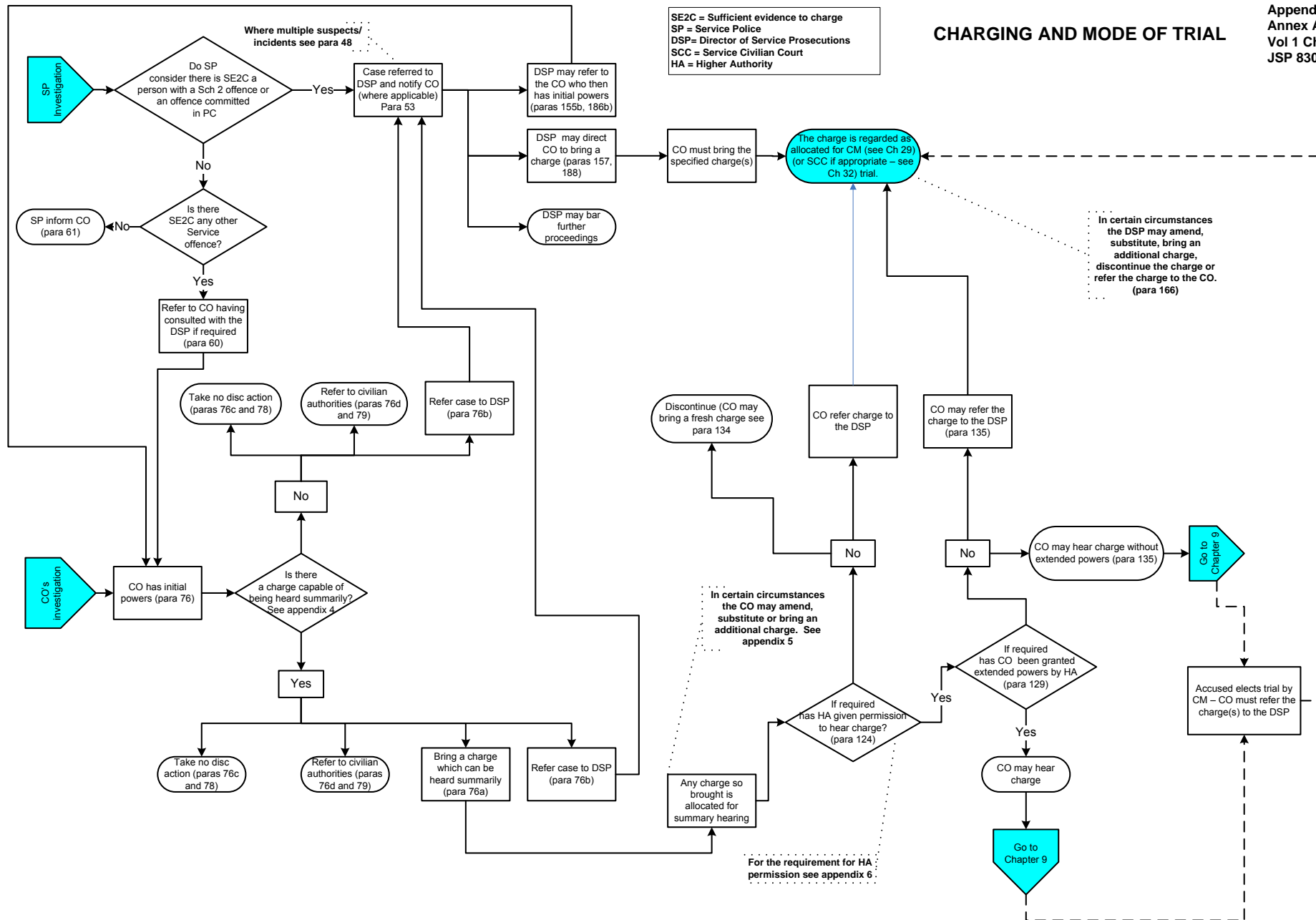
Appendix 1 to
Annex A to
Vol 1 Ch 6
JSP 830 MSL



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CHARGING AND MODE OF TRIAL

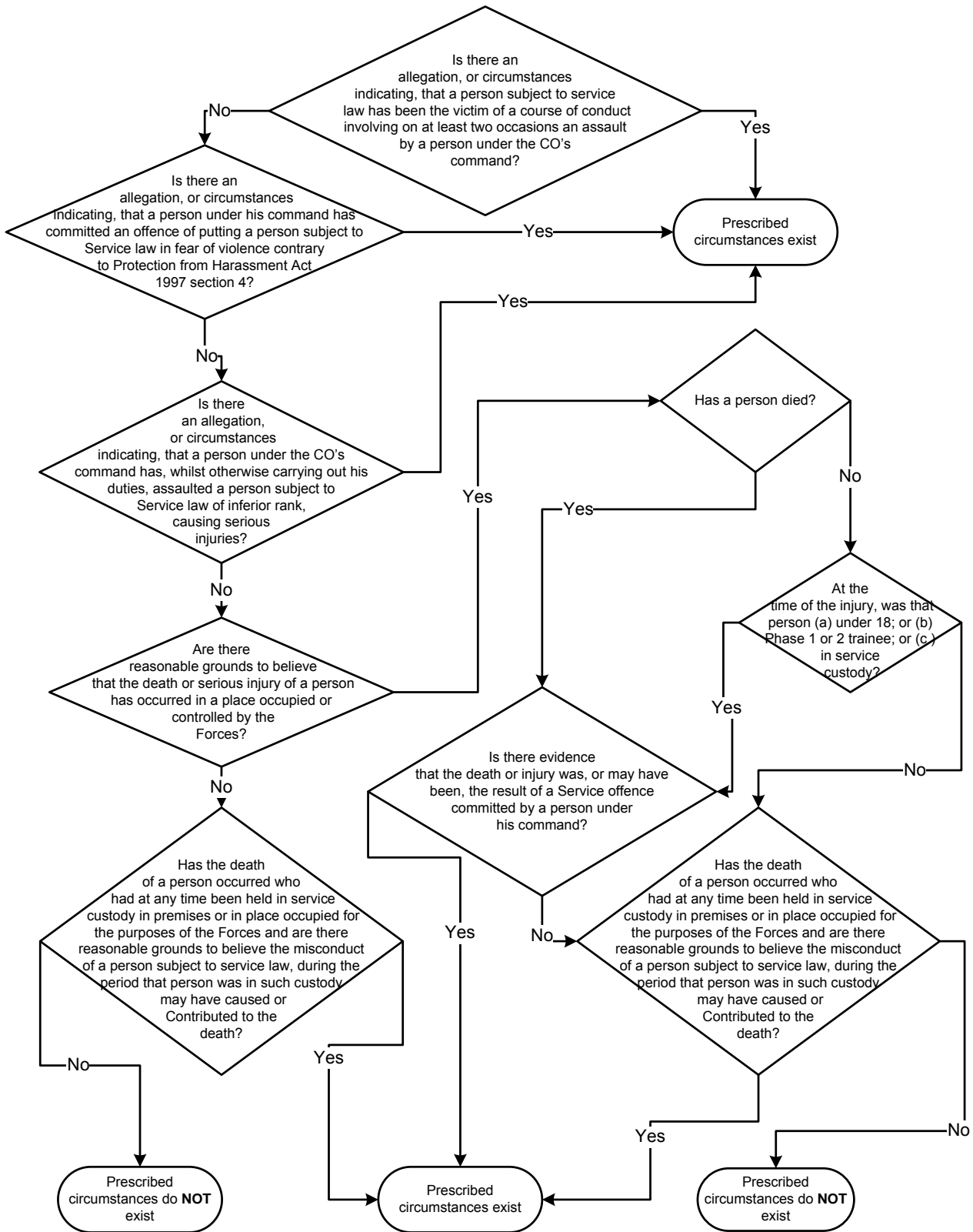
SE2C = Sufficient evidence to charge
SP = Service Police
DSP= Director of Service Prosecutions
SCC = Service Civilian Court
HA = Higher Authority



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PROCEDURE FOR CO TO DETERMINE WHETHER CIRCUMSTANCES OF A PRESCRIBED DESCRIPTION EXIST WHEN HE HAS BECOME AWARE OF ALLEGATION OR CIRCUMSTANCES

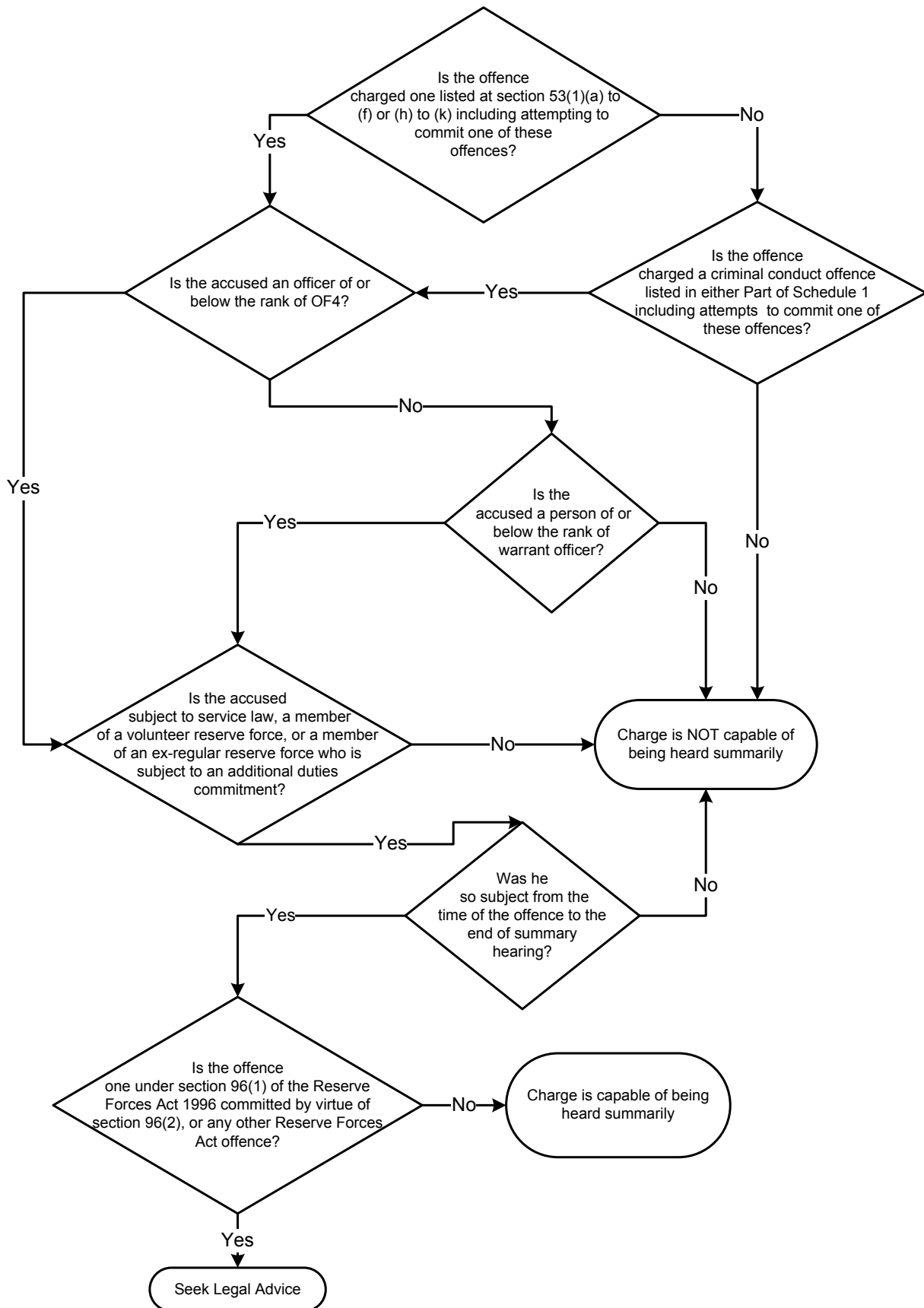
Appendix 3 to Annex A to Vol 1 Ch 6 JSP 830 MSL



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PROCEDURE TO DETERMINE WHETHER A CHARGE IS CAPABLE OF BEING HEARD SUMMARILY

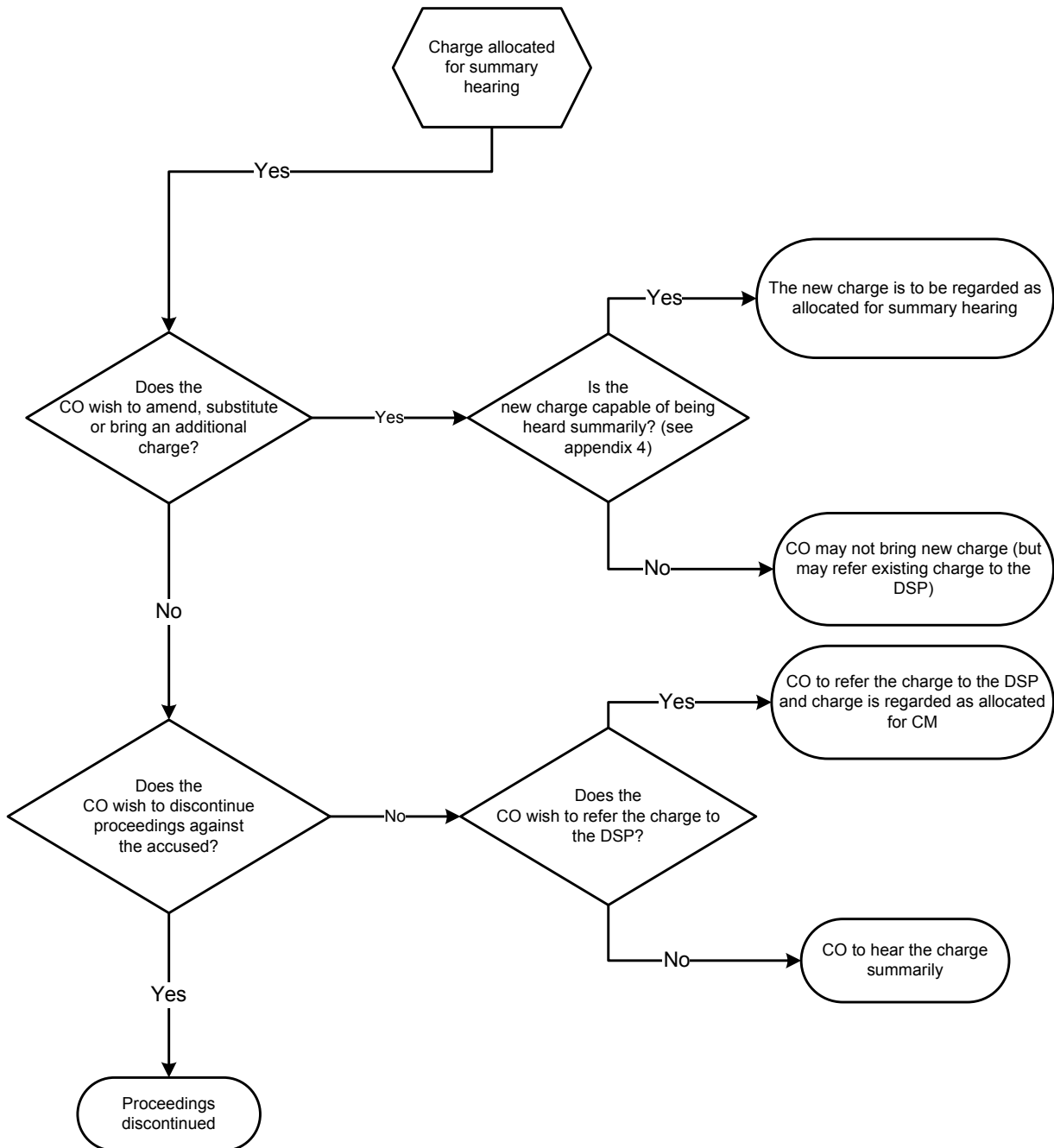
Appendix 4 to
Annex A to
Vol 1 Ch 6
JSP 830 MSL



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PROCEDURE TO BE FOLLOWED WHEN AMENDING SUBSTITUTING OR BRINGING AN ADDITIONAL CHARGE

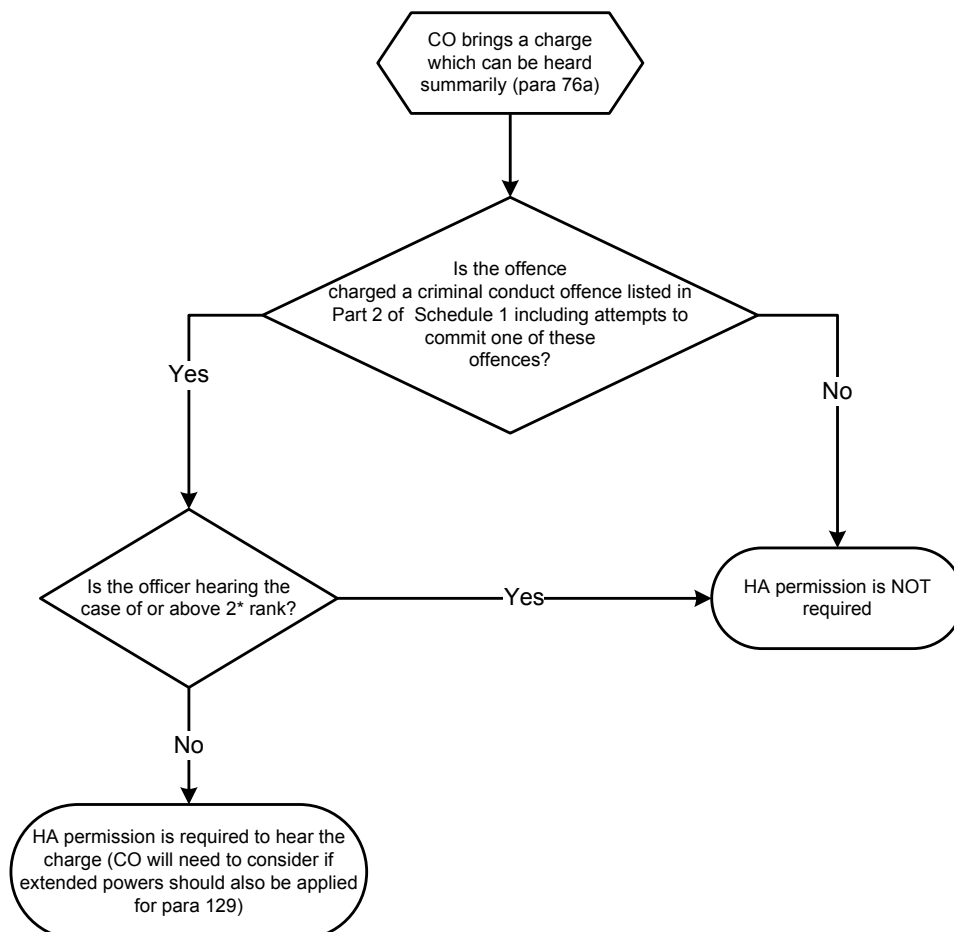
Appendix 5 to
Annex A to
Vol 1 Ch 6
JSP 830 MSL



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PROCEDURE TO DETERMINE WHETHER HA
PERMISSION REQUIRED

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Annex A to
Vol 1 Ch 6
JSP 830 MSL



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OFFENCES CAPABLE OF BEING HEARD SUMMARILY WITHOUT PERMISSION OF HIGHER AUTHORITY (SECTION 53 OF THE ACT)

Non-criminal conduct (disciplinary) offences

1. The following non-criminal conduct offences are capable of being heard summarily without permission. Further detail can be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences):

- a. Looting any vehicle, equipment or stores abandoned by an enemy (section 4(3)).
- b. Absence without leave (section 9).
- c. Failure to cause apprehension of deserters or absentees (section 10).
- d. Disobedience to lawful commands (section 11).
- e. Misconduct towards a superior officer (section 12).
- f. Contravention of standing orders (section 13).
- g. Using force against a sentry etc (section 14).
- h. Failure to attend for or perform a duty (section 15).
- i. Malingering (section 16(1) (a), or an offence under section 16(1) (c) committed by omission).
- j. Disclosure of information to the enemy (section 17).
- k. Making a false record (section 18).
- l. Conduct to the prejudice of good order and military discipline (section 19).
- m. Unfitness or misconduct through alcohol or drugs (section 20).
- n. Fighting and threatening behaviour (section 21).
- o. Ill treatment of subordinates (section 22).
- p. Disgraceful conduct of a cruel or indecent kind (section 23).
- q. Damage to or loss of public or Service property (section 24).
- r. Misapplying or wasting public or Service property (section 25).
- s. Obstructing or failing to assist a Service policeman (section 26).
- t. Resistance to arrest etc (section 28).

- u. Offences in relation to Service custody (section 29).
 - v. Allowing escape, or unlawful release, of prisoners etc (section 30(1) of negligently doing an act that results in a person's escape, or an offence under section 30(2)).
 - w. Low flying (section 34).
 - x. Annoyance by flying (section 35).
 - y. Inaccurate certification (section 36).
 - z. Failure to attend a hearing after release from custody after charge (section 107).
 - aa. Failure to provide a sample for a drugs test (section 305).
 - ab. Failure to provide a sample for analysis after serious incident (section 306).
 - ac. Enlistment offences (section 328).
 - ad. Service Inquiry offences²³⁷ (section 343).
 - ae. Absence without leave (section 96 or 97 of the Reserve Forces Act 1996).
2. An attempt (section 39) to commit any offence listed in paragraph 1 above.

Criminal conduct offences

3. The following criminal conduct (section 42) offences, as set out at Part 1 of Schedule 1, are capable of being heard summarily without permission. Further detail can be found in [Chapter 8](#) (Criminal conduct offences):
- a. Theft (section 1 of the Theft Act 1968).
 - b. Taking vehicle etc without consent (section 12 of the Theft Act 1968).
 - c. Possession of controlled drug (section 5(2) of the Misuse of Drugs Act 1971).
 - d. Criminal damage (section 1(1) of the Criminal Damage Act 1971).
 - e. Making off without payment (section 3 of the Theft Act 1978) where the payment required or expected did not exceed £100.
 - f. Interference with vehicles (section 9 of the Criminal Attempts Act 1981).
 - g. Assault and battery (section 39 of the Criminal Justice Act 1988).
 - h. Careless driving etc (section 3 of the Road Traffic Act 1988).
 - i. Driving a vehicle where driver has consumed excessive amount of alcohol etc (section 5 of the Road Traffic Act 1988).

²³⁷ See Service Inquiry Regulations 2008 for full details of the offences.

- j. Tampering with vehicles etc (section 25 of the Road Traffic Act 1988) where the vehicle was on a road.
 - k. Dangerous cycling (section 28 of the Road Traffic Act 1988).
 - l. Careless cycling etc (section 29 of the Road Traffic Act 1988).
4. An attempt to commit an (indictable) offence (section 43) listed in paragraph 3 above.

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**OFFENCES CAPABLE OF BEING HEARD SUMMARILY BY A 2*
COMMANDING OFFICER OR WITH PERMISSION OF HIGHER
AUTHORITY (SECTION 54 OF THE ACT)**

1. The following offences are capable of being heard summarily by a 2* CO or with permission of HA, further detail can be found in [Chapter 7](#) (Non-criminal conduct (disciplinary offences)) and [Chapter 8](#) (Criminal conduct offences):

- a. Assault occasioning actual bodily harm (section 47 of the Offences against the Person Act 1861).
- b. Possession in public place of offensive weapon (section 1 of the Prevention of Crime Act 1953).
- c. Abstracting of electricity (section 13 of the Theft Act 1968).
- d. Possession in public place of point or blade (section 139 of the Criminal Justice Act 1988).
- e. Dishonestly obtaining electronic communications services (section 125 of the Communications Act 2003).
- f. Possession or supply of apparatus etc for dishonestly obtaining electronic communication services (section 126 of the Communications Act 2003).
- g. Fraud (section 1 of the Fraud Act 2006).
- h. Dishonestly obtaining services (section 11 of the Fraud Act 2006).
- i. Attempting to commit one of the offences listed above.

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SCHEDULE 2 OFFENCES

1. The following offences²³⁸ are **not** capable of being heard summarily, further detail can be found in [Chapter 7](#) Non-criminal conduct (disciplinary) offences and [Chapter 8](#) (Criminal conduct offences):

- (1) An offence under section 1 (assisting an enemy).
- (2) An offence under section 2(1) (misconduct on operations).
- (3) An offence under section 3 (obstructing operations) which relates to an action or operation against an enemy.
- (4) An offence under section 4(1) or (2) (looting).
- (5) An offence under section 6 (mutiny).
- (6) An offence under section 7 (failure to suppress mutiny).
- (7) An offence under section 8 (desertion) where the accused intended to avoid a period of active service (within the meaning of that section).
- (8) An offence under section 31(1) (hazarding of ship).
- (9) An offence under section 33(1) (dangerous flying etc).
- (10) An offence under section 39 of attempting to commit an offence within any of paragraphs (1) to (9).
- (11) An offence under section 40 of encouraging or assisting another person to commit an offence within any of paragraphs (1) to (9).
- (12) An offence under section 42 (criminal conduct) as respects which the corresponding offence under the law of England and Wales is—
 - (a) Murder;
 - (b) Manslaughter;
 - (c) Kidnapping;
 - (d) High treason;
 - (e) Piracy;
 - (f) Cheating the public revenue;
 - (g) An offence under section 2 of the Treason Act 1842 (c. 51)

²³⁸ Special provisions governing these offences is dealt with in Part 6 of this chapter.

(attempt to injure or alarm the Sovereign);

(h) An offence under section 3 of the Treason Felony Act 1848 (c. 12) (compassing the deposition of the Sovereign etc);

(i) An offence under section 4, 18, 22, 23, 28 or 29 of the Offences against the Person Act 1861 (c. 100) (soliciting murder, wounding with intent, using chloroform etc to commit indictable offence, administering poison, causing injury by explosives, using explosives etc with intent);

(j) An offence under section 20 of that Act of inflicting grievous bodily harm;

(k) An offence under section 2 or 3 of the Explosive Substances Act 1883 (c. 3) (causing explosion likely to endanger life or property etc);

(l) An offence under section 1 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (corruption in office);

(m) An offence under section 1 of the Prevention of Corruption Act 1906 (c. 34) (corrupt transactions with agents), other than an offence falling within that section by virtue only of the third paragraph of subsection (1) of that section;

(n) An offence under section 1 or 2 of the Perjury Act 1911 (c. 6) (perjury or false statements on oath);

(o) An offence under section 1 or 7 of the Official Secrets Act 1911 (c. 28) (spying or harbouring spies); (p) an offence under section 1 of the Infant Life (Preservation) Act 1929 (c. 34) (child destruction);

(q) An offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to children);

(r) An offence under section 1 of the Infanticide Act 1938 (c. 36) (infanticide);

(s) An offence under section 33 or 33A of the Sexual Offences Act 1956 (c. 69) (keeping a brothel etc);

(t) An offence under section 1 of the Geneva Conventions Act 1957 (c. 52) (grave breaches of conventions);

(u) An offence under section 2 of the Suicide Act 1961 (c. 60) (assisting suicide etc);

(v) An offence under section 5, 16, 16A, 17, 18 or 20 of the Firearms Act 1968 (c. 27) (unlawful possession or use of firearm etc);

(w) An offence under section 8, 10 or 21 of the Theft Act 1968 (c. 60) (robbery, aggravated burglary, blackmail);

(x) An offence under section 12A of that Act (aggravated vehicle taking) involving an accident which caused the death of any person;

- (y) An offence under section 4, 5(3) or 8 of the Misuse of Drugs Act 1971 (c. 38) (production and supply of controlled drugs, possession of such drugs with intent to supply, permitting production of such drugs);
- (z) An offence under section 1(2) of the Criminal Damage Act 1971 (c. 48) (destroying or damaging property with intent to endanger life);
- (aa) An offence under section 1 of the Biological Weapons Act 1974 (c. 6) (developing biological agents etc);
- (ab) An offence under section 51 of the Criminal Law Act 1977 (c. 45) (bomb hoaxes);
- (ac) An offence under section 1 of the Protection of Children Act 1978 (c. 37) (indecent photographs of children);
- (ad) An offence under section 170 of the Customs and Excise Management Act 1979 (c. 2) (fraudulent evasion of duty etc);
- (ae) An offence under section 1 of the Taking of Hostages Act 1982 (c. 28) (hostage-taking);
- (af) An offence under any of sections 1 to 4 of the Aviation Security Act 1982 (c. 36) (hijacking, destroying, damaging or endangering safety of aircraft etc);
- (ag) An offence under section 1 or 2 of the Child Abduction Act 1984 (c. 37) (abduction of child);
- (ah) An offence under any of sections 1 and 18 to 23 of the Public Order Act 1986 (c. 64) (riot, stirring up racial or religious hatred, possession of inflammatory material);
- (ai) An offence under section 134 or 160 of the Criminal Justice Act 1988 (c. 33) (torture, possession of indecent photograph of child);
- (aj) An offence under section 1, 3A or 22A of the Road Traffic Act 1988 (c. 52) (causing death by dangerous driving, causing death by careless driving when under the influence of drink or drugs, causing danger to road-users);
- (ak) An offence under any of sections 1 to 6 or 8(6) of the Official Secrets Act 1989 (c. 6) (disclosure of information relating to security, intelligence, defence, international relations etc);
- (al) An offence under any of sections 1 or 9 to 13 of the Aviation and Maritime Security Act 1990 (c. 31) (endangering safety at aerodromes, offences against the safety of ships and fixed platforms);
- (am) An offence under section 72 of the Value Added Tax Act 1994 (c. 23) (evasion of VAT);
- (an) An offence under Part II of the Channel Tunnel (Security) Order 1994 (S.I. 1994/570) (offences relating to Channel Tunnel trains and the tunnel system);

- (ao) An offence under section 2 of the Chemical Weapons Act 1996 (c. 6) (use etc of chemical weapons);
 - (ap) An offence under section 11, 12, 15, 16, 17, 18, 38B, 39, 54, 56, 57 or 58 of the Terrorism Act 2000 (c.11);
 - (aq) An offence under section 51 or 52 of the International Criminal Court Act 2001 (c. 17) (genocide, crimes against humanity, war crimes etc);
 - (ar) An offence under section 47, 79, 80, 113 or 114 of the Anti-terrorism, Crime and Security Act 2001 (c. 24);
 - (as) An offence under section 1 of the Dealing in Cultural Objects (Offences) Act 2003 (c. 27) (dealing in tainted cultural objects);
 - (at) Any offence under Part 1 of the Sexual Offences Act 2003 (c. 42) except one under section 3, 66, 67 or 71;
 - (au) An offence under any of sections 1, 2, 5, 6 or 8 to 11 of the Terrorism Act 2006.
- (13) An offence under section 42 as respects which the corresponding offence under the law of England and Wales is–
- (a) An offence under section 1 of the Criminal Attempts Act 1981 (c. 47) of attempting to commit an offence within a sub-paragraph of paragraph 12;
 - (b) An offence under section 1 of the Criminal Law Act 1977 (c. 45) of conspiracy to commit such an offence;
 - (c) An offence under Part 2 of the Serious Crime Act 2007 of encouraging or assisting the commission of such an offence.

PRESCRIBED CIRCUMSTANCES IN RELATION TO THE NEED TO ENSURE THAT CERTAIN CIRCUMSTANCES ARE REFERRED BY THE CO TO THE SERVICE POLICE

1. Prescribed circumstances under the Act relate to two distinct, but connected aims. The first aim is to ensure that certain circumstances are investigated by the Service Police. The second is to ensure that certain situations where there is evidence of a Service offence are referred to the DSP for a decision whether to charge and if so, as to what the charges are to be.
2. The Act requires such steps where there is evidence of a Schedule 2 offence. Prescribed circumstances provide for additional circumstances in which the Service Police must be made aware or in which a decision on charging must be taken by the DSP.
3. Regulations under the Act prescribe:
 - a. In relation to a commanding officer²³⁹, circumstances in which he must, as soon as reasonably practicable, ensure that the Service Police are aware of the circumstances; and
 - b. In relation to the Service Police circumstances in which, if they consider there is sufficient evidence to charge a Service offence, the case must be referred to the DSP for a decision on what charge, if any, is to be brought.
4. Becoming aware of prescribed circumstances will not always place a duty on a CO to ensure that the Service Police are aware. This will depend on whether the CO is a prescribed officer in relation to the particular prescribed circumstance. For example, if a number of COs become aware of such circumstances, including perhaps the CO of the victim and one or more suspects, Regulations under the Act define who, in different circumstances, would be required to ensure that the Service Police are made aware. Broadly speaking, the CO of any suspect will be under a duty to ensure that the Service Police are made aware. The other COs may wish to liaise to ensure the Service Police are made aware. They do not have to contact the Service Police individually.
5. The following are prescribed circumstances in relation to the relevant CO²⁴⁰:

(a) an allegation has been made which would indicate to a reasonable person, or there are other circumstances which would indicate to a reasonable person, that a person subject to service law has or may have been the victim of—

- (i) a course of conduct by a person subject to service law, involving on at least two occasions an assault in which that individual participated as a principal offender or as a secondary party; or**
- (ii) an offence under section 42 as respects which the corresponding offence under the law of England and Wales is the offence under section 4 of the Protection from Harassment Act 1997, committed by a person subject to service law;**

²³⁹ The CO or a subordinate commander to whom the CO has delegated this function may authorise someone to inform the Service Police on his behalf but the ultimate responsibility for informing the Service Police remains with the CO.

²⁴⁰ The Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, regulation 3.

a. *Person subject to service law* – includes every member of the regular forces at all times and every member of the reserve forces (a) in permanent service on call-out (b) in home defence service on call-out (c) in full-time service (d) undertaking any training or duty, or (e) serving on the permanent staff of a reserve force. Persons subject to service law are defined in ss 367, 368 & 369 of the Armed Forces Act 2006.

b. *Course of conduct* - is a legal concept on which there is considerable case law. In some cases a course of conduct is obvious, as where there is evidence that one person has undertaken a campaign of misconduct against another. But there may be a course of conduct where the connection between incidents is less obvious. For example the mere fact of two assaults cannot of itself establish a course of conduct, the sort of factors which may be sufficient to establish a course of conduct would be if there was also evidence that the assailant intended to or had threatened that he would carry out further assaults or the two assaults came after a sustained campaign of threats and intimidation in the past. In all but the most obvious cases where the CO suspects that there may be a course of conduct he should take Staff legal advice.

c. *Assault* - See [Chapter 8](#) (Criminal conduct offences).

d. *Principal offender* – means the person who actually assaults the victim.

e. *Secondary party* – means the person(s) who aids, abets, counsels or procures the commission of the offence see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

f. *On at least two occasions* – means on distinct occasions which are clearly separated. The principal offender may assault the victim more than once on a single occasion but his conduct would not fall within this regulation unless he assaulted the victim on at least one other occasion.

g. *Section 4 of the Protection from Harassment Act 1997* – a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions. This offence consists of putting a person in fear of *violence on more than one occasion*. Legal advice should be sought whenever it is believed that this offence might apply.

(b) an allegation has been made which would indicate to a reasonable person, or there are other circumstances which would indicate to a reasonable person, that a person subject to service law has or may have been the victim of an assault causing serious injury, inflicted by a person of superior rank or rate while the assailant was otherwise carrying out his duties;

h. *Serious injury* – means a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ.

i. *Superior rank or rate* – means a person of higher rank than the victim regardless of which Service the victim and the assailant are members. Determining relative rank between Services is a matter for Queen's Regulations (section 377(3) of the Act). If a person holds acting rank then that acting rank will be relevant when determining whether they are of a higher rank than the victim. Local acting rank will be relevant when determining whether they are of a higher rank than the victim.

j. *Otherwise carrying out his duties* – the assailant must be carrying out his duties at the time of the alleged assault. Assaulting service personnel and causing them serious injury cannot be part of the assailant’s duties, hence the reference to ‘otherwise carrying out his duties’.

(c) there are what appear to the prescribed officer to be reasonable grounds to believe that the death of any person, or serious injury to a relevant person, has occurred in a relevant place, unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a Service offence committed by a person of whom he is the commanding officer;

k. *Prescribed officer* – covers in this particular case the commanding officer of any person (see regulation 4 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2008), but a duty to ensure that the Service Police are informed does not fall on him if he is satisfied that there is no reasonable indication that someone in his command may have caused the death or serious injury.

l. *Relevant place* – means any premises or other place which at the time of the death or serious injury was permanently or temporarily occupied or controlled for the purposes of Her Majesty’s forces, and any vehicle, ship or aircraft which at the time of the death or serious injury was in use for the purposes of Her Majesty’s forces.

m. *Death of any person* – this is not confined to service personnel and relevant civilians. It would include detainees, a visitor or a prisoner of war for example.

n. *Relevant person* – means;

(1) A person who is *not* a member of the regular or reserve forces or

(2) A person who is a member of the regular or reserve forces and:

(a) Is under 18 years old;

(b) Has enlisted in the regular or reserve forces but has not completed Phase 1 and Phase 2 Training;

(c) Is an officer or officer cadet and has not completed Phase 1 Training; or

(4) Is in service custody.

o. *Unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a service offence committed by a person of whom he is the commanding officer;* - The effect is that there will not be a prescribed circumstance if it is clear, for example, that the dead person was killed by incoming enemy fire or has died from natural causes in a hospital occupied or controlled by HM forces.

(d) the death of a person has occurred and—

(i) it appears to the prescribed officer that the person had at any time been held in a relevant place in service custody within the meaning of the Act;

- and**
- (ii) there are reasonable grounds to believe that the misconduct, during the period that person was in such custody, of a person subject to service law or a civilian subject to service discipline may have caused (directly or indirectly), or may have contributed to, the death.**

p. *Prescribed officer* – means the commanding officer of a person subject to service law or a civilian subject to service discipline whose misconduct may have caused (directly or indirectly), or may have contributed to, the death

q. *The person had at any time been held in a relevant place in service custody* - the deceased need not have died in service custody; this regulation will apply to a person who dies after being released from service custody if para. d (ii) above applies.

r. *Relevant place* – means any premises or other place which at the time of the suspected misconduct was permanently or temporarily occupied for the purposes of HM forces, and any vehicle, ship or aircraft which at the time of the suspected misconduct was in use for the purposes of HM forces

s. *Service custody within the meaning of the Act* – in the Armed Forces Act 2006 there are numerous references to service custody which includes custody without charge, custody after charge and detention in service custody following the passing of a custodial sentence. The reference to service custody in this regulation means all references to service custody in the 2006 Act.

t. *Misconduct* – means any conduct which falls below what would normally be expected of the person (whether a Service person or a civilian). Such conduct will, in the case of a person subject to service law, usually amount to at least a disciplinary service offence, but it is not limited to where there was a service offence. The general aim of the provision is that, where there is a failure of standards which may have caused or contributed to a death in service custody, this should be investigated, to see whether a service offence has been committed.

u. *During the period that person was in such custody* – this regulation only applies if the suspected misconduct took place when the deceased was in service custody.

v. *May have caused (directly or indirectly), or may have contributed to, the death* - This is a wide test. There must be reasonable grounds to believe that misconduct – which might, for example, be a direct assault, a failure to help a person who had been injured, or a failure to guard a person from harm where there was a responsibility to do so, - may have been a factor in the person's death. The general aim should be borne in mind: that deaths in service custody should be investigated by the Service Police if there is reasonable ground to believe that misconduct was a contributory factor.

6. The prescribed circumstances in relation to references by the Service Police to the DSP are set out in regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. There are differences between those prescribed circumstances and those relating to a CO's duty to ensure that the Service Police are aware of a matter. The main reason for these differences is that those under regulation 5 only apply where the Service Police consider that there is sufficient evidence to charge a person with a Service offence. Those which govern a CO's duty relate in part to circumstances which need to be investigated even if there is no immediate evidence of an offence. The prescribed circumstances under regulation 5 are summarised in paragraph 54 of Chapter 6.

CO'S INVESTIGATION - GUIDANCE

General

1 The aim of this guidance is to provide basic advice to personnel other than the Service Police on gathering evidence whilst conducting a CO's investigation²⁴¹. It is not for the person conducting the investigation to prove whether a person has committed an offence; rather, he is to gather all the evidence in order that a CO can make a properly informed decision on how to proceed with the matter. This guidance should be read in conjunction with [Chapter 11](#) (Summary hearing dealing with evidence). Staff legal advice may be obtained at any point during a CO's investigation, as well as advice from HA discipline staffs and the Service Police²⁴².

2. A CO's investigation is appropriate for simple disciplinary offences or where, owing to operational constraints, the Service Police are not available. Although the legal rules of evidence do not apply to gathering evidence during unit investigations or to the use of evidence in summary hearing, an accused has the right to elect for CM trial or appeal to the SAC, where only admissible evidence may be used. If new information subsequently comes to light or after the investigation has begun the matter appears to be more complex than initially envisaged, it may need to be handed over to the Service Police.

3. It may, in exceptional circumstances, be necessary to conduct initial investigations in those cases where normally the Service Police should carry out the investigation. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and investigate, for example, an SSBN on patrol. If this situation arises, the CO should be aware that he has departed from the normal procedure and should bring the Service Police into the investigation as soon as is reasonably practicable.

4. As a civilian can only be dealt with by the SCC or the CM, normally the Service Police should conduct any investigation.

5. **Advice during investigation.** Personnel conducting CO's investigations may consult with the Service Police and may seek advice from the relevant staff legal adviser or HA staffs. RN coxswains, however, should seek advice from the relevant Naval Provost Marshal, in the first instance.

Admission

6. An admission or confession includes any statement, written or oral, which is wholly or partly adverse to the person who made it. If a suspect is questioned (other than under caution by the Service Police) he should not be put under any pressure to make an admission.

7. Where an accused has admitted certain matters in relation to an offence, the CO should satisfy himself that any admission not made in an interview under caution was not

²⁴¹ See paragraphs 32 of this chapter for additional guidance on investigating allegations of harassment or bullying (prescribed circumstances).

²⁴² RN coxswains will obtain advice from relevant NPM staff, who if necessary will raise the issue with the DSP (see paragraph 5 of this Annex).

made under pressure. Where an admission or a confession is made, the CO should exercise care in using that evidence.

Witness evidence

8. In all cases, no matter how minor, it will be necessary to collect witness evidence by way of written statement. There is no required format for a witness statement; however, it should include the following information:

- a. Service number (if applicable), rank/rate/title and name of the witness;
- b. The facts (including the date/time/location of the incident);
- c. Signature of the witness; and
- d. Date of witness statement.

9. If a witness is unavailable to provide a statement to the person conducting the investigation, if for example, he has been deployed, the person conducting the investigation may request the witness write or type out the statement, sign it and send it by post (an email will not be sufficient as it can not be signed). These statements will be disclosed to the accused before summary hearing.

10. When written statements are taken from witnesses, the best practice is for the witness to compose his own statement using his own words. The person conducting the investigation is, however, through experience and knowledge of the case, more likely to be aware of the particular areas of relevance, about which he may ask the witness. Care should be taken not to provide the witness with information relating to the matter known only to the person conducting the investigation or other witnesses, which may influence his evidence. The importance of detailed witness statements, written when the incident is still fresh in the mind of the witness, cannot be overstated, particularly if the investigation results in a CM trial or summary appeal some months after the alleged offence.

11. If the victim is vulnerable, for example, a Service person under 18 years of age, it is preferable if the Service Police conduct the interview with that person and record a statement.

12. Civilian witnesses cannot be compelled to attend a summary hearing and if civilian witnesses are central to the case, the Service Police should normally conduct the investigation, as it is more likely that the matter will be dealt with by CM trial.

Identification

13. Where there is a requirement to conduct formal identification procedures, for example identification parades, the matter should be referred to the Service Police to investigate. If in doubt, seek staff legal advice or guidance from the Service Police.

Medical evidence

14. **Violent offences.** In any case involving the use of violence against another person, the evidence of the medical officer²⁴³ is often important. It may be appropriate in such cases that both the victim and the suspect are examined by a medical officer. Where bruising or

²⁴³ In the RN a Medical Assistant can also perform this function.

other injuries may emerge over a period of time, a follow-up medical examination should be considered.

15. When unfitness or misconduct through drink or drugs is under investigation, a medical examination may be obtained to determine whether there is any other reason why the suspect may be in that condition. In cases of unfitness or misconduct through alcohol or drugs, the decision of the following rests with the officer hearing the charge: fitness of a Service person to perform his duty or any duty he might reasonably be expected to perform; acting in a disorderly manner or a manner likely to bring discredit on the Service. However, in all cases of unfitness through alcohol or drugs, medical evidence can be of significant value at a subsequent summary hearing.

Search and seizure

16. Searches will normally be conducted by the Service Police. If in the course of an investigation the person conducting the investigation believes that it is necessary to perform a search and secure evidence, see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention).

Rights of the suspect

17. The rights of a suspect are set out in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to a suspect's attention as soon as reasonably practicable at the commencement of the investigation, to ensure that he is aware of his rights.

18. On completion of a CO's investigation, the findings of the investigation are to be provided to the CO and should normally contain:

- a. All witness statements;
- b. All other records of evidence;
- c. A list of all exhibits and details as to where these exhibits are held and can be inspected;
- d. All documentary exhibits;
- e. The suspects disciplinary records; and
- f. A suggested charge²⁴⁴, if appropriate.

²⁴⁴ This is not binding on the CO. The CO makes the final decision on what charge should be brought.

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MINISTRY OF DEFENCE

Your rights if you are accused of an offence

under the Service Justice System

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This guide is to help you understand your rights, and what help is available to you, if you are to be dealt with in the Service justice system. It aims to give you enough information to help you make informed decisions, but it will not answer every question you have. **If you have any questions about your rights, ask for an officer, a warrant officer (WO), a senior rate or a senior non-commissioned officer (SNCO) to help you.**

This copy has been issued to

Service number

Rank or rate

Name

Ship, unit, establishment

Definitions

In this guide, the words and phrases listed below have the meanings shown.

Activation hearing	A hearing at which your commanding officer will decide whether you should start a sentence of detention which had been suspended.
Armed forces criminal legal aid authority	The organisation that you will apply to for legal aid if you are being tried by the Court Martial or appearing before the Summary Appeal Court. If you are entitled to have a lawyer represent you, you can ask the armed forces criminal legal aid authority to appoint a lawyer to act for you.
Arrest	In this guide, the word 'arrest' also covers when a person who was AWOL surrenders to a civilian policeman.
Assisting officer	Assisting officer is the term used for a person who will help you when you are in custody. It could be an officer, WO, senior rate or SNCO. The 'accused's assisting officer' is the person who will help you to prepare for your summary hearing and represent you at that hearing. The 'appellant's assisting officer' is the person who will help you prepare for your summary appeal and represent you at that appeal. The 'offender's assisting officer' is the person who will help you to prepare for an activation hearing and represent you at that hearing. The 'defendant's assisting officer' is the person who will help you to prepare for your trial in the Court Martial, and can help you or your legal representative at that trial.
Commanding officer	Except where this guide says otherwise, all references to your commanding officer include other officers acting on your commanding officer's behalf.
Court administration officer	The court administration officer will make the arrangements for trials at a Court Martial, custody hearings before a judge advocate and hearings before the Summary Appeal Court. He or she is independent of the chain of command.
Court Martial	A court that has a judge advocate and between three and seven lay members (officers or WOs not from your chain of command). The lay members decide if a person is guilty of a charge and the judge advocate and lay members decide on any sentence.
Director of Service Prosecutions	The head of the Service Prosecuting Authority. His prosecuting officers prepare cases for trial and appear in court. They also represent the Director of Service Prosecutions at the Summary Appeal Court. The Director of Service Prosecutions is independent of the chain of command.
Reviewing authority	If the case against you is found proved at a summary hearing, an appointed officer will automatically review your case to decide whether the correct procedure was followed and the punishment awarded was reasonable.
Home nation consul	An embassy or high commission staffed by people from the country you are a citizen of and based in the country you are living in.
Judge advocate	Is a civilian judge who is chosen by the Judge Advocate General.
Service Civilian Court	The Service Civilian Court is a standing court that can deal with civilians who can be charged with offences under the Armed Forces Act 2006. Its powers are like those of a magistrates' court in England and Wales.
Summary Appeal Court	The Summary Appeal Court decides appeals from summary hearings. It is made up of a judge advocate and two service members from outside your chain of command.
Summary hearing	A hearing where you are charged in front of your commanding officer or other officer.

Note: Forms referred to in this guide are available on JPA from the SPVA information centre under 'JPA forms'. They are also available in JSP 830 Manual of Service Law.

General

Advice

- If you have been arrested for or charged with an offence you should read this guide carefully. It will help you to understand your rights and what will happen next.
- Part 1 of this guide is to help you if you are arrested or kept in custody.
- Part 2 of this guide is to help you if you are charged and face a summary hearing.

Help

- This guide only tells you about the law that applies to the rights of those accused of an offence. If you want to know more, ask your assisting officer to provide a copy of the Manual of Service Law and any other related documents.
- You can get help from an officer, WO, senior rate or SNCO of your choice.
- You can watch the Service Justice System DVD to help you understand what will happen if you are charged.

Legal representation

- If you are arrested or kept in custody, you can get legal advice.
- You cannot have a lawyer represent you at a summary hearing.
- You can ask for legal advice to help you decide whether you want a Court Martial trial rather than a summary hearing.
- You can ask for legal advice about appealing if a charge brought against you is found proved at a summary hearing.
- You are allowed a lawyer at a Summary Appeal Court or a Court Martial.

Part 1 – Arrest and custody

Arrest

Who can arrest you

- Service Police can arrest any member of HM Forces, no matter what their rank. Officers, WOs or NCOs can sometimes arrest people. Your arrest might not be valid if you are arrested by someone of a lower rank to you who is not a service policeman. If this is the case you should tell your commanding officer.
- You can find out more about arrest from chapter 4 (Arrest and search, stop and search, entry search and seizure and retention) of the Manual of Service Law.

Reporting your arrest

- If you have been arrested, you must report it to your commanding officer as soon as possible.
- You are formally charged when you are served with a charge sheet signed by your commanding officer.
- If you are not charged, you can only be kept in custody if the person who arrested you has good reason to believe that you need to be kept in custody so:
 - evidence relating to the offence you were arrested for can be gathered or protected; or
 - you can continue to be questioned.

Custody without charge - your rights

Once you have been arrested, you may be held in custody. If you are kept in custody you:

- must be given certain information;
- can apply to be released;
- can ask for writing materials;
- can contact certain people; and
- can choose an assisting officer to help you.

Information that must be given to you

- You must be given a 'Custody information for a person held in custody without charge' form every time you are kept in custody. You should read this form carefully.
- You will be asked to sign for this form to confirm that you have received it.
- You will not have to say anything, but if you do say anything about your arrest or the alleged offence, or about being kept in custody, that will be recorded.

Applying to be released

- At any time you can ask to be released from custody. To do this you can ask or write to the person who arrested you or your commanding officer.
- Explain why you think you should be released.
- If you have an assisting officer or lawyer, you can ask them to help you get released.

Asking for writing material

- You should be given writing materials (paper, pens and so on) if you ask for them.

Contacting certain people

- You can choose one person to be told about your arrest and where you are being held.
- You can make at least one phone call to a legal adviser. This call is free.
- You can phone relatives or friends to speak to them for a reasonable time. You can also receive phone calls at reasonable times. You will have to pay for any phone calls you make.
- You can send letters, but you will have to pay for posting them.

Some or all of these rights can be delayed or withheld. If this happens you will be told why.

Part 1 – Arrest and custody

Choosing an assisting officer to help you

- You can choose an officer, WO, senior rate or SNCO to help you as your assisting officer. If you have any difficulty finding a suitable person to be your assisting officer, your commanding officer will give you the names of at least two people who can help you. If you do not want an assisting officer you will be asked to sign a form to confirm this.

Attending for duty

- When you are in custody you will carry out work or training for between six and nine hours a day, except on Sundays and public holidays.

Commanding officer's decision on custody

- When your commanding officer has been told about your arrest they must decide if you should stay in custody without being charged. They will only decide to keep you in custody if they have good reason to believe that this is necessary.
- Your commanding officer must also be sure that the offence you were arrested for is being investigated properly and as quickly as possible.
- If your commanding officer decides that you should stay in custody, this must only be for as long as is necessary.

Legal representation

If you are arrested and interviewed by the Service Police, you have the right to be represented by a lawyer. A lawyer may be provided free of charge through the civilian duty solicitor scheme, or a service lawyer may be available, especially overseas. If you want to appoint your own lawyer, you may have to pay their costs if you do not have legal aid. See JSP 838 The Armed Forces Legal Aid Scheme, for more information.

Consular protection of foreign nationals

- If you are a foreign national who is serving in HM Forces, and you are arrested or detained by someone other than the service police, you have a legal right to contact your home nation consul. If you want to contact your home nation, tell your commanding officer as soon as possible

Time limits on custody

The maximum length of time that you can be held in custody without being charged is 48 hours from the time of your arrest. That time may be extended to 96 hours only if a judge advocate agrees. If you are not charged within 96 hours, you must be released.

- While you are in custody, at the end of every 12-hour period your commanding officer must consider whether you should stay in custody. At any time you can write to your commanding officer asking to be released.
- If your commanding officer orders that you should be kept in custody they must tell you why.
- Within 48 hours from the time of your arrest you will be:
 - released (with or without charge); or
 - taken before a judge advocate for him or her to decide whether you should be kept in custody (you may or may not have been charged).

Further custody without charge

- If your commanding officer wants to keep you in custody without charge for more than 48 hours, they must ask for a hearing before a judge advocate. The judge advocate will decide if you should stay in custody and, if so, for how long.
- In very exceptional circumstances your commanding officer may order you to stay in custody for longer than 48 hours, up to a maximum of 96 hours, if it is not practical to arrange a hearing with a judge advocate before then. If this happens, your commanding officer must consider your custody at least every six hours.

Further custody – your rights

If your commanding officer intends to ask a judge advocate for permission to keep you in custody without being charged, they must tell you this in writing, setting out the reasons for their decision. You have a right to:

- be at the hearing with the judge advocate, and to tell the judge advocate why you think you should be released;
- be represented by a lawyer at the hearing; and
- apply for legal aid or other similar arrangements in place in your area.

If you do not have a lawyer and want one, the judge advocate may adjourn (postpone) the hearing for you to contact one. This may mean that you stay in custody during the adjournment.

Part 1 – Arrest and custody

Judge advocate's powers

The judge advocate can order that you stay in custody for up to 96 hours after your arrest before you are charged or released. At the end of the period the judge advocate sets, if your commanding officer still wants to keep you in custody he or she must apply to the judge advocate again.

- The judge advocate can either refuse your commanding officer's application, or adjourn the hearing for up to 48 hours after your arrest, and order that you be kept in custody. If the judge advocate refuses the application to keep you in custody and it has been less than 48 hours since your arrest, he or she will order that you are charged or released immediately.

You can find out more about custody without charge in chapter 5 (Custody) of the Manual of Service Law.

Interviews or identification parades by Service Police

There are codes of practice which cover the way you should be treated by the Service Police. You can ask to read the codes of practice whenever you are questioned or put on an identification parade. The Service Police must give you a reasonable time to read the codes of practice. You may also want to get legal advice if you have not already done so.

Custody after charge - your rights

'Charging' is where you are formally accused of committing an offence. Your commanding officer will sign a charge sheet which states the offence or offences you have been accused of committing and will give you a copy of it.

Duties

- When you are in custody you will carry out work or training for between six and nine hours a day, except on Sundays and public holidays

Action by your commanding officer

- After you have been charged, if your commanding officer thinks that you should stay in custody until your case has been dealt with, he or she must arrange a custody hearing before a judge advocate as soon as possible.

Custody after charge – your rights

Your commanding officer must give you written notice to confirm that they intend to apply for you to be kept in custody. This notice will explain his or her reasons, and will set out your rights, including your right to:

- be brought before a judge advocate as soon as possible;
- be represented by a lawyer; and
- be told why your commanding officer thinks you should be kept in custody.

Judge advocate's powers

- At your first hearing the judge advocate can order that you stay in custody for up to eight days.
- More information on why a judge advocate can make this decision, and the things he or she takes into account, is given in chapter 5 (Custody) of the Manual of Service Law.
- You or your lawyer can talk to the judge advocate about any points you think are important.
- If the judge advocate makes an order for you to stay in further custody, that order will automatically end once you have been dealt with for the offence.

Part 1 – Arrest and custody

Review of custody after charge

- If the judge advocate orders that you stay in custody, he or she will set a date for your case to be reviewed. The date must be before the period of further custody runs out, unless you have already been released.
- At the review, the judge advocate will decide if you should stay in custody and, if so, for how long. The maximum period he can order is a further eight days, unless you agree to a longer period of up to 28 days. You can only agree to this if you have a lawyer.
- If the judge advocate decides that you should be released, he may still set conditions for your release. This will mean that your freedom will be restricted in some way. For example, you may have to report to the guard room at certain times. If you do not keep to these conditions, your commanding officer may order that you are arrested.
- The judge advocate will hold a hearing for a review if:
 - your further custody has not been reviewed before;
 - your commanding officer has asked for one because the reasons for keeping you in custody may no longer exist; or
 - it is during your trial by the Court Martial.
- In other cases, the judge advocate may decide to deal with the review on paper rather than at a hearing, but only after you have had the chance to write to the judge advocate (a copy of your letter will be given to your commanding officer). It will help if you raise some new points that support your request to be released.
- Your commanding officer may also write to the judge advocate about your custody. You will receive a copy of that letter.
- The judge advocate's decision will be given to you in writing.

If your commanding officer ever feels that the reasons for your custody no longer apply, he or she can either release you or ask the judge advocate to review your case.

MCTC (Colchester)

- If you are held in MCTC, your commanding officer will be Commandant MCTC, who will make applications about your custody if necessary.

Custody at Court Martial

- If your Court Martial trial has started and you are in custody, similar rules apply. However, any decisions on whether you should stay in custody are made by the judge advocate of the Court Martial.

Part 2 – Summary hearing, activation hearing and appeal

Summary hearing

General

The most serious offences must be investigated by the Service Police and reported directly to the Director of Service Prosecutions for Court Martial trial. However, less serious offences are investigated by your commanding officer. Most offences committed are less serious and your commanding officer can deal with them at a summary hearing if you wish.

Informing you

At least 24 hours before your summary hearing, you must be given the following.

- A copy of the charge sheet, showing the charges you face
- A copy of the case summary
- A copy of the written evidence relevant to the charge against you
- Details of any exhibits and where you can inspect them
- A copy of your disciplinary record
- A copy of any material collected during the investigation which is not intended to be used (you may be able to use some of this in your defence.)
- A copy of any permission of higher authority for extended powers to award:
 - extended detention (29 to 90 days);
 - a reduction in rank or disrating (WOs and below only);
 - removal of seniority (officers only);
 - a fine of 15 to 28 days' pay (officers and WOs only); or
 - detention (leading hand and below in the Royal Navy, lance corporal and below in the Royal Marines and Army, corporal and below in the Royal Air Force).
- A copy of this guide
- A copy of any permission to let your commanding officer hear some more serious charges
- The time of the hearing

You must also be told that you have the following rights.

- To choose to be tried in the Court Martial instead of having the charge dealt with by your commanding officer at a summary hearing
- To be helped by an assisting officer
- To question witnesses called by your commanding officer
- To give evidence yourself
- To call your own witnesses
- To appeal to the Summary Appeal Court, if the charge is proved.

Legal Advice

You can get legal advice from a civilian lawyer, but you may have to pay for this. If a service lawyer is available, you can get advice from him or her free of charge. See JSP 838 The Armed Forces Legal Aid Scheme, for more information.

You cannot be represented by a lawyer at a summary hearing, but you can get legal advice before the hearing. This could help you decide whether to admit the charge. In particular, you might want to get legal advice on whether you should ask for a trial at the Court Martial instead of having a summary hearing.

If you want to talk to a lawyer you must be given a reasonable chance to do so before the hearing. If you are not given enough time you may ask for more time.

Assisting officer

- When you appear at a summary hearing you may be helped by an assisting officer.
- You can choose your assisting officer. This will normally be someone you know who is an officer, WO, senior rate or SNCO. Some people (for example, people who have been involved in the case against you) cannot be your assisting officer.
- If the person you want is not available, or does not want to be your assisting officer, your commanding officer will give you at least two names of people who can be your assisting officer. You do not have to use the people suggested by your commanding officer.
- If you do not want an assisting officer, your commanding officer will go ahead with your hearing without one.

Your assisting officer is not a lawyer. They are there to give you advice before the hearing and at it, and to help with paperwork. He or she can help you decide if you should choose to have a Court Martial trial, but you may want to discuss this with a lawyer.

- If you prefer to have a summary hearing rather than a trial at the Court Martial, your assisting officer will help you decide whether to admit or deny the charge. However, he or she cannot make this decision for you. Your assisting officer can help you decide if you should give evidence or call witnesses, and can make a statement for you about your character or any special reasons why your punishment should be reduced.
- Your assisting officer will be with you during the hearing and you can talk to him or her at any time during the hearing. Your assisting officer can also help you to prepare questions for witnesses and ask those questions for you.

Part 2 – Summary hearing, activation hearing and appeal

- You can get some helpful ideas about what to discuss with your assisting officer or lawyer from chapter 9 (Summary hearing and activation of suspended sentences of Service detention) of the Manual of Service Law. Annex F of the manual contains instructions for your assisting officer.

Before the summary hearing

- Before starting the hearing, your commanding officer will ask you if you have been given all of the information listed on page 9 of this guide.
- Your commanding officer will ask you if you understand the charge or charges and if you have had enough time to prepare for the hearing.

Choosing a Court Martial trial

Before starting a summary hearing, your commanding officer will ask if you understand that you have the right to elect (choose) to have a Court Martial trial rather than a summary hearing.

Your commanding officer will then ask you whether or not you want to be tried by the Court Martial.

If you choose to have a Court Martial trial and are found guilty, the court will not be able to give you a punishment that is more severe than the punishment your commanding officer could give to you if you had a summary hearing.

At the start of a summary hearing

- If you have chosen a summary hearing, your commanding officer will read out the charge and ask you whether you admit to or deny the charge.

Admitting the charge

- If you admit the charge or charges, your commanding officer will read out a case summary and ask you if you agree with it. If you do not agree with all of the facts, your commanding officer may call witnesses to find out what the facts are. You will have the opportunity to tell the commanding officer which witnesses you think should be called. The final decision on which witnesses to call will be made by the commanding officer. Once the witnesses have been heard, the commanding officer will decide on the facts of your case.
- If you agree with the case summary, your commanding officer will accept it as the facts of the case and keep it in the Record of Summary Hearing. He or she will then sentence you.

Denying the charge

- If you do deny the charge, or you admit some charges but not others, your commanding officer will hear the evidence given by witnesses. Evidence from these witnesses will be read from written statements. If you or your commanding officer want to question a witness, they must come to the hearing. The witness statement will then be read out by your commanding officer, and you or your assisting officer can ask the witness questions.

You can also give evidence yourself, but you do not have to and cannot be forced to do so. If you do give evidence, it must be 'on oath' or after making a 'solemn affirmation' (that is, you must swear to tell the truth). You may also give your evidence in the form of a written statement, and your commanding officer will be able to question you.

- You can call witnesses yourself. If you want to call a witness, you should tell your commanding officer this at least 24 hours before the hearing. Their evidence can be read from written statements or given in person.
- If your commanding officer wants to question your witnesses, the witness must appear in person at the hearing.
- If your commanding officer finds that the charge against you is not proved, he or she will dismiss it and end the summary hearing.
- If you are charged with several offences, he or she may find all the charges proved, dismiss some of the charges and find some proved or dismiss all the charges.

Sentencing

- If your commanding officer finds the charge proved, or if you have admitted the charge, he or she will then hear any evidence you have provided about your character and performance and look at any other factors that may be useful in deciding on the right sentence.
- You have the right to have witnesses to comment on your character and professional performance. You (or your assisting officer) and your commanding officer can ask these witnesses questions.
- You or your assisting officer can then make a plea in mitigation of punishment (that is, tell the commanding officer about the offence, your personal circumstances or anything else that could help to reduce the punishment).
- The commanding officer will look at your disciplinary record. If you admitted the charge or charges, your commanding officer will give you credit for this when deciding on a punishment.

Part 2 – Summary hearing, activation hearing and appeal

- Your commanding officer will tell you what the punishment is and will explain the reasons for that decision.
- If you are sentenced to detention, you can choose to start your sentence immediately. If you do not choose to start your sentence immediately, it will be delayed for 14 days to give you time to appeal to the Summary Appeal Court.
- If you have spent time in custody after being charged with the offence, this time will be taken off the detention you must serve.
- You will be given a copy of the Record of Summary Hearing when it is over.
- You will be told about your right to appeal against the finding or punishment and your right to ask for legal advice about appealing.
- If you appeal to the Summary Appeal Court you can have a lawyer represent you in the court. You can apply for legal aid.
- If you do want to appeal, you should do so within 14 days of the date your commanding officer sentenced you. If you need more time to decide, you must ask the Summary Appeal Court for more time.
- You can find out more about summary hearings, and punishments your commanding officer can decide in chapter 13 (Summary hearing – sentencing and punishments) of the Manual of Service Law.
- You can find out more about the Summary Appeal Court in chapter 27 (Summary Appeal Court) of the Manual of Service Law.

Activation hearing

- If you are charged with an offence during the period of a suspended sentence of detention, and your commanding officer finds the charge proved at a summary hearing, at that hearing your commanding officer will decide whether or not you should serve the sentence of detention that had been suspended.
- If a civilian court convicts you of an offence committed during the period of a suspended sentence of detention, a special hearing will be arranged as soon as possible. This is called an activation hearing and it will be held before your commanding officer.
- In this case you will be given the following information.
 - A copy of your disciplinary record
 - A copy of the Record of Summary Hearing, or a copy of any record of the proceedings before the Summary Appeal Court that suspended the sentence of detention
 - Copies of the records of all summary hearings, the written records of any activation hearings, and any records of proceedings where reasons were given for any decision not to activate your suspended sentence of detention

- Any details your commanding officer has about any proved offences you have committed during the time the sentence of detention was suspended
- A copy of any notice a higher authority has given your commanding officer to give him or her extended powers.

Your commanding officer must tell you, in writing, about:

- his power to activate a suspended sentence of detention;
- your right to appeal;
- your right to give your commanding officer your opinion on whether your sentence should be activated or the terms of any activation order; and
- your right to have an assisting officer.

Assisting officer

- An assisting officer can help you at an activation hearing.
- You can choose an assisting officer. This will normally be someone you know who is an officer, WO, senior rate or SNCO. Some people (for example, people who have been involved in the case against you) cannot be your assisting officer.
- If the person you want to be your assisting officer cannot be, or does not want to be, your assisting officer, your commanding officer will give you at least two names of people who are available to you. You do not have to use the people suggested by your commanding officer.
- If you choose not to have an assisting officer, your commanding officer may go ahead with your hearing without one.
- Your assisting officer is not a lawyer. His or her job is to give you advice. They can help you to decide if you should call character witnesses. Your assisting officer can help you give your commanding officer your opinion on whether all or part of your suspended sentence of detention should be activated.
- Your assisting officer will be with you throughout the hearing and you can talk to him or her at any time. Your assisting officer may help you to prepare questions for character witnesses before and during the hearing.
- Annex O of chapter 9 (Summary hearing and activation of suspended sentences of Service detention) of The Manual of Service Law has more information about activation hearings and instructions for your assisting officer.

Part 2 – Summary hearing, activation hearing and appeal

Appeals from summary hearing to the Summary Appeal Court

Appeal

If your commanding officer finds the charge proved, you can appeal against that finding or the punishment. You should normally appeal within 14 days of being sentenced, but you can ask for permission to appeal later than this. Your appeal will be heard by the Summary Appeal Court.

The Summary Appeal Court may change your sentence but it cannot make it more severe than your commanding officer's punishment.

You can find out more about the Summary Appeal Court and making appeals in the Manual of Service Law (Chapter 15, Summary hearing review and appeal).

If you are thinking about appealing to the Summary Appeal Court you should get legal advice. See JSP 838 Armed Forces Legal Aid Scheme for more information.



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ANNEX H TO
VOL1 CH 6
JSP 830 MSL
revised 08/09

CHARGE SHEET - SUMMARY HEARING

T-SL-CS01

(Section 120(2) of the Armed Forces Act 2006 and the Schedule to the Armed Forces
(Part 5 Armed Forces Act 2006) Regulations 2008)

Charge against

Rank/Rate

Full name

Service Number

Ship/unit/establishment

Branch/Arm/Group

Sub-Branch/Cap badge

Main trade

Statement and particulars of offence(s)

(This must include the date/time and place of the offence(s) and if appropriate, citation of relevant provisions)

1-6-H-1

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Bringing charge

Commanding Officer Subordinate Commander

Rank/Rate

Forename

Surname

Signature

Date

Time

Person Serving charge

Rank/Rate

First name

Surname

Time of Service

Daily Rate of Pay

Signature

Date

Time

When completed, a copy of this form must be handed to the accused



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ANNEX I TO
VOL1 CH 6
JSP 830 MSL
revised 08/09

COMMANDING OFFICER'S NOTICE OF DISCONTINUANCE – SUMMARY HEARING

T-SL-DSP04A

NOTICE OF DISCONTINUANCE OF PROCEEDINGS ON CHARGE ALLOCATED FOR SUMMARY HEARING (Section 123(2)(d) of the Armed Forces Act 2006 and regulation 15 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009)

Reference

Rank/Rate

Full name

Service Number

Unit Case Reference *if applicable

Ship/Unit/Establishment

Notice to

In exercise of the power provided for in section 123(2)(d) of the Armed Forces Act 2006, proceedings on the charge(s) set out below are discontinued.

Enter here full details of the charge(s) to which this notice relates

Signature

Date

Rank of Commanding Officer/Subordinate Commander

Name of Commanding Officer/Subordinate Commander

When completed, a copy of this form should be handed to the accused.

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ANNEX K TO
VOL1 CH 6
JSP 830 MSL
revised 08/09

DSP DIRECTION TO BRING A CHARGE AGAINST A SERVICE PERSON OR A RELEVANT CIVILIAN

T-SL-DSP01A

DSP DIRECTION TO BRING A CHARGE AGAINST A PERSON SUBJECT TO SERVICE LAW OR A CIVILIAN SUBJECT TO SERVICE DISCIPLINE (Section 121(2) of the Armed Forces Act 2006)

Person to be charged

Rank/Rate

Full name

Service Number

DSP case reference

Direction to

Commanding Officer of (insert name of Ship/Unit/Establishment)

Having considered the above case in respect of the above individual, the Director of Service Prosecutions, under section 121(2) of the Armed Forces Act 2006, directs you to bring against him/her the charge or charges in the attached form T-SL-CS02 Charge sheet for Court Martial / Service Civilian Court.

Signature

Date

*a prosecuting officer appointed under section 365 of the Armed Forces Act 2006

Copy to:

Accused or Legal Representative
CAO

*The charge sheet setting out the charge(s) must be sent by the DSP to the CO in accordance with regulation 12(a) of The Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

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ANNEX L TO
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revised 08/09

DSP REFERENCE OF A CASE TO THE CO

T-SL-DSP02A

(Section 121(4) of the Armed Forces Act 2006)

Concerning

Rank/Rate

Full name

Service Number

DSP case reference

Ship/Unit/Establishment

Notice to

Commanding Officer

Having considered the above case in respect of the above individual, the Director of Service Prosecutions has decided that it would not be appropriate to direct that a charge or charges be brought against the above named (See section 121(2) of the Act)

Under section 121(4) of the Armed Forces Act 2006, the Director refers this case to you. By virtue of this reference and of section 119(5) of the Armed Forces Act 2006 you have initial powers in respect of the case. (See section 120 of the Act)

Signature

Date

*a prosecuting officer appointed under section 365 of the Armed Forces Act 2006

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ANNEX M TO
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revised 08/09

DSP DIRECTION BARRING FURTHER PROCEEDINGS

T-SL-DSP03B

(Section 121(5) of the Armed Forces Act 2006)

Concerning

Rank/Rate

Full name

Service Number

DSP case reference

Direction to

Commanding Officer of (insert name of Ship/Unit/Establishment)

Having considered the above case in respect of the above described individual, under section 127 of the Armed Forces Act 2006, the Director of Service Prosecutions directs that for the purposes of section 63 (service proceedings)* of that Act, the above-named is to be treated as acquitted of the service offence(s) specified below.

*and section 64 (civilian proceedings) this box should be selected if the DSP decides to make a direction under section 127(2).

Service offence(s) to which this direction applies

Signature

Date

*a prosecuting officer appointed under section 365 of the Armed Forces Act 2006

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ANNEX N TO
VOL1 CH 6
JSP 830 MSL
revised 08/09

**DSP DIRECTION BARRING FURTHER PROCEEDINGS
IN RESPECT OF A CHARGE ALLOCATED FOR COURT
MARTIAL OR SERVICE CIVILIAN COURT TRIAL**

T-SL-DSP03A

(Section 125(2)(g) or section 126(2)(f) of the Armed Forces Act 2006)

Concerning

Rank/Rate

Full name

Service Number

DSP case reference

Ship/Unit/Establishment

Service offence(s) charged or which could have been charged, to which this direction applies

Under section 127 of the Armed Forces Act 2006, the Director of Service Prosecutions directs that for the purposes of section 63 (Service Proceedings)* of the Armed Forces Act 2006 the above-named is to be treated as acquitted of the above service offence(s).

*and section 64 (civilian proceedings) this box should be selected if the DSP decides to make a direction under section 127(2).

Signature

Date

*a prosecuting officer appointed under section 365 of the Armed Forces Act 2006

Copy to
CAO

1-6-N-1

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MINISTRY OF DEFENCE

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ANNEX O TO
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DSP NOTICE OF DISCONTINUANCE OF PROCEEDINGS AT COURT MARTIAL

T-SL-DSP04B

DSP NOTICE OF DISCONTINUANCE OF PROCEEDINGS ON CHARGE ALLOCATED FOR COURT MARTIAL TRIAL (Sections 125(2)(d) of the Armed Forces Act 2006)

Concerning

Rank/Rate

Full name

Service Number

DSP case reference

Ship/Unit/Establishment

In exercise of the power under section 125(2)(d) (Powers of DSP - Court Martial trial) of the Armed Forces Act 2006, the Director of Service prosecutions has discontinued proceedings against the above-named on the charge(s) set out below.

Enter here full details of the charge(s) to which this notice relates

Signature

Date

*a prosecuting officer appointed under section 365 of the Armed Forces Act 2006

Accused or his/her Legal Representative
Accused's Commanding Officer
CAO

1-6-0-1

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MINISTRY OF DEFENCE

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ANNEX P TO
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DSP NOTICE OF DISCONTINUANCE OF PROCEEDINGS AT SERVICE CIVILIAN COURT

T-SL-DSP04C

DSP NOTICE OF DISCONTINUANCE OF PROCEEDINGS ON CHARGE ALLOCATED FOR SERVICE CIVILIAN COURT TRIAL (Sections 126(2)(d) of the Armed Forces Act 2006)

Concerning

First name(s)

Surname

Ship/Unit/Establishment

DSP case reference

In exercise of the power provided for in section 126(2)(d) (Powers of DSP - Service Civilian Court trial) of the Armed Forces Act 2006, the Director of Service Prosecutions has discontinued proceedings against the above-named on the charge(s) set out below.

Enter here full details of the charge(s) to which this notice relates

Signature

Date

*a prosecuting officer appointed under section 365 of the Armed Forces Act 2006

Address of Accused (if known)

Copy to

Accused or his/her Legal Representative
Commanding Officer of Accused
CAO

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ANNEX Q TO
VOL1 CH 6
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**DSP CHARGE SHEET FOR COURT
MARTIAL/SERVICE CIVILIAN COURT TRIAL**

T-SL-CS02

Section 121 of the Armed Forces Act 2006 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, Regulation 12

The Queen -v-

Rank/Rate (if appropriate)

Full name

*If a civilian subject to service discipline – full name

Service Number (if appropriate)

Name of the ship, establishment or unit

DSP Case reference

Statement and particulars of offence(s)

(This must include the data/time of the offence(s) and if appropriate, citation of relevant provisions)

Statement and particulars of offence(s) ...continued

Signature*

Date

* Commanding Officer/a prosecuting officer appointed under section 365 of the Armed Forces Act 2006
 A prosecuting officer will sign a charge sheet instead of the CO only when it is necessary to amend a charge, or substitute another charge or to bring an additional charge in accordance with section 125(2) if a person subject to Service law, and section 126(2) if a civilian subject to Service discipline of the Act.

Time

Rank

Name

Person serving charge

Rank/Rate

First name

Surname

Time of service

Daily rate of pay

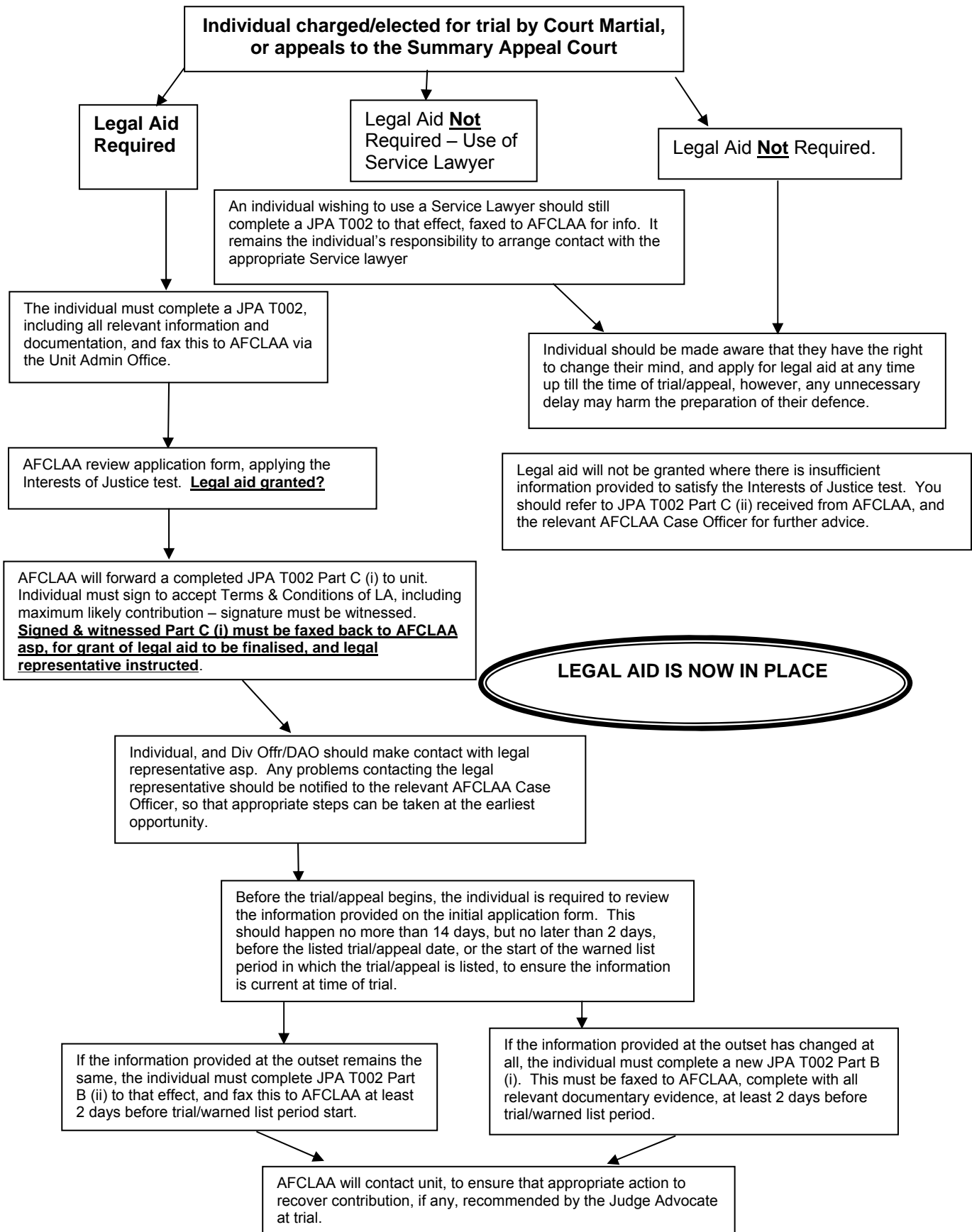
Signature

Date

Time

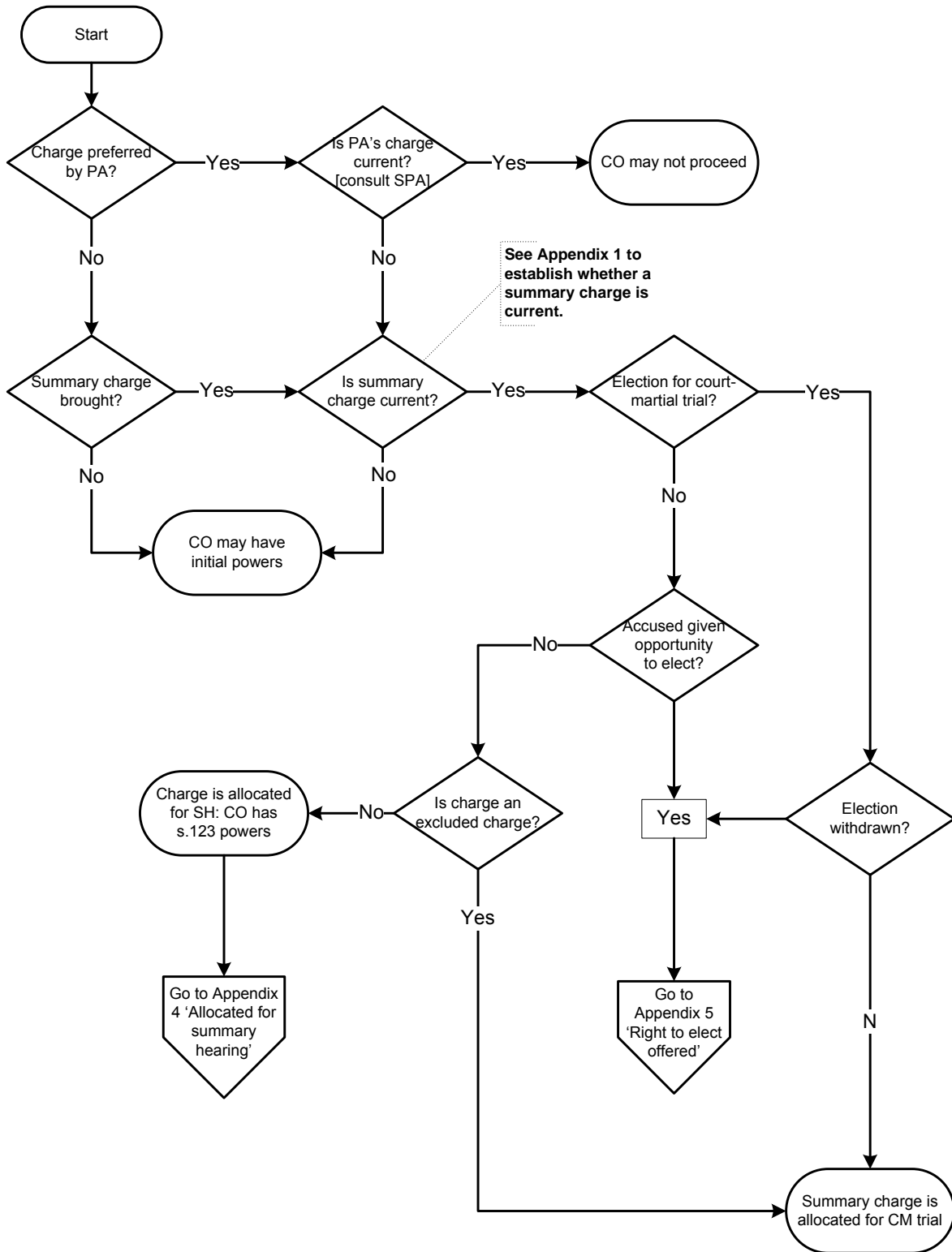
When completed, a copy of the form must be handed to the accused and the original returned to the DSP

FLOW CHART – LEGAL AID PROCESSES



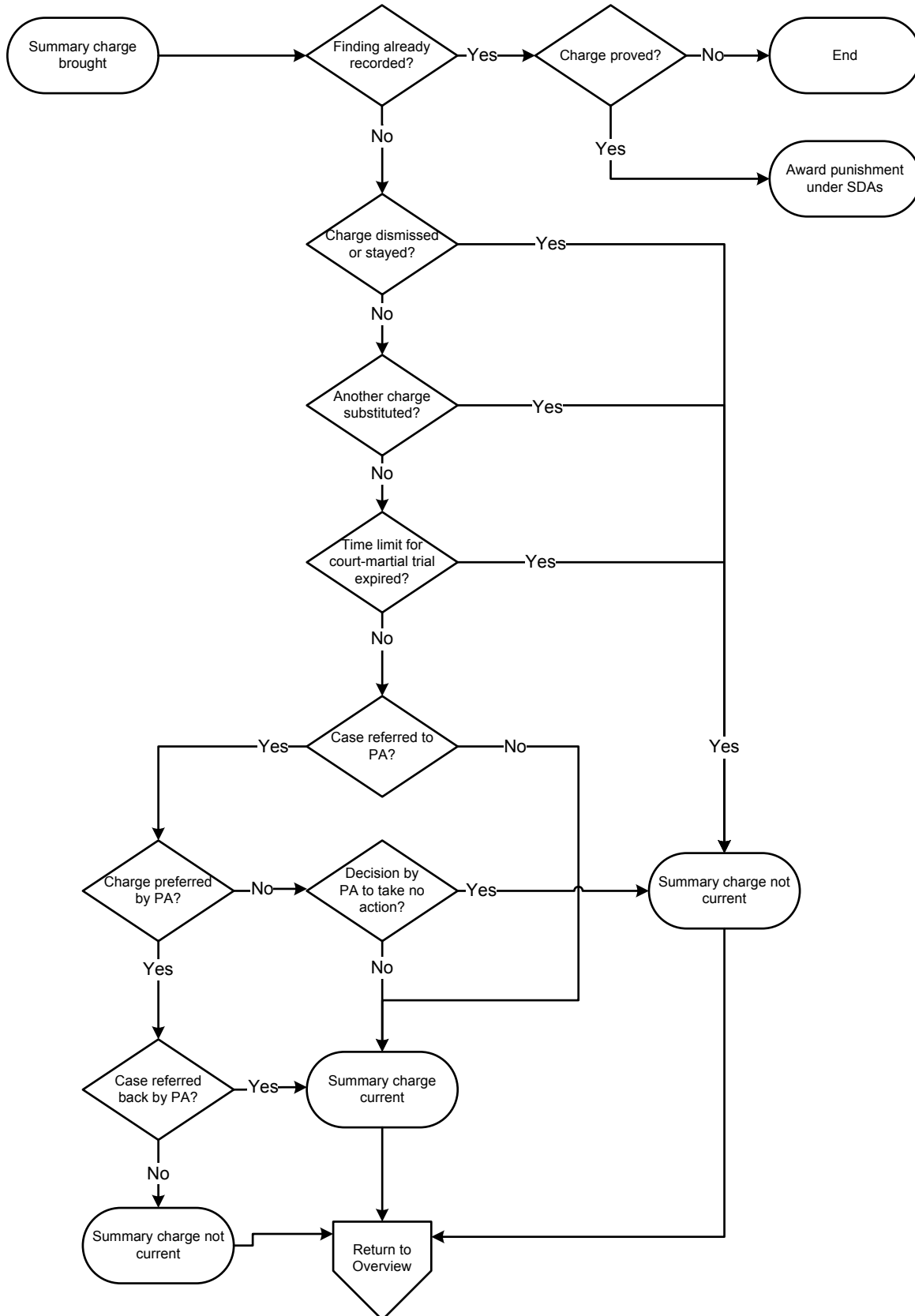
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TRANSITIONAL GUIDANCE - OVERVIEW



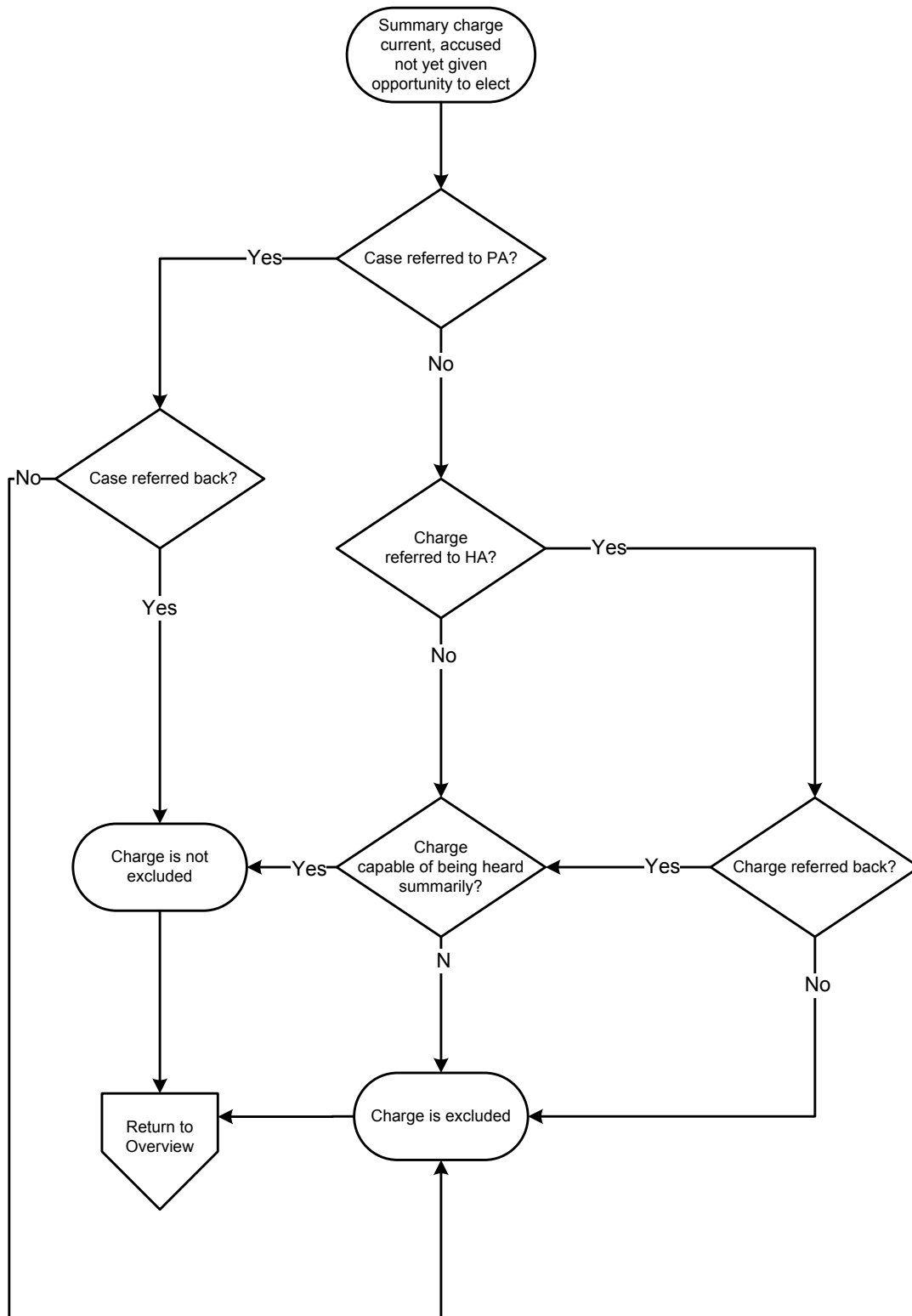
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SUMMARY CHARGE CURRENT?



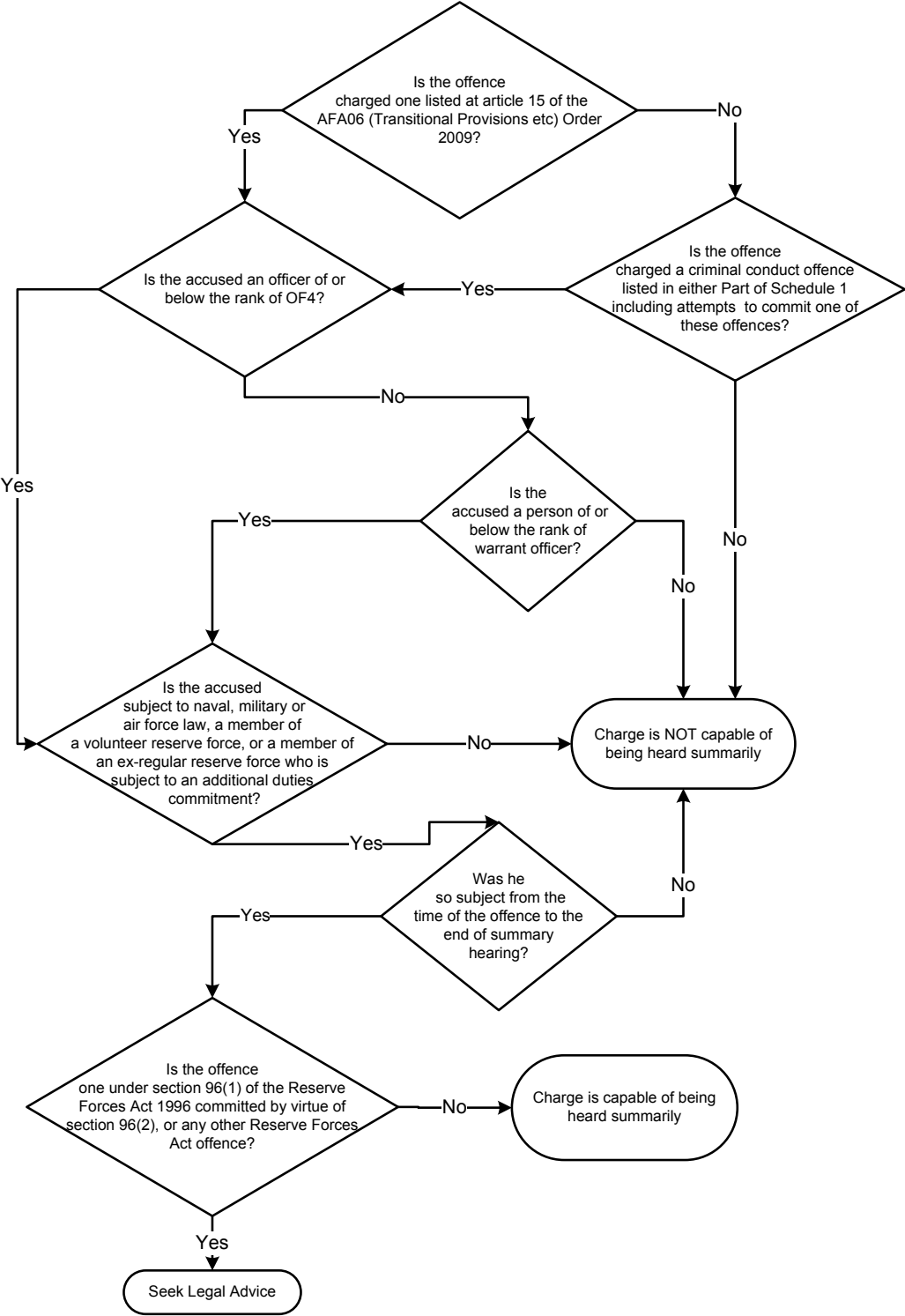
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EXCLUDED CHARGE?



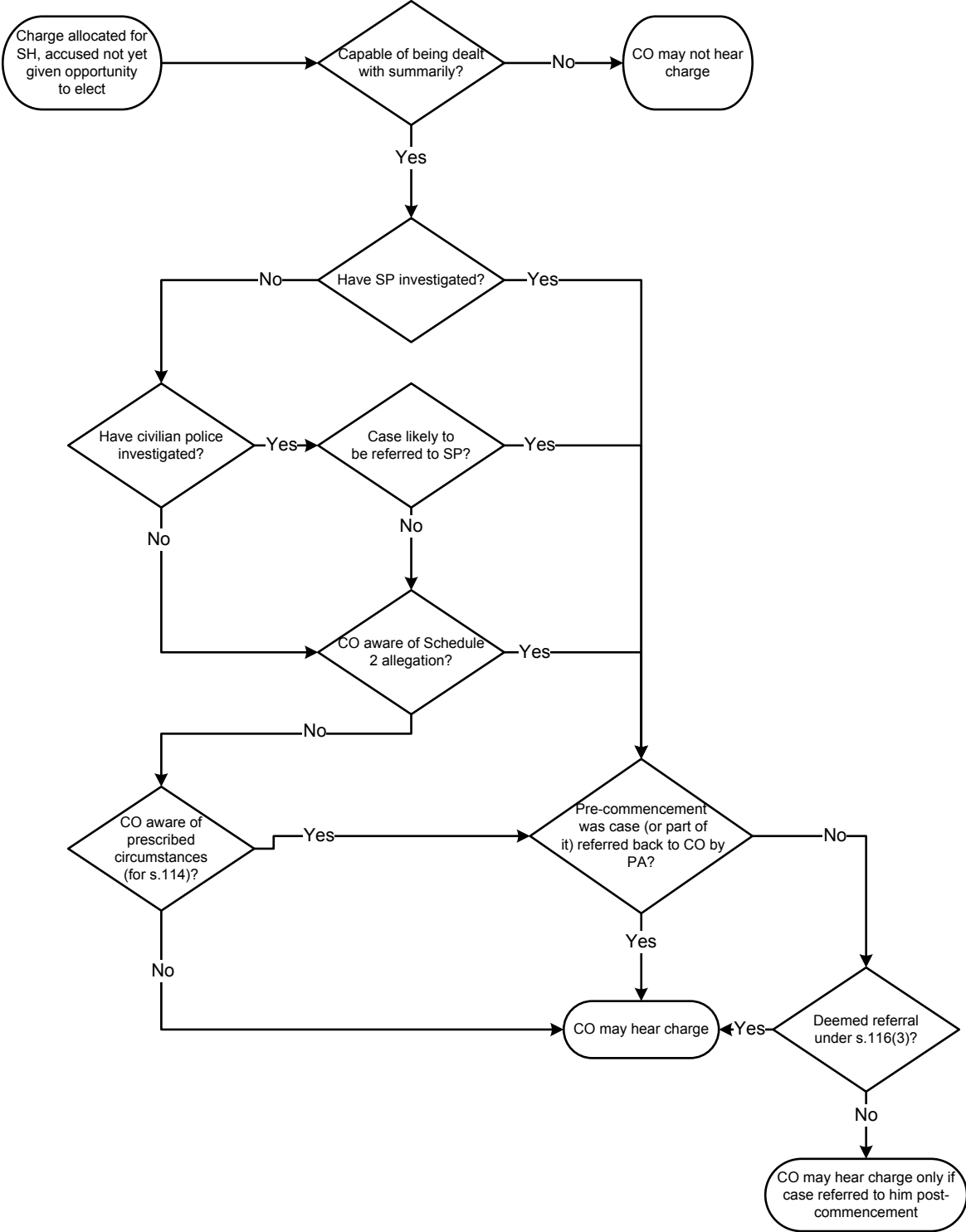
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CHARGE CAPABLE OF BEING HEARD SUMMARILY?



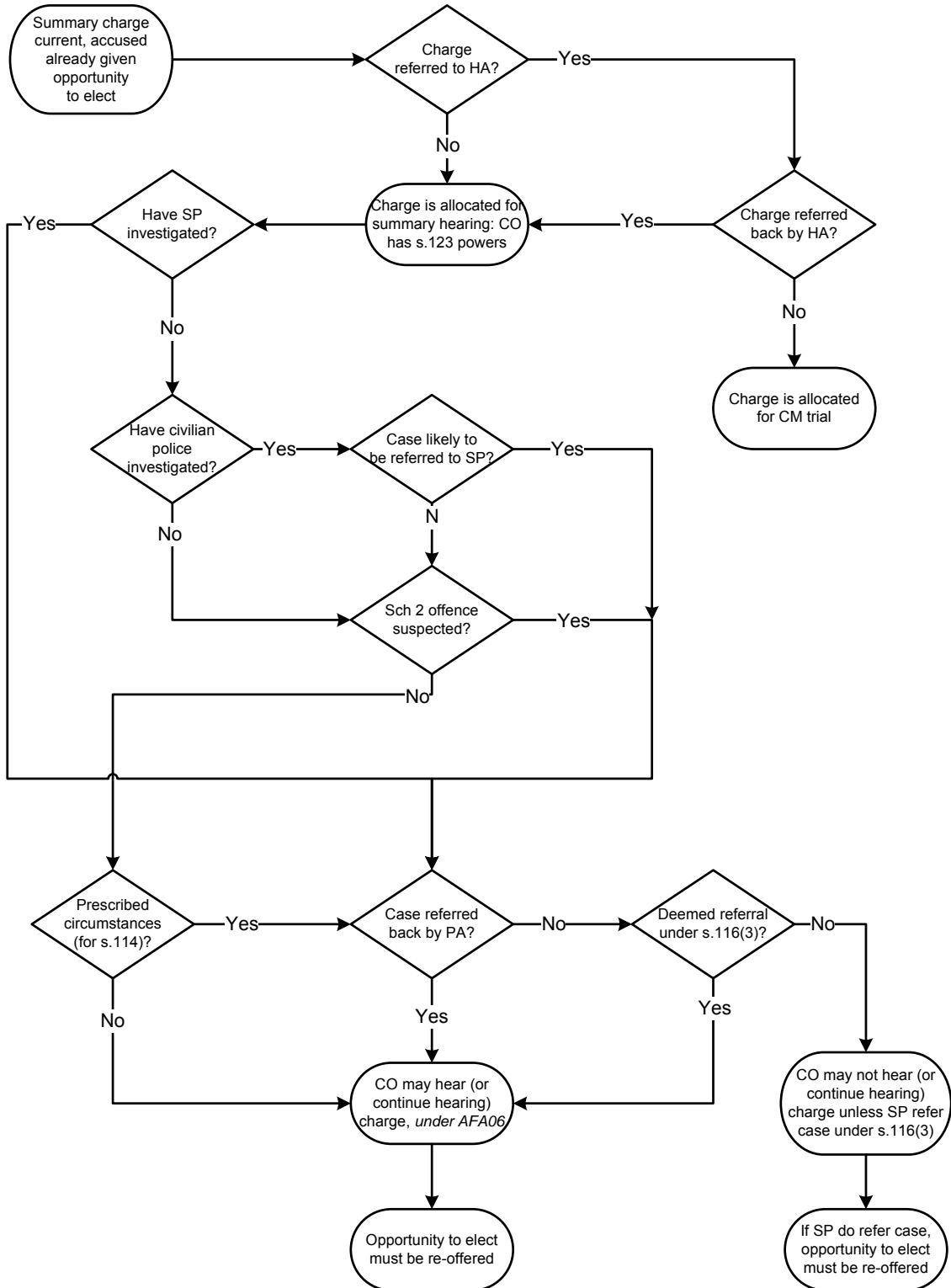
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ALLOCATED FOR SUMMARY HEARING



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RIGHT TO ELECT OFFERED



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Chapter 7

Non-criminal conduct (disciplinary) offences

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Chapter 7

Non-criminal conduct (disciplinary) offences

Introduction

1. This chapter contains information pertaining to those occasions when Service personnel and/or relevant civilians, see [Chapter 3](#) (Jurisdiction and time limits), commit disciplinary offences. Many of these offences can be dealt with summarily by the CO although others, including those of a more serious or complex nature will be tried at the Court Martial.

Chapter structure

2. This chapter is structured to address each offence in the following format:

AFA 06 reference	Offence as detailed within the Armed Forces Act 2006 (the Act).
Type of offence	Details of how the offence should be dealt with.
Specimen charges	Provided to assist in drafting of charges but where in doubt the advice of the DSP or staff legal adviser should be sought.
Ingredients of the offence	Guidance to the meaning of particular elements of the offence.
Defences	Contains defences which are particular to the offence. Other Defences will be contained within Chapter 12 (Defences, mitigation and criminal responsibility).
Notes	Further guidance and alternative charges.

Transitional guidance

3. Application of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 can be complicated and staff legal advice should always be taken. This guidance is restricted to the more common straightforward cases; however more complex situations will need careful consideration on a case by case basis. In all cases reference should be made to the Order itself, in particular, in the case of charging offences¹.

4. Where a person commits an offence before commencement (i.e. 31st October 09), the suspect cannot be charged with a Service offence (i.e. one of those offences set out in section 50 of the AFA 06). Instead, the suspect must be charged with the relevant SDA offence. For transitional purposes, and for the purposes of the flowchart at [Annex A](#), an 'SDA offence' means any of the following (note that, for those purposes, the expression includes more than just offences under the 1955 and 1957 acts):

- 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 NDA 1957;

¹ See Parts 1 to 3 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

- 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; or
- g. An offence under paragraph 5(1) of Schedule 1 to RFA 1996 committed before commencement by a person within a specific category².

5. For example, if a soldier steals something on the 29 Sep 09 (whilst subject to military law) but that offence does not come to light until on or after the 31 Oct 09, the soldier must be charged under section 70 of the AA55. He must not be charged with an offence under section 42 of the AFA 06. Where an accused is charged with a SDA offence, the SDA offence can be tried by a Service court or can be dealt with in a summary hearing under the AFA 06 by virtue of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

6. In most cases it will be obvious whether the suspect should be charged with an AFA 06 offence or a SDA offence. There may however be some situations where the matter is not so clear. Where these situations arise COs should seek staff legal advice before bringing a charge. The situations arise where:

a. **The offence is incomplete at commencement (relevant to offences under paragraphs 4a, b, f or g above).** An offence will be incomplete at commencement if the SDA offence has two or more elements and at least one of the elements occurs prior to commencement and at least one occurs after commencement. Where this occurs the accused can be charged under the relevant SDA offence even though the last element of the offence does not occur until after 31 Oct 09³. So for example, if a soldier deliberately leaves the ignition key in a Service vehicle on 30 Oct 09 with the result that the vehicle is stolen on 31 Oct 09, the soldier can be charged under the relevant SDA provision (in this case section 44(1)(b) of the AA55).

b. **A course of conduct is still ongoing at commencement (relevant to offences under paragraphs 4a, b or f above).** This situation is most likely to occur where a Service person is AWOL. For example, where a soldier goes absent prior to commencement and does not return until after commencement. The effect of article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 is that the whole course of conduct (both before and after commencement) can be charged under section 38 of the AA55. It will also be permissible to charge the accused with two shorter periods of AWOL; one under the AA55 for the period that terminates at commencement and one under section 9 of the AFA 06 which begins at commencement⁴.

c. **It is not clear when the conduct occurred.** This situation might arise where a suspect is alleged to have committed an offence within a period that began before 31 Oct 09 but finished after this date, but it is unclear exactly when (during the period) that alleged offence was committed. For example, in January 2010 a recruit might complain that he was assaulted during training a couple of months earlier, but cannot remember whether the assault occurred before or after 31 Oct 09. Where this occurs the suspect can be charged under the relevant SDA provision. However, the suspect

² See article 2(5) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

³ See article 9 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

⁴ See article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

must only be charged with the relevant SDA offence where the alleged conduct must have been an offence. The only question is when it was committed, and therefore which offence it was. In the example above, the assault must have been either an offence under section 70 of the AA/AFA55 (or section 42 of the NDA57) or an offence under section 42 of the AFA06. If the alleged conduct amounts to an offence under the SDAs but does not amount to any offence under AFA06, it must be proved to have occurred before commencement. Conversely, if it would be an offence under AFA06 but not under the SDAs, it must be proved to have occurred after commencement⁵.

⁵ See article 11 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

Offences

Section 1 - Assisting an enemy

1 Assisting an enemy

(1) A person subject to service law commits an offence if, without lawful excuse, he intentionally–

- (a) communicates with an enemy;
- (b) gives an enemy information that would or might be useful to the enemy;
- (c) fails to make known to the proper authorities any information received by him from an enemy;
- (d) provides an enemy with any supplies; or
- (e) harbours or protects an enemy other than a prisoner of war.

(2) A person subject to service law who has been captured by an enemy commits an offence if, without lawful excuse, he intentionally serves with or assists the enemy–

- (a) in the prosecution of hostilities or of measures likely to influence morale;
- or
- (b) in any other manner not authorised by international law.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.

(AFA06 s.1)

1. Type of offence

This is a Schedule 2 offence and **may not be** heard summarily⁶. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally and without lawful excuse did communicate with an enemy by [reporting orally/email/text/signal/letter etc] concerning

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally and without lawful excuse did give information to an enemy concerning that would or might be useful to the enemy.

⁶ Section 53 Schedule 2 of the Act.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(c) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally and without lawful excuse did fail to make known to the proper authorities information concerning received by him from an enemy.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(d) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally and without lawful excuse did provide an enemy with supplies, namely

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(e) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally and without lawful excuse did harbour in an enemy other than a prisoner of war.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(2)(a) OF THE ARMED FORCES ACT 2006

[AB] on, having been captured by an enemy, intentionally and without lawful excuse, did serve with [*or assists*] the enemy in the prosecution of hostilities [*or of measures likely to influence morale*] by

ASSISTING AN ENEMY CONTRARY TO SECTION 1(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on, having been captured by an enemy, intentionally and without lawful excuse, did serve with [*or assists*] the enemy in any other manner not authorised by international law by

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Without lawful excuse

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

An accused will have a lawful excuse if a person has authority, or is under orders, to communicate with the enemy or give information to the enemy if for example; his duties required him to participate in the broadcast of information operations or psyops messages to an enemy.

The accused is to be treated as not having had a lawful excuse unless he raises sufficient evidence as to whether he had such an excuse. Once the issue has been raised, the accused may not be convicted unless the court is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so he did not have a lawful excuse.

See also section 325 of the Act (evidential burden as respects excuses).

Intentionally

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For an offence under this section to be proved, the conduct of the accused must have been intentional.

Communicates

Communicates should be given its ordinary dictionary definition. It includes all forms of communication by every possible means (email, text, signal, letter or telephone conversation etc)

An enemy

For *enemy* see section 374 of the Act.

Information that would or might be useful

It does not matter whether the accused considered that information would or might be useful to an enemy. For subsection (1)(b) of this offence it is only necessary to show that the accused intended to pass the information to an enemy. It does not matter whether the information is true or accurate or whether the accused believed it to be true or accurate. It will be for the officer hearing the charge to decide whether the information was or might have been of use to the enemy.

Proper authorities

This would generally be a superior officer or somebody with functional authority over the accused.

Prisoner of war (PW)

PW are combatants captured during armed conflict and are entitled to certain fundamental rights at all times, including physical security. Their rights are engaged at the point of capture, when they fall under the power of the capturing unit.

For PW generally see JWP 383 Chapter 8 (The Law Of Armed Conflict – Prisoners of War)

Captured by an enemy

This is not limited only to those UK personnel captured (i.e. fall under the power of enemy combatants) during armed conflict who have PW status but will include those captured by any enemy⁷.

Serves with or assists the enemy

Serving with means taking a direct part, with the enemy, in hostilities or other operations against UK forces or other military or police forces co-operating with them. Assistance includes indirect assistance.

⁷ Section 374 of the Act.

Prosecution of hostilities

This is not limited to actions against UK forces in armed conflict.

Measures likely to influence morale

This can either improve the morale of the enemy or undermine the morale of, for example, UK forces or civilians.

Any other manner not authorised by international law

Thus, for example, the Geneva Conventions permit capturing forces to compel prisoners of war to do certain types of work. Where UK forces are carrying out this sort of work they will not be committing an offence under subsection (2).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Subsection (1)

It would not be an offence under subsection (1)(a) if the accused was required in the course of his duty to pass a message by a particular means, or even if he did so negligently, and the message was intercepted. The communication to any enemy must have been intentional.

In relation to subsection (1)(b) the accused must have intended to provide the information to an enemy. The offence is complete when the information is provided. It does not matter whether the enemy does anything with it.

It is important that any information received from an enemy is made available to the proper authorities. Subsection (1)(c) provides that unless they are permitted to do so as part of their duties it is not for individual personnel to decide whether or not to pass the information on.

It would not be an offence under subsection (1)(d) if an accused had abandoned equipment unless he did so in order to supply it to an enemy.

A accused who has harboured or protected a prisoner of war in the course of providing this protection will not have committed an offence under subsection (1)(e).

Subsection (2)

For an offence to be committed under this section the accused who has been captured must have intentionally served with or intentionally assisted the enemy (see below).

Alternative charges

Section 17 (disclosure of information useful to an enemy), section 19 (conduct prejudicial to good order and discipline), section 13 (contravention of standing orders) or section 15 (failure to attend for or perform duty etc).

Section 2 - Misconduct on operations

2 Misconduct on operations

(1) A person subject to service law commits an offence if, without reasonable excuse, he–

- (a) surrenders any place or thing to an enemy; or
- (b) abandons any place or thing which it is his duty to defend against an enemy or to prevent from falling into the hands of an enemy.

(2) Subsections (3) to (5) apply to a person subject to service law who is–

- (a) in the presence or vicinity of an enemy;
- (b) engaged in an action or operation against an enemy; or
- (c) under orders to be prepared for any action or operation by or against an enemy.

(3) A person to whom this subsection applies commits an offence if he fails to use his utmost exertions to carry out the lawful commands of his superior officers.

(4) A person to whom this subsection applies commits an offence if he is on guard duty and posted or ordered to patrol, or is on watch, and–

- (a) without reasonable excuse, he sleeps; or
- (b) (without having been regularly relieved) he leaves any place where it is his duty to be.

(5) A person to whom this subsection applies commits an offence if, without reasonable excuse, he intentionally communicates with a person who is–

- (a) a member of any of Her Majesty's forces or of any force co-operating with them, or
- (b) a relevant civilian,

and the communication is likely to cause that person to become despondent or alarmed.

(6) In subsection (5) “relevant civilian” means a person who–

- (a) is a civilian subject to service discipline; and
- (b) is accompanying a person subject to service law who is–
 - (i) in the presence or vicinity of an enemy; or
 - (ii) engaged in an action or operation against an enemy.

(7) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life. (AFA06 s.2)

1. Type of offence

The offences in the section are comprised in subsection (1)(a) and (b), subsection (3), subsection (4)(a) and (b) and subsection (5)(a) and (b).

The offences in subsection 1 are Schedule 2 offences and **may not** be heard summarily⁸. The offences in subsections 3, 4 and 5 although not Schedule 2 offences **may not** be heard summarily either⁹. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

⁸ Schedule 2 of the Act.

⁹ Section 53 of the Act.

2. Specimen charges

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on, without reasonable excuse, when being the officer in command of, did surrender the said *place/thing* to an enemy.

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on, without reasonable excuse, when it was his duty to defend a against an enemy [*or prevent from falling into the hands of an enemy*], did abandon the said

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(3) OF THE ARMED FORCES ACT 2006

[AB] on, being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*] when ordered by, his superior officer, to, did fail to use his utmost exertions to carry out the said lawful command.

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(4)(a) OF THE ARMED FORCES ACT 2006

[AB] on, being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*] while on watch [*or guard duty and posted*] [*or ordered to patrol*], without reasonable excuse, did sleep.

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(4)(b) OF THE ARMED FORCES ACT 2006

[AB] on, being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*] while on watch [*or guard duty and posted*] [*or ordered to patrol*], namely, without having been regularly relieved, did leave the said place where it was his duty to be.

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(5)(a) OF THE ARMED FORCES ACT 2006

[AB] on,, being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*], without reasonable excuse, did intentionally communicate with X, a person who was a member of Y, of Her Majesty's forces [*or of a force co-operating with Her Majesty's force*], by (*saying/shouting etc*) and that communication was likely to cause that person to become despondent or alarmed.

MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(5)(b) OF THE ARMED FORCES ACT 2006

[AB] on, being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or*

operation by or against an enemy], without reasonable excuse, did intentionally communicate with X, a person who was a relevant civilian, by (*saying/shouting etc*) and that communication was likely to cause that person to become despondent or alarmed.

A charge under subsection (1) or (3) may affirm an intent to assist.

3. Ingredients of the offence

A person subject to Service law

An offence under this section cannot be committed by civilians subject to Service discipline. For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Without reasonable excuse

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Surrenders or abandons

It is an offence under subsection (1)(a) to surrender a place or a thing to an enemy. This requires a direct surrender to, for example, an enemy unit. Abandoning is not limited in this way, however, the abandoning of places or things is an offence under subsection (1)(b) only if it is the duty of the individual to defend that place or things to prevent it falling into the hands of an enemy.

An enemy

For *enemy* see section 374 of the Act.

Action, Operation

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

'duty to defend' (subsection (1))

The duty to defend a place or thing against the enemy or to prevent it from falling into the hands of the enemy is one which may arise from circumstances where an objective assessment will need to be made from service experience of what course of action is to be expected from a Service person of the accused's rank or experience in the circumstances prevailing at the time.

Subsection (2): Application of subsections (3), (4) and (5)

Offences under subsection (3), (4) and (5) can only be committed in the circumstances set out in section 2. That means while the accused was taking part in, or under orders to take part in, operations against an enemy or was in the vicinity of an enemy. If these circumstances do not exist, alternative offences should be considered, such as a charge under section 15 (failure to

attend for or perform duty etc) rather than under subsection (4) where personnel sleep on watch or improperly leave their place of duty.

Fails to use his utmost exertions

This should be assessed objectively taking into account factors such as the training and experience of the individual and the circumstances in which the incident occurred.

Superior officers

For the purpose of this section the command or commands must have been given by a superior officer¹⁰ who is subject to Service law, this would include, for example, where the Commander of British Forces (CBF) has ordered a UK commander to follow the tactical commands of his coalition commander. However, in such a case the offence would be in relation to the failure to use utmost exertions to carry out the lawful command of the CBF's order.

See also the guidance on section 11 (misconduct towards a superior officer).

Co-operating force

This applies to a military force that is co-operating with one of Her Majesty's forces; for example, when the forces are participating together in an exercise or operation under a formal agreement.

Without having been regularly relieved

The relief provided must be a person who has authority to take on that duty.

Communicates

Communicates should be given its normal dictionary meaning. It would include all forms of communication by every possible means (email, text, signal, letter or telephone conversation etc). For an offence to have been committed under this section the communication must be likely to cause certain specified persons (see below) to become despondent or alarmed. These terms should be given their normal dictionary meaning.

Specified persons

The persons who become despondent or alarmed are set out in subsection (5). A relevant civilian is someone who is subject to Service discipline and they must be operating in the circumstances set out in subsection (6)(b)(i) and (ii). This would include contractors who are deployed with Service personnel who are on operations but it would not be an offence to communicate with a contractor who is, for example, working in a UK Naval Base with Service personnel who are under orders to deploy on operations.

Co-operating force subsection (5)(a)

This applies to a military force that is co-operating with one of Her Majesty's forces, for example, when the forces are participating together in an exercise or operational under a formal agreement.

'Despondent or alarmed' subsection (5)

¹⁰ Section 374 of the Act.

It is not necessary that the words in the communication should be false. It is not necessary to prove that the words actually caused a person to become despondent or alarmed, only that it was likely to do so.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

This offence is only to be charged in relation to misconduct on operations.

Section 3 - Obstructing operations

3 Obstructing operations

- (1) A person subject to service law commits an offence if–
- (a) he does an act that is likely to put at risk the success of an action or operation of any of Her Majesty's forces; and
 - (b) he intends to prevent, or is reckless as to whether he prevents, the success of the action or operation.
- (2) A person subject to service law commits an offence if–
- (a) without lawful excuse, he does an act that delays or discourages an action or operation of any of Her Majesty's forces; and
 - (b) he intends to delay or discourage the action or operation.
- (3) In this section “act” includes an omission and references to the doing of an act are to be read accordingly.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–
- (a) if the offence relates to an action or operation against an enemy, may be for life;
 - (b) otherwise, must not exceed ten years.

(AFA06 s.3)

1. Type of offence

An offence under this section **may not** be heard summarily¹¹. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

The offences in this section are comprised in subsection (1)(a) and (b) and subsection (2)(a) and (b). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these subsections they should, as soon as is practicable, make the Service Police aware of the matter.

An offence under section 3 which relates to an action or operation against an enemy is a Schedule 2 offence. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

OBSTRUCTING OPERATIONS CONTRARY TO SECTION 3(1) OF THE ARMED FORCES ACT 2006

[AB] on (insert details of the act), an act likely to put at risk the success of Operation WOODCUTTER, [an operation against an enemy], intending to prevent the success of the operation or being reckless as to whether the success of the operation would be so prevented.

¹¹ Section 53 Schedule 2 of the Act.

OBSTRUCTING OPERATIONS CONTRARY TO SECTION 3(2) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, (insert details of the act), an act that delayed Operation WOODCUTTER, [an operation against an enemy], intending to delay the operation.

3. Ingredients of the offence

A person subject to Service law (subsection (1) and (2))

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

This offence cannot be committed by civilians subject to Service discipline.

Likely to put at risk the success (subsection (1)(a))

Evidence of the purpose of an action or operation may be found in any associated mission directive. This may be relevant to any assessment of its success. It will be for a officer hearing the charge to decide whether the act or omission of the individual was likely to risk the success of the action or operation. This is an objective test.

Action, operation (subsection (1))

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

Intentionally, Recklessly (subsection (1) and (2))

For intention and recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Even if the act or omission was likely to risk the success of the action or operation, for the offence under subsection (1) to be proved, the individual must have either intended to prevent or been reckless as to whether he prevented the success of the action or operation.

Under subsection (2), there must have been intention

An enemy (subsection (4))

For *enemy* see section 374 of the Act.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful excuse provides a defence in relation to an offence under subsection (2). An accused will have a lawful excuse if, for example, he had been acting under the last order communicated to him.

5. Notes

Offences under this section are only to be charged in relation to misconduct on operations. While operations or actions will often be against an enemy (see above), this need not be the case. Outside operations, acts and omissions may amount to other offences. Examples are negligence under section 15 (failure to attend for, or perform, duty) or offences under section 12 (disobedience to lawful commands) or section 13 (contravention of standing orders).

Section 4 - Looting

4 Looting

- (1) A person within subsection (4) commits an offence if, without lawful excuse—
- (a) he takes any property from a person who has been killed, injured, captured or detained in the course of an action or operation of any of Her Majesty's forces or of any force co-operating with them; or
 - (b) he searches such a person with the intention of taking property from him.
- (2) A person within subsection (4) commits an offence if, without lawful excuse—
- (a) he takes any property which has been left exposed or unprotected in consequence of—
 - (i) an action or operation of any of Her Majesty's forces or of any force co-operating with them; or
 - (ii) an event, or state of affairs, in relation to which such an action or operation is undertaken; or
 - (b) he searches any place or thing with the intention of taking property of a description mentioned in paragraph (a).
- (3) A person within subsection (4) commits an offence if he takes otherwise than for the public service any vehicle, equipment or stores abandoned by an enemy.
- (4) A person is within this subsection if he is—
- (a) a person subject to service law; or
 - (b) a civilian subject to service discipline.
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence—
- (a) in the case of an offence under subsection (1) or (2), may be for life;
 - (b) in the case of an offence under subsection (3), must not exceed seven years.

(AFA06 s.4)

1. Type of offence

Offences under **subsection (1) and (2) are Schedule 2 offences**. An offence under these subsections **may not** be heard summarily¹². For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances which indicate an offence has been committed under these subsections, they must, as soon as is reasonably practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Only an offence under subsection (3) may be heard summarily¹³. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

2. Specimen charges

¹² Section 53 Schedule 2 of the Act.

¹³ Section 53 of the Act.

LOOTING CONTRARY TO SECTION 4(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, took a wallet from [CD], a person detained during Operation JUDGE, an operation conducted by Her Majesty's forces.

LOOTING CONTRARY TO SECTION 4(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, searched [CD] a person detained during Operation JUDGE with the intention of taking his property, namely his wallet.

LOOTING CONTRARY TO SECTION 4(2)(a) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, took a compact disc player, properly left exposed in consequence of Operation JUDGE, an operation conducted by Her Majesty's forces.

LOOTING CONTRARY TO SECTION 4(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, searched a house [details] with the intention of taking property which had been left exposed or unprotected as a consequence of Operation JUDGE, an operation conducted by Her Majesty's forces.

LOOTING CONTRARY TO SECTION 4(3) OF THE ARMED FORCES ACT 2008

[AB] on, otherwise than for the public service, took a vehicle, namely [describe vehicle], property abandoned by an enemy of Her Majesty's forces.

3. Ingredients of the offence

A person subject to Service law/civilian subject to Service discipline

For persons subject to Service law/civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Without lawful excuse

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful excuse only applies in relation to offences under subsection (1) and (2).

Takes

Takes should be given its normal dictionary meaning. It requires an intention to take, either temporarily or permanently. For an offence under subsection (1)(b) or (2)(b) a search must have been made with the intention of taking property. For an offence under subsection (3), the taking by the accused must have been intended for something other than it being put to the public service.

Unlike the offence of theft, this offence does not require proof of dishonesty or intention to permanently deprive. This offence merely requires a person to take an item without authority.

Property

Property should be given its normal dictionary meaning and covers anything which can be taken. It therefore includes, for example, both Service equipment and personal belongings.

Action, operation

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

Co-operating force

This applies to a military force that is co-operating with one of Her Majesty's forces; for example, when the forces are participating together in an exercise or operation under a formal agreement.

An enemy

For *enemy* see section 374 of the Act.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 5 - Failure to escape etc

5 Failure to escape etc

- (1) Subsections (2) and (3) apply to a person subject to service law who has been captured by an enemy.
- (2) A person to whom this subsection applies commits an offence if–
- (a) he is aware of steps that he could take to rejoin Her Majesty's forces;
 - (b) he could reasonably be expected to take those steps; and
 - (c) without lawful excuse, he fails to take them.
- (3) A person to whom this subsection applies commits an offence if, without lawful excuse, he intentionally prevents or discourages another person subject to service law who has been captured by an enemy from taking any reasonable steps to rejoin Her Majesty's forces.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years.

(AFA06 s.5)

1. Type of offences

Offences under this section **may not** be dealt with summarily¹⁴. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is reasonably practicable, make the Service Police aware of the matter. In all cases, reference should be made to an appropriate staff legal adviser at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

FAILURE TO ESCAPE CONTRARY TO SECTION 5(2) OF THE ARMED FORCES ACT 2006

[AB] on, having being captured by an enemy, without lawful excuse failed to take steps of which he was aware, which he could reasonably have been expected to take, to rejoin Her Majesty's forces by [detail failure(s) and circumstances].

FAILURE TO ESCAPE CONTRARY TO SECTION 5(3) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally and without lawful excuse prevented or discouraged [CD], a person subject to Service law and captured by an enemy, from taking any reasonable steps to rejoin Her Majesty's forces by [detail conduct and circumstances].

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

¹⁴ Section 53 of the Act.

Captured by an enemy

This is not limited only to those UK personnel captured (i.e. fall under the power of enemy combatants) during armed conflict who have Prisoner of War status but will include those captured by any enemy¹⁵.

Steps - reasonably be expected to take

For an offence to be committed under subsection (2) it must be proved that the accused was aware of steps that he could take, that (in the view of the officer hearing the charge) it was reasonable to expect him to take those steps, that he failed to take them, and that he did not have a lawful excuse to fail to do so. For example, a Service person who, after capture, is left unattended in an unlocked vehicle with an apparently unobstructed escape route might reasonably be expected to attempt an escape.

Without lawful excuse

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

An accused will have a lawful excuse if, for example, he is ordered by his superior officer not to attempt an escape which would compromise another, larger, escape plan.

The accused is to be treated as not having had a lawful excuse unless he raises sufficient evidence as to whether he had such an excuse. Once the issue has been raised, the accused may not be convicted unless the officer hearing the charge is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so he did not have a lawful excuse.

Prevents or discourages

For the offence under subsection (3) to be proved, the conduct of the accused towards other captured personnel must have been intended to have the effect of preventing or discouraging their taking reasonable steps to rejoin Her Majesty's forces. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). For example, where a superior officer dissuaded subordinates from an attempt to escape, because to do so would risk the removal of certain privileges, this offence may be committed.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

¹⁵ Section 374 of the Act.

Section 6 - Mutiny

6 Mutiny

- (1) A person subject to service law commits an offence if he takes part in a mutiny.
- (2) For the purposes of this section a person subject to service law takes part in a mutiny if–
- (a) in concert with at least one other person subject to service law, he–
 - (i) acts with the intention of overthrowing or resisting authority; or
 - (ii) disobeys authority in such circumstances as to subvert discipline;
 - (b) he agrees with at least one other person subject to service law to overthrow or resist authority; or
 - (c) he agrees with at least one other person subject to service law to disobey authority, and the agreed disobedience would be such as to subvert discipline.
- (3) For the purposes of subsection (2)–
- (a) “authority” means lawful authority in any part of Her Majesty's forces or of any force co-operating with them;
 - (b) the reference to acting includes omitting to act.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.

(AFA06 s.6)

1. Type of offence

The offence is comprised in subsection (1) by virtue of subsection (2)(a)(i) or (ii) and subsection (2)(b) or (c).

This is a Schedule 2 offence and **may not** be heard summarily¹⁶. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is reasonably practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2 Specimen charge

MUTINY CONTRARY TO SECTION 6(2)(a)(i) OF THE ARMED FORCES ACT 2006

[AB] on, in concert with [CD] a person [persons] subject to Service law, acted with the intention of overthrowing or resisting authority by [detail conduct].

MUTINY CONTRARY TO SECTION 6(2)(a)(ii) OF THE ARMED FORCES ACT 2006

[AB] on, in concert with [CD] a person [persons] subject to Service law, disobeyed authority in such circumstances as to subvert discipline by [detail conduct and circumstances].

¹⁶ Section 53 Schedule 2 of the Act.

MUTINY CONTRARY TO SECTION 6(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on, in agreement with [CD] a person [persons] subject to Service law, agreed to overthrow or resist authority namely by [detail conduct].

MUTINY CONTRARY TO SECTION 6(2)(c) OF THE ARMED FORCES ACT 2006

[AB] on, agreed with [CD] a person [persons] subject to Service law, to disobey authority by [detail conduct] and that agreed disobedience was such as to subvert discipline.

3. Ingredients of the offence.

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

At least one other person

The offence of mutiny cannot be committed by a single individual acting on his/her own. The individual must act in concert (subsection (2)(a) (i) and (ii)) or in agreement (subsections (2)(b) and (c)), with at least one other person who is also subject to Service law. An individual who by himself disobeys a lawful command should, therefore, be dealt with under section 12(1) (disobedience to lawful commands).

Acts with the intention/disobeys authority

For an offence under subsection (2)(a) there must be some conduct going beyond agreement. The conduct must involve either an act or omission and it must either have involved an intention to overthrow or resist authority or disobedience of authority in such circumstances as to subvert discipline.

Under subsection (2)(b) and (c) an agreement alone is enough if the agreement is either to overthrow or resist authority or to disobey authority in such circumstances as to subvert discipline.

In concert

For an offence under subsection (2)(a) at least two persons subject to Service law must have their charges found proved of the necessary misconduct acting jointly. It will not therefore be mutiny for two members of the armed forces to disobey the same order, unless they act *in concert*.

Disobeys

Disobeys should be given its normal dictionary meaning namely refusing or deliberately failing to obey. For the offence of mutiny, disobedience of *authority* may be relevant. This is wider than disobedience of a lawful command.

Authority may be disobeyed where there has been a lawful command. For such cases where the conduct could not amount to mutinous conduct see section 12 (disobedience to a lawful command). Authority may also be disobeyed even where there is no specific command issued to the accused personally. For example, a breach of standing orders which place an area out of bounds may suffice for section 12, but will only support a charge of mutiny if all of the elements mentioned above are in place.

Lawful authority

In the context of this section this means the authority of those in command. While UK personnel almost always serve directly under UK (Her Majesty's forces) Command there are circumstances where they may be in a formed unit which is under coalition command or may be attached to or embedded in a foreign force. Where a foreign force is co-operating with Her Majesty's forces in an exercise or operation disciplinary issues will usually be the subject of a formal agreement. In such cases, this offence may be committed where for example the lawful authority disobeyed is the authority of that co-operating force. Such cases will be rare, but where they occur they will raise important jurisdictional issues and staff legal advice should always be sought.

Overthrow(ing) or resist(ing)

The terms *overthrow* and *resist* should be given their normal dictionary meaning ie. *overthrow*, to remove forcibly from power or to put an end to an institution; *resist*, to strive against; to refuse to comply.

Subvert discipline

Under subsection (2)(a)(ii) and (2)(c) the accused's conduct or intended conduct respectively must be such as to undermine discipline. It will be a matter of evidence as to whether that is the case.

Agrees

Under subsection (2)(b) and (c), it is sufficient that the accused *agrees* with another person to make or prepare a plan, to carry out the required conduct at some future time. This is as opposed to subsection (2)(a)(i) and (ii) which would require some act such as actual planning or approaching third parties.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Duress

Where a person is threatened with violence unless he acquiesces in the mutiny this may provide a defence.

5. Notes

Mutiny is the most serious of all forms of indiscipline, therefore, charges under this section should normally only be preferred when the facts disclose a concerted and deliberate challenge to authority which strikes at the very heart of discipline and is calculated to prejudice significantly the ability of a unit to carry out its role, task or duties.

This section creates two types of offence; the first type is framed under subsection (2)(a) and deals with the actual commission of specific acts which are intended to overthrow or resist authority or subvert discipline. The second under subsection (2)(b) and (c) revolves around agreement between two or more individuals, subject to Service law, to act.

Section 7 - Failure to suppress mutiny

<p>7</p> <p>Failure to suppress mutiny</p> <p>(1) A person subject to service law commits an offence if–</p> <p>(a) he knows that a mutiny is occurring or is intended; and</p> <p>(b) he fails to take such steps as he could reasonably be expected to take to prevent or suppress it.</p> <p>(2) For the purposes of this section a mutiny occurs when a person subject to service law, in concert with at least one other person subject to service law–</p> <p>(a) acts with the intention of overthrowing or resisting authority; or</p> <p>(b) disobeys authority in such circumstances as to subvert discipline.</p> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.</p>	<p>(AFA06 s.7)</p>
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1. Type of offence

This is a Schedule 2 offence and **may not** be heard summarily¹⁷. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

FAILURE TO SUPPRESS MUTINY CONTRARY TO SECTION 7(1) OF THE ARMED FORCES ACT 2006

[AB] on, knowing that a mutiny was occurring [or knowing that a mutiny was intended] failed to take such steps as he could reasonably be expected to take to prevent or suppress it.

3. Ingredients of offence.

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Knows that a mutiny is occurring or is intended

The offence of failing to suppress a mutiny can only be committed in the circumstances set out in subsection (2), which is where there is an act of mutiny, as opposed to an agreement. Subsection (2) repeats only the section on mutiny section 6(2)(a), and not when there is only an agreement under section 6(2)(b) and (c). For mutiny generally see notes under section 6.

The accused must actually know the acts set out in subsection (2)(a) or the disobedience set out in subsection (2)(b) are occurring or that they are intended to occur. It is not necessary

¹⁷ Section 53 Schedule 2 of the Act.

for the individual to know that the acts or disobedience legally amount to the technical offence of mutiny.

Fails to take such steps as he could reasonably be expected to take.

In addition to knowledge that a mutiny is occurring, or is intended, the accused must fail to take reasonable steps to prevent or suppress it. What is reasonable will depend on the circumstances including: the rank and or experience of the individual; his ability to intervene or inform those in authority; and the danger involved in taking such action. An assessment of what could reasonably be expected is both an objective and subjective judgement. That is, it will include an assessment of what a reasonable person would do but could also take into account factors personal to the accused, which bear upon what *he* could reasonably do.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Duress

Where a person is threatened with violence unless he acquiesces in the mutiny this may provide a defence.

The accused cannot be convicted if, in all the circumstances of the case, it would not have been reasonable for him to have intervened or taken other action to stop the mutiny for example, owing to the danger involved or a physical inability to act.

5. Notes

Spare.

Section 8 - Desertion

<p>8</p> <p>Desertion</p> <p>(1) A person subject to service law commits an offence if he deserts.</p> <p>(2) For the purposes of this Act a person deserts if he is absent without leave and–</p> <p>(a) he intends to remain permanently absent without leave; or</p> <p>(b) he intends to avoid a period of active service.</p> <p>(3) In this section “ active service” means service in–</p> <p>(a) an action or operation against an enemy;</p> <p>(b) an operation outside the British Islands for the protection of life or property; or</p> <p>(c) the military occupation of a foreign country or territory.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–</p> <p>(a) if the offender intended to avoid a period of active service, may be for life;</p> <p>(b) otherwise, must not exceed two years.</p>	<p>(AFA06 s.8)</p>
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1. Type of offence

An offence under **subsection (2)(a) may not** be heard summarily¹⁸. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

An offence under subsection **(2)(b) is a Schedule 2 offence** (where the accused intended to avoid a period of active service) and **may not** be heard summarily. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this subsection they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

For reserve forces this offence may be tried in a civil court as well as the Court Martial. See section 98 of the RFA 96 as amended and [Chapter 3](#) (Jurisdiction and time limits).

2. Specimen charges

DESERTION CONTRARY TO SECTION 8(2)(a) OF THE ARMED FORCES ACT 2006

[AB] of [name of unit], was absent without leave from [date] to [date] and intended to remain permanently absent without leave.

DESERTION CONTRARY TO SECTION 8(2)(b) OF THE ARMED FORCES ACT 2006

¹⁸ Section 53 Schedule 2 of the Act.

[AB] of [name of unit] absented himself without leave from [date] to [date] with intent to avoid serving in operations outside the British Islands for the protection of life or property, namely [insert details or name of Operation]

or

[AB] of [name of location] when deployed on actions or operations against an enemy namely, [insert name of operation] absented himself without leave from [date] to [date].

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Absence without leave

For all offences of desertion it must be proved that the accused was in fact absent without leave from his unit, or other place of duty, see section 9 (absence without leave).

Intends to remain permanently absent without leave

Under subsection (2)(a) the accused must intend to remain absent permanently. This intention may be formed at various times. If the accused made the decision never to return either before, or at the time he left or failed to attend his unit or place of duty without leave, then this would be desertion. Furthermore, the charge of desertion would be found proved if at the time he went absent without leave he intended to return but he subsequently, while absent, formed the intention to stay away permanently.

The offence could also be committed after a period of authorised leave. The accused might have gone on authorised leave intending never to return. If, at the end of the authorised leave that intention still remains and, he does not in fact return, then the charge of desertion would be found proved.

It will be a matter of evidence whether the intent has been formed by the accused. It may be proved by direct evidence, e.g., an admission by the accused or remarks made by him to others; or it may be inferred from the surrounding circumstances; for example, the accused may have thrown away his kit, destroyed his ID card or changed his name. It may be shown from attempts to evade arrest, engagement in civilian employment, the length of absence, marriage to a resident of a foreign country, etc. It is for the officer hearing the charge to decide in each case whether the existence of the intent may be inferred from the facts.

However the burden of proving that the accused has deserted will always rest with the person hearing the charge or with the prosecution at CM.

The fact that an accused was recovered by being apprehended is not conclusive evidence of an intention to remain permanently absent since the arrest may occur before the date on which the accused intended to return. Although voluntary surrender may lead to a view that it is not desertion, desertion may have been committed even if the accused has voluntarily surrendered since the accused may have intended to remain permanently absent at one stage and later may have changed his mind. Both apprehension and surrender are facts to be weighed by the officer hearing the charge along with the rest of the evidence.

Intends to avoid any particular service or kind of service

Under subsection (2)(b) it must be proved that the accused intended to avoid active service (see below). That may be an intention to avoid active service generally, for example, to avoid a deployment to an operational theatre, or it may be a particular duty or aspect of a duty that arises during such a deployment, for example to avoid an order to mount a recce of an area or a specific attack on enemy forces.

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

'Active service'

Subsection (3) sets out the meaning of active service. These are:

Actions or operations against an enemy

An enemy is defined in section 374 of the Act and includes not only those engaged in armed operations against any of Her Majesty's forces or any force co-operating with any of Her Majesty's forces, but also all pirates, armed mutineers and armed rebels and armed rioters. It is therefore possible to commit the offence of desertion by absencing oneself without leave with intent to avoid serving in operations against pirates or armed rebels for example in Peace Support Operations or Maritime Interdiction Operations or any particular aspect of such operation.

Outside the British Islands

The British Islands are Great Britain, Northern Ireland, the Isle of Man and the Channel Islands¹⁹. Outside the British Islands should be given its normal dictionary meaning of any place outside the territorial waters of the British Islands, such that UK Overseas Territories are outside the British Islands. Thus absence without leave with the intent to avoid serving with a unit which will be deploying abroad (for the protection of life or property – see below) would amount to desertion within the meaning of subsection (2) of the Act.

Note that it is possible for the charge to be found proved under subsection (2) of the Act when already serving overseas, e.g. if a Service person serving in Germany absents himself without leave with intent to avoid service in a relevant place outside the British Islands, the charge of desertion would be found proved.

Operationsfor the protection of life or property

Many operations will involve, explicitly or implicitly, the protection of life or property, and the phrase should be given its normal dictionary meaning. It would include peace support operations or military aid to the civil power.

Military occupation of a foreign country or territory

Territory is considered to be occupied if it has actually come under the authority of a hostile army [armed forces] and it will extend to the territory where such authority has been established and can be exercised²⁰.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

¹⁹ Interpretation Act 1978.

²⁰ See article 42 Hague Regulations 18 Oct 1907 concerning the Laws and Customs of Wars on Land and JSP 383 (The Law Of Armed Conflict).

5. Notes

If it is not possible to prove the necessary intent to establish desertion, consideration should be given as to whether the individual may be charged under section 9 (absence without leave) or section 15 (failure to attend for or perform duty etc).

If a person tries to leave a unit or other place of duty with the intention of remaining permanently absent, or tries to absent himself without leave with the intention of avoiding service overseas, but is prevented from leaving, he can be charged with attempting to desert by virtue of section 39 (attempts).

For members of the reserve forces see section 98 of the RFA 96.

Section 9 - Absence without leave

- 9 Absence without leave**
- (1) A person subject to service law commits an offence if subsection (2) or (3) applies to him.
- (2) This subsection applies to a person if he is intentionally or negligently absent without leave.
- (3) This subsection applies to a person if—
- (a) he does an act, being reckless as to whether it will cause him to be absent without leave; and
- (b) it causes him to be absent without leave.
- (4) In subsection (3) “act” includes an omission and the reference to the doing of an act is to be read accordingly.
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.9)

1. Type of offence

An offence under this section **may be** heard summarily²¹.

2. Specimen charges

ABSENCE WITHOUT LEAVE CONTRARY TO SECTION 9(1) OF THE ARMED FORCES ACT 2006

[AB] of [name of unit], absented himself without leave from [date] to [date]

or

[AB] of [name of unit], did absent himself without leave from (time) on(date) to (time) on (date), namely hours minutes.

3. Ingredients of the offences

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Absent without leave

It must be proved that the accused was absent from his unit, or other place of duty and that the accused’s absence was not authorised. He may either improperly have left his unit or he may have failed to return to it at the required time. The accused would be absent without leave where he had never been granted leave or where he remained absent after authorised leave had expired, or where his leave had been rescinded by a subsequent lawful order to return to his unit. In all cases it would be necessary to prove by evidence that there was no authorised leave in place. Where authorised leave had been rescinded this would require evidence that that fact had been communicated to him.

²¹ Section 53 of the Act.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point he returns, or is apprehended. It will be for evidence to establish these points. A Service person who is absent without leave ceases to be absent if he is taken into Service custody, is arrested by a constable as suspected of being an absentee or if he surrenders himself as being illegally absent to a provost officer or to a Service unit or to a constable or at a police station in the UK or consular officer elsewhere.

Where the accused has been granted leave but merely fails to comply with administrative orders (such as by failing to hand in a leave card) the accused does not leave improperly: in such circumstances, the accused should be charged with an offence under section 13 (contravention of standing orders).

A person who obtains leave by a false pretence should be charged under section 19 (conduct prejudicial to good order and discipline).

Intentionally or negligently

For intention, recklessness and negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It must be proved that the accused either knew that he was not entitled to be absent or negligent or was reckless [see below] as to whether he was so entitled.

To establish that the accused was *intentionally* absent without leave under subsection (2), it must be proved that the accused intended to absent himself from his place of duty knowing that he was not entitled to be absent. The accused's intent to absent himself knowing he was not entitled to do so must be decided by the officer hearing the charge or CO by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances, e.g., an admission by the accused or remarks made by him to others.

To establish that the accused was *negligently* absent without leave under subsection (2) it must be proved that the accused either did something that a member of the armed forces of their experience, age, training and seniority should not have done, or failed to do something that a member of the armed forces of their experience, age, training and seniority should have done; and that, as a result of their negligent act or omission, they were absent and that their absence was not authorised. Examples would include where an accused oversleeps because they failed to make arrangements to be woken, where the accused loses a rail warrant and has insufficient money so that they cannot arrive at the unit before leave has expired, or where they fail to read unit orders and so overstays the leave.

Recklessly

To establish that the accused was *recklessly* absent without leave under subsection (3) it must be proved that the accused was aware that by acting or failing to act in a given manner, there was a risk that the accused would be absent without leave, yet they unreasonably went on to take that risk and in so doing was absent without leave. Examples would include where an accused renders himself incapable of returning to his unit through drink, or where the accused returns to his unit by inappropriate means (eg hitch-hiking) and so returns late.

If there were evidence that the accused intended to remain permanently absent, the proper charge would be desertion under section 8 (desertion).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

If an accused honestly, but mistakenly, believes leave to have been granted the offence will not be committed. The existence or otherwise of reasonable grounds for such belief will be relevant only to the question of whether he honestly held the belief he professed.

5. Notes

Charging

In the charge, the period of absence should be expressed in days, hours and minutes. However, where it is unclear precisely when the accused left it is unobjectionable to insert 'on or about [date] or 'not later than [date]', or in the case of his return 'not earlier than [date].'

The period of improper absence should normally be calculated from the time when leave expires (or the time of breaking out) until the time of return to the place of duty. Absence may however terminate in many different ways and calculation of the period of absence for the purpose of framing the charge and deciding the punishment (including forfeiture of pay) can be finally determined only by the officer hearing the charge, having regard to its circumstances.

Where a person surrenders or is apprehended as an absentee away from the locality in which his leave expired it is within the discretion of the officer hearing the charge to consider the absence as having terminated at the time of the surrender or apprehension. However, where a lengthy journey is involved in returning to the place where leave expired it may be appropriate to include the time of travel in computing the period of absence.

Where a person is arrested by the civilian authorities on another charge and is handed over to the Service authorities absence without leave is to be treated as ceasing from the time of his arrest.

Particular duty

Absence from a particular duty should not be charged under this section but under section 15 (failure to attend or perform a duty etc).

Section 10 - Failure to cause apprehension of deserters or absentees

- 10 Failure to cause apprehension of deserters or absentees**
- (1) A person subject to service law commits an offence if–**
- (a) he knows that another person–**
- (i) has committed, is committing or is attempting to commit an offence under section 8 (desertion); or**
- (ii) is committing or attempting to commit an offence under section 9 (absence without leave); and**
- (b) he fails to take such steps as he could reasonably be expected to take to cause that person to be apprehended.**
- (2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.**

(AFA06 s.10)

1. Type of offence

An offence under this section **may be** heard summarily²².

2. Specimen charges

FAILING TO TAKE STEPS TO CAUSE THE APPREHENSION OF A DESERTER
CONTRARY TO SECTION 10(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on....., knowing that [CD] was a deserter, failed to take such steps as he could reasonably be expected to take to cause that person to be apprehended.

FAILING TO TAKE STEPS TO CAUSE THE APPREHENSION OF A PERSON
ATTEMPTING TO ABSENT HIMSELF WITHOUT LEAVE TO SECTION 10(1)(b) OF THE
ARMED FORCES ACT 2006

[AB] on....., knowing that [CD] was attempting to absent himself without leave, failed to take such steps as he could reasonably be expected to take to cause that person to be apprehended.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Knows

This must be actual knowledge that desertion has been committed, is being committed or is being attempted or, in the case of absence, that it is being committed or attempted. It is not enough that the accused *should* have known or that he wilfully shut his eyes to the truth. The evidence must prove that he actually knew what the main offender was doing and that it amounted to the offence as appropriate.

Another person

²² Section 53 of the Act.

This will be a person subject to Service law and therefore capable of offending under Service law.

Desertion

For desertion see commentary on section 8.

Absence without leave

For absence without leave see commentary on section 9.

Fails to take steps that he might reasonably be expected to take to cause apprehension of deserters or absentees

In addition to knowledge as above, it must be shown that the accused failed to take such steps as he could reasonably be expected to take to cause that person to be apprehended. It is a question of fact for the officer hearing the charge to decide what steps the person could reasonably be expected to have taken in the circumstances of each case. This phrase is setting a standard which is both objective and subjective. That is, it will include an assessment of what a reasonable person would do but could also take into account factors personal to the accused, which bear upon what *he* could reasonably do. Factors could include the degree of personal risk, the likelihood of success and the seniority, age and experience of the accused.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 11 - Misconduct towards a superior officer

<p>11 Misconduct towards a superior officer</p> <p>(1) A person subject to service law commits an offence if–</p> <p> (a) he uses violence against a superior officer (“ B”); and</p> <p> (b) he knows or has reasonable cause to believe that B is a superior officer.</p> <p>(2) A person subject to service law commits an offence if–</p> <p> (a) his behaviour towards a superior officer (“ B”) is threatening or disrespectful; and</p> <p> (b) he knows or has reasonable cause to believe that B is a superior officer.</p> <p>(3) For the purposes of this section–</p> <p> (a) the behaviour of a person (“ A”) towards another person (“ B”) includes any communication made by A to B (whether or not in B's presence);</p> <p> (b) “threatening” behaviour is not limited to behaviour that threatens violence.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed–</p> <p> (a) in the case of an offence under subsection (1), or an offence under subsection (2) of behaviour that is threatening, ten years;</p> <p> (b) in any other case, two years.</p> <p style="text-align: right;">(AFA06 s.11)</p>
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1. **Type of offence**

An offence under this section **may be** heard summarily²³.

2. **Specimen charges**

USING VIOLENCE AGAINST A SUPERIOR OFFICER CONTRARY TO SECTION 11(1) OF THE ARMED FORCES ACT 2006

[AB] on, used violence to [CD], a superior officer, knowing or having reasonable cause to believe that was a superior officer.

USING THREATENING OR DISRESPECTFUL BEHAVIOUR TOWARDS A SUPERIOR OFFICER CONTRARY TO SECTION 11(2) OF THE ARMED FORCES ACT 2006

[AB] on, used threatening/disrespectful behaviour towards [CD], a superior officer.

3. **Ingredients of the offence**

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Uses violence (against)

²³ Section 53 of the Act.

For an offence under subsection (1) there must be actual violence used *against* the superior officer and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against him. However, the level need not be severe. It can be any kind of violence such as striking, kicking, butting with the head, pushing or throwing an object at a person. There is no requirement for there to be an injury caused or intended to be caused. It would not be enough under this section however for violence to be used, for example, by punching the wall as that would not be *against* the superior officer. However it might be threatening or disrespectful (see below).

*Superior officer*²⁴

Superior officer, in relation to a person (A), means an officer, warrant officer or non-commissioned officer who is subject to Service law and is of superior rank or rate to A; or is of equal rank or rate to A and is exercising authority as A's superior (see below).

It does not matter whether the superior officer is of the same or different Service to the accused, providing that the superior officer is also subject to Service law. This would include Service personnel from other nations when they are posted to serve with UK forces and become subject to Service law, but would not include, for example, coalition forces or other nations' personnel alongside whom UK Service personnel happen to be working.

A person of a higher rank or rate than the accused will always be his superior officer under the Act. In addition there can be occasions when someone of the same rank or rate as the accused will be his superior officer. This would not apply in the case of those of the lowest rank and rates in each Service: a private, able rate and airman (ac, LAC and SAC) can never be the superior officer of another private, able rate or airman. All other ranks or rates can become the superior officer of another person of the same rank where he is *exercising authority as [the accused's] superior*. In order to be his superior officer however it must be an official entitlement to exercise authority over the other, such as having been tasked to carry out a temporary duty or a specific assignment which puts him in a position of authority over that other individual. Where an accused does not know or does not have reasonable cause to believe that a person is their superior officer and uses violence against him consideration may be given to a charge under section 21 (fighting or threatening behaviour etc).

Knows or has reasonable cause to believe

It is necessary that there was actual knowledge that the individual was a superior officer or that the accused had reasonable cause to believe he was a superior officer. If the superior officer was the accused's commanding officer or his sub unit commander this would be sufficient to prove actual knowledge, because the person and his rank was known to him. Similarly, if it is shown that the superior officer is a higher rank than the accused and at the time of the offence was in uniform this would impute actual knowledge. Where the superior officer is not known to the accused or is not in uniform it will be necessary to consider whether the accused knew in the circumstances, or whether he should have known. The test of whether he would have reasonable cause to believe is an objective one and should be judged on the evidence in the case. If the accused raises the issue that he did not know, it is not for him to prove that. In that case the person hearing the charge should consider the evidence produced, and the evidence of the accused and decide, on the basis of his view of the evidence, whether it has been shown that the accused knew or had reasonable cause to believe. In cases where the individuals are of the same rank or rate as each other there

²⁴ Section 374 of the Act.

should be evidence of the superior's authority as well as how the accused was aware of that authority or had reasonable cause to be aware of it.

Behaviour towards

Behaviour here includes both actions and words, whether spoken or written. It does not matter what form the communication takes (email, text, signal, letter or telephone conversation etc). The behaviour does not have to be in the presence of the superior officer, but the superior officer must have been the intended recipient and the subject of the comment. For example, a comment made to a third party or muttered under one's breath deliberately within earshot of the superior officer. Alternatively, where an email is sent and the superior officer is an intended addressee. It is possible for this to be the case even when the accused is not in the superior officer's presence at the time he receives the communication. It is a question of fact whether the behaviour was *towards* the superior officer. This offence is not intended to be used to charge individuals in relation to comments they may make to each other in private about a superior officer. If threatening or insubordinate language is used about a superior officer to a third party, then consideration may be given to a charge under section 19 (conduct prejudicial to good order and discipline).

Threatening or disrespectful

Threatening behaviour can include anything said by the accused and is not limited to behaviour that threatens personal violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example threats to burn someone's house down, or to injure a member of their family. Threatening should be given its normal dictionary meaning and considered objectively. It is for the person hearing the charge to decide as a question of fact.

Disrespectful should also be given its normal dictionary meaning. Within the Service context, insubordinate language will always be disrespectful but it may also be threatening behaviour. Disrespectful covers the situation where a subordinate, having been given a lawful command which does not require immediate compliance, indicates in respectful words and tone that he does not intend to comply with the order. Disrespectful in this context means disrespectful of the authority of the superior. If the command is disobeyed, consideration may be given to a charge under section 12 (disobedience to a lawful command).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

The actual violence or behaviour alleged does not have to be particularised in the charge, however it must be set out in the case summary against the accused.

Section 12 - Disobedience to lawful commands

12 Disobedience to lawful commands

- (1) A person subject to service law commits an offence if–
- (a) he disobeys a lawful command; and
 - (b) he intends to disobey, or is reckless as to whether he disobeys, the command.
- (2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years.

(AFA06 s.12)

1. Type of offence

An offence under this section **may be** heard summarily²⁵.

2. Specimen charges

DISOBEDIENCE OF A LAWFUL COMMAND CONTRARY TO SECTION 12(1) OF THE ARMED FORCES ACT 2006

[AB] on, intentionally or recklessly disobeyed an order to recharge an Extended Duration Breathing Apparatus when ordered to do so by [CD].

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Disobeys

Disobedience requires awareness of what is being disobeyed, so it must be shown that the command was clear as to what is required and when it is to be carried out. It must also have been received by the person charged. A command need not be given directly, but it does have to be personal to the accused (although it might have been delivered to more than one person at the same time). A command can be oral or written and can be conveyed by a third person, providing it can be shown that the accused received it and knew that it originated from someone who had authority to give it.

The offence will have been committed at the time of the failure to obey the lawful command. If the command required the person to carry out an act at a point in the future, the offence is committed at that later time, not at the time the order was given. For example, if a task is ordered to be carried out by 1200 there is no offence until 1200 has passed.

Lawful command

A command is lawful if:

- a. It is within the authority of the person giving it;

²⁵ Section 53 of the Act.

- b. It is for a proper Service purpose. For example, an officer may not order a Service person to wash his private car or to pay a fine awarded by the Magistrates' Court as neither order is for a Service purpose;
- c. It is possible for the command to be carried out; and
- d. It is not contrary to UK domestic law, International Law or relevant local law.

As to the power of British overseas territory force officers to give lawful orders see section 369(2).

Intends to disobey

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless as to whether he disobeys

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

If the accused genuinely made a mistake and misunderstood the terms of the command he may have a defence.

5. Notes

This section is specifically designed for those occasions where an offender intends not to carry out the order or he is reckless as to whether he is doing what he has been ordered to

Failure to obey a standing or routine order should be charged under section 13 (contravention of standing orders).

A person who obeys a command, but in a manner which is sub-standard, should not be charged under this section. Such behaviour might instead amount to an offence under section (15)(2) (negligently performing a duty).

Section 13 - Contravention of standing orders

<p>13 Contravention of standing orders</p> <p>(1) A person subject to service law, or a civilian subject to service discipline, commits an offence if–</p> <p> (a) he contravenes a lawful order to which this section applies; and</p> <p> (b) he knows or could reasonably be expected to know of the order.</p> <p>(2) This section applies to standing orders, and other routine orders of a continuing nature, of any of Her Majesty's forces, made for any–</p> <p> (a) part of Her Majesty's forces;</p> <p> (b) area or place; or</p> <p> (c) ship, train or aircraft;</p> <p>but paragraph (a) of this subsection does not apply in relation to a civilian subject to service discipline.</p> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.13)</p>
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1. Type of offence

An offence under this section **may be** heard summarily²⁶.

2. Specimen charges

CONTRAVENTION OF STANDING ORDERS CONTRARY TO SECTION 13(1) OF THE ARMED FORCES ACT 2006

[AB] on, contravened order number 21 of RAF Station LITTLE SNORING Standing Order Serial Number 1 dated 1 January 2009, an order known to him or which he might reasonably be expected to have known, by entering the female accommodation which had been placed out of bounds by the said order.

3. Ingredients of the offence

A person subject to Service law/a civilian subject to Service discipline

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Contravenes

To contravene a lawful order means to breach or disobey an order.

Lawful order

An order is lawful if:

- a. It is within the authority of the person giving it;

²⁶ Section 53 of the Act.

- b. It is for a proper Service purpose;
- c. It is possible for the command to be carried out; and
- d. It is not contrary to UK domestic law, International Law or relevant local law.

As to the power of British overseas territory force officers to give lawful orders see section 369(2) of the Act.

Knows or could reasonably be expected to know

It must be shown that the order contravened was known to the accused, or that he might reasonably be expected to know of it. The test of reasonable expectation is an objective one however there must have been some obvious requirement imposed on the individual for them to familiarise themselves with any standing orders before they can be charged with contravention under this offence. Evidence must be produced on this point so that the person hearing the charge can satisfy himself that the accused either did know or could reasonably be expected to know.

Her Majesty's forces

Consist of Her Majesty's naval, military and air forces.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The following defences may be available:

Lack of knowledge.

It is open to the accused to raise the defence that the order was not known to him and he could not reasonably have been expected to know it. This might be particularly relevant where the accused has only been at the unit for a few days or is only visiting temporarily.

If an accused genuinely made a mistake and misunderstood the standing order he may have a defence.

5. Notes

Standing and routine orders are made in a number of ways and for a number of purposes. These will include unit, formation and tri-Service orders. It will not be unusual for personnel to be subject to more than one set of orders at one time.

Orders must be drafted so that it is clear to whom they apply. Visiting Service persons or civilians should have any relevant orders drawn to their attention. It is usual for them to be asked to read a copy of the relevant orders and sign a statement that they have read them.

Evidence must be produced to prove that the orders were published as required and that the individual knew or could reasonably be expected to have known of them.

The original or certified copy of any order made in a Service book or other document in pursuance of any Service duty to which this offence relates (purporting to be signed by the CO of the accused or by some other person whose duty it was to make the entry) must be given in evidence.

Where standing orders are applicable to civilians subject to Service discipline it must be clear (by appropriate drafting and notice) who is expected to obey different orders.

This section applies to standing and routine orders of a continuing nature but does not apply to orders that only apply to a single occasion. A breach of the latter should be charged under section 12 (disobedience to lawful commands).

Section 14 - Using force against a sentry

<p>14 Using force against a sentry etc</p> <p>(1) A person subject to service law commits an offence if–</p> <p> (a) he uses force against a member of any of Her Majesty's forces, or of any force co-operating with them, who is–</p> <p> (i) on guard duty and posted or ordered to patrol;</p> <p> (ii) on watch; or</p> <p> (iii) under orders to regulate traffic by land, water or air; or</p> <p> (b) by the threat of force he compels such a person to let him or any other person pass.</p> <p>(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p>	<p>(AFA06 s.14)</p>
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1. Type of offence

An offence under this section **may be** heard summarily²⁷.

2. Specimen charges

USING FORCE AGAINST A PERSON ON GUARD DUTY CONTRARY TO SECTION 14(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on, used force against [CD], The Loamshire Rifles, who was on guard duty and posted as the main gate sentry.

USING FORCE AGAINST A PERSON ON GUARD DUTY CONTRARY TO SECTION 14(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on, used force against [CD] who was on watch on the gangway of HMS TENACIOUS as Quarter Master of the middle watch.

COMPELLING A PERSON ON GUARD DUTY TO LET A PERSON PASS CONTRARY TO SECTION 14(1)(b) OF THE ARMED FORCES ACT 2006.

[AB] on, compelled [CD] of the United States Army, a member of a force co-operating with Her Majesty's forces who was the sentry on guard duty and posted on the north bridge, to let him pass by threatening to strike the said soldier with a crowbar.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

²⁷ Section 53 of the Act.

Uses force

For a charge under subsection (1)(a) it is sufficient to show that the accused used force against a guard. This includes for example pushing, striking, punching, kicking, head-butting, biting etc.

It must be proved that the person against whom the accused used force was one of those persons detailed in subsection (1)(a)(i), (ii) or (iii) and evidence must be adduced to support this.

Co-operating force

This applies to a military force that is co-operating with one of Her Majesty's forces. This will occur when, for example, the forces are participating together in an exercise or operation under a formal agreement.

The threat of force

For a charge under subsection (1)(b) the threat of force must be such that the person threatened could reasonably expect that force was about to be used. This might be inferred either from the character of the threat or from the surrounding circumstances. In addition the threat of force must be such that it compels a guard to let him or another person pass. This is so even where the accused or other person does not in fact gain entry to the establishment.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

This offence recognises the vital role that is played by members of the guard force and those undertaking similar duties. It is specifically designed to protect such personnel when they are subjected to violence, or the threat of violence, because of the duty they are undertaking. However, if the offence is more serious because, for example the guard has sustained serious injury, it will be more appropriate to charge a criminal conduct offence under section 42 of the Act.

It is possible for this offence to be committed even where the accused was drunk. For voluntary intoxication see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Section 15 - Failure to attend for, or perform, duty

- 15 Failure to attend for or perform duty etc
- (1) A person subject to service law commits an offence if, without reasonable excuse, he—
- (a) fails to attend for any duty;
 - (b) leaves any duty before he is permitted to do so; or
 - (c) fails to perform any duty.
- (2) A person subject to service law commits an offence if he performs any duty negligently.
- (3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.15)

1. Type of offence

An offence under this section **may be** heard summarily²⁸.

2. Specimen charges

FAILING TO ATTEND FOR A DUTY CONTRARY TO SECTION 15(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on, without reasonable excuse, failed to attend the Working Parade at 0830 hrs, being a parade it was his duty to attend.

LEAVING A DUTY CONTRARY TO SECTION 15(1)(b) OF THE ARMED FORCES ACT 2006.

[AB] on, without reasonable excuse, and before he was permitted to do so left a muster of the fire and emergency party, a muster which it was his duty to attend.

FAILING TO PERFORM A DUTY CONTRARY TO SECTION 15(1)(c) OF THE ARMED FORCES ACT 2006.

[AB] on, when chief clerk at Battalion Headquarters 1st Battalion, the Welsh Rangers, failed, without reasonable excuse, to ensure that the daily rations state (Army form F711) for that day was completed as his duty required him to do.

NEGLIGENTLY PERFORMING A DUTY CONTRARY TO SECTION 15(2) OF THE ARMED FORCES ACT 2006.

[AB] on....., on date, did negligently perform his duty whilst handling a service rifle by causing the unintended discharge of [a] round[s].

²⁸ Section 53 of the Act.

NEGLIGENTLY PERFORMING A DUTY CONTRARY TO SECTION 15(2) OF THE ARMED FORCES ACT 2006.

[AB] between and when caterer of the Sergeants' Mess at RAF LITTLE SNORING, negligently performed his duty in that he was unable to properly balance the catering account.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and Time Limits).

Without reasonable excuse (offences under subsection (1) only)

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The onus is on the accused to raise the issue that he has a reasonable excuse. Where he does so (or the evidence suggests it) it is for the officer hearing the charge to be satisfied beyond reasonable doubt that there was no reasonable excuse for the alleged misconduct of the accused. If he cannot be satisfied beyond reasonable doubt he must find the charge not proved.

For example, if an accused claims to have had a reasonable excuse that he did not know of the duty it is for the officer hearing the charge to determine whether he did know or ought to have known of that duty in the circumstances. To do so he should take into account whether a relevant order was posted on an appropriate notice board or computer etc to which he had access and where he could and ought to have seen it; or that an order was given to him orally.

Fails to attend (offences under subsection (1) only)

The accused must have failed to attend for the duty. Attend means presence at the right place and the right time. Where there is a failure to attend a regular duty (e.g., attendance in an office for work) for which there is no specific order there should be evidence from the accused's superior officer of the practice regarding time and place for attendance for work.

Duty

This means the normal professional duties of the person subject to Service law, plus any other duties incidental to Service life. This includes, but is not limited to:

- a. Any duty to attend at a particular place or muster/parade.
- b. Any duty imposed on an accused because he is acting in some specific capacity (e.g., mess treasurer or officer of the watch)
- c. Any duty arising from some order given to the accused or applicable to him
- d. Any duty arising from the accused's rank or rating.

Fails to perform any duty (offences under subsection (1) only)

This covers the situation where the accused does not perform the duty at all.

Negligently performs a duty (an offence under subsection (2) only)

For negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

A description of the failure or negligence, sufficient to let the accused know what the charge is about, must be included in the particulars of the charge.

Charges under subsection (1)(a) should not state the offence as absence from a place of duty. The mischief of this offence is not absence without leave but the missing of a particular duty. If a person fails to attend for a protracted period or leaves and fails to return for a protracted period, consideration should be given to a charge under section 9 (absence without leave) as an alternative to subsections (1)(a) or (b).

Charges under subsection (1) should be reserved for cases where such a specific duty is placed upon the accused - where no specific duty has been placed upon him any act or omission which would be to the prejudice of good order and Service discipline may be charged under section 19 (conduct prejudicial to good order and discipline) or otherwise section 13 (contravention of standing orders). Where the allegation is that the accused failed to comply with a lawful command the appropriate charge would be one contrary to section 12 (disobedience to lawful commands) rather than under this section.

A charge under subsection (2) may sometimes usefully form an alternative to a charge involving dishonesty in appropriate circumstances.

When there is more than one occasion of failing to attend a parade, each must be charged separately and not combined into one charge.

Section 16 - Malingering

<p>16 Malingering</p> <p>(1) A person subject to service law commits an offence if, to avoid service–</p> <ul style="list-style-type: none">(a) he pretends to have an injury;(b) by any act he causes himself an injury;(c) by any act or omission he aggravates or prolongs any injury of his; or(d) he causes another person to injure him. <p>(2) A person subject to service law commits an offence if, at the request of another person subject to service law (“ B”) and with the intention of enabling B to avoid service–</p> <ul style="list-style-type: none">(a) by any act he causes B an injury; or(b) by any act or omission he aggravates or prolongs any injury of B. <p>(3) In this section–</p> <p>“injury” includes any disease and any impairment of a person’s physical or mental condition, and the reference to injuring is to be read accordingly;</p> <p>“service” includes any particular duty or kind of duty.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.16)</p>
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1. Type of offence

Any offence under **subsection (1)(a)** and **subsection (1)(c)** (committed by omission) **may be** heard summarily²⁹. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

All other offences under this section **may not be** heard summarily³⁰. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, reference should be made to an appropriate staff legal adviser at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

MALINGERING CONTRARY TO SECTION 16(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to avoid Service pretended that he was suffering from a sprained ankle.

MALINGERING CONTRARY TO SECTION 16(1)(b) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to avoid Service injured himself by omitting to apply sun-screen.

MALINGERING CONTRARY TO SECTION 16(1)(c) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to avoid Service prolonged the injury from which he was suffering from by failing to take prescribed medicine for that injury.

²⁹ Section 53 of the Act.

³⁰ Section 53 and Schedule 2 of the Act.

MALINGERING CONTRARY TO SECTION 16(1)(d) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to avoid Service caused [CD] to injure him by placing his foot in a position to be injured after asking [CD] to run over his foot in a motor vehicle.

MALINGERING CONTRARY TO SECTION 16(2) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to enable [CD] to avoid Service at the request of [CD] shot [CD] in the right foot.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Pretends

Pretends should be given its normal dictionary meaning.

Injury

See subsection (3); the injury may either be temporary or permanent.

To avoid service

See subsection (3).

Intention

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There was no intention to avoid Service.

The injury is real and/or caused by accident.

5. Notes

The charge should show the precise way in which the accused is alleged to have malingered.

The contracting of a venereal disease or failure to report it, or the failure of an injured person to cease sporting activity on medical advice so prolonging the injury, cannot be charged under this section unless it is done with the intention of avoiding Service. In such cases however, consideration may be made for charging under section 12 (disobedience to lawful commands), section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline).

Offences under this section may only be committed by persons subject to Service law. Where an accused causes another person to injure him, he will have committed an offence

under subsection (1)(d). The other person will only have committed an offence if they are also subject to Service law.

Section 17 - Disclosure of information useful to an enemy

17 Disclosure of information useful to an enemy

- (1) A person subject to service law commits an offence if–
- (a) without lawful authority, he discloses information that would or might be useful to an enemy; and
 - (b) he knows or has reasonable cause to believe that the information would or might be useful to an enemy.
- (2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.17)

1. Type of offence

An offence under this section **may be** heard summarily³¹.

2. Specimen charge

DISCLOSING INFORMATION CONTRARY TO SECTION 17(1) OF THE ARMED FORCES ACT 2006.

[AB] on, when speaking on an insecure military telephone network, without lawful authority disclosed the order of battle of, information relating to a matter upon which information would or might be useful to an enemy and knowing or having reasonable cause to believe that the said information would or might be useful to an enemy.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Without lawful authority

It will need to be proved that the accused did not have lawful authority. Lawful authority means express or implied permission to disclose information to another party.

Discloses

Discloses requires some positive act by the accused such as telling, revealing or showing the information to some other party. Where the information falls into the hands of a third party as a result of an accidental act on the part of an accused, for example by leaving a briefcase containing documents that would be useful to the enemy on a train, this would not amount to an offence under this section, although it may well amount to an offence contrary to section 15(2) (neglect of duty).

Information that would or might be useful

The offence requires it to be proved that the information disclosed would or might be useful to an enemy. This is an objective test. The information disclosed may not be useful to an

³¹ Section 53 of the Act.

enemy if it is already within the public domain. The information need not be true or accurate, nor reach the enemy or his agents.

Knows or has reasonable cause

The offence also requires it to be proved either that an individual knew or had reasonable cause to believe that the information would or might be useful. If the knowledge of the accused cannot be proved, it is sufficient to prove that the accused had reasonable cause to believe that the information would or might be useful to an enemy. This is an objective test.

For example, where a Service person writes to a friend and discloses information about equipment shortages this would be an offence if he knew or had reasonable cause to believe it contained information which would or might be useful to an enemy.

Enemy

For *enemy* see section 374 of the Act.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 18 - Making false records

18 Making false records etc

- (1) A person subject to service law commits an offence if–
 - (a) he makes an official record, knowing that it is false in a material respect; and
 - (b) he knows or has reasonable cause to believe that the record is official.
- (2) A person who adopts as his own a record made by another person is for the purposes of subsection (1) to be treated, as well as that other person, as making the record.
- (3) A person subject to service law commits an offence if–
 - (a) with intent to deceive, he tampers with or suppresses an official document; and
 - (b) he knows or has reasonable cause to believe that the document is official.
- (4) A person subject to service law commits an offence if–
 - (a) with intent to deceive, he fails to make a record which he is under a duty to make; and
 - (b) he knows or has reasonable cause to believe that the record would, if made, be official.
- (5) For the purposes of this section–
 - (a) “record” means a document or an entry in a document;
 - (b) “document” means anything in which information is recorded;
 - (c) a record or document is official if it is or is likely to be made use of, in connection with the performance of his functions as such, by a person who holds office under the Crown or is in the service of the Crown.
- (6) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.18)

1. Type of offence

An offence under this section **may be** heard summarily³².

2. Specimen charges

MAKING A FALSE OFFICIAL RECORD CONTRARY TO SECTION 18(1) OF THE ARMED FORCES ACT 2006.

[AB] on, when orderly officer of 1st Battalion the Blankshire Regiment made a written report, an official record, which was to his knowledge false in a material respect, in that it purported to show that he had turned out the guard of the said unit twice during his tour of duty, knowing or having reasonable cause to believe the said written report was an official record.

³² Section 53 of the Act.

TAMPERING WITH AN OFFICIAL DOCUMENT CONTRARY TO SECTION 18(3) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to deceive, suppressed the imprest account of A Company, 1st Battalion the Blankshire Regiment, an official document by burning it, knowing or having reasonable cause to believe the said document was an official document.

FAILING TO MAKE AN ENTRY IN AN OFFICIAL RECORD CONTRARY TO SECTION 18(4) OF THE ARMED FORCES ACT 2006.

[AB] on, with intent to deceive, failed to make a record which it was his duty to make in the daily stock book of the RAF LITTLE SNORING Sergeants' Mess, namely the receipt of 4000 cigarettes, knowing or having reasonable cause to believe the said record of receipt would, if made, have been official.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Makes an official record

A false record may be made by omitting a material particular from it; a person who signs a document or record which is not otherwise false with another's name makes a false record. If a person signs a blank form with the intention it will be filled in by another person in a manner which will be false in a material respect the charge of making a false official record would be found proved. A person who signs their own name when they are not entitled to sign makes a false record.

Knowing that it is...

For the purpose of an offence under subsection (1) it is not necessary to prove that the accused acted with intent to deceive but only that he knew at the time when he did the alleged act that the record, document or entry was false in a material respect.

Material respect

A material respect is one likely to play a part in influencing the minds of those whose duty may require them to consider the whole document. An example is a false entry on a claim for expenses which would be likely to play a part in influencing the decision to allow or disallow the claim.

Knows or has reasonable cause to believe

The offence will only be proved if a person knows or has reasonable grounds for believing that the record is official (for definition of when a record or document is official see subsection (5)(c) above).

Belief should be given its normal dictionary meaning, and what is a reasonable cause to believe is for the officer hearing the charge to decide. The officer hearing the charge can imply from the surrounding circumstances of the case, what would have been within the knowledge of the accused. In doing so he would wish to consider the Service experience of the accused, relevant training and time in post.

Official record/official document

See subsection (5). Documents are not just paper documents but any record of information in any form including computer records. Making a false entry into JPA would come within subsection (1). Documents such as reports, returns, pay lists, certificates and supporting vouchers to official financial transactions are all official records, as are documents relating to Service funds. This offence is not limited to MOD or Service documents. In theory it could be used to deal with other official forms such as tax forms however in practice a charge under this section should only be considered if there is some Service connection.

Adopts as his own

It is not the case that every person who signs a document adopts it as his own. For example a travel form that is countersigned as being correct to the best of the individual's knowledge and belief is not a form that will have been adopted by that counter-signing officer. The mischief in adopting a document as his own comes with the individual knowing that the document is false in a material respect. For example if an individual countersigns a document knowing that it is false in a material respect then he will have adopted it as his own. He may then be charged as well as the originator under subsection (1).

With intent to deceive

In subsections (3) and (4) intent should be given its normal dictionary meaning. To deceive is to induce a person to believe that a thing is true when it is false and which the person practising the deceit knows or has reasonable cause to believe is false.

Tampers with or suppresses a document

It must be proved that either the whole or part of the document was deliberately altered, destroyed, removed or otherwise tampered with or suppressed. This should be such that it affects the document sufficiently so that a deceit is carried out. The words false in a material respect have no application here.

Fails to make a record

This includes a failure to make out any document or record at all when there is a duty to make such a document.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It would be a defence that the accused was not responsible for the making of the record or tampering with it.

If a charge of failing to make a record is alleged the accused may contend he was not under a duty to make it.

Where intent to deceive is required the accused may argue he had formed no such intent but that his actions owed more to an honest mistake or even incompetence on his part.

5. Notes

A false record or document may be made by omitting a material particular from it.

Altering an official travel warrant could be charged under this section.

A charge under this section does not necessarily have to involve financial gain. If dishonesty in respect of financial gain can be proved then an offence under section 42 of the Act should be considered for example a charge relating to theft, forgery or fraud.

A person who has signed or otherwise adopted as his own a document made by another shall be treated as well as that other, as the maker of the document (see subsection (2)).

Section 19 - Conduct prejudicial to good order and discipline

19 Conduct prejudicial to good order and discipline

- (1) A person subject to service law commits an offence if he does an act that is prejudicial to good order and service discipline.
- (2) In this section “act” includes an omission and the reference to the doing of an act is to be read accordingly.
- (3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.19)

1. Type of offence

An offence under this section **may be** heard summarily³³.

2. Specimen charges

CONDUCT PREJUDICIAL TO GOOD ORDER AND SERVICE DISCIPLINE CONTRARY TO SECTION 19(1) OF THE ARMED FORCES ACT 2006

[AB] on, wore the rank of Lieutenant on his uniform, a rank of which he was not entitled to wear.

CONDUCT PREJUDICIAL TO GOOD ORDER AND SERVICE DISCIPLINE CONTRARY TO SECTION 19(1) OF THE ARMED FORCES ACT 2006

[AB] on, was in possession of 1 pair of boots, the property of [CD] without his permission.

3. Ingredients of offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Prejudicial to

It does not have to be shown that good order and Service discipline is actually affected. Conduct of the accused which is either harmful or likely to be harmful can therefore, be said to be prejudicial.

Good order and Service discipline

To be punishable under this section, conduct must be prejudicial to *both* good order *and* to Service discipline.

Good order has a wide meaning, encapsulating good order as would be understood in civilian life and applicable to civilians. Conduct by a Service person which is prejudicial to

³³ Section 53 of the Act.

good order may not necessarily be prejudicial to Service discipline however it is accepted that every act which is prejudicial to Service discipline is also prejudicial to good order.

Any conduct by an individual which breaches good order will adversely affect Service discipline if it has a direct bearing on the unit to which the offender belongs. However, an officer who creates a disturbance when he is away from his unit and in civilian clothes may have displayed conduct to the prejudice of good order but not necessarily of Service discipline.

Criminal conduct offences should be charged under section 42 of the Act and must not be charged under this section unless the character of the alleged offence is essentially prejudicial to Service discipline. For example, driving a vehicle in a manner dangerous to the public on the highway is not necessarily prejudicial to Service discipline; but, if it were a Service vehicle, such driving might well be prejudicial and could be charged under this section if, for some reason, it is inadvisable or impossible to charge it under another section such as section 42 of the Act.

A charge cannot be proved for an offence against this section unless the following are proved:

- a. The conduct (act or omission) on his part, as specified in the particulars of charge.
- b. The conduct, considered objectively, had the character of being prejudicial to good order and Service discipline.
- c. The accused intended to act (or omitted to act) as he did or had been reckless whether he was so acting (or omitting to act).
- d. There may be an additional element that must be proven where the wording of the charge imports an extra element e.g. the *lying* to a superior officer.
- e. If the first three, or if appropriate four, elements of the offence are proved, it is *no defence* for the accused to assert that he *did not know* that his conduct was likely to prejudice good order and Service discipline.

To establish a charge under this section there must be either a definite dereliction of a Service duty on the part of the accused, or at least some reasonably direct connection between the accused's behaviour and its effect on good order and discipline.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Any conduct which amounts to a Service offence should be charged under whichever section is appropriate. Negligent discharge of a weapon during an unload procedure should be charged as negligent performance of a duty³⁴. Whilst there may be no legal objection to any conduct which is prejudicial being charged under this section, it should not be used where there is a more appropriate alternative Service offence or for example to merely circumvent a defence which might otherwise have been available to the accused. E.g. contravention of

³⁴ Section 15(2) of the Act.

standing orders should not be charged under this section merely to deprive the accused of the defence that he knew or could reasonably be expected to know of the order.

If a series of acts or omissions are all part of one transaction they can be charged in one charge; otherwise they must be separate charges.

Section 20 - Unfitness or misconduct through alcohol or drugs

20 Unfitness or misconduct through alcohol or drugs

- (1) A person subject to service law commits an offence if, due to the influence of alcohol or any drug—
- (a) he is unfit to be entrusted with his duty or any duty which he might reasonably expect to be called upon to perform; or
 - (b) his behaviour is disorderly or likely to bring discredit to Her Majesty's forces.
- (2) Subsection (1) does not apply to the influence of a drug on a person (“ A”) if—
- (a) the drug was taken or administered on medical advice and A complied with any directions given as part of that advice;
 - (b) the drug was taken or administered for a medicinal purpose, and A had no reason to believe that the drug might impair his ability to carry out the duties mentioned in subsection (1)(a) or (as the case may be) result in his behaving in a way mentioned in subsection (1)(b);
 - (c) the drug was taken on the orders of a superior officer of A; or
 - (d) the drug was administered to A on the orders of a superior officer of the person administering it.
- (3) In this section—
- (a) “drug” includes any intoxicant other than alcohol;
 - (b) a person's “behaviour” includes anything said by him.
- (4) In proceedings for an offence under this section, any paragraph of subsection (2) is to be treated as not having applied in relation to the defendant unless sufficient evidence is adduced to raise an issue as to whether it did.
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.20)

1. Type of offence

An offence under this section **may be** heard summarily³⁵.

2. Specimen charges

UNFITNESS OR MISCONDUCT THROUGH ALCOHOL OR DRUGS CONTRARY TO SECTION 20(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on, having taken cannabis was unfit to be entrusted with his duty as Guard Commander.

UNFITNESS OR MISCONDUCT THROUGH ALCOHOL OR DRUGS CONTRARY TO SECTION 20(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on, when drunk repeatedly swore at the guard.

³⁵ Section 53 of the Act.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Due to the influence of

The amount of alcohol or drugs taken is irrelevant. All that must be proven is that some alcohol or drugs were taken and this caused one of the four situations as listed in subsection (1) above, namely:

- a. He is unfit to be entrusted with his duty; or
- b. He is unfit to be entrusted with any duty he might reasonably expect to be called upon to perform; or
- c. His behaviour is disorderly; or
- d. His behaviour is likely to bring discredit to Her Majesty's forces.

Drug

Notwithstanding the definition at subsection (3)(a) this has a wide meaning and includes anything taken into the body which affects the control of the body.

Unfit to be entrusted

A further subjective test is applied. It does not have to be proved that the accused was in an unfit state however there is no requirement for the accused to be in an extreme condition; the officer hearing the charge simply has to be satisfied that he was unfit to be *entrusted* with a duty. A person in authority must form the opinion that the individual is unfit to be entrusted to perform a particular duty. That determination is not conclusive but is evidence of the accused alleged unfitness. The amount of alcohol or drug consumed is insufficient on its own to found a charge under subsection (1). The consumption must render the accused unfit to do his duty i.e. unable to carry out the duty in an acceptable manner.

Duty

This means the normal professional duties of the person subject to Service law, and any other duties incidental to Service life. This includes, but is not limited to:

- a. Any duty to attend at a particular place or muster/parade
- b. Any duty imposed on an accused because he is acting in some specific capacity (e.g., mess treasurer or officer of the watch)
- c. Any duty arising from some order given to the accused or applicable to him
- d. Any duty arising from the accused's rank or rating.

Might reasonably expect to be called upon to perform

A subjective test is applied. If the duty is a specific one particular to the accused, it must be proved that the accused had proper notice and knowledge of it. The expectation in respect

of normal duties is as laid down in terms of reference or relevant orders for example, Unit Orders, Part One Orders.

Disorderly

This should be given its normal dictionary meaning. It includes both verbal and physical misconduct.

Likely to bring discredit to Her Majesty's forces.

This is behaviour that falls below that standard which is expected of a Service person. The circumstances where the misconduct occurred must be where the public are likely to witness this conduct and the public must be aware that the accused is a member of Her Majesty's forces.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Subsection (2) specifies the circumstances in which an accused could be exonerated of a charge under **subsection (1)**, in relation to *drugs only*, provided sufficient evidence is offered to support the relevant circumstance(s).

Medical

Medical by its normal dictionary meaning includes the preserving or restoring of health as well as the treatment of illnesses and similar conditions.

If a drug is ordered to be taken directly or indirectly by a superior officer and the accused relies on **subsection (2)(c) or (d)** then the accused must believe that it was in accordance with medical advice and that he was complying with any such directions.

5. Notes

Any person may give evidence as to his opinion on whether the accused was under the influence of drugs or alcohol at the relevant time. As a matter of general principle this person should also qualify his reasons for holding such an opinion, e.g. because the accused's eyes were glazed, he was unsteady on his feet or he smelled of alcohol. This evidence need not be provided by medical personnel. However, if the accused has been examined by a medical officer in relation to an injury (for example, a head injury), that medical officer could be asked to provide his opinion as to whether other factors have caused his condition. If there is any suggestion that substances, other than alcohol (for example prescription drugs), have caused his condition then medical opinion will be required.

If an individual is suspected of having consumed illicit drugs, regardless of whether he has behaved in one of the four ways in subsections (1)(a) and (1)(b) the Service Police should be called upon to investigate the circumstances further. If there is evidence of use of illicit drugs, consideration should be given to bringing a charge under section 42 of the Act (Possession of a controlled drug contrary section 5(2) of the Misuse of Drugs Act 1971).

If an individual's conduct suggests that he may be charged with another more serious offence whilst under the influence of alcohol, the other offence should be considered first and it may be that the drunkenness is considered as either an additional offence or as an aggravating feature of the first offence. Drunkenness in these circumstances can only be

charged if there is a separate factual basis for doing so, for example a Service person is arrested for drunkenness and subsequently assaults the arresting officer.

Section 21 - Fighting or threatening behaviour, etc.

21 Fighting or threatening behaviour etc

- (1) A person subject to service law commits an offence if, without reasonable excuse, he fights another person.
- (2) A person subject to service law commits an offence if—
 - (a) without reasonable excuse, his behaviour is—
 - (i) threatening, abusive, insulting or provocative; and
 - (ii) likely to cause a disturbance; and
 - (b) he intends to be, or is aware that his behaviour may be, threatening, abusive, insulting or provocative.
- (3) For the purposes of this section a person's “behaviour” includes anything said by him.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.21)

1. Type of offence

An offence under this section **may be** heard summarily³⁶.

2. Specimen charges

FIGHTING CONTRARY TO SECTION 21(1) OF THE ARMED FORCES ACT 2006

[AB] on, without reasonable excuse fought with [CD] of The Broadback Yeomanry.

USING THREATENING, ABUSIVE, INSULTING OR PROVOCATIVE BEHAVIOUR,
CONTRARY TO SECTION 21(2) OF THE ARMED FORCES ACT 2006

[AB] on, without reasonable excuse threw the contents of his beer glass in the face of [CD] being provocative behaviour likely to cause a disturbance.

3. Ingredients of offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Without reasonable excuse.

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The onus is on the accused to raise the defence that he has a reasonable excuse. Where he does so (or the evidence suggests it) it is for the officer hearing the charge to be satisfied beyond reasonable doubt that there was no reasonable excuse for the alleged misconduct of the accused. If he cannot be satisfied he must find the charge not proved.

³⁶ Section 53 of the Act.

For example, an accused may claim that he had a reasonable excuse because: he was acting in self-defence; or he got involved in order to try to stop the commission of an offence; or he had mistakenly but honestly believed he was under threat. If the officer considers that an accused had or may have had a reasonable excuse he must dismiss the charge.

Fights

Fight is given its normal dictionary meaning, (i.e. a person taking part in a struggle or contention), and as to whether a fight has occurred is a question of fact for the officer hearing the charge. It must be proved that an accused intended to fight. If both parties were merely engaging in 'horseplay' this may not amount to an offence under subsection (1). If the accused struck another who did not retaliate there would be no fight (but a charge of assault may be brought under section 42). A fight between the accused and any other person is covered by the section (it is not necessary that the other person should be another member of Her Majesty's forces therefore one person can be charged with fighting).

Threatening, abusive, insulting or provocative

It is necessary to identify the way in which the offence under subsection (2) was committed for the purposes of framing the charge. Only one of these types of behaviour should be used for a charge. Where more than one of these types of behaviour is present, an accused may be charged with separate offences arising out of different acts occurring during the same incident.

Whether an accused's behaviour amounts to any one (or more) of these is a question of fact for the particular circumstances of each case, having regard to the normal dictionary meanings of these words. However *threatening* relates only to circumstances where violence is threatened and does not include disrespectful behaviour. *Provocative* means challenging and/or confrontational and is not merely insulting.

Likely to cause a disturbance

The behaviour does not have to have actually caused a disturbance but, in the circumstances, it must be likely that a disturbance could occur. This is wider than causing harassment or alarm to an individual. Whether the behaviour is likely to have caused a disturbance is an objective test.

4. Defences

For defences generally and more on voluntary intoxication see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Voluntary intoxication

If it is considered that an accused was so drunk or under the influence of drugs that he could not have formed an intention to fight then the charge must be dismissed. This will involve taking into consideration whether the accused voluntarily consumed alcohol and whether he was able and in fact did form the necessary intent at the time. A drunken or drugged intent nevertheless is still an intent.

5. Notes

If excessive force is used in an alleged fighting charge the accused should be charged with another offence, for example under section 42 of the Act (criminal conduct - assault or battery).

If an accused is charged with fighting it is not a defence to claim that the other party gave their consent to the fighting. If that were the case the other party could also be charged with fighting.

Section 22 - Ill-treatment of subordinates

22 Ill-treatment of subordinates

- (1) A person subject to service law who is an officer, warrant officer or non-commissioned officer commits an offence if–
- (a) he ill-treats a subordinate (“ B”);
 - (b) he intends to ill-treat B or is reckless as to whether he is ill-treating B; and
 - (c) he knows or has reasonable cause to believe that B is a subordinate.
- (2) For the purposes of this section a person (“ B”) is a subordinate of another person (“ A”) if–
- (a) B is subject to service law; and
 - (b) A is a superior officer of B.
- (3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.22)

1. Type of offence

An offence under this section **may be** heard summarily³⁷. However if this offence is committed in circumstances of a prescribed nature³⁸ then the instructions in [Chapter 6](#) (Investigation, charging and mode of trial) must be adhered to. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge.

ILL-TREATMENT OF A SUBORDINATE CONTRARY TO SECTION 22(1) OF THE ARMED FORCES ACT 2006

[AB] on, ill-treated [CD], whom he knew or had reasonable cause to believe was a subordinate.

3. Ingredients of offence.

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

As this offence can only be committed by an officer, warrant officer or NCO this means that it cannot be committed by personnel below the ranks of leading rate, lance corporal or corporal (RAF).

Ill treats

³⁷ Section 53 of the Act.

³⁸ Section 114 of the Act.

Ill treatment is to be given its normal dictionary meaning of treating badly or cruelly. A series of minor actions against a victim, which would in themselves not amount to offences of assault, might amount to ill treatment. Ill treatment includes but is not limited to physical force. Bullying or frightening may suffice, as may behaviour or treatment that is unnecessarily harsh or which degrades or humiliates another person. Whether conduct amounts to ill-treatment is a question of fact for the person hearing the charge to decide on the circumstances of each case.

A subordinate

In order to be a subordinate the victim must be subject to Service law and the accused must be his superior officer³⁹. This offence, therefore, cannot be committed by or against a civilian. For example a military instructor would not be able to be charged under this section where the victim was a civilian trainee. Staff legal advice should be sought on other appropriate charges.

Superior officer, means an officer, warrant officer or non-commissioned officer who is subject to Service law and who is a superior rank or rate to the victim or is of equal rank or rate to him and is exercising authority as his superior.

It does not matter, therefore, whether the superior officer is of the same or different Service to the victim, providing that the superior officer is also subject to Service law. This would include Service personnel from other nations when they are posted to serve with UK forces and become subject to Service law, but would not include, for example, coalition forces or other nations' personnel alongside whom UK Service personnel happen to be working.

A person of a higher rank or rate than the victim will always be his superior officer under the Act. In addition there can be occasions when someone of the same rank or rate as the accused will be his superior officer. This would **not** apply in the case of those of the lowest rank and rates in each Service: a private, able rate (or below) and airman (AC, LAC and SAC) can never be the superior officer of another private, able rate (or below) or airman. All other ranks or rates can become the superior officer of another person of the same rank where he is *exercising authority as [the accused's] superior*. In order to be his superior officer however it must be an official entitlement to exercise authority over the other, such as having been tasked to carry out a temporary duty or a specific assignment which puts him in a position of authority over that other individual.

Intends

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Knows or had reasonable cause to believe that [the victim] is a subordinate

It is necessary that there was actual knowledge that the individual was a subordinate or that the accused had reasonable cause to believe he was a subordinate. Where the subordinate is of a different rank or rate to the accused and they belong to the same unit this should be sufficient to prove actual knowledge, because the person and his rank or rate was known to him. Similarly, if they were from different units but were both in uniform at the time of the offence this could impute actual knowledge.

³⁹ Section 374 of the Act

Where the subordinate is not known to the accused or was not in uniform it will be necessary to consider whether the accused knew in the circumstances that he was his subordinate, or whether he should have known. The test of whether he would have reasonable cause to believe is an objective one and should be judged on the evidence in the case. If the accused raises evidence on this, it is not for him to prove it. The person hearing the charge should consider all the evidence and decide, based on his view of the evidence, whether it has been shown that the accused knew or had reasonable cause to believe.

In cases where the individuals are of the same rank or rate as each other there should be evidence of the superior's authority which would indicate that the accused was aware that the victim was a subordinate.

If on the evidence, it is doubtful as to whether the accused knew or had reasonable cause to believe that the victim was his subordinate it may mean this offence should not be charged. However, consideration should be given as to whether any other offences have been committed (e.g. assault).

4. Defences.

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Consent to ill-treatment is no defence.

5. Notes.

Conduct that could amount to ill treatment may also amount to other disciplinary or criminal conduct offences, for example assault. Depending on the circumstances, another charge may be more appropriate. Before charging under this section staff legal advice should be sought.

Section 23 - Disgraceful conduct of a cruel or indecent kind

23	Disgraceful conduct of a cruel or indecent kind (1) A person subject to service law commits an offence if– (a) he does an act which is cruel or indecent; and (b) his doing so is disgraceful. (2) In this section “act” includes an omission and the reference to the doing of an act is to be read accordingly. (3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years. <p style="text-align: right;">(AFA06 s.23)</p>
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1. Type of offence

An offence under this section **may be** heard summarily⁴⁰.

2. Specimen charges

DISGRACEFUL CONDUCT OF A CRUEL KIND CONTRARY TO SECTION 23(1) OF THE ARMED FORCES ACT 2006

[AB] on, held a cat by the hind legs and repeatedly beat it against a wall.

DISGRACEFUL CONDUCT OF AN INDECENT KIND CONTRARY TO SECTION 23(1) OF THE ARMED FORCES ACT 2006

[AB] on, removed all his clothing and said to [CD], “Come on, let’s see what a man can do to you with some real equipment”, or words to that effect.

3. Ingredients of the offence.

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Does an act

It is a question of fact whether the accused does an act for the purpose of this offence. By virtue of subsection (2) *does an act* also includes an omission to act. For example, a person who accidentally traps an animal in a door will act cruelly if on realising this, he fails to open the door and release the animal.

Cruel or indecent

These terms are to be given their normal dictionary meaning. Whether an act is cruel or indecent must be assessed using the objective test. When making the assessment the officer hearing the charge should consider the circumstances in which the act or omission occurred. Thus, an act of sexual nature that occurs in private with the consent of persons

⁴⁰ Section 53 of the Act.

present and where such persons are old enough to give consent will not generally be regarded as indecent.

And ...is disgraceful

Disgraceful must be given its normal dictionary meaning. It is insufficient to prove that the conduct in question was cruel or indecent. It must also be proved that the circumstances, motive of the accused or other factors make it disgraceful. For example, killing an animal may involve cruelty but the circumstances, such as obtaining food to survive, would prevent the conduct amounting to an offence. Similarly, removing one's clothes would require an objective test to be applied when considering whether the conduct in question is disgraceful.

4. Defence.

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes.

Consideration should be given to the professional responsibilities or obligations of the accused i.e. where a soldier has responsibility for the care of animals and he acts in a negligent way whereby the act constitutes cruelty he should be charged under this section rather than section 15 (failure to attend for, or perform, duty).

Where the alleged conduct may amount to a criminal conduct offence under section 42 of the Act, for example sexual assault, legal advice should be obtained before any charge under this section is considered. The act(s) or omission(s) alleged to constitute the disgraceful conduct must be included in the particulars of charge.

It is possible for this offence to be committed even where the accused was drunk. For voluntary intoxication see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Section 24 - Damage to or loss of public or service property

<p>24 Damage to or loss of public or service property</p> <p>(1) A person subject to service law commits an offence if–</p> <p> (a) he does an act that causes damage to or the loss of any public or service property or any property belonging to another person subject to service law; and</p> <p> (b) either–</p> <p> (i) he intends to cause damage to or the loss of the property, and there is no lawful excuse for his act; or</p> <p> (ii) he is reckless as to whether he causes damage to or the loss of the property.</p> <p>(2) A person subject to service law commits an offence if–</p> <p> (a) negligently, he does an act that causes damage to or the loss of any public or service property; or</p> <p> (b) he does an act that is likely to cause damage to or the loss of any public or service property and–</p> <p> (i) he is reckless as to whether he causes damage to or the loss of the property; or</p> <p> (ii) he is negligent.</p> <p>(3) For the purposes of this section–</p> <p> (a) “act” includes an omission and references to the doing of an act are to be read accordingly;</p> <p> (b) references to causing include allowing;</p> <p> (c) “loss” includes temporary loss;</p> <p> (d) “property” means property of a tangible nature, and references to public or service property are to be read accordingly.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed–</p> <p> (a) in the case of an offence under subsection (1), ten years;</p> <p> (b) in the case of an offence under subsection (2), two years.</p> <p style="text-align: right;">(AFA06 s.24)</p>
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1. Type of offence

An offence under this section **may be** heard summarily⁴¹, however consideration should always be given as to whether Schedule 2 offences might apply, see [Chapter 6](#) (Investigation, charging and mode of trial). For example, damaging property with an intention to endanger life⁴² is listed in Schedule 2 of the Act. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence that the property in question might have been damaged with this intention and may have been committed under this section, he **must**, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

⁴¹ Section 53 Schedule 2 of the Act.

⁴² Criminal Damage Act 1971 section 1(2).

2. Specimen charges

DAMAGING OR LOSS OF PUBLIC OR SERVICE PROPERTY OR PROPERTY BELONGING TO ANOTHER PERSON SUBJECT TO SERVICE LAW CONTRARY TO SECTION 24(1) OF THE ARMED FORCES ACT 2006

[AB] on, damaged a Service vehicle registration number belonging to [name of unit] to the value of £....., by pouring water into the fuel tank of the said vehicle intending to damage or being reckless as to whether such vehicle would be damaged.

DAMAGING PROPERTY BELONGING TO ANOTHER CONTRARY TO SECTION 24(1) OF THE ARMED FORCES ACT 2006

[AB] on, threw a glass tankard belonging to [CD], a person subject to Service law, against a wall intending to damage such property or being reckless as to whether such property would be damaged; thereby causing damage to the said tankard to the value of £.....

NEGLIGENTLY DAMAGING PUBLIC PROPERTY CONTRARY TO SECTION 24(2) OF THE ARMED FORCES ACT 2006

[AB] on, negligently caused damage to a bivouac, belonging to the Secretary of State for Defence, by lighting a candle inside the bivouac and leaving the bivouac unattended, thereby causing damage to the said bivouac to the value of £.....

3. Ingredients of offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Does an act

It is a question of fact whether the accused *does an act* for the purpose of this offence. By virtue of subsection (3)(a) of the Act *does an act* also includes an omission to act. For example, a person who when legitimately refuelling a vehicle, omits to turn off the pump when the tank is full and instead allows the fuel to overflow will be causing a loss of the fuel.

Causes

The loss or damage alleged in the charge must have resulted from the alleged act of the accused. An omission is also capable of causing damage or loss. By virtue of **subsection (3)(b)** *causes* for these purposes includes *allowing*.

Damage to

This will include not only permanent or temporary actual damage but also permanent or temporary impairment of value or usefulness, such as installing a virus on a computer. For the purpose of offences charged under this section, damage also includes destruction of property.

Loss of

This will include temporary loss see subsection (4). In some circumstances a loss will be incurred because property has been irreparably damaged.

Property

To show the property belonged to another person who was subject to Service law, evidence must be given as to the identity of the owner and why this person was at the time subject the Service law. This offence cannot be committed where the property in question belongs to civilians subject to Service discipline.

Two other types of property are mentioned in this section, public property and Service property. Public property and Service property are defined in section 26 of the Act which provides:

26	Sections 24 and 25: “public property” and “service property” (1) This section applies for the purposes of sections 24 and 25. (2) “ Public property” means property belonging to or held for the purposes of– (a) a department of the Government of the United Kingdom; (b) any part of the Scottish Administration; (c) a Northern Ireland department; or (d) the National Assembly for Wales. (3) “Service property” means property– (a) belonging to or used for the purposes of any of Her Majesty's forces; (b) belonging to a Navy, Army and Air Force Institute; or (c) belonging to an association established, or having effect as if established, under section 110 of the Reserve Forces Act 1996 (c. 14) (reserve associations).	(AFA06 s.26)
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Intends

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Is likely to cause

An objective test will be applied. It must be shown that it was reasonably foreseeable that damage or loss was likely to occur in the circumstances: It is insufficient to merely show that there was a remote possibility of damage etc. This may be the case if it is the timely intervention of a third party that prevents loss or damage occurring.

Reckless

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligence

For negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful excuse. An accused will have a lawful excuse if, for example his normal duties required him to do something to the property that would result in its damage or loss. This is only available where the offence is alleged to have been committed intentionally.

5. Notes

In addition to the above, before a charge under section 24 of the Act is brought, consideration should be given as to whether there may be a more appropriate charge under section 42 of the Act, for example, arson for deliberate fire raising. Where the property has been damaged or destroyed a charge of criminal damage may be more appropriate. This might be the case where the property belonging to the person subject to Service law is totally unconnected with the Service. For example, where a Service person's personal television is damaged. However if a Service person's property is used in the Service context e.g. a personal rucksack or leatherman then an offence under this section should normally be charged. Where the allegation relates to offences under this section which involve *loss*, there may be no corresponding criminal conduct offence available. If there is any doubt staff legal advice should be sought.

It should be noted that this offence can be committed in a number of ways;

Causing damage to or the loss of property can be committed intentionally or recklessly to all three types of property (public, Service and property belonging to another person subject to Service law).

The offence can only be committed negligently in relation to public or Service property.

In addition it is possible to negligently or recklessly do an act which is likely to cause damage to or the loss of public or Service property. Service property includes such things as:

- a. Mess property (even if purchased with non-public funds) when it is property used for the purpose of Her Majesty's forces; or
- b. Any clothing, equipment, decorations *etc* issued to a Service person for his use for Service purposes.

It does not include property belonging to civilians subject to Service discipline.

Section 25 - Misapplying or wasting public or Service property

25 Misapplying or wasting public or service property

(1) A person subject to service law commits an offence if he misapplies or wastes any public or service property.

(2) A person guilty of an offence under this section is liable to any punishment mentioned in rows 2 to 12 of the Table in section 164.

(AFA06 s.25)

1. Type of offence

An offence under this section **may be** heard summarily⁴³.

2. Specimen charge

MISAPPLYING OR WASTING PUBLIC PROPERTY CONTRARY TO SECTION 25(1) OF THE ARMED FORCES ACT 2006

[AB] on, misapplied 10 fire buckets belonging to the RNAS [name] fire station, public property by using the said fire buckets to grow shrubs.

MISAPPLYING OR WASTING SERVICE PROPERTY CONTRARY TO - SECTION 25(1) OF THE ARMED FORCES ACT 2006

[AB] on, wasted Service property, namely 15 gallons of Service diesel fuel, to the value of £20.00, by allowing the said diesel to overflow the fuel tank.

3. Ingredients of offence

A person subject to service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Misapplies

Misapplies requires misconduct on the part of the accused. It is not sufficient for the accused to merely use the property in question he must also use it for an improper purpose. It is irrelevant whether the accused or any other person has benefited from the misapplication. The misapplication need not result in any actual loss to the Service.

Wasting

This term should be given its normal dictionary meaning. The act requires some form of misconduct. For example, a legitimate disposal would not be *wasting*; there must be some unnecessary loss to the Service.

⁴³ Section 53 of the Act.

Public property and Service property

Two types of property are mentioned in this section, public property and Service property. . Public property and Service property are defined in section 26 of the Act which provides (as below):

26	Sections 24 and 25: “public property” and “service property”
	(1) This section applies for the purposes of sections 24 and 25.
	(2) “Public property” means property belonging to or held for the purposes of–
	(a) a department of the Government of the United Kingdom;
	(b) any part of the Scottish Administration;
	(c) a Northern Ireland department; or
	(d) the National Assembly for Wales.
	(3) “Service property” means property–
	(a) belonging to or used for the purposes of any of Her Majesty's forces;
	(b) belonging to a Navy, Army and Air Force Institute; or
	(c) belonging to an association established, or having effect as if established, under section 110 of the Reserve Forces Act 1996 (c. 14) (reserve associations).
	(AFA06 s.26)

An offence under this section can be committed intentionally or recklessly. For intention and recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences.

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Mistake

An honest but mistaken belief by the accused that he has used or applied the property in a proper manner. Additionally, an accused will have a defence if he acted on the order of a superior and he honestly believed the order was lawful.

5. Notes.

In a Service environment, it is essential that public and Service property is protected from misapplication and waste.

Because an offender cannot be awarded a punishment of imprisonment, where the evidence suggests that the circumstances of the case are more serious, for example because the accused may have acted dishonestly, it may be more appropriate to bring a charge under section 42 of the Act for theft or other dishonesty offences. Similarly, where the accused is alleged to have acted negligently, consideration should be given as to whether an offence under section 15 (negligently performing a duty) might be brought. In cases of doubt, staff legal advice should be sought.

Property must always be of a tangible nature. It will include captured enemy property.

Service property includes such things as:

- a. Mess property (even if purchased with non-public funds) when it is property used for the purpose of Her Majesty's forces; or
- b. Any clothing, equipment, decorations *etc* issued to a Service person for his use for Service purposes.

It does not include property belonging to civilians subject to Service discipline.

Section 26 – Definition of public property or service property

This section has been incorporated into Section 24 and 25 to which it relates.

Section 27 - Obstructing or failing to assist a service policeman

- 27 **Obstructing or failing to assist a service policeman**
- (1) **A person within subsection (2) commits an offence if–**
- (a) **he intentionally obstructs, or intentionally fails to assist when called upon to do so, a person who is–**
- (i) **a service policeman acting in the course of his duty; or**
- (ii) **a person subject to service law lawfully exercising authority on behalf of a provost officer; and**
- (b) **he knows or has reasonable cause to believe that that person is a service policeman or a person exercising authority on behalf of a provost officer.**
- (2) **A person is within this subsection if he is–**
- (a) **a person subject to service law; or**
- (b) **a civilian subject to service discipline.**
- (3) **A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.**

(AFA06 s.27)

1. **Type of offence**

An offence under this section **may be** heard summarily⁴⁴.

2. **Specimen charges**

OBSTRUCTING A SERVICE POLICEMAN CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on, did obstruct [CD], a Service Policeman, by preventing the said Service policeman from entering [name] nightclub in Gosport.

OBSTRUCTING A PERSON LEGALLY EXERCISING AUTHORITY UNDER, OR ON BEHALF OF, A PROVOST OFFICER CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on, did obstruct [CD], a person lawfully exercising authority under, or on behalf of, a provost officer, by preventing the said non-commissioned officer from entering [name] nightclub in Worcester.

FAILING TO ASSIST A SERVICE POLICEMAN CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on, when called upon for assistance by [CD], a Service policeman, refused to assist the said Service policeman.

FAILING TO ASSIST A PERSON LEGALLY EXERCISING AUTHORITY UNDER, OR ON BEHALF OF, A PROVOST OFFICER CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

⁴⁴ Section 53 of the Act.

[AB] on, when called upon for assistance by [CD], a person legally exercising authority under, or on behalf of, a provost officer, refused to assist the said non-commissioned officer.

3. Ingredients of offence

A person subject to Service law/civilian subject to Service discipline

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Intentionally

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Obstructs

The obstruction must be a positive act. Standing by and doing nothing is not obstruction unless there is a legal duty to do something.

Fails to assist

Where a Service policeman actually calls upon a person for assistance and such a person then deliberately refrains from acting, this should be charged as failing to assist under this section. Failing to answer questions is not *failing to assist* or *obstruction*. However, in some circumstances a duty to answer a question or provide information may be imposed by statute e.g. Road Traffic Act 1988 section 174. In such circumstances the offence should be charged under the relevant statute.

Knows or has reasonable cause to believe

To find the offence proven, it is necessary for the accused to have known or had reasonable cause to believe that the person he obstructed or failed to assist was a Service policeman acting in the course of his duty, or a person subject to Service law lawfully exercising authority on behalf of a provost officer.

A person..... legally exercising authority under, or on behalf of, a provost officer

A person legally exercising authority under, or on behalf of, a provost officer includes all members of the Navy, Army or Royal Air Force when acting under the orders of a Naval, Military or Royal Air Force provost officer. It includes naval patrols exercising authority on behalf of a provost officer as defined above. Shore patrols do not exercise authority under this section unless they are acting under the orders of an officer appointed as Naval Provost Marshal, Provost Marshal (Army) or Provost Marshal (Royal Air Force).

Provost officer

A *provost officer* means a commissioned officer who is a Service policeman.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It is a defence for a person charged under this section to prove that he neither knew nor had reasonable cause to believe that the person in relation to whom the offence is alleged to

have been committed was a Service policeman nor a person acting under, or on behalf of, a provost officer. It is for the accused to introduce evidence of this in cases where this statutory defence is pleaded.

The burden of proof on the accused is on the balance of probabilities rather than beyond reasonable doubt.

For burden of proof generally see [Chapter 12](#) (Summary hearing – dealing with evidence).

Since it is for the accused to raise the above defence (by cross-examination or by giving or calling evidence) there is no obligation upon the officer hearing the charge to adduce evidence to rebut it until he has done so. However, in practice it is usual to elicit from witnesses called to prove the matters referred to in subsection (1)(a)(i) and (1)(a)(ii) above any additional evidence they can give to rebut this defence (e.g. that the person concerned was in uniform and identifiable as a member of the Service Police or that he was personally known to the accused).

5. Notes

Regimental police or coxswains do not normally exercise authority under provost officers and so to obstruct them would not be an offence under this section unless they were so acting but may be charged under other sections as appropriate.

Section 28 - Resistance to arrest etc

28	<p>Resistance to arrest etc</p> <p>(1) A person subject to service law (“ A”) commits an offence if another person (“ B”), in the exercise of a power conferred by or under this Act, orders A into arrest and–</p> <ul style="list-style-type: none">(a) A disobeys the order;(b) A uses violence against B; or(c) A's behaviour towards B is threatening. <p>(2) A person subject to service law, or a civilian subject to service discipline, commits an offence if–</p> <ul style="list-style-type: none">(a) he uses violence against a person who has a duty to apprehend him, or his behaviour towards such a person is threatening; and(b) he knows or has reasonable cause to believe that the person has a duty to apprehend him. <p>(3) For the purposes of this section–</p> <ul style="list-style-type: none">(a) a person's “ behaviour” includes anything said by him;(b) “threatening” behaviour is not limited to behaviour that threatens violence;(c) a “duty” to apprehend a person means such a duty arising under service law. <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.28)</p>
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1. Type of offence

An offence under this section **may be** heard summarily⁴⁵.

2. Specimen charges

DISOBEYING AN AUTHORISED PERSON WHO ORDERS HIM INTO ARREST
CONTRARY TO SECTION 28(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on, on being ordered into arrest by [CD], when he the accused was concerned in a disorder, disobeyed the said order.

USING VIOLENCE TOWARDS AN AUTHORISED PERSON WHO ORDERS HIM INTO
ARREST CONTRARY TO SECTION 28(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on, on being ordered into arrest by [CD], used violence against Flight Lieutenant Q Wings.

BEHAVING IN A THREATENING MANNER TOWARDS AN AUTHORISED PERSON WHO
ORDERS HIM INTO ARREST CONTRARY TO SECTION 28(1)(c) OF THE ARMED
FORCES ACT 2006

[AB] on, on being ordered into arrest by [CD], threatened [CD].

⁴⁵ Section 53 of the Act.

USING VIOLENCE TOWARDS AN AUTHORISED PERSON WHO HAS A DUTY TO APPREHEND CONTRARY TO SECTION 28(2) OF THE ARMED FORCES ACT 2006

[AB] on, on being apprehended used violence towards [CD].

3. Ingredients of the offence

A person subject to service law/civilian subject to service discipline

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

A person in the exercise of a power conferred by or under this Act

For those persons who have the power to arrest see [Chapter 4](#) (Arrest and search, stop and search, search, entry and seizure and retention).

Disobeys

Disobedience requires awareness of what is being disobeyed, so it must be shown that the order into arrest was clear and that it was received by the person charged. The power to arrest may be exercised personally; by giving orders for the arrest of the person who is to be arrested; or, where that person is subject to Service law, by ordering him into arrest. Therefore the offence is committed by disobeying the person who is carrying out the arrest.

However, if the arrest is unlawful, and the accused disobeys and/or resists the person who is carrying out the arrest the accused will not have committed an offence due to the fact that this section presupposes that the person carrying out the arrest is acting in the exercise of a power conferred by or under the Act, and a person has an unqualified right to resist an unlawful arrest. Whilst this is so, the degree of force which may be used in doing so is qualified – he may not use grossly excessive force. For example, a person wrongly arrested may not use lethal force in resisting arrest.

Uses Violence

There must be actual violence used *against* the person whose duty it is to arrest or apprehend and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against him. However, the level need not be severe. It can be any kind of violence such as striking, kicking, butting with the head, pushing or throwing an object at a person. There is no requirement for there to be an injury caused or intended to be caused. It would not be enough under this section however for violence to be used, for example, by punching the wall as that would not be *against* the person whose duty it is to arrest or apprehend.

Threatening behaviour

Threatening behaviour can include anything said by the accused and is not limited to behaviour that threatens violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example a threat to interfere with the brakes of a person's car. *Threatening* should be considered using the objective test. It is for the officer hearing the charge to decide as a question of fact.

Duty to apprehend

Apprehend covers both an arrest (essentially for the purpose of charging an offence or to prevent an offence for which see section 67) and other types of lawful capture, such as of someone escaping from custody. It can also include the initial placing into detention of an individual by a person with no actual powers of arrest (such as a member of the civilian guard force) pending that person's arrest by for example a provost officer.

Once a person decides (or is made aware it has been decided) that it is appropriate or necessary to apprehend an accused then it is his duty to do so.

The officer hearing the charge must be satisfied that the person whose duty it was to apprehend the accused had lawful authority to do so. If this cannot be proved then no duty to apprehend will be deemed to have arisen, and therefore an accused's use of reasonable force to resist such apprehension/arrest would be lawful.

A duty to apprehend will arise in certain circumstances and includes:

- a. An offender escaping from lawful custody for example Service detention or imprisonment.
- b. Where civilian police either in the UK or overseas make a decision to arrest an individual;
- c. Individuals being apprehended by a member of a guard force;
- d. The arrest by the civilian police of a member of the reserve forces for desertion;
- e. The arrest of a civilian witness on a warrant issued by a judge advocate by the civilian police in order to compel the attendance of a witness at Court Martial;
- f. A Service policeman who either sees a crime being committed by an accused or (unless it is a minor matter that can be dealt with by way of a warning) who has reasonable cause to suspect an accused of an offence;
- g. A person authorised by a provost officer to arrest a civilian accused subject to Service discipline; or
- h. An officer who is not a Service policeman who reasonably suspects an accused of committing a Service offence.

Knows or has reasonable cause to believe

The offence will only be proved if the accused knows or has reasonable grounds for believing that the other person has a duty to apprehend or arrest him. This does not mean that the accused must be aware of the exact circumstances behind his lawful arrest/apprehension, (see mistake below) but that at the time of his arrest/apprehension he knows or has reasonable cause to believe that the person arresting/apprehending him has the lawful authority to do so.

This knowledge or reasonable cause to believe on the part of the person being apprehended/arrested most usually will be imparted by the person arresting/apprehending the accused, informing him he is for example a Service policeman, and why he is arresting him, and/or by the uniform of the Service policeman or guard etc. Belief should be given its

normal dictionary meaning, and what is reasonable cause to believe is for the officer hearing the charge to decide. The officer hearing the charge can imply from the surrounding circumstances of the case, what would have been within the knowledge of the accused at the time.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Mistake

It does not have to be proved that the accused was aware of the circumstances that would have made the arrest lawful. He could for example be the innocent victim of a case of mistaken identity – the arrest could be lawful, since for example the Service Police had reasonable grounds for suspecting him and therefore arresting him, yet he would not know that. If he assaulted the person who carried out the arrest the charge would be found proved.

If however, for example the person to be arrested believes the person seeking to make the arrest was not a person authorised, e.g. people impersonating Service Police, his criminality is judged on his mistaken view of the facts. The reasonableness or unreasonableness of the accused's belief is relevant only to the question of whether the accused genuinely held that belief, and will need to be judged by the officer hearing the charge, considering all of the surrounding circumstances.

It shall be a defence for any person charged under this section to prove that he neither knew nor had a reasonable cause to believe that the person in relation to whom the offence is alleged to have been committed was an authorised person exercising a power of arrest under this Act.

5. Notes

Disobeying any other order, or the use of violence or threatening behaviour in response to any order, other than that of ordering the accused into arrest should be charged under section 11 (misconduct to a superior officer) or section 12 (disobedience to lawful commands).

Where an accused is alleged to have assaulted a civilian police officer, or resisted a civilian police officer's attempt to arrest him, (e.g. where the civilian police were acting in concert with the Service Police to effect an arrest), consideration should be given to charging the accused under section 42 of the Act either with an offence contrary to section 38 of the Offences against the Person Act 1861, (assault with intent to resist arrest) or contrary to section 89(1) of the Police Act 1996 (assaulting a constable in the execution of his duty).

Section 29 - Offences in relation to Service custody

<p>29 Offences in relation to service custody</p> <p>(1) A person subject to service law, or a civilian subject to service discipline, commits an offence if he escapes from lawful custody.</p> <p>(2) A person subject to service law, or a civilian subject to service discipline, commits an offence if–</p> <p> (a) he uses violence against a person in whose lawful custody he is, or his behaviour towards such a person is threatening; and</p> <p> (b) he knows or has reasonable cause to believe that the custody is lawful.</p> <p>(3) For the purposes of this section–</p> <p> (a) references to custody are to service custody;</p> <p> (b) a person's behaviour includes anything said by him;</p> <p> (c) “threatening” behaviour is not limited to behaviour that threatens violence.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.29)</p>
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1. Type of offence

An offence under this section **may be** heard summarily⁴⁶.

2. Specimen charges

ESCAPE FROM LAWFUL CUSTODY CONTRARY TO SECTION 29(1) OF THE ARMED FORCES ACT 2006

[AB] on, when in arrest in the guardroom Trenchard Lines escaped.

[AB] on, when serving a sentence of service detention at the Military Corrective Training Centre, Colchester, escaped.

[AB] on, when in the lawful custody of [CD] of the Naval Provost Marshal Headquarters (Eastern) escaped.

USING VIOLENCE WHILST IN CUSTODY CONTRARY TO SECTION 29(2) OF THE ARMED FORCES ACT 2006

[AB] on, being in the lawful custody of [CD] of the Naval Provost Marshal Headquarters (Eastern), and knowing or having reasonable cause to believe that the custody was lawful, did use violence towards the said [CD].

⁴⁶ Section 53 of the Act.

USEING THREATENING BEHAVIOUR WHILST IN CUSTODY CONTRARY TO SECTION 29(2) OF THE ARMED FORCES ACT 2006

[AB] on, did use threatening behaviour towards [CD] whilst in custody at RAF LITTLE SNORING.

3. Ingredients of the offence

A person subject to Service law/civilian subject to Service discipline

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Escapes

What constitutes an escape is a question of fact, but before a prisoner can be said to have escaped, it must be shown that he was out of the control and reach of his escort, if appropriate, even if he is subsequently recaptured.

Lawful custody

It must be proven that the accused was lawfully detained in Service custody. This may be by producing relevant evidence e.g. an arrest warrant or a committal order, or evidence that the accused had been absent or sentenced to detention. In addition, the accused must know that he is in custody. It is therefore vital that the person placing the accused into custody makes this clear to the accused and, as far as is reasonably possible, ensures that the accused understands that he is in custody. Custody in relation to this offence means Service custody wherever that may be, for example temporary facilities used on operations abroad. Service custody includes being under arrest, whether in a custody facility or whilst being transferred to a custody facility or whilst being held temporarily, for example to prevent an offence being committed.

Uses violence

There must be actual violence used *against* the person in whose lawful custody the accused was, and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against him. However, the level need not be severe. It can be any kind of violence such as striking, kicking, butting with the head, pushing or throwing an object at a person. There is no requirement for there to be an injury caused or intended to be caused. It would not be enough under this section however for violence to be used, for example, by punching the wall as that would not be *against* the person in whose lawful custody the accused was.

Threatening behaviour

Threatening behaviour can include anything said by the accused and is not limited to behaviour that threatens violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example a threat to interfere with the brakes of a person's car. *Threatening* should be considered using the objective test. It is for the officer hearing the charge to decide as a question of fact.

Knows or has reasonable cause to believe

The charge will only be found proved if a person escaping knows or has reasonable grounds for believing that the custody is lawful. In practice it would be virtually impossible for a person to be in lawful custody without being aware of that fact, because he should have been told by the person arresting him, why he was being placed into custody either at the time or as soon as practically possible afterwards. The officer hearing the charge will need to satisfy himself that this was indeed communicated to the accused.

Belief should be given its normal dictionary meaning, and what is reasonable cause to believe is for the officer hearing the charge to decide. The officer hearing the charge can imply from the surrounding circumstances of the case, what would have been within the knowledge of the accused. The fact that e.g. an accused had had his custody approved by a judge advocate, had been sentenced to detention at summary hearing, and/or had been served with a document explaining why he was being placed in custody would help prove an accused's actual knowledge.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

If a person is not in lawful custody, he is entitled to use reasonable force to prevent his false imprisonment; he may not use grossly excessive force. For example, a person wrongly detained may not use lethal force in effecting his escape.

5. Notes

If evidence is not available to prove lawful custody, consideration should be given to a charge of assault contrary to section 42 of the Act.

Descriptive details of the use of violence or threatening behaviour should not be included in the charge.

A person who escapes and who then remains absent without leave, or deserts, could be charged under this section in addition to being charged with section 9 (absence without leave) or section 8 (desertion).

This offence is not applicable to a UK Service person who is a prisoner of war (PW).

Section 30 - Allowing escape, or unlawful release, of prisoners etc

30	<p>Allowing escape, or unlawful release, of prisoners etc</p> <p>(1) A person subject to service law commits an offence if–</p> <ul style="list-style-type: none">(a) he knows that a person is committed to his charge, or that it is his duty to guard a person;(b) he does an act that results in that person's escape; and(c) he intends to allow, or is reckless as to whether the act will allow, that person to escape, or he is negligent. <p>(2) A person subject to service law commits an offence if–</p> <ul style="list-style-type: none">(a) he knows that a person is committed to his charge;(b) he releases that person without authority to do so; and(c) he knows or has reasonable cause to believe that he has no such authority. <p>(3) In this section “act” includes an omission and the reference to the doing of an act is to be construed accordingly.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed–</p> <ul style="list-style-type: none">(a) in the case of an offence under subsection (1) where the offender intended to allow the person to escape, or an offence under subsection (2) where the offender knew he had no authority to release the person, ten years;(b) in any other case, two years. <p style="text-align: right;">(AFA06 s.30)</p>
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1. Type of offence

An offence under this section **may be** heard summarily⁴⁷.

2. Specimen charges

ALLOWING A PERSON TO ESCAPE CONTRARY TO SECTION 30(1) OF THE ARMED FORCES ACT 2006

[AB] on, when he was Guard Commander of 'A' Wing, Military Corrective Training Centre, Colchester, allowed [CD], a person [whom it was his duty to guard] [who was committed to his charge], to escape.

RELEASING A PERSON WITHOUT AUTHORITY CONTRARY TO SECTION 30(2) OF THE ARMED FORCES ACT 2006

[AB] on, when a member of the landing party from HMS DAUNTLESS released [CD] a member of the civil population, a person who was committed to his charge.

3. Ingredients of the offence

A person subject to Service law.

⁴⁷ Section 53 of the Act.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Knows

Knows should be given its normal dictionary meaning. Actual knowledge on the part of the accused that the prisoner was committed to his charge or that it was his duty to guard the prisoner must be proved. This can be done by producing evidence in the form of the guard roster, or for example, evidence that the prisoner had been committed to the accused's charge, and that the accused knew this. In practice it would be virtually inconceivable that an accused would not know this, and know therefore that he had a formal responsibility to ensure that the person he was guarding/who was committed to his charge did not escape.

Committed to his charge

This means that a person by virtue of his post or due to orders has formal responsibility. This could be personal charge of the prisoner or overall responsibility for it.

Situations where a prisoner may be committed to an accused's charge include:

- a. A Guard Commander of a unit guardroom holding a Service person arrested for absence or; an officer given command over a PW camp or a facility to hold security detainees or common criminals in an operational area. The officer will understand his responsibility to ensure no one escapes and for putting in place suitable arrangements (guards, fences etc) to ensure that this does not happen.
- b. A prisoner in Service custody abroad, being returned to the UK. For example, where an officer or other person is responsible for having a prisoner escorted back to the UK, he is not necessarily obliged personally to guard the prisoner. Instead, it would be sufficient for him to make adequate provision for others to guard the prisoner. Therefore, if the officer does not make adequate arrangements to ensure the prisoner remains secure he may be charged with this offence.

Duty to guard

A duty to guard arises self evidently when an accused is assigned to guard a prisoner in custody and he knows this (see above).

Does an act

It is a question of fact whether the accused "does an act" for the purpose of this offence. *Does an act* also includes an omission to act. For example a guard, who on noticing the keys to the cell block are accessible to the person who is committed to his charge, fails to move them out of his reach, thereby facilitating his escape.

Escapes

What constitutes an escape is a question of fact, but before a prisoner can be said to have escaped, it must be shown that he was out of the control and reach of his escort, if appropriate, even if he is subsequently recaptured.

Intends

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligent

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Allow

It must be proved that the accused's act (or omission to act) substantially facilitated (or *allowed*) the escape to take place. If it did not, then the charge is not proven (although consideration may wish to be given for example, to a charge under section 15 (failing to perform a duty)).

Where it is alleged that the accused *intends to allow*, this imparts some knowledge on the part of the accused of what is being allowed or authorised. In these circumstances the accused will have committed the more serious offence as ordinarily, a person cannot be said to *allow* a particular event, still less authorise it, unless he is aware of the activity being carried on.

Where however it is alleged that the accused was reckless as to whether his act would allow an escape, it covers a situation where an accused took an unjustified risk as to whether his act (or omission to act) would allow an escape, for example by taking the risk of not placing a guard by an unbarred toilet window whilst the prisoner (who then escaped out of the window) went to the toilet.

To negligently allow an escape, it must be proved an accused (taking into account his training and experience) failed to take reasonable steps to prevent an escape. The officer hearing the charge must be satisfied beyond reasonable doubt that the accused failed to meet the objective test of what would be expected of him in those circumstances, and that this failure allowed the escape to occur.

Releases

This should be given its normal dictionary meaning. An accused can release a person without authority recklessly or negligently. Where an accused does so, the appropriate charge will be contrary to subsection (1) (rather than subsection (2)).

Authority

Where a person is authorised by his superior officer to release a prisoner, it is not for that person to question that authority. If later it turns out his superior officer had no such authority, the person so ordered to release the prisoner will not have committed an offence so long as they acted in good faith.

Knows or has reasonable cause to believe

This knowledge or reasonable cause to believe on the part of the accused must be ascertained by the officer hearing the charge either from direct evidence produced detailing what the accused was told (or not told), or for example the absence of any relevant written release authority, or from the surrounding circumstances. Belief should be given its normal dictionary meaning, and what is reasonable cause to believe is for the officer hearing the charge to decide.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Duress

If a prisoner holds a gun to the head of a guard and threatens to shoot either him or another guard unless the guard allows him to escape this would form a defence.

Self Defence/defence of others

If there was a fire in the prison/detention facility and the person let all of the prisoners out to protect their lives, this would form a defence since the person would not intend to allow the prisoners to escape from custody, merely to leave the burning prison, would not be reckless as to whether this would allow them to escape, since he would have taken a justifiable risk, and would not be negligent, since he would have acted in a way that a person in his position ought to act.

5. Notes

The person committed to the accused's charge or whom it is his duty to guard need not be subject to Service law, e.g. contractors, dependants, pirates, or common criminals in an operational theatre.

Section 31 - Hazarding of ship

<p>31 Hazarding of ship</p> <p>(1) A person subject to service law commits an offence if he does an act that causes the hazarding of any of Her Majesty's ships and–</p> <p>(a) he intends to cause damage to or the stranding or loss of the ship, and there is no lawful excuse for his act; or</p> <p>(b) he is reckless as to whether he causes damage to or the stranding or loss of the ship.</p> <p>(2) A person subject to service law commits an offence if, negligently, he does an act that causes the hazarding of any of Her Majesty's ships.</p> <p>(3) For the purposes of this section–</p> <p>(a) “act” includes an omission and references to the doing of an act are to be read accordingly;</p> <p>(b) references to causing include allowing;</p> <p>(c) “Her Majesty's ships” means all ships belonging to or used for the purposes of any of Her Majesty's forces.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–</p> <p>(a) in the case of an offence under subsection (1), may be for life;</p> <p>(b) in the case of an offence under subsection (2), must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.31)</p>
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1. Type of offence

An offence under subsection (1) is a **Schedule 2 offence** and **may not be** heard summarily⁴⁸. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under subsection (2) may not be heard summarily⁴⁹. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

HAZARDING OF ONE OF HER MAJESTY'S SHIPS CONTRARY TO SECTION 31(1) OF THE ARMED FORCES ACT 2006

⁴⁸ Section 53 Schedule 2 of the Act.

⁴⁹ Section 53 and Schedule 2 of the Act.

[AB] on, without lawful excuse, caused Her Majesty's Ship TENACIOUS to become stranded, intending to cause the said vessel to become stranded, or being reckless as to whether the vessel would become so stranded.

NEGLIGENTLY HAZARDING OF ONE OF HER MAJESTY'S SHIPS CONTRARY TO SECTION 31(2) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, negligently did an act, namely, gross deviation from the planned navigational track, that hazarded Her Majesty's Ship TENACIOUS.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Does an act

It is a question of fact whether the accused *does an act* for the purpose of this offence. *Does an act* also includes an omission to act. For example, a ship's captain fails to check a navigation plan which contains an error or danger to navigation, thereby hazarding the ship.

Her Majesty's ship

Means all ships belonging to or used for the purposes of any of Her Majesty's forces. *Ship* includes a hovercraft and any description of vessel.

Hazarding

This means unjustifiably exposing the vessel to danger or harm, or to the risk of danger or harm.

Intends

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligently

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Causes

It must be proved that the act or omission to act was at least a contributory factor. Where it was so remote from the hazarding that it could not have contributed to it, the offence will not have been committed, although consideration should be given to a charge contrary to section 15 (failing to perform a duty).

Lawful excuse

A person will have a lawful excuse if he acts because of some lawful reason. For example, there may well be circumstances where it is inevitable that a ship will be put at risk, for example when in action against an enemy. In those circumstances it may be justified to do

something which is bound to damage a ship (for example by ramming an enemy) or even to destroy a ship (perhaps to avoid its capture).

The accused is to be treated as not having had a lawful excuse unless sufficient evidence is produced to raise an issue as to whether he had such an excuse. Once the issue has been raised, the accused must not be convicted unless the officer hearing the charge is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so he did not have a lawful excuse.

Stranding

It is not sufficient to prove that the ship touched the bottom. It must be established that the ship ran aground or settled on the bottom, or into or onto some object affixed to the ground, and remained fast for a time (i.e. other than momentarily). A ship is not stranded if e.g. she scrapes over a shoal patch.

Loss

This means total loss. A surface ship can be lost without necessarily being lost to view as e.g. when salvage operations for her recovery are abandoned. Salvage operations undertaken for the purposes merely of saving anything of value that may be in the hull, but not the hull itself, will not prevent a ship from being regarded as lost. A vessel which is wholly submerged and incapable of coming to the surface by her own efforts is lost within the meaning of this section.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

This section should be regarded as applying only to persons who are responsible for the navigation, control, management, or propulsion of the ship. Thus, if a person unconnected with these responsibilities does something by which the loss or hazarding is caused, e.g., leaving a watertight hatch open, or smoking near inflammable matter, he should not be charged under this section. In such circumstances charges contrary to section 13 (contravention of standing orders), or section 15 (failing to perform a duty) should be charged.

The following examples may assist in deciding whether this charge or another should be proceeded with:

- a. If the Captain was on the bridge personally directing operations when hazarding occurred, he should be charged under this section;
- b. If the Captain was on the bridge when some error in an order given by the Officer of the Watch caused the ship to run aground, both the CO and the Officer of the Watch should be charged under this section;
- c. If a Captain was below at the time his ship was hazarded, and the person hearing the charge merely contend that he ought to have been on the bridge, he should normally be charged under section 15 of the Act with negligently performing his duty by leaving the bridge in circumstances which should be stated, or in not being on the bridge when he should have been;

d. If the CO (or navigating officer) were to be tried for hazarding his ship while in charge of a Pilot when a *common degree of attention* on his part *would have prevented the hazarding*, he should be charged under this section; or

e. When the ship is controlled from the operations room, the Principal Warfare Officer controls the ship by passing instructions to the Officer of the Watch. If the ship is hazarded during this time both the Officer of the Watch and the Principal Warfare Officer should be considered for charge under this section.

Where it is established from the evidence that an act or omission to act contributed to the hazarding, and further negligent acts or omissions to act affected the subsequent loss or stranding, both charges could be preferred, but it would usually be oppressive to do this unless there was a real time difference between the first hazarding and the eventual stranding, so that there were two distinct phases.

Section 32 - Giving false air signals etc

32 Giving false air signals etc

(1) A person subject to service law commits an offence if, without lawful excuse, he intentionally–

(a) gives a false air signal; or

(b) alters or interferes with an air signal or any equipment for giving an air signal.

(2) In this section “air signal” means a message, signal or indication given (by any means) for the guidance of aircraft or a particular aircraft.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.

(AFA06 s.32)

1. Type of offence

An offence under this section **may not be** heard summarily⁵⁰. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

GIVING A FALSE AIR SIGNAL CONTRARY TO SECTION 32(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on without lawful excuse, intentionally showed a flare by night in order to indicate that the said place was a suitable landing place for aircraft when it was known to him that the said place was unsuitable for the landing of aircraft.

ALTERING OR INTERFERING WITH AN AIR SIGNAL CONTRARY TO SECTION 32(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse, intentionally interfered with an air signal by interrupting the electrical supply to the runway of the said station, causing the runway landing lights to be extinguished.

3. Ingredients of the offence

A person subject to Service law.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Lawful excuse

A person will have a lawful excuse if for example, a person has authority, or is under orders, to modify an air signal or to adjust air signalling equipment. The accused is to be treated as

⁵⁰ Section 53 and Schedule 2 of the Act.

not having had a lawful excuse unless he raises some evidence as to whether he had such an excuse.

Once the issue has been raised, the accused may not be convicted unless the officer hearing the charge is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so he did not have a lawful excuse.

For more information in respect of lawful excuse see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Intentionally

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Gives, alters or interferes with

These expressions should be given their normal dictionary meaning.

Air signal

Air signal is defined in subsection (2). They are of great importance as they are for the guidance of aircraft⁵¹. A false air signal may cause loss of life. This offence is not limited to Her Majesty's aircraft.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

This offence is designed to support air safety so should usually only be considered for offences directly related to air operations.

⁵¹ Section 374 of the Act.

Section 33 - Dangerous flying etc

33 Dangerous flying etc

- (1) A person subject to service law commits an offence if—
- (a) he does an act—
 - (i) when flying or using an aircraft, or
 - (ii) in relation to an aircraft or aircraft material,that causes or is likely to cause loss of life or injury to any person; and
 - (b) either—
 - (i) he intends to cause loss of life or injury to any person, and there is no lawful excuse for his act; or
 - (ii) he is reckless as to whether he causes loss of life or injury to any person.
- (2) A person subject to service law commits an offence if, negligently, he does an act—
- (a) when flying or using an aircraft, or
 - (b) in relation to an aircraft or aircraft material,
- that causes or is likely to cause loss of life or injury to any person.
- (3) In this section—
- “act” includes an omission and the reference to the doing of an act is to be read accordingly;
- “aircraft material” includes—
- (a) parts of and accessories for aircraft (whether or not for the time being in aircraft);
 - (b) armaments in or for use in aircraft;
 - (c) any other equipment or instrument in or for use in aircraft;
 - (d) any equipment for use in connection with the taking-off or landing of aircraft or for detecting the movement of aircraft;
 - (e) any fuel for the propulsion of aircraft; and (f) any lubricant for aircraft or for anything within any of paragraphs (a) to (d).
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence—
- (a) in the case of an offence under subsection (1), may be for life;
 - (b) in the case of an offence under subsection (2), must not exceed two years.

(AFA06 s.33)

1. Type of offence

An offence under this section is a **Schedule 2 offence** (where the offender is reckless) and **may not be** heard summarily⁵². For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

DANGEROUS FLYING CONTRARY TO SECTION 33(1) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse when pilot of Her Majesty's aircraft X2590, flew the said aircraft above the M5 motorway in Somerset at a height of fifty metres causing injury to [CD] intending thereby to cause injury to any person or, being reckless as to whether injury would thereby be caused.

NEGLIGENTLY DOING AN ACT IN RELATION TO AIRCRAFT OR AIRCRAFT MATERIAL CONTRARY TO SECTION 33(2) OF THE ARMED FORCES ACT 2006

[AB] on, when carrying out a pre flight check on Her Majesty's aircraft X2590 negligently left a screwdriver in the air intake of the port engine of the said aircraft being an act likely to cause loss of life or injury to any person.

3. Ingredients of the offence

A person subject to Service law.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Does an act

It is a question of fact whether the accused *does an act* for the purpose of this offence. It includes an omission to act. For example, a pilot or ground crew who fails to carry out a required check.

"Flying", "using", "or in relation to".

These words should be given their normal dictionary meaning. For the latter two they are wide enough to cover people other than pilots. They would cover the acts and omissions other persons including for example ground crews and passengers.

Aircraft

This offence covers aircraft⁵³ which are not only Her Majesty's aircraft. For example, it would include British military personnel who are controlling foreign military or civilian aircraft or for example, where foreign aircraft use military airfields in the UK.

Aircraft material

⁵² Section 53 Schedule 2 of the Act.

⁵³ Section 374 of the Act.

See subsection (3) above.

Causes or likely to cause

It must be proved that the act caused or was likely to cause loss of life or injury. For causing there must be a loss of life or injury. However, the same act which did not actually cause a loss of life or injury is still an offence if it was *likely to cause* such loss or injury. This will be a matter of evidence for the officer hearing the charge to decide. For causing it must be proved that the act or omission to act was at least a contributory factor to the loss of life or injury occurring. Where the act was so remote that it could not have contributed to it, the offence will not have been committed, although consideration should be given to a charge contrary to section 15 (failing to perform a duty).

Injury

This could include psychiatric/psychological injury, and not just strictly physical injury.

Lawful excuse

A person will have a lawful excuse if he acts because of some lawful reason. For example, there may well be circumstances where it is inevitable that a pilot will fly dangerously, for example when in action against an enemy, and taking evasive action, or in an emergency. The accused is to be treated as not having had a lawful excuse unless sufficient evidence is produced to raise an issue as to whether he had such an excuse. Once the issue has been raised, the accused must not be convicted unless the officer hearing the charge is satisfied beyond reasonable doubt that the accused acted in the way alleged, and that when doing so he did not have a lawful excuse.

Intends

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligently

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

If the incident was either beyond the accused's control or he made a mere error of judgement, not amounting to negligence, following a mechanical defect such as an instrument failure this would provide a defence.

5. Notes

Spare.

Section 34 – Low flying

<p>34 Low flying</p> <p>(1) A person subject to service law commits an offence if–</p> <p> (a) he flies an aircraft at a height less than the minimum height, other than–</p> <p> (i) when taking off or landing; or</p> <p> (ii) in any other circumstances prescribed by regulations made by the Defence Council; and</p> <p> (b) he intends to fly, or is reckless as to whether he flies, the aircraft at a height less than the minimum height, or he is negligent.</p> <p>(2) If a person flies an aircraft in contravention of subsection (1) on the orders of another person who is in command of the aircraft, that other person is for the purposes of this section to be treated as flying the aircraft.</p> <p>(3) In this section “ minimum height” means the height prescribed by regulations made by the Defence Council.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.34)</p>

1. Type of offence

An offence under this section **may be** heard summarily⁵⁴.

2. Specimen charge

UNLAWFUL LOW FLYING CONTRARY TO SECTION 34(1) OF THE ARMED FORCES ACT 2006

[AB] on, when pilot of Her Majesty’s aircraft X2590 intentionally, flew the said aircraft at a height of less than the 2,000 feet minimum prescribed limit in Ministry of Defence Military Aircraft Regulations made by the Defence Council or was reckless as to whether the said aircraft was being flown below 2,000 feet.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Aircraft

For the purposes of offences under this section, aircraft are defined under section 374 of the Act.

Minimum height

A fixed wing aircraft will low fly for the purpose of this charge if without authorisation it is flown below 2,000 feet above the ground or other surface. A rotary aircraft (including light

⁵⁴ Section 53 of the Act.

propeller aircraft) will low fly if without authorisation it is flown at a height below 500 feet above the ground or other surface⁵⁵. The minimum height and the circumstances in which a pilot will have authorisation to fly below these are set out in regulation 4 of Low Flying Regulations 2009.

When taking off or landing

This will also include practice approaches where the aircraft descends as if to land but does not in fact do so.

Any other circumstances prescribed by regulations

See regulation 4 of Low Flying Regulations 2009.

Intends

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligently

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A pilot may have a defence if he can show that he was low flying under the orders of another person in command of the aircraft. The other person who is in command of the aircraft may be charged with an offence under this section.

5. Notes

Where a pilot has flown an aircraft in a manner which is contrary to guidance set out in JSP 550 but they do not fall within this offence, consideration should be given to another appropriate Service offence, for example section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline).

If the low flying occurred over a place where the pilot has had previous associations e.g. over his home or school, evidence may be produced on this matter to suggest a motive for associating the accused with the alleged low flying although this in itself would never be sufficient to justify conviction.

Where low flying has occurred and the pilot has not received prior authorisation for this, evidence that the pilot did not notify his chain of command of the low flying where it was reasonably practicable for him to do so may be produced. For example, where the pilot has flown an aircraft below the minimum height because of adverse weather⁵⁶ and has not reported it in accordance with the relevant procedures set out in JSP 550.

⁵⁵ Low Flying Regulations 2009 regulation 3 and JSP 550.

⁵⁶ Low Flying Regulations 2009 regulation 4(c).

Before bringing a charge under this section JSP 550 should also be consulted (Military Aviation Policy Regulations and Directives).

Section 35 - Annoyance by flying

35	<p>Annoyance by flying</p> <p>(1) A person subject to service law commits an offence if–</p> <ul style="list-style-type: none">(a) he flies an aircraft so as to annoy or be likely to annoy any person;(b) he can reasonably avoid flying the aircraft as mentioned in paragraph (a); and(c) he intends to fly, or is reckless as to whether he flies, the aircraft so as to annoy any person, or he is negligent. <p>(2) If a person flies an aircraft in contravention of subsection (1) on the orders of another person who is in command of the aircraft, that other person is for the purposes of this section to be treated as flying the aircraft.</p> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in rows 3 to 12 of the Table in section 164.</p> <p style="text-align: right;">(AFA06 s.35)</p>
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1. Type of offence

An offence under this section **may be** heard summarily⁵⁷.

However, if circumstances indicate or there is an allegation that the manner of the flying was likely to cause loss of life or injury, consideration should be given to an offence under section 33 (dangerous flying) which is a Schedule 2 offence.

2. Specimen charge

ANNOYANCE BY FLYING CONTRARY TO SECTION 35(1) ARMED FORCES ACT 2006

[AB] on when pilot of Her Majesty's aircraft X2590 negligently flew the said aircraft so as to annoy or be likely to annoy any person in circumstances where he could reasonably have avoided flying the said aircraft in such manner

3. Ingredients of the offence

A person subject to service law.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

A person.....who flies

It is not only a pilot who can be charged with an offence under this section the offence may be committed by anyone who is in command of the aircraft (see subsection (2)). For example a Flight Commander in the Royal Navy may be the pilot or the observer. Similarly in the training environment a pilot may be required to follow the orders of an instructor who will be in command of the aircraft for the purposes of this section.

⁵⁷ Section 53 of the Act.

Annoy or likely to annoy

Annoy or likely to annoy should be given their normal dictionary meaning. In the absence of any victim it is not necessary to show that another person was annoyed by the manner in which the aircraft was flown. It is sufficient to only show that it was likely in the circumstances that another person *could* have been annoyed.

Reasonably avoid

A pilot who flies an aircraft in a manner which causes annoyance or is likely to cause annoyance does not commit an offence under this section unless the manner of his flying could be reasonably avoided. Even if a pilot is authorised to fly at a low level in a particular area, if he were to fly several times over his girlfriend's house just to impress her and in doing so he caused annoyance to others in that area then he would commit an offence under this section. However, if the manner of the flying is due to an exigency such as bad weather within the reasonable scope of the authorisation of the flight no offence would be committed.

Intends

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Reckless

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligent

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Where there is a suggestion that the aircraft flew low without authorisation but there is no annoyance consideration may be given to a charge under section 34 (low flying) or an offence under section 13 (contravention of standing order).

Section 36 - Inaccurate certification

36 Inaccurate certification

(1) A person subject to service law commits an offence if he makes or signs a relevant certificate without having ensured its accuracy.

(2) In this section “relevant certificate” means a certificate (including an electronic certificate) relating to–

(a) any matter affecting the seagoing or fighting efficiency of any of Her Majesty's ships;

(b) any of Her Majesty's aircraft;

(c) any aircraft material; or

(d) any equipment of a description prescribed by regulations made by the Defence Council.

(3) In subsection (2)–

“Her Majesty's ships” has the meaning given by section 31;

“Her Majesty's aircraft” means all aircraft belonging to or used for the purposes of any of Her Majesty's forces;

“aircraft material” has the meaning given by section 33.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.36)

1. Type of offence

An offence under this section **may be** heard summarily⁵⁸.

2. Specimen charges

INACCURATE CERTIFICATION CONTRARY TO SECTION 36(1) ARMED FORCES ACT 2006

[AB] on, when pilot of Her Majesty's aircraft X2590 signed the Daily Inspection Certificate relating to the said aircraft without having ensured its accuracy.

3. Ingredients of the offence

A person subject to Service law.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Makes

Makes should be given its normal dictionary meaning. For this offence it generally means an accused who completes the relevant certificate except for signing.

⁵⁸ Section 53 of the Act.

Signs

This includes signing the certificate electronically and also includes an accused who countersigns a certificate made by another person. In this case an accused who signs a certificate without having ensured its accuracy, would have committed an offence under subsection (1) as well as the person who made it.

Relevant certificate

See subsection (2). Note that an electronic certificate is caught under this section.

Without having ensured its accuracy

This means an accused makes or signs a certificate without having first checked it is correct. An accused therefore must confirm that the relevant checks and/or procedures have been carried out, and have been carried out correctly and accurately, in order for him to be able to certify the safety and working condition of Service ships, and aircraft, or materials used in connection with aircraft, or other prescribed equipment. An accused cannot claim he reasonably believed a certificate to be accurate - it must be accurate.

Equipment...prescribed

At the time of publication of this volume and chapter of the MSL, there are no equipments that have been so prescribed.

This offence can be committed intentionally, recklessly or negligently.

Intention

For *intention* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessness

For *recklessness* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Negligence

For *negligence* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 37 - Prize offences by officer in command of ship or aircraft

37	<p>Prize offences by officer in command of ship or aircraft</p> <p>(1) A person subject to service law who, while in command of any of Her Majesty's ships or aircraft, takes any ship or aircraft as prize commits an offence if he unlawfully fails to ensure that all the ship papers or aircraft papers found on board are sent to a prize court of competent jurisdiction.</p> <p>(2) A person subject to service law who, while in command of any of Her Majesty's ships or aircraft, takes any ship, aircraft or goods as prize commits an offence if he unlawfully fails to ensure that—</p> <ul style="list-style-type: none">(a) the ship is brought to a convenient port for adjudication;(b) the aircraft is brought to a convenient airfield for adjudication; or(c) the goods are brought to a convenient port or airfield for adjudication. <p>(3) In this section—</p> <p>“Her Majesty's ships” and “Her Majesty's aircraft” have the meanings given (respectively) by sections 31 and 36;</p> <p>“prize court” means a prize court within the meaning of the Naval Prize Act 1864 (c. 25);</p> <p>“ship papers” and “aircraft papers” have the meanings given by section 2 of that Act.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.37)</p>
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1. Type of offence

Offences under this section are **Schedule 2** offences and **may not be** heard summarily⁵⁹. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

PRIZE OFFENCE BY AN OFFICER IN COMMAND OF SHIP OR AIRCRAFT CONTRARY TO SECTION 37(1) OF THE ARMED FORCES ACT 2006

[AB] while in command of Her Majesty's Ship took as prize, and unlawfully failed to ensure all the [specify ship or aircraft] papers found on board were sent to a prize court of competent jurisdiction.

PRIZE OFFENCE BY AN OFFICER IN COMMAND OF SHIP OR AIRCRAFT CONTRARY TO SECTION 37(2) OF THE ARMED FORCES ACT 2006

[AB] while in command of Her Majesty's Ship took..... as prize, and unlawfully failed to ensure that the [specify ship/aircraft/goods] were brought to a [specify convenient port/airfield] for adjudication.

⁵⁹ Section 53 Schedule 2 of the Act.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

While in command of Her Majesty's ships or aircraft

The responsibilities in relation to prize relate to the person who is in command of the ship or aircraft at the time the prize is taken. It is this person who will commit any offence under these sections.

Her Majesty's ships and Her Majesty's aircraft

For definition of ship and aircraft see section 374 of the Act.

Her Majesty's ships and aircraft means not only those ships or aircraft that belong to the armed forces but extends to those that are being *used for the purposes of* either the Royal Navy, Army or Royal Air Force.

Fails to ensure

It will need to be shown that the person in command of the ship or aircraft did not take all reasonable steps to ensure the necessary actions under each of the sections where taken. This will be a question of fact for the Court Martial.

Papers

The term *ship papers* includes all books, passes, sea briefs, charter parties, bills of lading, letters, and other documents and writings delivered up or found on board a captured ship.

The term *aircraft papers* includes all books, passes, charter parties, bills of lading, manifests, certificates, licences, lists, tickets, notes, letters and other documents and writings delivered up or found on board a captured aircraft.⁶⁰

Goods

The goods that are able to be taken as prize relate to cargo on board ships or aircraft.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There may be a lawful reason why the responsibility to send papers or to deliver a ship, aircraft or goods to a convenient port or airfield for adjudication does not need to be carried out; for example if it could not be as a result of enemy action.

5. Notes

During an armed conflict commanding officers are entitled to capture most enemy ships and aircraft and any goods in them (known as *prize*). Under international law they must bring such

⁶⁰ Naval Prize Act 1864 section 2.

prize to an appropriate place for a proper adjudication on whether they were lawfully taken as prize.

Prize is a term used in international law to refer to equipment, vehicles, vessels and aircraft captured *during* armed conflict. The most common use of prize in this sense is the capture of an enemy ship and its cargo. Once the ship is secured on friendly territory, it will be made the subject of *a case before a prize court which would* then go on to determine the status of the property and the manner in which it was to be disposed of.

The offences under this section all relate to the law of prize and breaches of the responsibilities imposed on those in command under international law. These offences can only be tried at the Court Martial. For full details of the law in relation to prize reference should be made to specialist publications such as Halsbury's Laws and the Naval Prize Act 1864.

Section 38 - Other prize offences

<p>38 Other prize offences</p> <p>(1) A person subject to service law commits an offence if–</p> <p>(a) he ill-treats a person who is on board a ship or aircraft when it is taken as prize; or</p> <p>(b) he unlawfully takes anything in the possession of such a person.</p> <p>(2) A person subject to service law commits an offence if he unloads, unpacks or otherwise interferes with any goods that are on board a ship or aircraft which has been taken as prize, unless–</p> <p>(a) the goods have been adjudged by a prize court (within the meaning of the Naval Prize Act 1864 (c. 25)) to be lawful prize; or</p> <p>(b) the goods are removed for safe keeping or for necessary use by any of Her Majesty's forces or any force co-operating with them.</p> <p>(3) A person subject to service law commits an offence if, without lawful excuse, he unloads, unpacks or otherwise interferes with any goods that are on board a ship or aircraft that has been detained in exercise of a belligerent right or under an enactment.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.38)</p>
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1. Type of offence

Offences under this section are **Schedule 2 offences** and **may not be** heard summarily⁶¹. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

ILLTREATMENT OF PERSONNEL FROM A SHIP OR AIRCRAFT TAKEN AS PRIZE
CONTRARY TO SECTION 38(1)(A) OF THE ARMED FORCES ACT 2006

[AB] on, did ill-treat who was on board, the said [ship/aircraft] having been taken as prize.

UNLAWFULLY TAKING AN ITEM BELONGING TO PERSONNEL FROM A SHIP OR
AIRCRAFT TAKEN AS PRIZE CONTRARY TO SECTION 38(1)(B) OF THE ARMED FORCES
ACT 2006

[AB] on, unlawfully took from who was on board, the said [ship/aircraft] having been taken as prize.

INTERFERENCE WITH GOODS BELONGING TO A SHIP OR AIRCRAFT TAKEN AS
PRIZE CONTRARY TO SECTION 38(2) OF THE ARMED FORCES ACT 2006

⁶¹ Section 53 Schedule 2 of the Act.

[AB] on ,unlawfully unloaded / unpacked / interfered with (delete as appropriate or specify) (specify the nature of the goods) that were onboard, the said [ship/aircraft] having been taken as prize.

INTERFERENCE WITH GOODS BELONGING TO A SHIP OR AIRCRAFT DETAINED IN EXERCISE OF A BELLIGERENT RIGHT OR UNDER AN ENACTMENT CONTRARY TO SECTION 38(3) OF THE ARMED FORCES ACT 2006

[AB] on, without lawful excuse unloaded/unpacked/otherwise interfered with (delete as appropriate or specify) goods [specify the nature of the goods) that were on board, [specify the name the ship or aircraft) a ship/aircraft that was detained in exercise of a belligerent right/under an enactment [specify the nature of authority to detain).

3. Ingredients of the Offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

Ill-treats

Ill treatment is to be given its normal dictionary meaning of treating badly or cruelly. A series of minor actions against a victim, which would in itself not amount to an offence of assault, might amount to ill treatment. Ill treatment includes but is not limited to physical force. Bullying or frightening may suffice, as may behaviour or treatment that is unnecessarily harsh or which degrades or humiliates another person. Whether conduct amounts to ill-treatment is a question of fact for the officer hearing the charge to decide on the circumstances of each case.

Unlawfully takes anything in the possession

It is not generally lawful to remove personal belongings of those on board ships or aircraft taken as prize. However, it would be lawful to remove and temporarily retain their weapons for force protection. The taking of any items should be officially recorded and the property retained within authorised secure facilities.

Unlike the offence of theft, this offence does not require proof of dishonesty or intention to permanently deprive. This offence merely requires a person to take an item without authority. Takes should be given its normal dictionary meaning. It requires an intention to take, either temporarily or permanently.

Unloads or unpacks or otherwise interferes with

It is only permissible to unload, unpack or otherwise interfere with the goods described in subsection (2) if:

- a. A prize court has determined the prize to be lawful; or
- b. It is necessary for safekeeping or for use by Her Majesty's or co-operating forces.

For the purposes of this subsection interfering with goods may include disabling and/or destroying.

Goods

Goods covers any cargo on board a ship or aircraft.

Safekeeping

Means such steps as are necessary to prevent loss or protect others. In extreme circumstances this may permit dangerous goods to be destroyed.

Necessary use by any of Her Majesty's and co-operating forces

This means the goods can be used to enhance the existing Service resources where this would assist the undertaking of their mission. For example, where weapons are the goods, this will allow the weapons to be used where they are needed to protect Her Majesty's or co-operating forces. It could also include a situation where such weapons were used to enhance the offensive or defensive capability of the force.

Co-operating force

This applies to a military force that is co-operating with one of Her Majesty's forces. This will occur, for example, when the forces are participating together in an exercise or operation under an agreement.

Without lawful excuse

A lawful excuse may arise under **subsection (3)** for example where a person demonstrates that he was acting under the lawful order of a superior officer.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Prize is a term used in international law to refer to equipment, vehicles, vessels and aircraft captured *during* armed conflict. The most common use of prize in this sense is the capture of an enemy ship and its cargo. Once the ship is secured on friendly territory, it will be made the subject of *a case before a prize court which would* then go on to determine the status of the property and the manner in which it was to be disposed of.

An offence under subsections (1) and (2) are prize offences and can only be committed during an armed conflict situation. An offence under subsection (3) can be committed at any time. An example of an offence under subsection (3) would be interfering with controlled drugs seized during an anti-drug boarding operation.

Section 39 - Attempts

39 Attempts

- (1) A person subject to service law commits an offence if he attempts to commit an offence to which this subsection applies.
- (2) Subsection (1) applies to any service offence except--
 - (a) an offence committed by virtue of section 41 (aiding and abetting);
 - (b) an offence under this section or section 42.
- (3) A civilian subject to service discipline commits an offence if he attempts to commit an offence to which this subsection applies.
- (4) Subsection (3) applies to--
 - (a) an offence under section 4, 13, 27, 28(2), 29, 107 or 306 of this Act or under section 18 or 20 of the Armed Forces Act 1991 (c 62); and
 - (b) an offence under section 40 of encouraging or assisting the commission of an offence mentioned in paragraph (a).
- (5) For the purposes of this section a person attempts to commit an offence if, with intent to commit the offence, he does an act which is more than merely preparatory to the commission of the offence.
- (6) For those purposes, a person may attempt to commit an offence even though the facts are such that the commission of the offence is impossible.
- (7) Where--
 - (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence, but
 - (b) if the facts of the case had been as he believed them to be his intention would be so regarded,then for the purposes of this section he shall be regarded as having had an intent to commit that offence.
- (8) Where in proceedings for an offence under this section there is evidence sufficient in law to support a finding that the defendant did an act falling within subsection (5), the question whether his act fell within that subsection is a question of fact.
- (9) A person guilty of an offence under this section is liable to the same punishment as he would be liable to if guilty of the offence attempted.

(AFA06 s.39)

1. Type of offence

Under paragraph 10, Schedule 2 of the Act, an offence of attempting the commission of an offence within any of paragraphs 1-9 of Schedule 2 of the Act will be a **Schedule 2 offence** and therefore **may not be heard** summarily⁶². For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a

⁶²Section 53 Schedule 2 of the Act.

CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section (offences within paragraphs 1-9 of Schedule 2 as referred to above) they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not a Schedule 2 offence but nevertheless may not be dealt with summarily, he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under this section may be heard summarily as long as the full offence may also be heard summarily⁶³.

2. Specimen charges

ATTEMPTING TO COMMIT A SERVICE OFFENCE CONTRARY TO SECTION 39 OF THE ARMED FORCES ACT 2006 NAMELY LOOTING

[AB] on ,attempted to steal a gold ring from the person of an airman killed in the course of an action by 1st Battalion The Blankshire Regiment to capture the enemy-occupied air base at South Ridge, Upland.

ATTEMPTING TO COMMIT A SERVICE OFFENCE CONTRARY TO SECTION 39 OF THE ARMED FORCES ACT 2006 NAMELY MALINGERING

[AB] on, attempted to shoot himself in the left foot with intent thereby to render himself unfit for service.

ATTEMPTING TO COMMIT A OFFENCE CONTRARY TO SECTION 39 OF THE ARMED FORCES ACT 2006 NAMELY ILL-TREATING AN OFFICER OF INFERIOR RANK

[AB] on, attempted to [strike/kick/ punch] [CD], The Wessex Rangers, an officer of inferior rank.

3. Ingredients of the offence

A person subject to Service law/civilian subject to Service discipline

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Attempts to commit

To constitute an offence under the section an act must be more than merely preparatory to the commission of an offence. The act must be a step towards the commission of the intended offence and must be more than merely remotely connected with the commission of that offence.

Intent

⁶³ Section 53 Schedule 2 of the Act.

There must be evidence to show that the accused intended to commit the full offence; merely being reckless as to whether he might be committing an offence is insufficient.

If the accused embarks on a course of action, but changes his mind before committing an act sufficient to amount to an attempt, he cannot be convicted of an attempt. However, if he changes his mind at a point that is too late to deny that he had gone as far as an attempt, the offence of attempt may be found proved. As to whether there has been an act amounting to an attempt is a question of fact for the officer hearing the charge to decide.

An accused's failure to commit the full offence due to circumstances outside his control or due to his own ineptitude, inefficiency or insufficient is not a defence to an offence under this section of the Act.

Attempting the impossible

If the facts are such that the commission of the offence is impossible but the accused is not aware of this, the accused may still commit an offence under this section.

Mistaken belief of facts

If the accused is mistaken about the facts of the case, where the accused has the necessary intent to commit the full offence, the accused may still be regarded as having committed the offence, if the facts of the case had been as he falsely believed them to be.

For example, if a Service person (with an intention to mangle) intentionally self-administers a substance into an open wound believing that it would aggravate the injury but unbeknown to him the substance could not have had the intended effect, he cannot be charged with the full offence (mangling); however because of the operation of subsection (7) he may nevertheless be convicted of an attempt.

An act which is more than merely preparatory

Mere preparation, even with intent, does not amount to an attempt. For example, buying a box of matches with the intent of setting fire to a building is without more, merely a preparatory act. However, actually lighting a match in the vicinity of flammable materials in or near the building with the intent of setting fire to the building would be an act sufficient to amount to an offence under this section of the Act.

Although preparation for an offence may not be sufficient for an attempt, if such preparation consists of doing something which is to the prejudice of good order and Service discipline, consideration should be given to bringing a charge under section 19 of the Act (conduct prejudicial to good order and discipline).

Offences to which this section applies

A person subject to Service law can be charged with attempting to commit any Service offences except aiding and abetting (section 41 of the Act) and any criminal conduct offences (section 42 of the Act). The Service offences which a civilian subject to Service discipline may be charged with attempting to commit are more limited and are listed in **subsection (4)**.

4. Defences

For Defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 40 – Encouraging and assisting

40 Encouraging and assisting

(1) A person subject to service law commits an offence if he encourages or assists the commission of a service offence (other than an offence under section 42).

(2) A civilian subject to service discipline commits an offence if he encourages or assists the commission of an offence mentioned in section 39(4).

(3) Reference in this section to encouraging or assisting the commission of an offence is to the doing of an act that would have constituted an offence under Part 2 of the Serious Crime Act 2007 if the offence encouraged or assisted had been an offence under the law of England and Wales.

(4) In determining whether an act would have constituted an offence under that Part, section 49(4) of that Act has effect as if for "offences under this Part and listed offences" it read "offences under sections 39 and 40 of the Armed Forces Act 2006".

(5) Any requirement in that Part to specify matters in an indictment applies for the purposes of this section as it applies for the purposes of that Part, but with references to the indictment being read as references to the charge sheet.

(6) A person guilty of an offence under this section is liable to the same punishment as he would be liable to if guilty of--

(a) the service offence encouraged or assisted; or

(b) if convicted of the offence under this section by reference to more than one such service offence, any one of those service offences.

(AFA06 s.40)

1. Type of offence

Under paragraph 11, Schedule 2 of the Act, an offence of encouraging or assisting the commission of an offence within any of paragraphs 1-9 of Schedule 2 of the Act will be a **Schedule 2 offence** and therefore **may not be** heard summarily⁶⁴. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section (offences within paragraphs 1-9 of Schedule 2 as referred to above) they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not a Schedule 2 offence but nevertheless may not be dealt with summarily, he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

In all other cases legal advice should always be sought before framing any charge of encouraging or assisting a Service offence under section 40.

⁶⁴ Section 53 Schedule 2 of the Act.

2. Specimen charge

ENCOURAGING OR ASSISTING DISOBEDIENCE OF A LAWFUL COMMAND CONTRARY TO SECTION 40 AND SECTION 12(1) OF THE ARMED FORCES ACT 2006.

[A B] on ..., encouraged or assisted LOGS(CS)(P) Jones to disobey the lawful Command of POLOG(CS) Grainger.

3. Ingredients of offence

Persons subject to service law and civilians subject to Service discipline

For persons subject to service law and civilians subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Note that a civilian subject to service discipline can only commit the offence of encouraging or assisting if he encourages or assists another person to commit an offence mentioned in Section 39(4) of the Act.

Encourages or assists

Encouraging or assisting are not necessarily separate activities; conduct described as 'encouraging' and conduct described as 'assisting' may overlap. Encouraging includes not only instigating and persuading but also conduct that simply emboldens a person who has already decided to commit an offence. Assisting means any conduct on the part of an individual that, as a matter of fact, makes it easier for another person to commit the principal offence. For example, a person who acts as a lookout during a burglary. A person who is under a duty to act but refrains from doing so is capable of assisting the commission of an offence. A security guard who fails to turn on a burglar alarm with the intention of assisting another to burgle the premises of the security guard's employer would be guilty of assisting the principal offender.

The words encourages or assists should be given their ordinary meaning. Encourages essentially means supporting, persuading or giving confidence to another to commit a service offence. Encouragement also includes threatening or pressurising another person to commit a service offence, or offering a bribe; this is because someone who threatens or pressurises someone to commit a service offence should be in no better position than someone who attempts to persuade another to commit an offence. A person subject to service law who attempts to persuade another to commit a service offence by threatening him with an adverse annual report, or by offering a bribe, would commit an offence under section 40.

The essence of the offence lies in the encouraging and assisting; it is therefore irrelevant that the person encouraged or assisted does not in fact carry out the act. For example, where A offers B a sum of money to make a false record a charge of encouraging or assisting against A would be proved even though A's efforts at persuasion or encouragement were totally ineffective and B refused to have anything to do with the scheme.

The elements of encouragement, or of threats or other pressure, may be implied by an accused as well as stated expressly. For example a defendant may strongly imply that if the other person does not commit an offence he may 'suffer for it'.

A person can in fact be assisted without being aware of the act of assistance. For example, a person who dislikes his neighbour and leaves a ladder by the side of his neighbour's property when he knows his neighbour is away on holiday, intending that this should assist a burglary

of the neighbour's property, has done an act capable of assisting an offence even though the burglar may not be aware of the assistance which he has been given. By contrast, a person cannot in fact be encouraged unless he or she is aware of the encouragement. Therefore where a letter is sent encouraging the addressee to commit a service offence, but it is not proved that it reached the intended recipient; this might more appropriately be charged as an attempt to encourage the commission of a service offence. However, the sending of the letter is an act capable of encouraging the commission of an offence regardless of whether it is received by the intended recipient. This is a technical area of law and legal advice should always be sought before framing a charge under section 40.

4. Defences

For 'defences' generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Acting reasonably

It will be a defence to this offence, if the person charged with such an offence acted reasonably, that is in the circumstances he was aware of, or in the circumstances he reasonably believed existed, it was reasonable for him to act as he did. There are a number of factors that the court could consider when determining whether an act was reasonable in the circumstances. These factors (which are not exhaustive) are the seriousness of the anticipated offence(s); any purpose for which the defendant claims to have been acting; any authority by which he claims to have been acting.

For example, D lends P a knife and P then goes on to burgle a property. P then goes on to commit another offence of attacking a person with the knife causing minor harm (assault). In this case D could be convicted of encouraging and assisting burglary. He could also be prosecuted of encouraging and assisting burglary or assault. D would however have a defence of acting reasonably if he could prove (on the balance of probabilities) that at the time he gave P the knife, knowing what he knew at the time, he reasonably believed P was going to use the knife to cut some rope or butcher some meat. Where D gave P the knife near to the scene of the crime, in the early hours of the morning, knowing P was a serial burglar, a court would be unlikely to find that D did act reasonably and therefore be likely to convict him.

5. Notes

References to 'encouraging or assisting' the commission of an offence in section 40 must be read with the provisions in Part 2 of the Serious Crime Act 2007, which provide for three separate offences (see sections 44, 45 and 46 of the Serious Crime Act 2007). Those offences are:-

- Intentionally encouraging or assisting another person to commit an offence. For *intention* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).
- Encouraging or assisting an offence *believing* that it will be committed, and that the encouragement or assistance will assist the commission of the offence. (In other words the defendant understood that his encouragement or assistance would be used to commit the offence).
- Encouraging or assisting one or more offences *believing one or more* will be committed. (In other words where the defendant understood that his encouragement or assistance would be used to commit one or more of a range of different offences, without necessarily knowing which one(s)).

This section applies to encouraging or assisting the commission of a service offence other than an offence under section 42- criminal conduct. Encouraging or assisting criminal conduct is provided for in section 46.

As with offences of conspiracy and attempt (for which see sections 45 and 39 respectively) it is possible to commit this offence even though the facts are such that the commission of the principal (intended) offence is impossible. It is the accused's state of mind that must be considered, not the unknown impossibility of the principal offence being committed. For example, a defendant who encouraged or assisted a person to sabotage a service vehicle by adding a substance to its fuel tank, commits an offence under this section even if that substance would not in fact damage the vehicle in any way.

Where a defendant is charged with encouraging or assisting offences believing one or more will be committed, these possibly contemplated disciplinary offences must be identified on the charge sheet.

Section 41 - Aiding, abetting, counselling or procuring

<p>41. Aiding, abetting, counselling or procuring</p> <p>(1) Where a person subject to service law aids, abets, counsels or procures the commission by another person of an offence to which this subsection applies, he commits that offence.</p> <p>(2) Subsection (1) applies to any service offence except an offence under section 42.</p> <p>(3) A person who by virtue of subsection (1) commits an offence is liable to be charged, tried (including dealt with at a summary hearing) and punished as a principal offender.</p> <p>(4) Where a civilian subject to service discipline aids, abets, counsels or procures the commission by another person of an offence mentioned in section 39(4), he commits that offence and is liable to be charged, tried and punished as a principal offender.</p> <p style="text-align: right;">(AFA06 s.41)</p>

1. Type of offence

An individual who aids, abets, counsels or procures the commission of any non criminal conduct offence is treated under section 41 as though he committed the offence himself (as a principal offender) and charged with the principal offence. Therefore the guidance for the principal offence in this chapter applies.

2. Specimen charges

No offence will be charged under this section. The accused will always be charged as the principal offender under the section of the principal offence.

3. Ingredients of offence.

A person subject to service law/civilian subject to service discipline

For persons subject to Service law and civilians subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Persons subject to Service law may commit an offence under subsections (1) to (3).

Civilians subject to Service discipline may commit an offence under subsection (4)

Aid and abet

The term *aid and abet* means to assist the actual perpetrator of an offence (the principal offender): that assistance may be rendered at the time when the offence was committed or before the time when the offence was committed and at a different place. For example, to keep watch near the scene of the commission of an offence, or to distract someone's attention while an offence is committed, is aiding and abetting if the aider and abettor knew what was going on. Likewise the supply of a weapon by a person who knew that there was a real possibility it would be used for murder, will make that person an aider and abettor (accessory) to the principal offence. The accused need not know the precise crime that was intended or which was committed: If he realises or contemplates that there is a real

possibility that a number of offences may be committed, and one of those offences is committed, the fact that he has lent assistance to the principal to commit the offence will be sufficient.

Counsel or procure

An accused *counsels or procures* an offence when; knowing that an offence is contemplated, he approves of or assents to it, and his approval or assent encourages the principal offender to commit it. It is not necessary for the accused counselling or procuring the offence to be present when the offence is committed. An example would be encouraging or persuading an individual to make a false official record to conceal the loss of an expensive item of Service equipment.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Otherwise the defences available are as for the principal offence charged.

5. Notes.

It is important to note that a person charged with this offence, will not be charged under this section, but under the principal offence he is alleged to have aided and abetted or counselled and procured. The distinction between aiding and abetting, counselling and procuring is not significant when it comes to wording the charge.

This section does not apply to criminal conduct offences (section 42 of the Act). Under the criminal law of England and Wales a person who aids, abets, counsels or procures the commission of a criminal offence has his charge found proved of that offence under common law. Where the offence is a criminal conduct offence consideration should be given to bringing a charge under section 47 of the Act which modifies that common law offence for the purposes of the Act.

Section 49 - Air Navigation Order offences

49. Air Navigation Order offences

- (1) If a person subject to service law, or a civilian subject to service discipline, does in or in relation to a military aircraft any act that if done in or in relation to a civil aircraft would amount to a prescribed Air Navigation Order offence, the act shall be treated for the purposes of section 42(1) as punishable by the law of England and Wales.
- (2) Where an act is an offence under section 42 by reason of subsection (1) above—
 - (a) section 42(8)(b) does not apply; and
 - (b) it shall be assumed for the following purposes that the act amounted to the offence under the law of England and Wales that it would have amounted to if it had been done in or in relation to a civil aircraft.
- (3) Those purposes are—
 - (a) the purpose of determining what punishment may be imposed for the offence under section 42;
 - (b) the purpose of determining for the purposes of any of the following provisions of this Act whether the act constituting the offence under section 42 is—
 - (i) an offence under the law of England and Wales;
 - (ii) any particular such offence;
 - (iii) such an offence of any particular description.
- (4) In this section –
“military aircraft” has the meaning given by section 92 of the Civil Aviation Act 1982 (c. 16);
“civil aircraft” means an aircraft that is registered in the United Kingdom and is not a military aircraft;
“Air Navigation Order offence” means an offence under an Order in Council made under section 60 of the Civil Aviation Act 1982 (whenever made, and whether or not also mad under any other enactment);
“prescribed” means prescribed by an order made by the Secretary of State for the purposes of this section.

(AFA06 s.49)

1. Type of offence

An offence under this section **may not be** heard summarily⁶⁵. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

ANO Article 73

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, ENDANGERING THE SAFETY OF AN AIRCRAFT CONTRARY TO ARTICLE 73 OF THE AIR

⁶⁵ Section 53 and Schedule 2 of the Act.

NAVIGATION ORDER 2005/1970

[AB] on ..., [negligently/recklessly] acted in a manner likely to endanger [type of aircraft and military registration number] or [any of the (number of) persons therein], namely by [particulars of conduct].

ANO Article 74

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, PERMITTING AN AIRCRAFT TO ENDANGER THE SAFETY OF ANY PERSON OR PROPERTY CONTRARY TO ARTICLE 74 OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on....., [negligently/recklessly] [caused/permitted] [type of aircraft and military registration number] to endanger any person or property, namely by [particulars of conduct].

ANO Article 75(1)

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, DRUNKENNESS IN AN AIRCRAFT CONTRARY TO ARTICLE 75(1) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on....., entered [type of aircraft and military registration number] when he was drunk.

or

When in [type of aircraft and military registration number] on [AB] was drunk.

ANO Article 75(2)

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, DRUNKENNESS IN AN AIRCRAFT CONTRARY TO ARTICLE 75(2) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on, when acting as a member of the crew of [type of aircraft and military registration number], was under the influence of drink or a drug to such an extent as to impair his capacity so to act.

or

[AB] on, when being carried in [type of aircraft and military registration number] for the purpose of acting as a member of the crew, was under the influence of drink or a drug to such an extent as to impair his capacity so to act.

ANO Article 77

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, DISOBEYING A LAWFUL COMMAND OF THE COMMANDER OF AN AIRCRAFT CONTRARY TO ARTICLE 77 OF THE AIR NAVIGATION ORDER 2005/1970

AB on ..., when in [Type of aircraft and military registration number] did not obey the order to [particulars of order] which was issued by [CD], the commander of the said aircraft.

ANO Article 78(a)

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, USING THREATENING, ABUSIVE OR INSULTING WORDS TOWARDS A MEMBER OF THE CREW OF AN AIRCRAFT CONTRARY TO ARTICLE 78(a) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on ..., when in [type of aircraft and military registration number] said [particulars of words] or words to that effect to [CD] who was a crew member of the said aircraft.

ANO Article 78(b)

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, BEHAVING IN A THREATENING, ABUSIVE, INSULTING OR DISORDERLY MANNER TOWARDS A MEMBER OF THE CREW OF AN AIRCRAFT CONTRARY TO ARTICLE 78(b) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on....., when in [type of aircraft and military registration number] [particulars of conduct] towards [CD] who was a crew member of the said aircraft.

ANO Article 78(c)

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, INTENTIONALLY INTERFERING WITH THE PERFORMANCE OF CREW MEMBERS DUTIES CONTRARY TO ARTICLE 78(c) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on ..., when in [type of aircraft and military registration number] intentionally interfered with [CD] duty to [particulars of duty] by [particulars of conduct].

3. Ingredients of the offence

A person subject to Service law/civilian subject to Service discipline

For persons subject to Service law and civilians subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits). It should be noted that civilians will be subject to Service law when they are in a UK military aircraft in flight⁶⁶.

In relation to a military aircraft

Offence under this section can only be committed in a military aircraft. See also subparagraph 4 which refers to s92 Civil Aviation Act 1982 which provides that: -

'military aircraft' means:

- a. An aircraft of the naval, military or air forces of any country; or
- b. Any other aircraft in respect of which there is in force a certificate issued in accordance with any Order in Council in force under section 60, 87, 89, 91, 101(1)(a) or 107(2) of this Act that the aircraft is to be treated for the purposes of that Order in Council as a military aircraft; and

⁶⁶ Schedule 15 of the Act.

- c. A certificate of the Secretary of State that any aircraft is or is not a military aircraft for the purposes of this section shall be conclusive evidence of the fact certified.”

Prescribed Air Navigation Order offence

Air Navigation Orders made by Order in Council under the Civil Aviation Act 1982 (CAA), create offences of misconduct on civil aircraft. The CAA does not generally apply to military aircraft however so in most circumstances a person cannot be charged with an Air Navigation Order offence if the misconduct takes place within a military aircraft. Because of the wording of section 49 of the Act, it is possible to *prescribe* certain Air Navigation Order offences. Once an Air Navigation Order offence has been prescribed in this way, it will also be possible to also commit this offence on a military aircraft.

The following are the Air Navigation Order offences that have been prescribed for the purposes of section 49(1) and (4) of the Act.

- (a) **recklessly or negligently acting in a manner likely to endanger an aircraft, or any person in the aircraft, under article 73 of the Order;**
- (b) **recklessly or negligently causing or permitting an aircraft to endanger any person or property under article 74 of the Order;**
- (c) **entering an aircraft when drunk, or being drunk in an aircraft, under article 75(1) of the Order;**
- (d) **when acting as a member of the crew of an aircraft or while carried in an aircraft for the purpose of so acting, being under the influence of drink or a drug to such an extent as to impair his capacity so to act, under article 75(2) of the Order;**
- (e) **while in an aircraft, failing to obey a lawful command which the commander of an aircraft may give for the purpose of securing the safety of the aircraft and of persons or property carried in it, or the safety, efficiency or regularity of air navigation, under article 77 of the Order;**
- (f) **while in an aircraft, using threatening, abusive or insulting words towards a member of the crew of the aircraft under article 78(a) of the Order;**
- (g) **while in an aircraft, behaving in a threatening, abusive, insulting or disorderly manner towards a member of the crew of the aircraft under article 78(b) of the Order; and**
- (h) **while in an aircraft, intentionally interfering with the performance by a member of the crew of the aircraft of his duties under article 78(c) of the Order.**

SI 2009/1094

Treated for the purpose of section 42(1) as punishable by the law of England and Wales

This must be read in conjunction with section 42(1) of the Act. This means that a person who is subject to Service law or a civilian who is subject to Service discipline will commit an offence under section 42 of the Act if he behaves in a manner that would amount to a corresponding Air Navigation Order offence which has been prescribed.

Sub paragraph 2(a) – “section 42(8)(b) does not apply”

Sub paragraph 2(a) modifies the definition of the phrase *the corresponding offence under the law of England and Wales* which is found at section 42(8) of the Act. This phrase is frequently used in the Act in relation to criminal conduct offences and normally its meaning has to be modified to take into account that an accused’s act may not be an offence under English law because the offence has occurred outside England and Wales. In this case

however, instead of disregarding the place where the act was done, this subsection works by disregarding the type of aircraft in which the act was performed.

For intention, negligence or recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Air Navigation Orders made under the Civil Aviation Act 1982 (CAA), create offences of misconduct on civil aircraft. The CAA does not generally apply to military aircraft however so in most circumstances a person cannot be charged with an Air Navigation Order offence if the misconduct takes place within a military aircraft. Because of the wording of section 49 of the Act, it is possible to *prescribe* certain Air Navigation Order offences. Once an Air Navigation Order offence has been prescribed in this way, it will also be possible to commit this offence on a military aircraft.

Although a prescribed Air Navigation Order offence may not be dealt with summarily⁶⁷ it may be dealt with by the Service Civilian Court or the Court Martial.

Nothing in this section prevents persons on board a military aircraft in flight being charged with other types of Service offences. For example a person who steals may still be charged with theft under section 42 of the Act.

There are some elements peculiar to Air Navigation Order offences that have specific meaning. Examples include the words *likely to endanger* which means *where there is a real risk that should not be ignored* and *drunkenness* which means *a person is drunk when he has taken alcohol to an extent which effects his steady self control*.

Some forms of conduct on an aircraft may be prohibited through standing orders and a charge under section 13 (contravention of standing orders) may therefore be appropriate.

⁶⁷ Section 53 of the Act.

Section 107(5) - Failure to attend hearings which are a condition of release from Service custody

107. Failure to attend hearings which are a condition of release from service custody
- (1) A person commits an offence if upon being released from service custody after charge:
- (a) he is a person on whom a requirement has been imposed by a Judge Advocate, to attend any hearings in the proceedings against him; and
 - (b) without reasonable excuse, he fails to attend any hearing to which the requirement relates.
- (2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.
- (AFA06 s.107(5))

1. Type of offence

An offence under this section **may be** heard summarily⁶⁸.

2. Specimen charge

FAILURE TO ATTEND A HEARING FOLLOWING RELEASE FROM SERVICE CUSTODY CONTRARY TO SECTION 107(5) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a requirement has been imposed under section 107(3)(a) of the Armed Forces Act 2006 to secure his attendance at a hearing at.....on..... without reasonable excuse, failed to attend the said hearing.

4. Ingredients of offence

Without reasonable excuse

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any requirements to attend a hearing made by a Judge Advocate remains with him and is his responsibility. For example, a reasonable excuse could be incapacity through illness or accident or lawful authorisation not to attend.

In contravention of the requirement placed upon him

The record of the decision of the Judge Advocate relating to the time and place for the person to attend the hearing or a certified true copy of the decision will be evidence of the time and place for the person to attend the hearing.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

⁶⁸ Section 53 of the Act.

5. Notes

Spare.

Section 229 – Breach of a Service Restraining Order

229 Service Restraining Orders

(1) The Court Martial or the Service Civilian Court may make an order under this section where-

- (a) it convicts or acquits a person (“the defendant”) of an offence; and
- (b) the defendant is subject to service law or is a civilian subject to service discipline.

(2) An order under this section-

- (a) prohibits the defendant from doing anything proscribed in the order; and
- (b) has effect for a fixed period specified in the order or until further order.

(3) An order under this section may be made, and a prohibition may be included in the order, only for the purpose of protecting a person mentioned in the order from conduct which amounts to harassment.

(4) A person subject to service law or a civilian subject to service discipline commits an offence if, without reasonable excuse, he does anything which he is prohibited from doing by an order under this section.

(5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence should not exceed five years.

(AFA 06 s.229)

1. Type of Offence

An offence under section 229 **may not be** heard summarily⁶⁹, but will be dealt with by the court originally imposing the order, whether the Court Martial or the Service Civilian Court.

2. Specimen Charge

FAILURE TO COMPLY WITH A SERVICE RESTRAINING ORDER CONTRARY TO SECTION 229 (4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a service restraining order has been imposed under section 229(4) of the Armed Forces Act 2006, namely [*state prohibition*] without reasonable excuse failed to comply with the said order in that he on the day of [*state act constituting breach*].

3. Ingredients of Offence

A person subject to service law / civilian subject to service discipline (subsection 1(a) and (4))

For persons subject to service law and civilian subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Harassment

⁶⁹ Section 53 Schedule 2 of the Act.

Harassing a person includes alarming a person or causing that person distress.

Without reasonable excuse

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any order made by a Judge Advocate restraining him from prohibited acts remains with him and is his responsibility. An example of a reasonable excuse could be that he was ordered by a police officer to enter an area he was prohibited from entering under the order.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 266 - Financial statement orders

266	Financial Statement Orders <p>(1) Before sentencing a person who has been convicted of a service offence, a court may make a financial statement order; but this does not apply to the Summary Appeal Court.</p> <p>(2) A financial statement order is an order requiring the person to give to the court, within such period as may be specified in the order, such a statement of his financial circumstances as the court may require.</p> <p>(3) A person who without reasonable excuse fails to comply with a financial statement order commits an offence and is liable to a fine not exceeding level 3 on the standard scale.</p> <p>(4) A person who in providing any statement in pursuance of a financial statement order-</p> <ul style="list-style-type: none">(a) makes a statement which he knows to be false in a material particular,(b) recklessly provides a statement which is false in a material particular,(c) knowingly fails to disclose any material fact, <p>commits an offence and is liable to a fine not exceeding level 4 on the standard scale.</p> <p style="text-align: right;">(AFA 06 s.266)</p>
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1. Type of Offence

An offence under section **may not be** heard summarily⁷⁰, but will be dealt with by the Service Court that originally imposed the order, whether the Court Martial or the Service Civilian Court.

2. Specimen Charge

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(3) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, without reasonable excuse failed to comply with the said order.

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, made a statement which he knew to be false in a material particular, namely

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, recklessly made a statement which was false in a material particular, namely

⁷⁰ Section 53 Schedule 2 of the Act.

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, knowingly failed to disclose a material fact, namely

3. Ingredients of Offence

Without reasonable excuse

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any financial statement order made by a Judge Advocate remains with him and is his responsibility. An example of a reasonable excuse could be that he became ill shortly after the imposition of the order and was unable to provide the order.

Recklessly

To prove that the accused was reckless when he made a statement under subsection (4) (b), it must be proved that the accused made a statement in the awareness of a risk that it might have been false, but unreasonably went on to take the risk and make the statement anyway.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 305 - Failure to provide a sample for drug testing

305. Failure to provide a sample for drug testing

- (1) A drug testing officer may, in order for it to be ascertained whether or to what extent a person subject to service law has or has had drugs in his body, require the person to provide a sample of his urine for analysis.
- (2) A drug testing officer may not impose a requirement under subsection (1) if—
 - (a) he or his commanding officer is the person's commanding officer; or
 - (b) the sample is sought in connection with an investigation under this Act of an offence or an investigation of an incident within section 306(1)(a).
- (3) A person commits an offence if he fails to comply with a requirement imposed under subsection (1).
- (4) In this section—
“drug” means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971 (c. 38); and
“drug testing officer” means an officer, warrant officer or non-commissioned officer who is authorised by or in accordance with regulations made by the Defence Council for the purpose of obtaining samples for analysis for drugs
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks.

(AFA06 s. 305)

1. Type of offence

An offence under this section **may be** heard summarily⁷¹.

2. Specimen charges

FAILING TO PROVIDE A SAMPLE FOR DRUG TESTING CONTRARY TO SECTION 305(3) OF THE ARMED FORCES ACT 2006

[AB], a person subject to Service law, did on....., when requested to do so by a drug testing officer, failed to provide a sample of urine for testing for the presence of drugs.

3. Ingredients of the offence

A person subject to Service law

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

A drug testing officer

Is any officer, warrant officer or non-commissioned officer appointed or drafted to have immediate authority over or to serve as a member of an Armed Forces Compulsory Drug Testing Team and is authorised for the purpose of obtaining samples for analysis for drugs.

⁷¹ Section 53 of the Act.

Fail to provide a sample of urine

If a person required to provide a sample of urine under this section, either refuses to provide a sample of his urine, is unable to provide such a specimen or adulterates the specimen, he shall be deemed to have failed to provide a specimen of urine.

Testing for the presence of drugs

The sample may only be requested and tested to ascertain whether or to what extent a person subject to service law has, or has had drugs in his body.

Drugs

Means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). However, it may be a defence for a person to provide medical evidence providing reasons for his inability to provide a sample of urine when requested.

A person may also be afforded a defence if the sample of urine was not taken in accordance with the mandated procedures contained in JSP 835 (Alcohol and substance misuse and testing).

5. Notes

Spare.

Section 306 - Failure to provide a sample for alcohol and drug testing after serious incident

306. Failure to provide a sample for alcohol and drug testing after serious incident

- (1) This section applies where—
 - (a) an incident has occurred which in the opinion of an officer resulted in, or created a risk of, death or serious injury to any person or serious damage to any property; and
 - (b) in the opinion of the officer, it is possible that a person within subsection (3) (“A”) may have caused or in any way contributed to—
 - (i) the occurrence of the incident;
 - (ii) any death or serious injury to any person, or serious damage to any property, resulting from it; or
 - (iii) the risk of any such death, injury or damage.
- (2) The officer may, in order for it to be ascertained whether or to what extent A has or has had alcohol or drugs in his body, require A to provide a sample for analysis.
- (3) A person is within this subsection if—
 - (a) he is a person subject to service law or a civilian subject to service discipline; and
 - (b) the officer mentioned in subsection (1) is his commanding officer.
- (4) A person commits an offence if without reasonable excuse he fails to comply with a requirement imposed under subsection (2).
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks.

(AFA06 s. 306)

1. Type of offence

An offence under this section **may be** heard summarily⁷².

2. Specimen charges

FAILING TO PROVIDE A SAMPLE FOR ALCOHOL AND DRUG TESTING AFTER SERIOUS INCIDENT CONTRARY TO SECTION 306(4) OF THE ARMED FORCES ACT 2006

[AB] being a [person subject to Service law/civilian subject to Service discipline] did on....., when requested to do so by an officer, fail to provide a sample of urine [breath] for testing for the presence of drugs [alcohol].

3. Ingredients of the offence

A person subject to Service law/civilian subject to Service discipline

For persons subject to Service law and civilians subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

⁷² Section 53 of the Act.

An officer

Means an officer described in section 306(1) of the Act.

Fail to provide a sample for alcohol and drug testing

If a person required to provide a sample for alcohol and drug testing under this section, either refuses to provide a sample, is unable to provide such a sample or adulterates the sample, he shall be deemed to have failed to provide a sample for testing. A sample means a sample of urine or breath.

Testing for the presence of drugs or alcohol

The sample may only be requested and tested to ascertain whether or to what extent a person subject to service law or a civilian subject to service discipline has, or has had drugs or alcohol in his body.

Drugs and alcohol

Means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971. Alcohol has its normal dictionary meaning.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). However, it may be a defence for a person to provide medical evidence providing reasons for his inability to provide a sample of urine or breath when requested.

A person may also be afforded a defence if the sample was not taken in accordance with the mandated procedures contained in JSP 835 (Alcohol and substance misuse and testing).

5. Notes

Spare.

Section 328 - Knowingly giving false answers during the enlistment procedure

328. Knowingly giving false answers during the enlistment procedure

- (1) The Defence Council may by regulations make provisions with respect to the enlistment of persons into the regular forces (including enlistment outside the United Kingdom).
- (2) The regulations (The Armed Forces (Enlistment) regulations 2008 Art 9) make provision for –
 - ((a) – (e) and (g) omitted)
 - (f) creating offences relating to knowingly giving false answers during the enlistment procedure.
- (3) Omitted.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in rows 2-12 of the Table in section 164.

(AFA06 s. 328)

1. Type of offence

An offence under this section **may be** heard summarily⁷³.

2. Specimen charges

KNOWINGLY GIVES FALSE ANSWERS DURING THE ENLISTMENT PROCEDURE
CONTRARY TO SECTION 328(2)(f) OF THE ARMED FORCES ACT 2006

[AB] on, did knowingly give false answers to questions contained in the enlistment paper and put to him by the recruiting officer, for the purposes of enlisting in the UK regular forces.

3. Ingredients of the offence

Knowingly gives false answers

Means that the accused knew that the answers he gave were false. In this case, that the answers he has made in relation to the enlistment paper and those put to him by the recruiting officer, are known to him to be false at the time he made the answer.

Enlistment paper

This is the document prescribed in The Armed Forces (Enlistment) Regulations 2008, Schedule 2, and is used in connection with the enlistment of a person in the regular forces. It contains personal details of the person including name, date of birth, place of birth, nationality, partner's details, previous convictions etc

Recruiting officer

Means a person who is appointed by:

⁷³ Section 53 of the Act.

- a. The Defence Council, who may appoint any British consul-general, consul or vice-consul and any person duly exercising the authority of a British consul, in a country or territory of which Her Majesty is not the head of state; or
- b. The Naval Secretary, Military Secretary and Air Secretary and any officer on their staffs not below the rank of naval captain, colonel or group captain who may appoint an officer.

United Kingdom Regular Forces

Means the Royal Navy and Royal Marines, the British Army and the Royal Air Force.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Spare.

Section 343 - Offences in relation to Service inquiries

Section 343(4) of the Armed Forces Act 2006 makes provision for regulations to be made by the Secretary of State to create offences in connection with Service Inquiries. These regulations are contained within The Armed Forces (Service Inquiries) Regulations 2008, and the extent and detail of the offences is contained in regulation 16.

Offences under the Armed Forces (Service Inquiries) Regulations 2008 Regulation 16.

343. Offences under the Armed Forces (Service Inquiries) Regulation 2008 Regulation 16.

- (1) A person is guilty of an offence if he fails without reasonable excuse to do anything that he is required to do by a witness notice served upon him in accordance with regulation 14 (witness notice).
- (2) A person is guilty of an offence if, during a service inquiry, he does anything that is intended to have the effect of—
 - (a) distorting or otherwise altering any evidence, document or other thing that is given, produced or provided to a service inquiry panel, or
 - (b) preventing any evidence, document or other thing from being given, produced or provided to a service inquiry panel, or does anything that he knows or believes is likely to have such effect.
- (3) A person is guilty of an offence if, during a service inquiry —
 - (a) he intentionally suppresses or conceals a document that is, and that he knows or believes to be, a relevant document, or
 - (b) he intentionally alters or destroys any such document.
- (4) For the purposes of paragraph (3) a document is a “relevant document” if it is likely that the service inquiry panel would (if aware of its existence) wish to be provided with it.
- (5) A person does not commit an offence under paragraph (2) or (3) by doing anything that he is authorised to do by the president or by virtue of regulation 13(5).
- (6) An offence under any of paragraphs (1) to (3) is triable summarily by a civilian court in the United Kingdom, the Isle of Man or in a British overseas territory, and shall be punishable by a fine not exceeding level 3 on the standard scale.

(AFA06 s.343)

1. Type of offence

An offence under this section **may be** heard summarily⁷⁴.

2. Specimen charges

FAILURE TO COMPLY WITH A WITNESS NOTICE SERVED IN CONNECTION WITH A SERVICE INQUIRY CONTRARY TO THE ARMED FORCES ACT 2006 SECTION 343(4) NAMELY REGULATION 16 OF THE ARMED FORCES (SERVICE INQUIRIES) REGULATIONS 2008

⁷⁴ Section 53 of the Act.

Regulation 16(1)

[AB] did, on, at....., without reasonable excuse fail to act in accordance with a witness notice by failing to

COMMITTING AN ACT INTENDED TO HAVE AN EFFECT ON A SERVICE INQUIRY CONTRARY TO THE ARMED FORCES ACT 2006 SECTION 343(4) NAMELY REGULATION 16 OF THE ARMED FORCES (SERVICE INQUIRIES) REGULATION 2008

Regulation 16(2)(a)

[AB] did, between and, during the course of a Service Inquiry, distort or alter any [evidence, document or other thing given, produced or provided] to a Service Inquiry panel.

Regulation 16(2)(b)

[AB] did, between and, during the course of a Service Inquiry, prevent any [evidence, document or other thing] from being [given, produced or provided] to a Service Inquiry panel.

Regulation 16(3)(a)

[AB] did, between and, during the course of a Service Inquiry, intentionally suppress or conceal a document knowing or believing it to be a relevant document to the conduct of the Service Inquiry panel.

Regulation 16(3)(b)

[AB] did, between and, during the course of a Service Inquiry, intentionally destroy a relevant document.

3. Ingredients of the offence

Without reasonable excuse

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Witness notice

Is a notice issued on application to a judge advocate⁷⁵.

Distort, alter, suppress, conceal or destroy

Should be given their normal dictionary meaning.

Service Inquiry panel

Has the same meaning as in section 343 and *panel* is to be construed accordingly.

Document

⁷⁵ The Armed Forces (Service Inquiries) Regulations 2008, regulation 13.

Includes information recorded in any form. References to producing or providing a document in relation to information recorded are to be read as producing or providing a copy of the information in a legible form.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Evidence given by persons to a Service Inquiry panel is not admissible against a person at a summary hearing or in proceedings before a civilian court or a Service court (Summary Appeal Court, Court Martial, Service Civilian Court or Court Martial Appeal Court).

For further information pertaining to Service Inquiries⁷⁶ and perjury in relating to evidence given at a Service Inquiry see [Chapter 6](#) (Investigation, charging and mode of trial).

⁷⁶ See JSP 832 (Service Inquiries).

Section 18(8) Armed Forces Act 1991 – Family child assessment order

18(8) Family Child Assessment Orders

(8) A person subject to service law or a civilian subject to service discipline, commits an offence if he intentionally obstructs any person exercising a power conferred by virtue of the making of an assessment order.

(8A) A person guilty of an offence under this section is liable to any punishment mentioned in rows 5 to 12 of the Table in section 164 of the Armed Forces Act 2006.

(8B) For the purpose of determining the court's powers when sentencing a civilian offender (within the meaning of Part 1 of Schedule 3 to the Armed Forces Act 2006) for an offence under this section, subsection (8A) has effect as if the reference were to rows 5 to 12 were to rows 2 to 7.

(8C) For the purpose of determining the court's powers when sentencing an offender to whom Part 2 of that Schedule applies (ex-servicemen etc) for an offence under this section, subsection (8A) has effect as if the reference were to rows 5 to 12 were 5 to 10.

(AFA91 s.18(8))

1. Type of Offence

An offence under section 18(8) **may not be** heard summarily⁷⁷.

2. Specimen Charge

OBSTRUCTING A PERSON CARRYING OUT A FAMILY CHILD ASSESSMENT ORDER CONTRARY TO SECTION 18(8) OF THE ARMED FORCES ACT 1991

[AB] on the day of obstructed [name], a person carrying out a family child assessment order.

3. Ingredients of Offence

A person subject to service law / civilian subject to service discipline (subsection 1(a) and (4))

For persons subject to service law and civilian subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Intentionally

An act is done intentionally if it is deliberate and wilful, not accidental or inadvertent. It is therefore necessary for the prosecution to prove that the act in question was done with the intention of obstructing. Provided that the person charged intended to do an act which amounted to obstruction, it is immaterial that he did not appreciate that what he did amounted in law to obstruction.

Obstructs

⁷⁷ Section 53 Schedule 2 of the Act.

Obstruction need not involve physical violence; anything which makes it more difficult for a person to carry out his duty amounts to obstruction.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It would be a defence to this charge for the accused to show that he did not act intentionally, but accidentally or inadvertently.

5. Notes

Spare.

Section 20(9) Armed Forces Act 1991 – Obstructing a person exercising the power to remove a child.

20(9)

(9) A person subject to service law, or a civilian subject to service discipline, commits an offence if he -

(a) intentionally obstructs any person exercising the power under subsection (2)(b) above to remove, or prevent the removal of, a child; or (b) intentionally fails to comply with an exclusion requirement included in a protection order by virtue of section 20A below.

(9A) A person guilty of an offence under this section is liable to any punishment mentioned in rows 5 to 12 of the Table in section 164 of the Armed Forces Act 2006.

(9B) For the purposes of determining the court's powers when sentencing a civilian offender (within the meaning of Part 1 of Schedule 3 to the Armed Forces Act 2006) for an offence under this section, subsection (9A) has effect as if the reference to rows 5 to 12 were to rows 2 to 7.

(9C) For the purposes of determining the court's powers when sentencing an offender to whom Part 2 of that Schedule applies (ex-servicemen etc) for an offence under this section, subsection (9A) has effect as if the reference to rows 5 to 12 were to rows 5 to 10.

(AFA91 s.20(9))

1. Type of Offence

An offence under section 20(9) **may not be** heard summarily⁷⁸.

2. Specimen Charge

OBSTRUCTING A PERSON CARRYING OUT A PROTECTION ORDER CONTRARY TO SECTION 20(9)(a) OF THE ARMED FORCES ACT 1991

[AB] on the day of obstructed [*name*], a person carrying out a protection order.

FAILURE TO COMPLY WITH AN EXCLUSION ORDER CONTRARY TO SECTION 20(9)(b) OF THE ARMED FORCES ACT 1991

[AB] on the day of failed to comply with an exclusion order in that (s)he [*failed to leave relevant premises at... / entered relevant premises at / entered defined area*]

3. Ingredients of Offence

A person subject to service law / civilian subject to service discipline (subsection 1(a) and (4))

For persons subject to service law and civilian subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Intentionally

An act is done intentionally if it is deliberate and wilful, not accidental or inadvertent. It is therefore necessary for the prosecution to prove that the act in question was done with the

⁷⁸ Section 53 Schedule 2 of the Act.

intention of obstructing. Provided that the person charged intended to do an act which amounted to obstruction, it is immaterial that he did not appreciate that what he did amounted in law to obstruction.

Obstructs

Obstruction need not involve physical violence; anything which makes it more difficult for a person to carry out his duty amounts to obstruction.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It would be a defence to this charge for the accused to show that he did not act intentionally, but accidentally or inadvertently.

5. Notes

Spare.

RFA 96⁷⁹ Section 95. Reserve force offences

s.95

(1) A member of a reserve force who—

(a) when required by or in pursuance of orders or regulations under section 4 to attend at any place, fails without reasonable excuse to attend in accordance with the requirement;

(c) by any fraudulent means obtains or is an accessory to the obtaining of any pay or other sum contrary to orders or regulations under section 4;

(d) knowingly or recklessly makes a statement false in any material particular in giving any information required by orders or regulations under section 4; or

(e) fails without reasonable excuse to comply with orders or regulations under section 4,

(1A) A member of a reserve force ("A") commits an offence if--

(a) a superior officer ("B"), in pursuance of orders or regulations under section 4, is acting in the execution of his office;(b) A's behaviour towards B is threatening or disrespectful; and(c) A knows or has reasonable cause to believe that B is a superior officer.

(1B) For the purposes of subsection (1A)--

(a) "superior officer" has the same meaning as in the Armed Forces Act 2006;(b) section 11(3) of that Act (meaning of "behaviour" and "threatening") applies.

(1C) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).]

(2) A person guilty of an offence under this section is liable--

(a) on conviction by the Court Martial--

(i) in the case of an offence under subsection (1)(a) or (e) or (1A), to any punishment mentioned in rows 5 to 12 of the Table in section 164 of the Armed Forces Act 2006;(ii) in the case of an offence under subsection (1)(c) or (d), to any punishment mentioned in that Table, but any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks;

(b) on summary conviction by a civil court--

(i) in the case of an offence under subsection (1)(a), (e) or (1A), to a fine not exceeding level 3 on the standard scale; and

(ii) in the case of an offence under subsection (1)(c) or (d) to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale (or both).

(2A) For the purposes of determining the Court Martial's powers when sentencing an offender to whom Part 2 of Schedule 3 to the Armed Forces Act 2006 applies (ex-servicemen etc) for an offence under subsection (1)(a) or (e) or (1A), subsection (2)(a)(i) has effect as if the reference to rows 5 to 12 were to rows 5 to 10.

(RFA 96 s.95)

⁷⁹ Reserved Forces Act 1996 is contained within MSL Volume 3.

1. Type of Offence

An offence under this section **may not be** heard summarily⁸⁰, though it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

FAILURE TO ATTEND CONTRARY TO SECTION 95(1)(a) OF THE RESERVE FORCES ACT 1996

[AB] on , without reasonable excuse failed to attend for guard duty at Melchett Barracks, Aldershot, when required to do so by an order made under Section 4 of the Reserve Forces Act 1996.

OBTAINING PAY OR OTHER SUM BY FRAUDULENT MEANS CONTRARY TO SECTION 95(1)(c) OF THE RESERVE FORCES ACT 1996

[AB] on fraudulently obtained [*pay amounting to £xx / the sum of £xx*] in that he falsely represented to [CD] that he was entitled to Lodging Allowance.

MAKING A FALSE STATEMENT CONTRARY TO SECTION 95(1)(d) OF THE RESERVE FORCES ACT 1996

[AB] on when required to give information by an order made under section 4 of the Reserve Forces Act 1996, knowingly made a statement that was false in a material particular, namely that he had never previously been married.

FAILURE TO COMPLY WITH REGULATIONS CONTRARY TO SECTION 95 (1) (e) OF THE RESERVE FORCES ACT 1996

[AB] on failed without reasonable excuse to comply with an order made under section 4 of the Reserve Forces Act 1996, in that he left his personal weapon unattended.

USING THREATENING OR DISRESPECTFUL BEHAVIOUR TOWARDS A SUPERIOR OFFICER CONTRARY TO SECTION 95(1A)(a) OF THE RESERVE FORCES ACT 1996

[AB] on used threatening / disrespectful behaviour towards [CD], a superior officer.

3. Ingredients of Offence

Without reasonable excuse

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). An accused would have a reasonable excuse with regard to offences under s. 95(1)(a) if the order had genuinely never been communicated to him for whatever reason.

⁸⁰ Section 53 of the Act

Knowingly / Recklessly

To prove that the accused made the false statement knowingly, it must be shown that he knew that it was false and deliberately made it nonetheless. To prove that the accused was reckless when he made a statement under subsection (4) (b), it must be proved that the accused made a statement in the awareness of a risk that it might have been false, but unreasonably went on to take the risk and make the statement anyway.

*Superior officer*⁸¹

Superior officer, in relation to a person (A), means an officer, warrant officer or non-commissioned officer who is subject to Service law and is of superior rank or rate to A; or is of equal rank or rate to A and is exercising authority as A's superior (see below).

It does not matter whether the superior officer is of the same or different Service to the accused, providing that the superior officer is also subject to Service law. This would include Service personnel from other nations when they are posted to serve with UK forces and become subject to Service law, but would not include, for example, coalition forces or other nations' personnel alongside whom UK Service personnel happen to be working.

A person of a higher rank or rate than the accused will always be his superior officer under the Act. In addition there can be occasions when someone of the same rank or rate as the accused will be his superior officer. This would not apply in the case of those of the lowest rank and rates in each Service: a private, able rate and airman (ac, LAC and SAC) can never be the superior officer of another private, able rate or airman. All other ranks or rates can become the superior officer of another person of the same rank where he is *exercising authority as [the accused's] superior*. In order to be his superior officer however it must be an official entitlement to exercise authority over the other, such as having been tasked to carry out a temporary duty or a specific assignment which puts him in a position of authority over that other individual. Where an accused does not know or does not have reasonable cause to believe that a person is their superior officer and uses violence against him consideration may be given to a charge under section 21 (fighting or threatening behaviour etc).

Knows or has reasonable cause to believe

It is necessary that there was actual knowledge that the individual was a superior officer or that the accused had reasonable cause to believe he was a superior officer. If the superior officer was the accused's commanding officer or his sub unit commander this would be sufficient to prove actual knowledge, because the person and his rank was known to him. Similarly, if it is shown that the superior officer is a higher rank than the accused and at the time of the offence was in uniform this would impute actual knowledge. Where the superior officer is not known to the accused or is not in uniform it will be necessary to consider whether the accused knew in the circumstances, or whether he should have known. The test of whether he would have reasonable cause to believe is an objective one and should be judged on the evidence in the case. If the accused raises the issue that he did not know, it is not for him to prove that. In that case the person hearing the charge should consider the evidence produced, and the evidence of the accused and decide, on the basis of his view of the evidence, whether it has been shown that the accused knew or had reasonable cause to believe. In cases where the individuals are of the same rank or rate as each other there

⁸¹ Section 367 of the Act.

should be evidence of the superior's authority as well as how the accused was aware of that authority or had reasonable cause to be aware of it.

Behaviour towards

Behaviour here includes both actions and words, whether spoken or written. It does not matter what form the communication takes (email, text, signal, letter or telephone conversation etc). The behaviour does not have to be in the presence of the superior officer, but the superior officer must have been the intended recipient and the subject of the comment. For example, a comment made to a third party or muttered under one's breath deliberately within earshot of the superior officer. Alternatively, where an email is sent and the superior officer is an intended addressee. It is possible for this to be the case even when the accused is not in the superior officer's presence at the time he receives the communication. It is a question of fact whether the behaviour was *towards* the superior officer. This offence is not intended to be used to charge individuals in relation to comments they may make to each other in private about a superior officer. If threatening or insubordinate language is used about a superior officer to a third party, then consideration may be given to a charge under section 19 (conduct prejudicial to good order and discipline).

Threatening or disrespectful

Threatening behaviour can include anything said by the accused and is not limited to behaviour that threatens personal violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example threats to burn someone's house down, or to injure a member of their family. Threatening should be given its normal dictionary meaning and considered objectively. It is for the person hearing the charge to decide as a question of fact.

Disrespectful should also be given its normal dictionary meaning. Within the Service context, insubordinate language will always be disrespectful but it may also be threatening behaviour. Disrespectful covers the situation where a subordinate, having been given a lawful command which does not require immediate compliance, indicates in respectful words and tone that he does not intend to comply with the order. Disrespectful in this context means disrespectful of the authority of the superior. If the command is disobeyed, consideration may be given to a charge under section 12 (disobedience to a lawful command).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

The offence under section 95 (1)(c) includes acting as a principal or an accessory. To be an accessory is the same as aiding and abetting an offence. To aid and abet means to assist the actual perpetrator of an offence (the principal offender): that assistance may be rendered at the time when the offence was committed or before the time when the offence was committed and at a different place. For example, to keep watch near the scene of the commission of an offence, or to distract someone's attention while an offence is committed, is aiding and abetting if the aider and abettor knew what was going on. Likewise the supply of a weapon by a person who knew that there was a real possibility it would be used for murder, will make that person an aider and abettor (accessory) to the principal offence. The accused need not know the precise crime that was intended or which was committed: If he realises or contemplates that there is a real possibility that a number of offences may be

committed, and one of those offences is committed, the fact that he has lent assistance to the principal to commit the offence will be sufficient.

It is important to note that a person charged with this offence will not be charged under this section, but under the principal offence he is alleged to have aided and abetted or counselled and procured. The distinction between aiding and abetting, counselling and procuring is not significant when it comes to wording the charge.

This section does not apply to criminal conduct offences (section 42 of the Act). Under the criminal law of England and Wales a person who aids, abets, counsels or procures the commission of a criminal offence has his charge found proved of that offence under common law. Where the offence is a criminal conduct offence, consideration should be given to bringing a charge under section 47 of the Act which modifies that common law offence for the purposes of the Act.

RFA 96⁸² Section 96. Failure to attend for service on call out or recall

<p>42. RFA 96 Section 96. Failure to attend for service on call out or recall</p> <p>(1) A member of a reserve force served with a call-out notice under any provision of this Act who, without leave lawfully granted or reasonable excuse-</p> <p>(a) fails to present himself for service at the time and place specified in the call-out notice under section 32(3)(b), 43(4)(b) or 58(3)(c) (as the case may be);</p> <p>(b) having so presented himself, fails to remain there until accepted into service or informed that he is not to be accepted into service in pursuance of that notice; or</p> <p>(c) where he has for any reason failed to present himself at the time and place so specified or to remain there, fails-</p> <p>(i) to present himself to a person specified in the call-out notice or to any other authorised officer; or</p> <p>(ii) having so presented himself, to remain until accepted into service or informed that he is not to be accepted into service in pursuance of that notice,</p> <p>is guilty of desertion (if section 8(2)(a) or (b) of the Armed Forces Act 2006 applies to him) or absence without leave (if neither of those provisions applies to him).</p> <p>(2) Subsection (1) above applies to a person liable to recall as it applies to a member of a reserve force –</p> <p>(a) with the substitution for references to a call-out notice of references to a recall notice; and</p> <p>(b) as if paragraph (a) of that subsection referred to the time and place specified in the recall notice under section 70(3)(c).</p> <p>(3) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).</p> <p style="text-align: right;">(RFA 96 s.96)</p>
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1. Type of offence

An offence of desertion under this section (as applied by section 8 of the Act) **may not be** heard summarily⁸³, although it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence of absence without leave under this section (as applied by section 9 of the Act) **may be** heard summarily⁸⁴ and tried summarily by a civil court.

2. Specimen charges

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(a)

[AB] absented himself without leave from [date] to [date] by failing to present himself at the time and place specified [in the call-out/recall notice].

⁸² Reserved Forces Act 1996 is contained within MSL Volume 3.

⁸³ Section 53 and Schedule 2 of the Act.

⁸⁴ Section 53 of the Act.

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(b)

[AB] absented himself without leave from [date] to [date] by having presented himself under the terms of the [call-out/recall notice], failed to remain there until accepted into service or on being informed that he was not to be so accepted.

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(c)(i)

[AB] absented himself without leave from [date] to [date] by failing to present himself in accordance with the [call-out/recall] notice or to remain there, failed to present himself to a person specified in the notice or to any other specified officer.

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(c)(ii)

[AB] absented himself without leave from [date] to [date] by failing to present himself in accordance with the [call-out/recall] notice or to remain there, and having so presented himself, to remain until accepted into service or informed that he is not to be accepted for service.

3. Ingredients of the offence

Member of the reserve forces

It must be proved that the accused was a member of a reserve force see [Chapter 3](#) (Jurisdiction and time limits) when served with a call-out notice. For the purposes of the Reserve Forces Act 1996 (RFA 96), reserve forces means the following forces—

- a. The Royal Fleet Reserve, the Royal Naval Reserve and the Royal Marines Reserve (“the reserve naval and marine forces”);
- b. The Army Reserve and the Territorial Army (“the reserve land forces”); and
- c. The Air Force Reserve and the Royal Auxiliary Air Force (“the reserve air forces”).

An accused will also be a member of the reserve forces for the purposes of this offence if he is a person liable to recall⁸⁵.

Service of call-out notice or recall notice

It must be proved that the accused was served with a call-out notice. For issues concerning service see [Chapter 19](#) (Service of process).

The call-out notice for the purposes of section 96(1) shall be those made under section 32(3)(b), 43(4)(b) or 58(3)(c) of the RFA 96.

⁸⁵ Reserve Forces Act 1996, section 66.

Fail to present or failure to remain.

Evidence will be required that the person failed to present himself at the time and place specified in the call-out notice or that he did present himself but then failed to remain at the specified place until accepted for service or informed that he was not to be accepted into service.

Authorised officer

This means an officer authorised by or in accordance with directions of the Defence Council under section 35 of the RFA 96.

Desertion

In addition to the ingredients above, the offence of desertion under section 96 of the RFA 96 (as applied by section 8 of the Act) requires proof of the accused's intent either to remain permanently absent without leave, or to avoid relevant service. For intent as it applies to desertion and desertion generally, refer to section 8 of the Act.

Absence without leave

It must be proved that the accused was absent from his unit, or other place of duty and that the accused's absence was not authorised. He may either improperly have left his unit or he may have failed to return to it at the required time. The accused would be absent without leave where he had never been granted leave or where he remained absent after authorised leave had expired, or where his leave had been rescinded by a subsequent lawful order to return to his unit. In all cases it would be necessary to prove by evidence that there was no authorised leave in place. Where authorised leave had been rescinded this would require evidence that that fact had been communicated to him.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point he returns, or is apprehended. It will be for evidence to establish these points. A Service person who is absent without leave ceases to be absent if he is taken into Service custody, is arrested by a constable as suspected of being an absentee or if he surrenders himself as being illegally absent to a provost officer or to a Service unit or to a constable or at a police station in the UK or consular officer elsewhere.

Intentionally, recklessly, negligently

For intention, negligence or recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For intention, negligence or recklessness regarding absence without leave, refer to section 9 of the Act.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For defences regarding absence without leave, see section 9 of the Act. For desertion see section 8 of the Act.

5. Notes

Time limits for commencing proceedings

Section 107 of the RFA 96 (as amended) prescribes time limits for instituting proceedings in the civil courts; reference to proceedings at Court Martial have been deleted from this section. However these time limits are not the same as those established by section 62 of the Act for charging RFA offences. The section 62 time limits prescribed by the Act would apply if an offence under this section is to be prosecuted at Court Martial.

If a person liable to recall is charged under this section, references to 'call-out notices' shall be substituted by the words 'recall notice'.

RFA96⁸⁶ Section 97. Failure to attend for duty or training

<p>42. RFA96 Section 97. Failure to attend for duty or training</p> <p>(1) A member of a reserve force who has entered into a full-time service commitment or additional duties commitment and, without leave lawfully granted or reasonable excuse, fails to appear at the time and place at which he is required to attend-</p> <p>(a) in the case of a full-time service commitment, to begin the period of full-time service contemplated by the commitment;</p> <p>(b) in the case of an additional duties commitment, to begin a period of service under the commitment, to begin a period of service under the commitment, is guilty of desertion (if section 8(2)(a) or (b) of the Armed Forces Act 2006 applies to him) or absence without leave (if neither of those provisions applies to him).</p> <p>(2) A member of a reserve force who -</p> <p>(a) is required to undergo a period of training in accordance with section 22, a special agreement or an employee agreement (or any other requirement applicable to special members), and</p> <p>(b) fails, without leave lawfully granted or reasonable excuse, to appear at any time and place at which he is required to attend, is guilty of absence without leave.</p> <p>(3) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).</p> <p style="text-align: right;">(RFA 1996 s.97)</p>
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1. Type of offence

An offence of desertion under this section (as applied by section 8 of the Act) **may not be** heard summarily⁸⁷, although it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence of absence without leave under this section (as applied by section 9 of the Act) may be heard summarily⁸⁸ and tried summarily by a civil court.

2. Specimen charges

FAILURE TO ATTEND FOR DUTY OR TRAINING CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 97(1)(a)

[AB] absented himself without leave from [date] to [date] when he, having entered into a full-time service commitment, failed to appear at a time and place required to begin a period of full-time Service.

⁸⁶ Reserve Forces Act 1996 is contained within MSL Volume 3.

⁸⁷ Section 53 and Schedule 2 of the Act.

⁸⁸ Section 53 and Schedule 2 of the Act.

FAILURE TO ATTEND FOR DUTY OR TRAINING CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 97(1)(b)

[AB] absented himself without leave from [date] to [date] when he, having entered into an additional duties commitment, failed to appear at a time and place required to begin a period of additional duties service.

All the above offences may be charged as desertion if the criteria under sections 8(2)(a) or (b) of the Act apply (intention to remain permanently absent or intention to avoid a period of active service).

FAILURE TO ATTEND FOR DUTY OR TRAINING CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 97(2)

[AB] absented himself without leave from [date] to [date] when under a [special/employee agreement/annual training quota requirement (RFA section 22)] failed to appear at any time or place required to carry out a period of training.

3. Ingredients of the offence

Member of the reserve forces

It must be proved that the accused was a member of a reserve force when he entered into a full-time service commitment or additional duties commitment. For the meaning of reserve forces see paragraph 3 of the commentary on section 96 of the Reserve Forces Act 96 (RFA 96).

Full-time service commitment or additional duties commitment

It must be proved that such a commitment has been entered into by the accused. For a full-time service commitment, such evidence should be contained in a written document in accordance with section 24 of the RFA 96. For an additional duties commitment, such evidence should be contained in a written document in accordance with section 25 of the RFA 96.

Failure to appear.

Evidence will be required that the person failed to appear at the time and place at which he was required to attend. In the case of a full-time service commitment (subsection (1)(a)), to begin the period of full-time service contemplated by the commitment. In the case of an additional duties commitment (subsection (1)(b)) to begin a period of service under the commitment.

Desertion

See section 8 of the Act and section 96 of the RFA 96. If there is no evidence of desertion then the proper charge is one of absence without leave.

Absent without leave

It must be proved that the accused was absent from his unit, or other place of duty and that the accused's absence was not authorised. He may either improperly have left his unit or he may have failed to return to it at the required time. The accused would be absent without leave where he had never been granted leave or where he remained absent after authorised leave had expired, or where his leave had been rescinded by a subsequent lawful order to return to

his unit. In all cases it would be necessary to prove by evidence that there was no authorised leave in place. Where authorised leave had been rescinded this would require evidence that that fact had been communicated to him.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point he returns, or is apprehended. It will be for evidence to establish these points. A Service person who is absent without leave ceases to be absent if he is taken into Service custody, is arrested by a constable as suspected of being an absentee or if he surrenders himself as being illegally absent to a provost officer or to a Service unit or to a constable or at a police station in the UK or consular officer elsewhere.

Intentionally, negligently or recklessly

For intention, negligence or recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For intention, negligence or recklessness regarding absence without leave, refer to section 9 of the Act.

Required to attend training

A person will be required to attend training in accordance with section 22 RFA 96, a special agreement under section 28 of the RFA 96, or an employee agreement under sections 38 and 39 of the RFA 96 (or any other requirement applicable to special members under section 40 of the RFA 96).

Failure to appear.

Evidence will be required that the person failed to appear at any time and place at which he was required to attend.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For defences regarding absence without leave, see section 9 of the Act. For desertion see section 8 of the Act.

5. Notes

Time limits for commencing proceedings

Section 107 of the RFA 96 (as amended) prescribes time limits for instituting proceedings in the civil courts; reference to proceedings at Court Martial have been deleted from this section. However these time limits are not the same as those established by section 62 of the Act for charging RFA offences. The section 62 time limits prescribed by the Act would apply if an offence under this section is to be prosecuted at Court Martial.

RFA96 Schedule 1 paragraph 5 - False answers in attestation papers

5

(1) Any person appearing before an enlisting officer for the purpose of being attested who knowingly makes a false answer to any question contained in the attestation paper and put to him by or by the direction of the enlisting officer is guilty of an offence.

(2) A person guilty of an offence under sub-paragraph (1) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale (or both); and he may be proceeded against summarily notwithstanding that he has since become a member of the reserve forces.

(3) A person guilty of an offence under sub-paragraph (1) who has since become a member of the reserve forces is liable on conviction by the Court Martial to any punishment mentioned in rows 2 to 12 of the Table in section 164 of the Armed Forces Act 2006.

(4) For the purposes of determining the Court Martial's powers when sentencing an offender to whom Part 2 of Schedule 3 to the Armed Forces Act 2006 (ex-servicemen etc) applies for an offence under sub-paragraph (1), sub-paragraph (3) has effect as if the reference to rows 2 to 12 were to rows 2 to 10.

(5) Where an offence under sub-paragraph (1) is committed by a person within sub-paragraph (3), the time for which he is for the purposes of section 62 of the Armed Forces Act 2006 (time limits for charging) to be regarded as being a relevant reservist (within the meaning of that section) includes the period from (and including) the time he committed the offence to the time he became a member of the reserve forces.

(RFA 1996 Schedule 1)

1. Type of Offence

An offence under this section **may not be** heard summarily⁸⁹, though it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

MAKING A FALSE ANSWER TO AN ATTESTING OFFICER CONTRARY TO SCHEDULE 1 PARAGRAPH 5(1) OF THE RESERVE FORCES ACT 1996

[AB] on knowingly made a false answer to a question put to him by [CD] an attesting officer, in that he stated that he had no previous criminal convictions.

3. Ingredients of Offence

Knowingly

⁸⁹ Section 53 of the Act

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility). There must be evidence to show that the accused fully knew that what he was saying was false when he made the statement in question.

4. Defences

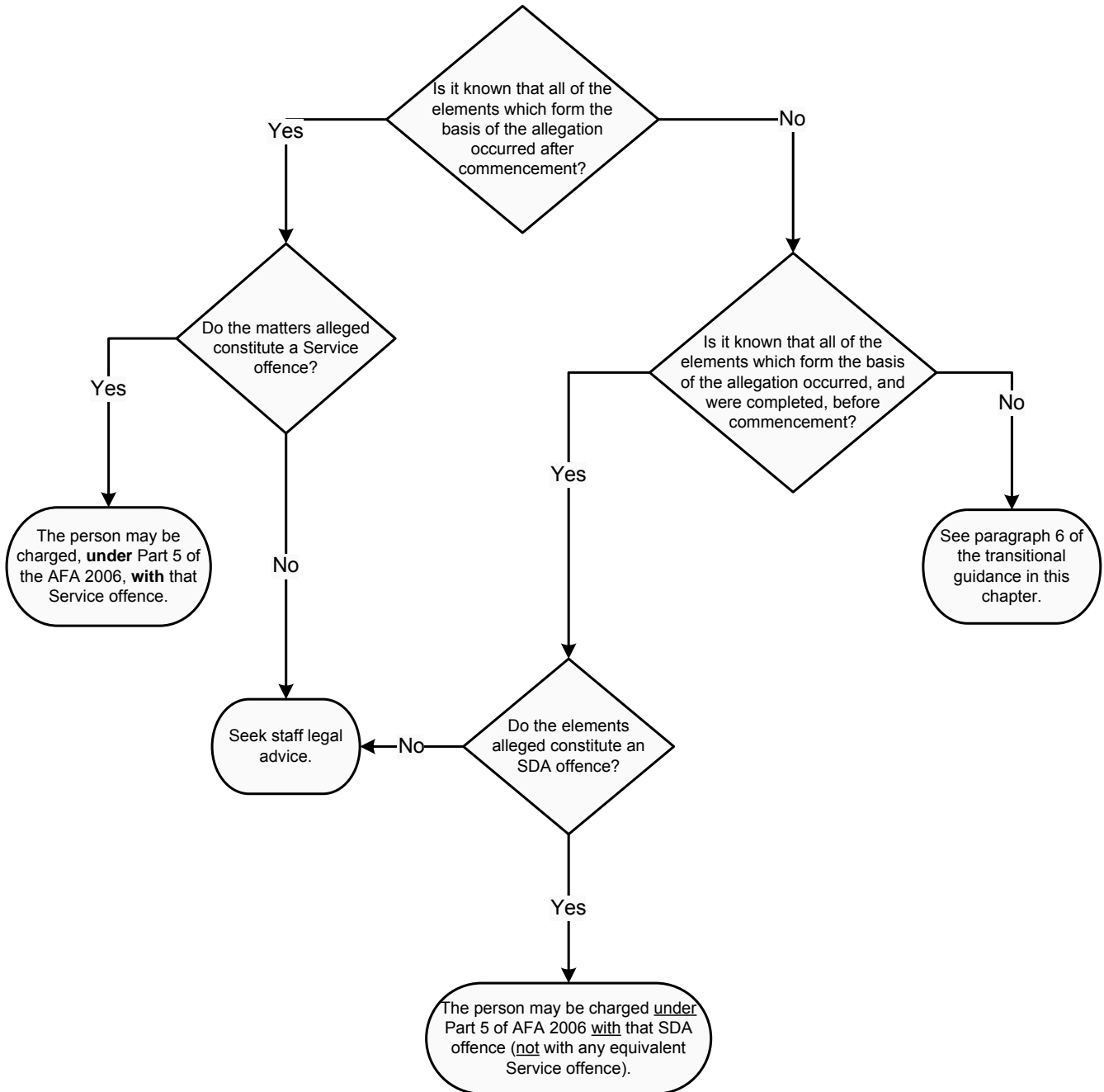
For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

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TRANSITIONAL GUIDANCE



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Chapter 8

Criminal conduct offences

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Chapter 8

Criminal conduct offences

Introduction

1. This chapter contains information pertaining to those occasions when Service personnel and/or relevant civilians commit criminal conduct offences which may be dealt with summarily. Some of these offences require prior permission from higher authority before the charge can be heard. However, those of a more serious or complex nature, may be referred for Court Martial trial.

2. Those mentioned below represent some of the most common criminal conduct offences tried within the Service jurisdiction, but do not represent the wide range of offences against the criminal law.

Chapter structure

3. This chapter is structured to address each offence in the following format:

Reference to appropriate Act	Offence as detailed within the relevant Act
Type of offence	Details of how the offence should be dealt with
Specimen charges	Provided to assist in drafting of charges but where in doubt the advice of the DSP or staff legal advice should be sought
Ingredients of the offence	Guidance to the meaning of particular elements of the offence
Defences	Contains defences which are particular to the offence. Other defences will be contained within Chapter 12 (Defences, mitigation and criminal responsibility)
Notes	Further guidance and alternative charges

Transitional guidance

4. Application of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 can be complicated and staff legal advice should always be taken. This guidance is restricted to the more common straightforward cases; however more complex situations will need careful consideration on a case by case basis. In all cases reference should be made to the Order itself, in particular, in the case of charging offences¹.

5. Where a person commits an offence before commencement (i.e. 31st October 09), the suspect cannot be charged with a Service offence (i.e. one of those offences set out in section 50 of the AFA 06). Instead, the suspect must be charged with the relevant SDA offence. For transitional purposes, and for the purposes of the flowchart at [Annex A](#), an 'SDA offence' means any of the following (note that, for those purposes, the expression includes more than just offences under the 1955 and 1957 acts):

- a. Any offence under Part 2 of AA 1955 or AFA 1955;

¹ See Parts 1 to 3 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

- b. Any offence under Part 1 of NDA 1957;
- c. An offence under section 47K of NDA 1957;
- 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; or
- g. An offence under paragraph 5(1) of Schedule 1 to RFA 1996 committed before commencement by a person within a specific category².

6. For example, if a soldier steals something on the 29 Sep 09 (whilst subject to military law) but that offence does not come to light until on or after the 31 Oct 09, the soldier must be charged under section 70 of the AA55. He must not be charged with an offence under section 42 of the AFA 06. Where an accused is charged with a SDA offence, the SDA offence can be tried by a Service court or can be dealt with in a summary hearing under the AFA 06 by virtue of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

7. In most cases it will be obvious whether the suspect should be charged with an AFA 06 offence or a SDA offence. There may however be some situations where the matter is not so clear. Where these situations arise COs should seek staff legal advice before bringing a charge. The situations arise where:

- a. **The offence is incomplete at commencement (relevant to offences under paragraphs 5a, b, f or g above).** An offence will be incomplete at commencement if the SDA offence has two or more elements and at least one of the elements occurs prior to commencement and at least one occurs after commencement. Where this occurs the accused can be charged under the relevant SDA offence even though the last element of the offence does not occur until after 31 Oct 09³. So for example, if a soldier deliberately leaves the ignition key in a Service vehicle on 30 Oct 09 with the result that the vehicle is stolen on 31 Oct 09, the soldier can be charged under the relevant SDA provision (in this case section 44(1)(b) of the AA55).
- b. **A course of conduct is still ongoing at commencement (relevant to offences under paragraphs 5a, b or f above).** This situation is most likely to occur where a Service person is AWOL. For example, where a soldier goes absent prior to commencement and does not return until after commencement. The effect of article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 is that the whole course of conduct (both before and after commencement) can be charged under section 38 of the AA55. It will also be permissible to charge the accused with two shorter periods of AWOL; one under the AA55 for the period that terminates at commencement and one under section 9 of the AFA 06 which begins at commencement⁴.
- c. **It is not clear when the conduct occurred.** This situation might arise where a suspect is alleged to have committed an offence within a period that began before 31 Oct 09 but finished after this date, but it is unclear exactly when (during the period) that alleged offence was committed. For example, in January 2010 a recruit might complain that he was assaulted during training a couple of months earlier, but cannot

² See article 2(5) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

³ See article 9 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

⁴ See article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

remember whether the assault occurred before or after 31 Oct 09. Where this occurs the suspect can be charged under the relevant SDA provision. However, the suspect must only be charged with the relevant SDA offence where the alleged conduct must have been an offence. The only question is when it was committed, and therefore which offence it was. In the example above, the assault must have been either an offence under section 70 of the AA/AFA55 (or section 42 of the NDA57) or an offence under section 42 of the AFA06. If the alleged conduct amounts to an offence under the SDAs but does not amount to any offence under AFA06, it must be proved to have occurred before commencement. Conversely, if it would be an offence under AFA06 but not under the SDAs, it must be proved to have occurred after commencement⁵.

⁵ See article 11 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

Criminal conduct - section 42 Armed Forces Act 2006

- 42. Criminal conduct**
- (1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that—**
 - (a) is punishable by the law of England and Wales; or**
 - (b) if done in England or Wales, would be so punishable.**
 - (2) A person may be charged with an offence under this section even if he could on the same facts be charged with a different service offence.**
 - (3) A person guilty of an offence under this section is liable to—**
 - (a) if the corresponding offence under the law of England and Wales is under that law an offence punishable with imprisonment, any punishment mentioned in the Table in section 164;**
 - (b) otherwise, any punishment mentioned in rows 5 to 12 of that Table.**
 - (4) Any sentence of imprisonment or fine imposed in respect of an offence under this section must not exceed—**
 - (a) if the corresponding offence under the law of England and Wales is a summary offence, the maximum term of imprisonment or fine that could be imposed by a magistrates' court on summary conviction;**
 - (b) if that corresponding offence is an indictable offence, the maximum sentence of imprisonment or fine that could be imposed by the Crown Court on conviction on indictment.**
 - (5) In subsection (4) “a summary offence” and “an indictable offence” mean, respectively, a summary offence under the law of England and Wales and an indictable offence under that law.**
 - (6) In this section and sections 45 to 49 “act” includes an omission and references to the doing of an act are to be read accordingly.**
 - (7) In subsections (1) and (8) and sections 45 to 49 “punishable” means punishable with a criminal penalty.**
 - (8) In this Act “the corresponding offence under the law of England and Wales”, in relation to an offence under this section, means—**
 - (a) the act constituting the offence under this section; or**
 - (b) if that act is not punishable by the law of England and Wales, the equivalent act done in England or Wales.**

3. The effect of this section is to establish an offence creating provision so that an act or omission done by a person subject to Service law or a civilian subject to Service discipline⁶, see [Chapter 3](#) (Jurisdiction and time limits) anywhere in the world will be an offence under Service law if (a) it is a crime under the law of England and Wales or (b) had it been done in England or Wales would have been a crime under that law.

4. As to (a) this is straightforward: if the act or omission is a crime under English law it will be an offence under Service law. As to (b) this does not mean that every offence under English Criminal law is capable of being translated to apply to acts or omissions abroad, for example a regulatory offence relating solely to conditions in the UK or the EU or a road traffic offence which could only be committed by reference to a place in the domestic jurisdiction. Each instance must be assessed on its own merits and advice from an appropriate staff legal adviser may be sought.

⁶ Schedule 15 of the Act.

Violence offences

Common assault and battery

Section 39 of the Criminal Justice Act 1988 provides:-

Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority⁷.

Section 39 of the Criminal Justice Act 1988 creates two separate offences namely assault and battery (see notes on drafting of charges below).

In all cases before bringing a charge a CO should consider whether the circumstances reveal a prescribed circumstance or whether there is an allegation or circumstances which indicate that a Schedule 2 offence has been committed. These may not be dealt with summarily⁸. For the handling of cases in relation to Schedule 2 offences and prescribed circumstances see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these circumstances he must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY COMMON ASSAULT CONTRARY TO SECTION 39 OF THE CRIMINAL JUSTICE ACT 1988

[AB] on, assaulted [CD].

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY BATTERY CONTRARY TO SECTION 39 OF THE CRIMINAL JUSTICE ACT 1988

[AB] on, assaulted [CD] by beating him.

3. Ingredients of the offences

Assault

Assault is an act by which a person, intentionally or recklessly, causes another person (the victim) to apprehend immediate unlawful personal violence.

An act

It is necessary to show that the accused did something – an assault cannot be committed by omission. Words alone may constitute an assault, or words accompanied by some threatening act. Mere silence can however constitute an assault if the other elements of the

⁷ Section 53 Schedule 1 Part 1 of the Act.

⁸ Section 53, section 114 and Schedule 2 of the Act.

offence are present e.g. where an accused makes a threatening action but does not say anything.

In view of the requirement that the victim must be caused to fear immediate unlawful violence (see below) a silent telephone call is unlikely to constitute an assault. Words may also deprive an act such as a gesture of its otherwise threatening character.

Intentionally

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessly

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

To apprehend

This phrase should be given its normal dictionary meaning and will require the victim to have been aware of the accused's actions at the time.

Immediate unlawful violence

The threat of violence must be immediate. It is not sufficient for the threat to relate to an occurrence in the future. Therefore a person in Germany who phones a person in the UK and threatens to beat them up when they next meet will not have committed this offence.

The threat must relate to unlawful violence. Thus, it will not be an offence if a person threatens to use force lawfully, for example, where a police officer threatens to lawfully restrain a person who is resisting arrest.

Battery

Battery is the intentional or reckless application of unlawful force by one person upon another, however slight. This offence can be committed intentionally or recklessly.

Intentional

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessly

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Application of unlawful force

The slightest touch may amount to unlawful force for these purposes. The victim must be subject to the application of direct or indirect force for example, being punched or being struck by a bottle thrown by the accused. It would also be a battery if the accused set a dog upon the victim.

The fundamental principle is that every person's body is inviolate. The effect is that everybody is protected against physical injury and any form of molestation. There are however exceptions to this principle for example, where lawful force is applied to arrest a suspect. Additionally, a broader exception also exists to cater for the exigencies of everyday life which results in contact between individuals. Thus, jostling in a crowd or touching someone to get their attention, would not normally come within the remit of battery. The test

to be applied is whether the physical contact is so persistent in the particular circumstances as to go beyond generally accepted standards of conduct.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Self defence

A person may lawfully use force to defend himself (or other people, for guidance on which, see below) from attack or from threatened attack provided that he used force only when it was necessary, and he used no more force than was reasonable in the circumstances.

Although the force used must be reasonable and necessary, it is recognised that a person defending himself cannot always weigh precisely the exact amount of defensive action which is necessary. To be lawful, the amount of force that an accused uses must be proportionate to the immediate threat posed (or that he believes is posed) at the time. This depends on the facts, such as the nature of the attack, whether a weapon was used, and if so what sort of weapon. If it is assessed that an accused did no more than he instinctively thought necessary, that would be very strong evidence that the amount of force used was both necessary and reasonable.

In some cases it may be sensible and possible to take some avoiding action. A failure to retreat from the threat by the accused does not necessarily mean that the accused did not act in self defence. It is simply a factor to take into account when deciding whether it was necessary for the accused to use force and whether the force used was reasonable.

There is no rule of law which requires that the accused must wait until he is struck before using force in self defence. It is lawful to use reasonable force to deal with a threat that is imminent. Even if the accused appears to have been the initial aggressor, his subsequent acts may have been lawful self-defence to retaliatory violence by the victim.

The burden of disproving that this defence is available does not arise unless some admissible evidence of this defence is presented. This evidence may be presented by the accused, or any other witness in the case. Once this defence has been raised, if the officer hearing the charge is convinced of the accused's innocence or is left in doubt as to whether the accused might have acted in self defence, he should find the charge not proven. It is a defence for an accused to act in self defence even if he was mistaken about being the victim of an attack. Thus, if the accused used force because he mistakenly but honestly and reasonably believed he was the victim of an attack, he should be acquitted as long as the force used was reasonable and necessary in the circumstances as he understood them to be.

Defence of others

The same principles that apply in relation to self defence apply where the accused acts in the defence of a third party. Thus his actions must be proportionate in the circumstances as he perceived them to be.

Prevention of crime etc

An accused may also use such force as is reasonable in the circumstances in the prevention of crime or in assisting the lawful arrest of offenders.

Defence of property

An accused may also use force to prevent a person taking his goods or prevent another person trespassing on his property.

Consent

An accused will not commit an offence under section 39 of the Criminal Justice Act 1988 if the alleged victim has consented to the force used against him, for example, where force is used against another when participating in sporting activities. However, conduct that goes beyond what a player can reasonably be regarded as having accepted by his or her participation in the sport can render that conduct sufficiently serious to be categorised as criminal. Additionally, it may be lawful to engage in rough and undisciplined horseplay, provided that there is no intention to injure on the part of any of the participants.

Intoxication

Self-induced intoxication or voluntary drug taking is *not* a defence to either assault or battery. If the intoxication is not self induced, for example where the accused claims that his drink has been spiked, advice should be sought from the staff legal adviser.

Lawful correction of a child

It is a defence to a charge of battery for a parent to inflict upon his child such degree of force as is necessary to correct the child. Such force must however be reasonable and must not exceed the bounds of moderation. Regard must be paid to the manner of the infliction, the quantity inflicted and the instrument used for correction. The age and health of the child will also be relevant.

Provocation

This is not a defence to an offence but may, if raised by an accused, amount to mitigation.

5. Notes

Examples of assaults include:

- a. Drawing a weapon on someone in a threatening manner so as to pose an imminent threat to them.
- b. Striking at someone with a fist or a weapon – even though the blow misses its target.
- c. Any other act similar to a. or b. above which indicates an immediate intention to use violence against another person.
- d. Threatening words or gestures towards a person, or a combination of both.

Despite the terms *assault* and *common assault* having been used generally to cover assault and battery, the two offences are separate and therefore when drawing up a charge it is important that the offence being charged is clearly specified.

Joint enterprise

Incidents of violence or disorder, especially those fuelled by alcohol, may appear to have involved a number of personnel. In cases such as these particular care should be taken. While a number of personnel present may have been drunk within the meaning of section 20, they may only be charged together with, for example Assault if the evidence supports the view that they each participated (for example by punching or kicking the victim) or if it is clear that, regardless who actually struck the blows, it was a group action which they were *all in together*. In all such cases staff legal advice should be sought.

Possible alternative non-criminal conduct (disciplinary) offences

In dealing with violent incidents involving Service personnel, it is likely that Service Police and COs might be able to consider a range of Service disciplinary offences - listed below and covered in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) - as an alternative to the criminal conduct offences dealt with here. The choice of which is appropriate must be an informed one, and staff legal advice should be sought. Each offence contains different points to prove, and staff legal advisers are able to advise on which, in any given case, are capable of proof. They will also provide advice on the consequences of conviction of both disciplinary and criminal conduct offences. Where alternatives are available, consideration should be given to the context in which the offence occurred. This is not just a case of asking whether the offence was committed in a Service establishment, but whether Service issues were a factor.

For example, the ongoing work-related grievance of a Service person which is behind his assault on a superior officer committed in front of other personnel from his unit in a civilian bar could be charged under section 11 (misconduct towards a superior officer) see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). However where actual bodily harm (or greater) is caused, criminal conduct offences would always be appropriate.

- Section 14 (using force against a sentry)
- Section 11 (misconduct towards a superior officer)
- Section 20 (misconduct through alcohol or drugs)
- Section 21 (fighting and threatening behaviour)
- Section 22 (ill treatment of subordinates)
- Section 27 (obstructing a Service policeman)
- Section 28 (resisting arrest)

Assault occasioning actual bodily harm

Section 47 of the Offences against the Person Act 1861 provides that:

Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable...to imprisonment for not more than five years.

1. Type of Offence

This offence **may be** heard summarily **with** permission of higher authority⁹.

In all cases before bringing a charge a CO should consider whether the circumstances reveal a prescribed circumstance or whether there is an allegation or circumstances which indicate that a Schedule 2 offence has been committed. These may not be dealt with summarily¹⁰. For the handling of cases in relation to Schedule 2 offences and prescribed circumstances see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under prescribed circumstances or Schedule 2 offence he must, as soon as is practicable, make the Service Police aware of the matter. In all cases of assault occasioning actual bodily harm, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY SECTION 47 OF THE OFFENCES AGAINST THE PERSON ACT 1861.

[AB] on, assaulted [CD], thereby occasioning her actual bodily harm.

3. Ingredients of the offences

Assault

Assault is an act by which a person, intentionally or recklessly, causes another person (the victim) to apprehend immediate unlawful personal violence or to sustain unlawful personal violence. The necessary link between an assault and actual bodily harm must be made so that it must be proved that the assault or battery caused the bodily harm. For example, an assault causing the victim to jump or fall and so injure themselves requires proof that the accused's action or words caused the fall/jump which in turn led to the injury.

An act

It is necessary to show that the accused did something – an assault cannot be committed by omission. Words alone may constitute an assault, or words accompanied by some threatening act. In view of the requirement that the victim must be caused to fear immediate unlawful violence (see below) a silent telephone call is unlikely to constitute an assault. Words may also deprive an act such as a gesture of its otherwise threatening character.

Intentionally

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

⁹ Section 54 Schedule 1 Part 2 of the Act.

¹⁰ Section.54, section 114 and Schedule 2 of the Act.

Recklessly

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

To apprehend

This phrase should be given its normal dictionary meaning and will require the victim to have been aware of the accused's actions at the time.

Immediate unlawful violence

The threat of violence must be immediate. It is not sufficient for the threat to relate to an occurrence in the future. Therefore a person in Germany who phones a person in the UK and threatens to beat them up when they next meet will not have committed this offence.

The threat must relate to unlawful violence. Thus, it will not be an offence if a person threatens to use force lawfully, for example, where a police officer threatens to lawfully restrain a person who is resisting arrest.

Actual bodily harm

This offence is an assault which results in some harm. Although more serious than an assault, the offence of assault occasioning actual bodily harm may be no more complex either legally or factually, and therefore may be appropriate to be dealt with at summary hearing.

The bodily harm need not be permanent, nor need it amount to what would be considered really serious bodily harm, however it must be more than merely transient or trifling. It is appropriate to charge this offence in cases where there is: loss or breaking of a tooth; temporary loss of sensory function (e.g. loss of consciousness); extensive or multiple bruising; minor fractures; minor, but more than superficial, cuts requiring medical treatment. In addition, actual bodily harm is capable of including psychiatric injury. However, it does not include mere emotions such as fear, distress or panic.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Self defence

A person may lawfully use force to defend himself (or other people, for guidance on which, see below) from attack or from threatened attack provided that he used force only when it was necessary, and he used no more force than was reasonable in the circumstances.

Although the force used must be reasonable and necessary, it is recognised that a person defending himself cannot always weigh precisely the exact amount of defensive action which is necessary. To be lawful, the amount of force that an accused uses must be proportionate to the immediate threat posed (or that he believes is posed) at the time. This depends on the facts, such as the nature of the attack, whether a weapon was used, and if so what sort of weapon. If it is assessed that an accused did no more than he instinctively thought necessary, that would be very strong evidence that the amount of force used was both necessary and reasonable.

In some cases it may be sensible and possible to take some avoiding action. A failure to retreat from the threat by the accused does not necessarily mean that the accused did not act in self defence. It is simply a factor to take into account when deciding whether it was necessary for the accused to use force and whether the force used was reasonable.

There is no rule of law which requires that he must wait until he is struck before using force in self defence. It is lawful to use reasonable force to deal with a threat that is imminent.

Even if the accused appears to have been the initial aggressor, his subsequent acts may have been lawful self-defence to retaliatory violence by the victim.

The burden of disproving that this defence is available does not arise unless some admissible evidence of this defence is presented. This evidence may be presented by the accused, or any other witness in the case. Once this defence has been raised, if the officer hearing the charge is convinced of the accused's innocence or is left in doubt as to whether the accused might have acted in self defence, he should find the charge not proven. It is a defence for an accused to act in self defence even if he was mistaken about being the victim of an attack. Thus, if the accused used force because he mistakenly but honestly and reasonably believed he was the victim of an attack, he should be acquitted as long as the force used was reasonable and necessary in the circumstances as he understood them to be.

Defence of others

The same principles that apply in relation to self defence apply where the accused acts in the defence of a third party. Thus his actions must be proportionate in the circumstances as he perceived them to be.

Prevention of crime etc

An accused may also use force as is reasonable in the circumstances in the prevention of crime or in assisting the lawful arrest of offenders.

Defence of property

An accused may also use force to prevent a person taking his goods or prevent another person trespassing on his property.

Consent

An accused will not commit an offence under section 39 of the Criminal Justice Act 1988 if the alleged victim has consented to the force used against him, for example, where force is used against another when participating in sporting activities. However, conduct that goes beyond what a player can reasonably be regarded as having accepted by his or her participation in the sport can render that conduct sufficiently serious to be categorised as criminal. Additionally, it may be lawful to engage in rough and undisciplined horseplay, provided that there is no intention to injure on the part of any of the participants. In the absence of a good reason, consent will not be available where the force has caused actual or grievous injury.

Intoxication

Self-induced intoxication or voluntary drug taking is *not* a defence to assault occasioning actual bodily harm. If the intoxication is involuntary, for example spiking drinks, advice should be sought from the staff legal adviser.

Lawful correction of a child

This can never be a defence to a charge of assault occasioning actual bodily harm.

Notes

Joint enterprise

Incidents of violence or disorder, especially those fuelled by alcohol, may appear to have involved a number of personnel. In cases such as these particular care should be taken. While a number of personnel present may have been drunk within the meaning of section 20, they may only be charged together with, for example, assault if the evidence supports the view that they each participated (for example by punching or kicking the victim) or if it is clear that, regardless who actually struck the blows, it was a group action which they were *all in together*. In all such cases staff legal advice should be sought.

Possession in public place of offensive weapon

Section 1 of the Prevention of Crime Act 1953 provides:

- (1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable –
- (a) on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding the prescribed sum or both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding 4 years or a fine, or both.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹¹.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY HAVING WITH HIM AN OFFENSIVE WEAPON IN A PUBLIC PLACE CONTRARY TO SECTION 1(1) OF THE PREVENTION OF CRIME ACT 1953.

[AB] on, without lawful authority or reasonable excuse, had with him in a public place, namely, an offensive weapon, namely

3. Ingredients of the offence

Has with him

The words *has with him in any public place* mean *knowingly has with him in any public place* and this must be proved to the satisfaction of the officer hearing the charge. Once a person has something knowingly, merely forgetting he has it is not enough to prevent him from continuing to have it.

Public place

A public place includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise.

Offensive weapon

The meaning of offensive weapon can be broken down into two categories:

- a. Those that are offensive *per se*, that is, those either made (e.g. knuckle-duster, dagger, gun) or adapted (e.g. broken bottle) for use for causing injury to the person; and
- b. Weapons not so made or adapted (e.g. kitchen knife, spanner, hammer) but intended by the person having it with him for causing injury to the person.

¹¹ Section 54 Schedule 1 Part 2 of the Act.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Without lawful authority or reasonable excuse.

For lawful and reasonable excuse generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful authority would include those people who from time to time carry an offensive weapon as a matter of duty e.g. the soldier and his rifle and the police officer with his baton.

Where the accused carries a weapon as a result of a recent attack which he fears may be repeated it is a question of degree whether he has a reasonable excuse. Carrying the weapon for a day or two after an attack might be reasonable but for a longer period might not. If he arms himself to repel violence which he himself is about to create he does not establish a reasonable excuse.

An innocent motive for carrying an offensive weapon can sometimes amount to a reasonable excuse.

In the case of weapons which are offensive *per se*, that the accused did not know that the article was made or adapted for causing injury to the person cannot of itself amount to a reasonable excuse for having it in a public place.

5. Notes

As ships and other Service establishments are not public places for the purpose of an offence under section 1 of the Prevention of Crime Act 1953, Service establishments should promulgate standing orders which prohibit behaviour within their confines, equivalent to that set out in this offence i.e. relating to the possession of offensive weapons. However, on days when ships and establishments are opened to the public e.g. Air displays, Navy Days and Army Open Days, they will be public places.

A lesser charge may be brought under section 139(1) of the Criminal Justice Act 1988 which describes an offence of having an article with a blade or point, in a public place.

Possession in public place of point or blade

Section 139 of the Criminal Justice Act 1988 provides:

- (1) Subject to sub-sections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
- (2) Subject to sub-section (3) below, this section applies to any article which has a blade or a sharp point except a folding pocket knife.
- (3) This section applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches.
- (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.
- (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had an article with him –
 - (a) for use at work;
 - (b) for religious reasons; or
 - (c) as part of any national costume.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹².

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

The Criminal Justice Act 1988, Section 139A creates a separate offence for a person to have any article to which Section 139 above applies with him on school premises. This offence however cannot be dealt with summarily.

2. Specimen charge

COMMITTED A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY HAVING WITH HIM AN ARTICLE WITH A BLADE [POINT] IN A PUBLIC PLACE CONTRARY TO SECTION 139(1) OF THE CRIMINAL JUSTICE ACT 1988.

[AB] at, a public place, on without good reason or lawful authority had with him an article with a blade [point] namely

3. Ingredients of the offence

Has with him

The words *has with him* in any public place mean *knowingly* has with him in any public place and it is proved to the satisfaction of the officer hearing the charge. Once a person knowingly has something, he continues to have it until he does something to rid himself of it. See however, Defences (below) for circumstances where an accused forgets that he has an article with him. The words *has with him* require proof of contact with the article which will amount to more than mere possession.

Public place

¹² Section 54 Schedule 1 Part 2 of the Act.

Public place for the purposes of this offence includes any place to which at the material time the public have or are permitted to have access, whether on payment or otherwise. It will not be a public place if access is available only to a particular class of the public. For this reason, an offence under this section cannot be committed in ships or Service establishments. See notes (below) on prohibiting similar behaviour through standing orders.

Bladed article

This section applies to any article which has a blade or a sharp point except a folding pocket knife (unless the cutting edge of the pocket knife exceeds 3 inches). A screw-driver is not a bladed article within the meaning of the section.

Without good reason, lawful authority etc

See defences below.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It will be a defence if the accused can prove on a balance of probabilities that he had the article with him for a good reason, with lawful authority or for any of the reasons set out in 139(5) of the Criminal Justice Act 1988 (see above).

Lawful authority refers to the circumstances where a person from time to time as a matter of duty carries an otherwise prohibited article. For example, a soldier performing ceremonial duties who is required to fix a bayonet to his weapon will have a defence on this basis.

A good reason

A good reason will include circumstances such as where a person is travelling home from the shop after purchasing a knife for a legitimate purpose. Forgetfulness alone cannot amount to a good reason but forgetfulness combined with another reason might. For example, where a parent after buying a knife places it in the glove compartment to keep it out of a child's reach and then forgets to retrieve it on arrival at home.

The Criminal Justice Act 1988 section 139 and Criminal Justice Act 1996 sections 3 and 4 allows anyone to carry a blade exceeding the length of 3 inches for religious, cultural or work related reasons. However the defence of having a bladed article for religious, cultural or work reasons is only a defence if this is offered as the predominant motivation for having the bladed article at the time. If the stated use is in itself unreasonable then this will not be a defence.

It is not necessary to prove that the accused did not have a defence (good reason or lawful authority) unless the accused proves on a balance of probabilities that the defence is available. An accused does not discharge the burden of showing a good reason only by providing an explanation that is not contradicted by the evidence in support of the charge. Rather, the officer hearing the case must be satisfied that the reason is a good reason. If however the accused establishes, to the required standard, that he has a defence, the accused cannot be convicted unless it is proven beyond reasonable doubt that the accused did the act complained of and that he did not have a defence.

5. Notes

As ships and other Service establishments are not public places for the purpose of an offence under section 139 of the Criminal Justice Act 1988, where a person is in possession

of a pointed blade in a Service establishment it may be appropriate to charge under section 13 (contravention of standing orders).

Dishonesty offences

Theft – section 1 Theft Act 1968

1. Basic definition of theft

- (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly.
- (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.
- (3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

2. Dishonestly

- (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—
 - (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

3. Appropriates

- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
- (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

4. Property

- (1) Property” includes money and all other property, real or personal, including things in action and other intangible property.
- (2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say—
 - (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or

(b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or

(c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

For purposes of this subsection “land” does not include incorporeal hereditaments; “tenancy” means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and “let” shall be construed accordingly.

(3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.

For purposes of this subsection “mushroom” includes any fungus, and “plant” includes any shrub or tree.

(4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession.

5. Belonging to another

(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

(2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

(3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

(4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

(5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

6. With the intention of permanently depriving the other of it

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

A person guilty of theft shall on conviction on indictment be liable to imprisonment for a term not exceeding [seven years].

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority¹³.

The above sections of the Theft Act are self explanatory for most occurrences of the offence; if in doubt seek advice from the appropriate staff legal adviser.

2. Specimen Charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968

[AB] on, stole £100 belonging to [CD].

3. Ingredients of the Offence

Dishonesty

The accused must have acted dishonestly at the time of the appropriation.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly, two tests must be applied. Firstly, was what the accused did dishonest by ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what he was doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both these questions is yes, the element of dishonesty should be proved. If the answer to either question is no, the element of dishonesty is not proved and therefore the charge is not proved.

Section 2 provides circumstances when an appropriation by the accused will not be dishonest. See also *defences* at paragraph 4.

¹³ Section.53 Schedule 1 Part 1 of the Act.

Appropriation

Section 3 provides that *appropriation* is any assumption by the accused of the rights of the owner and this includes any later assumption of a right to it (by keeping or dealing with it as the owner) even where the accused has come by the property (innocently or not) without stealing it. See however *defences* below where an accused purchases goods in good faith.

It is not necessary to establish that the appropriation occurred without the authorisation or consent of the owner, although the issue of authorisation or consent may be relevant for the question of dishonesty.

The following serve as examples of an appropriation:

- a. A NAAFI employee makes a sale to a customer and places the money in their pocket with the intention of spending it; that amounts to an act of appropriation because it is an assumption of ownership by the worker.
- b. A Service person finds a wallet on the street containing money and decides to return to the owner whose identity and address is apparent from information contained in the wallet. That does not amount to an appropriation because it is not an assumption of ownership: he intends at that time to give it back. However, if he later changes his mind and decides to spend the money contained in the wallet and throw away the wallet away, at that later stage the Service person will have assumed the rights of an owner in respect of the money and the wallet and will therefore have appropriated them.

Property

Property should be given its normal dictionary meaning and section 4 (property) is self explanatory in relation to its meaning. It includes a thing in action, for example the right to payment from a victim's bank account stolen by means of a forged or stolen cheque.

Belonging to another

Section 5 is self explanatory. The person from whom the property is taken need not be the owner; it is sufficient that the victim had possession or control of the property at the time of its appropriation by the accused. For example, x lends y a cycle which is then taken by z; z may stand accused of theft of the cycle from either x or y.

With intention of permanently depriving

Section 6. This, for example, would be evidenced where an accused appropriated a victim's property and then offered to sell it on or put it to his own use with no intention of returning it. An accused disposing of, or destroying a thing they have taken, or converting it into something else will be evidence of such intention.

The appropriation of something with the intention of giving it back is not an intention to permanently deprive the owner of it. However, borrowing of property can amount to theft if it is for such a period of time and in such circumstances as to make it equivalent to an outright taking or disposal: for example where a person takes a concert ticket but returns it after the date of the concert so that its value has gone.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Abandoned property

Property that is abandoned is not capable of being stolen. If the property had not been abandoned, but the accused believed that it had, then he cannot be guilty of the offence, however unreasonable the belief.

5. Notes

Unknown owner

Where the owner is unknown, the charge will be proved provided it can be established that the property belonged to someone other than the accused and that the accused knew this.

Mistake

Property obtained by an accused from a victim as a result of the victim's mistake, or another's mistake may nevertheless constitute a theft. In such circumstances the victim is likely to be regarded as being entitled to restoration of their property. For example failure to repay an overpaid amount in the knowledge of the circumstances of the overpayment may be theft.

Misuse of property given for a particular purpose

Where a person receives property from or on account of another and is under an obligation to the other person to retain and deal with that property or its proceeds in a particular way, but it is dealt with inconsistently with that purpose may constitute a theft. For example if monies put in the hands of an NCO appointed to organise a Warrant Officers' and Sergeants' Mess Christmas fund are dishonestly misappropriated by the NCO for his own or other purposes, that would be theft. He will have appropriated funds belonging to others.

Taking a motor vehicle or other conveyance without authority

Section 12 of the Theft Act 1968 provides in so far as is relevant in a service context: -

- (1) Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.
- (2) A person guilty of an offence under subsection (1) above shall ... be liable on summary conviction to a fine not exceeding level 5 [£5000] on the standard scale, to imprisonment for a term not exceeding six months, or to both.
- (3) ...*[Repealed by PACE 1984 Schedule 7]*
- (4) If on the trial of an indictment for theft the jury are not satisfied that the accused committed theft, but it is proved that the accused committed an offence under subsection (1) above, the jury may find him guilty of the offence under subsection (1) and if he is found guilty of it, he shall be liable as he would have been liable under subsection (2) above on summary conviction.
[Note: the effect of this is that under the [AFA 2006 the CO can convict of an alternative charge under s12 (1) in the event that they are not satisfied that the accused committed theft but it was proved that he committed an offence under s12(1)]
 - (4A) Proceedings for an offence under subsection (1) above (but not proceedings of a kind falling within subsection (4) above) in relation to a mechanically propelled vehicle—
 - (a) shall not be commenced after the end of the period of three years beginning with the day on which the offence was committed; but
 - (b) subject to that, may be commenced at any time within the period of six months beginning with the relevant day.
[Note: the effect of this is to create a time limit on bringing service proceedings]
 - (4B) In subsection (4A)(b) above "the relevant day" means—
 - (a) in the case of a prosecution for an offence under subsection (1) above by a public prosecutor[CO], the day on which sufficient evidence to justify the proceedings came to the knowledge of any person responsible for deciding whether to commence any such prosecution;
[Note: the effect of this in the service context will be that [public prosecutor] means the CO]
- (5) Subsection (1) above shall not apply in relation to pedal cycles; but, subject to subsection (6) below, a person who, without having the consent of the owner or other lawful authority, takes a pedal cycle for his own or another's use, or rides a pedal cycle knowing it to have been taken without such authority, shall on summary conviction be liable to a fine not exceeding level 3 [£1000] on the standard scale.
- (6) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

- (7) For purposes of this section—
- (a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and "drive" shall be construed accordingly; and
 - (b) "owner", in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the conveyance under that agreement.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority¹⁴.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY TAKING A CONVEYANCE WITHOUT AUTHORITY CONTRARY TO SECTION 12(1) OF THE THEFT ACT 1968

[AB] on, without the consent of the owner or other lawful authority, took a conveyance, namely a Porsche motor car registration number for the use [of himself]

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ALLOWING HIMSELF TO BE CARRIED IN OR ON A CONVEYANCE TAKEN WITHOUT AUTHORITY CONTRARY TO SECTION 12(1) OF THE THEFT ACT 1968

[AB] on, knowing that a conveyance, namely a Porsche motor car registration number, had been taken without the consent of the owner, allowed himself to be carried in or on the said conveyance.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY TAKING A PEDAL CYCLE CONTRARY TO SECTION 12(5) OF THE THEFT ACT 1968

[AB] on, without the consent of the owner or other lawful authority, took a pedal cycle belonging to [CD] for the use [of himself] [of another].

3. Ingredients of the offence

Section 12(1) creates three offences:

- a. Taking a conveyance without consent or lawful authority.
- b. Driving a conveyance without consent or lawful authority.
- c. Being carried in a conveyance that has been taken without consent or lawful authority.

Section 12(5) creates two offences:

- a. Taking a pedal cycle without consent or lawful authority.

¹⁴ Section 53 Schedule 1 Part 1 of the Act.

b. Riding a conveyance without consent or lawful authority

Taking

To constitute the offence of *taking*, there is no requirement for the conveyance to be driven away.

There must be evidence of more than mere unauthorised taking of possession or control adverse to the rights of the owner. Some element of movement (however small) must have been caused by a voluntary act done with the intention of putting the conveyance in motion. Nevertheless, only the *taking* has to be proved and not a taking and *driving away*. In the absence of any evidence as to movement (however small) in respect of the element of *taking*, there may still be sufficient evidence of an attempt, which is itself an offence.

Conveyance

The definition in subsection (7) is self explanatory. The taking of pedal cycles is not included in the offence under subsection (1), but is included under the offence in subsection (5).

Consent

This is given its normal dictionary meaning. It is necessary to prove that the owner of the conveyance did not consent to its taking by the accused. This may be because the accused did not seek the consent of the owner or because the limitation of the consent to use was exceeded, for example if the owner consents to a vehicle being used for a journey of 10 miles but the accused uses it for a journey of 100 miles. The defence under subsection (6) may be available (belief of lawful authority).

Owner

Owner includes the person who is in possession of a conveyance under a hire or hire purchase contract.

Other lawful authority

This relates to situation where the taker of a conveyance knows it is not his own conveyance, but for some reason nevertheless believes he has lawful authority to take it.

Drives

This is given its normal dictionary meaning in the context of the conveyance concerned, namely that the person driving must be substantially controlling the movement and direction of the conveyance, including having something to do with the conveyance's propulsion. Whether someone is *driving* in the ordinary sense is a question of fact and degree. This involves something more than mere movement of the vehicle (*e.g.* pushing it), namely that it should be used as a means of transport. An accused cannot be said to be driving a vehicle unless he is in the driving seat or is in control of the steering wheel and also has something to do with the propulsion of the vehicle.

For his own or another's use

In relation to an offence under section 12(1) Theft Act 1968, it is necessary to prove that the accused took the conveyance named in the charge for his own use or for the use of another.

Pedal cycle

Means a bicycle, tricycle or any cycle having more than four wheels, not being in any case a motor vehicle.

Taking, consent, owner, other lawful authority, for his own or another's use

See guidance above under section 12 (1) Theft Act 1968.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A statutory defence is available under section 6 of the Theft Act 1968. As a result, an accused will not commit an offence under this section if he believes he has a lawful authority to do the act alleged or if he believed he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

5. Notes

Spare.

Making off without payment

Section 3 of the Theft Act 1978 provides:

- (1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.
- (2) For purposes of this section "payment on the spot" includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.
- (3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.
- (4) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, committing or attempting to commit an offence under this section.

1. Type of offence

This offence **may be** heard summarily **only** where the payment required or expected did not exceed £100. In these circumstances permission from higher authority need not be sought. Where the payment required or expected exceeds £100 the matter must be referred to the DSP¹⁵.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY MAKING OFF WITHOUT PAYMENT CONTRARY TO SECTION 3(1) OF THE THEFT ACT 1978

[AB] on, knowing that payment on the spot for a meal costing £43 was required or expected from him dishonestly made off from the [name] Restaurant, without having paid as required or expected.

3. Ingredients of the offence

Knowing that payment ... is required or expected

It must be proved that the accused had actual knowledge of the requirement or expectation that payment should be made. It is not an excuse that the accused wilfully shut his eyes to the truth.

On the spot

On the spot means that payment is to be made *there and then*. This is a question of fact. Section 3(2) of the Theft Act 1978 defines *payment on the spot* as including payment at the time of collecting goods on which work has been done or in respect of which service has been provided.

Dishonestly

¹⁵ Section 53 Schedule 1 Part 1 of the Act.

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what he was doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

Making off

These words should be given their normal dictionary meaning in relation to the facts of the particular case. *Making off* involves a departure from the spot where payment is required or expected.

Intended to avoid payment

There must be an intention to permanently avoid payment. An intention to merely delay or defer payment is not sufficient to constitute the offence. However, the length of time that has passed since payment on the spot was required, in the absence of any reasonable excuse by the accused as to the delay or deferment in payment, will be of relevance to the question of whether or not there is in fact any likelihood of the accused making payment at all.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A person may be able to prove that he had no intention to permanently avoid payment and was merely deferring or delaying it for some reason. The reasonableness or otherwise of any reasons put forward by that person will be a question for the officer hearing the charge to decide.

There is a statutory defence under section 3(3) of the Theft Act 1978. Where the supply of goods or services is contrary to the law, or where a service done is such that payment is not legally enforceable, making off without payment on the spot does not constitute the offence, even if there was no intention of paying. For example, failure by a taxi to drop a person where they requested means the taxi driver is in breach of contract and cannot lawfully demand the fare at any time thereafter.

5. Notes

This section applies where goods or services have been supplied and the person leaves without paying when he knows he should have paid. If the goods have not been supplied (e.g. if they are taken from a supermarket shelf) this section does not apply but consideration should be given to a charge of theft.

If a person is stopped before passing the *spot* where payment is expected or required, this may constitute an attempt to commit the offence, provided the other ingredients are established.

Abstraction of electricity

Section 13 of the Theft Act 1968 provides:

A person who dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity shall be guilty of an offence.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁶.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ABSTRACTING ELECTRICITY CONTRARY TO SECTION 13 OF THE THEFT ACT 1968.

[AB] on, dishonestly used without due authority [or dishonestly caused to be wasted or diverted] a quantity of electricity.

3. Ingredients of the offence

Dishonestly

This should be given its normal dictionary meaning. The officer hearing the charge must first decide whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest. If it was not dishonest by those standards the charge must be dismissed. However, if it was dishonest by those standards the officer hearing the charge must then further consider whether the accused himself realised that what he was doing was dishonest by the standards of ordinary people, whatever his own moral principles or standards might be.

Use, waste or diversion

Any use, waste or diversion of electricity will suffice, so a meter does not have to be tampered with. Electricity is abstracted where the electricity supply to a house is reconnected without the consent of the electricity supplier. It is also abstracted where the electricity supply to a house is caused not to be registered by the meter. It may well be an abstraction of electricity to make a call from a telephone that belongs to another person.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Mechanical defect in the meter or associated equipment.

5. Notes

Spare.

¹⁶ Section 54 Schedule 1 Part 2 of the Act.

Dishonestly obtaining electronic communications services

Section 125 of the Communications Act 2003 provides:-

- (1) A person who:
- (a) dishonestly obtains an electronic communication service, and
 - (b) does so with intent to avoid payment of a charge applicable to the provision of that service, is guilty of an offence.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁷.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DISHONESTLY OBTAINING ELECTRONIC COMMUNICATIONS SERVICES CONTRARY TO SECTION 125(1) OF THE COMMUNICATIONS ACT 2003.

[AB] on, dishonestly obtained an electronic communications service namely
[give details] with intent to avoid payment of a charge applicable to the provision of that service.

3. Ingredients of the offence

Dishonestly

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what he was doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

Obtains

Obtains means *gets*. Therefore, the offence will apply to a situation where the accused taps into another person's telephone or internet connection in order to communicate at the other's expense e.g. using a computer to communicate via another's wireless connection. This may cause further problems for the authorised user of the wireless connection because the authorised user is potentially liable for the unauthorised use of illegal websites.

¹⁷ Section 54 Schedule 1 Part 2 of the Act.

Electronic communication service

The service must be one where the principal feature is the conveyance by means of an electronic communications network of signals. This offence therefore relates primarily to telephones but covers broadband and internet services. It is not an offence under section 125(5) Communications Act 2003 to obtain a broadcasting or cable programme - see notes below. In cases of doubt, advice should be sought from a staff legal adviser.

With intent

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused must have intended to avoid payment of a charge applicable to the provision of that service.

It is necessary to prove that the accused acted with the purpose of evading any or all of the costs that would have been charged for the electronic service had those services been properly obtained.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Regard should be had to section 126 of the Communications Act 2003 (see below) which makes it an offence for a person to possess or supply apparatus for the contravention of section 125 of the Communications Act 2003.

The offence under section 125 does not apply to the interception of a *content service* – for example a radio or television programme broadcasting service which is covered by section 297 of the Copyright, Designs and Patents Act 1988 – for meaning of electronic communication networks and service see section 32(7) of the Communications Act 2003.

Broadcasting and cable services

It is not an offence under section 125 of the Communications Act 2003 to obtain a service mentioned in section 297 of the Copyright, Designs and Patents Act 1988 (i.e. dishonestly obtaining a broadcasting or cable programme service provided from a place in the UK).

Possession or supply of apparatus which may be used for obtaining an electronic communications service

Section 126 Communications Act 2003 provides:

- (1) A person is guilty of an offence if –
with an intention falling within sub-section (3) he has in his possession or under his control anything that may be used –
 - (a) for obtaining an electronic communications service; or
 - (b) in connection with obtaining such a service.
- (2) A person is guilty of an offence if –
 - (a) he supplies or offers to supply anything which may be used as mentioned in sub-section (1); and
 - (b) he knows or believes that the intentions in relation to that thing of the person to whom it is supplied or offered fall within sub-section (3).
- (3) A person's intentions fall within this sub-section if he intends –
 - (a) to use the thing to obtain an electronic communications service dishonestly;
 - (b) to use the thing for a purpose connected with the dishonest obtaining of such a service;
 - (c) dishonestly to allow the thing to be used to obtain such a service; or
 - (d) to allow the thing to be used for a purpose connected with the dishonest obtaining of such a service.
- (4) An intention does not fall within subsection (3) if it relates exclusively to the obtaining of a service mentioned in section 297(1) of the *Copyright, Designs and Patents Act 1988*.(see notes)
- (5) A person guilty of an offence under this section shall be liable –
 - (a) on summary conviction, to imprisonment for term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding five years or to imprisonment, or to both.
- (6) In this section, references in the case of a thing used for recording data, to the use of that thing include references to the use of the data recorded by it.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁸.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY POSSESSION / SUPPLY OF APPARATUS WITH THE INTENTION OF DISHONESTLY OBTAINING AN ELECTRONIC COMMUNICATIONS SERVICE CONTRARY TO SECTION 126(1)(a) OF THE COMMUNICATIONS ACT 2003.

[AB] on, had in his possession [name/describe the device] with the intention of using the said [name/description of device] to dishonestly obtain an electronic communication service.

3. Ingredients of the offence

Intention

¹⁸ Section 54 Schedule 1 Part 2 of the Act.

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The effect of the offence is that if someone has a computer with the intention of using it to use another's wireless connection to gain access to the internet, they will be in breach of this section. When they start so using it they will be guilty of an offence under section 125 of the Communications Act 2003 (see page 1-8-32).

In his possession or under his control

This means he must know that he has the apparatus in his possession or knowledge that he can gain access to it.

Obtaining

This means *gets*. This offence will have been committed where an accused has in his possession equipment capable of tapping into someone's telephone or internet connection to communicate at another's expense. An example would be possessing a computer capable of communicating via another's wireless connection.

Electronic communications service

This covers a wide range of such services and includes telephone, broadband, and other internet services etc.

Supplies or offers to supply

It is sufficient to be guilty of this offence that a person merely offers to supply such apparatus to another person who he knows or believes intends to use it dishonestly. He does not actually have to supply the other person with the apparatus.

Knows or believes

Knows or believes should be given their normal dictionary meaning. Actual knowledge or belief on the part of the accused that the apparatus he supplied or offered to supply were intended to be used for one of the dishonest purposes in subsection (3) must be proved. This is a subjective test. This is proved directly by the evidence of the person to whom the apparatus was either supplied or offered to, and/or through circumstantial evidence from which the accused's knowledge or belief can be inferred, see [Chapter 11](#) (Summary hearing – dealing with evidence).

Suspicion that the accused knew or believed that the intention of the person to whom he supplied or offered to supply the apparatus was to use it for one of the dishonest purposes set out in subsection (3) is not enough. It is always open to the officer hearing the charge however, to base a finding of knowledge on evidence that the accused had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed. It is vital therefore that the officer hearing the charge takes all the surrounding circumstances into account when deciding whether or not the necessary knowledge or belief existed.

Dishonestly

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is

an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what he was doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

To allow

This means the person to whom the apparatus is supplied or offered to intends to give access to it to others to use it for dishonest purposes.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Honest mistake/error of judgment

An honest but mistaken belief by the accused that he had used or applied the thing in a proper manner. Additionally, an accused will have a defence if he acted on the order of a superior and he honestly believed the order was lawful.

5. Notes

Section 297(1) of the *Copyright, Designs and Patents Act 1988* states that a person who dishonestly receives a programme included in a broadcasting or cable programme service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable to conviction. That is to say a person, for example, who is receiving a broadcast but has not obtained a TV licence, does not fall under subsection (3) and therefore could not be prosecuted under this section.

Fraud

1. **Section 1 of the Fraud Act 2006 provides:-**
 - (1) **A person is guilty of fraud if he is in breach of any of the sections listed in sub-section (2) (which provide for different ways of committing the offence).**
 - (2) **The sections are -**
 - (a) **section 2 (fraud by false representation),**
 - (b) **section 3 (fraud by failing to disclose information), and**
 - (c) **section 4 (fraud by abuse of position).**
 - (3) **A person who is guilty of fraud is liable - This is relevant in the context of Section 42(3) and (4) of the Act.**
 - (a) **on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);**
 - (b) **on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).**
 - (4) **Sub-section (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.**
2. **Fraud by false representation:-**
 - (1) **A person is in breach of this section if he -**
 - (a) **dishonestly makes a false representation, and**
 - (b) **intends, by making the representation -**
 - (i) **to make a gain for himself or another, or**
 - (ii) **to cause loss to another or to expose another to a risk of loss.**
 - (2) **A representation is false if -**
 - (a) **it is untrue or misleading, and**
 - (b) **the person making it knows that it is, or might be, untrue or misleading.**
 - (3) **“Representation” means any representation as to fact or law, including a representation as to the state of mind of -**
 - (a) **the person making the representation, or**
 - (b) **any other person.**
 - (4) **A representation may be express or implied.**
 - (5) **For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).**
3. **Fraud by failing to disclose information:-**
 - (1) **A person is in breach of this section if he -**
 - (a) **dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and**
 - (b) **intends, by failing to disclose the information -**
 - (i) **to make a gain for himself or another, or**
 - (ii) **to cause loss to another or to expose another to a risk of loss.**

4. Fraud by abuse of position:-

- (1) A person is in breach of this section if he -
- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position -
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

5. “Gain” and “loss”:-

- (1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.
- (2) “Gain” and “loss”—
- (a) extend only to gain or loss in money or other property;
 - (b) include any such gain or loss whether temporary or permanent; and
- “property” means any property whether real or personal (including things in action and other intangible property).
- (3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.
- (4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁹.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY FALSE REPRESENTATION CONTRARY TO SECTION 1 AND 2 OF THE FRAUD ACT 2006.

[AB] on, dishonestly obtained from an employee of (give details) goods to the value of eighty pounds (£80.00) belonging to by falsely representing that he, the accused, was then entitled and authorised to use bank card serial number

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY FAILING TO DISCLOSE INFORMATION CONTRARY TO SECTION 3 OF THE FRAUD ACT 2006.

[AB] on, at, dishonestly failed to disclose to the Abbey Bank that he had debts of £50,000 and thereby obtained for himself an overdraft of £5,000.

¹⁹ Section 54 Schedule 1 Part 2 of the Act.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY ABUSE OF POSITION CONTRARY TO SECTION 4 OF THE FRAUD ACT 2006.

[AB] on, when he was a pay clerk at with access to the bank account (give details) of [CD], dishonestly abused his position by removing monies to the value of four hundred and fifty pounds (£450) for his own personal use.

3. Ingredients of the offence

Dishonestly

The term *dishonestly* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly, two tests must be applied. Firstly, was what the accused did dishonest by the ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what he was doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either question is no, the element of dishonesty is not proved.

Intends

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Gain and loss

Gain includes obtaining a pecuniary or financial advantage such as an overdraft that he would not otherwise have received. It does not have to be proved in such a case that the person actually drew on this facility. It would also include the salary of a post the accused would not otherwise have been appointed to, but for his dishonest act.

Loss includes the victim not receiving property he did not previously have but might have later received had it not been for the accused's actions. For example, where a victim lost his likely entitlement to a dividend on shares as a result of the accused's dishonest disposal of them in his capacity as the victim's stockbroker, before the dividend was due to be paid to the victim.

Property

Property includes money and all other property whether real or personal, including *things in action* (e.g. a bank balance) and other intangible property (e.g. stocks and shares). It does not extend to, for example, under these sections, obtaining a service, which is dealt with separately under section 11 of the Fraud Act 06.

False representation

The accused must make the representation with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place. A representation is false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading. A representation can be stated in words or communicated by conduct, for example by presenting a cheque which is not the good and valid order for the amount entered on the cheque that it is represented to be. A representation can be written or spoken or posted on a website.

Express or implied

An express representation means simply an unequivocal or direct representation as to something. Rather than concerning oneself as to what may amount to an implied representation, the officer hearing the charge should instead simply consider whether the accused *by words or conduct* induces a false belief in the other person's mind.

Failing to disclose

There must be a legal duty to disclose information and the accused must know he has such a duty. For example in an application form for credit, insurance or for an employment post.

Abuse of position

This applies where the accused has been put in a position, for example because of his rank he holds certain responsibilities, or because of his post as a pay clerk or a person's accountant, and by virtue of this position is expected to safeguard another's financial interest or not act against those interests. The offence is committed when the accused abuses his position by dishonestly acting against the victim's financial interest, either for his own personal gain or that of another, and/or in order to cause loss or the risk of loss to the victim.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused may seek to show that he did not act intentionally but that his conduct was accidental or mistaken and that he was not acting dishonestly.

No dishonesty on the part of the accused in these circumstances would entail:

- a. A belief by the accused that he had a right in law to the gain made on behalf of himself or a third party, or to the incurring of the loss or risk of loss to the victim; or
- b. A belief by the accused that he would have had the victim's consent for the gain made on behalf of himself or a third party, or loss or risk of loss caused to the victim, had the victim known of the transaction and the circumstances surrounding it; or
- c. A belief when making the representation that it was true; or
- d. A belief that the actions he took were designed to safeguard, and not to act against, the financial interests of the victim.

5. Notes

If it is alleged that the accused dishonestly made a number of false representations with an intent to make a gain or cause a loss or risk of loss to another, then in order to find the charge proved the officer hearing the charge must either be sure as to the falsity of at least one of those representations (unless he is sure that at least some of the representations were false but is not sure which ones), or that their effect taken together was misleading.

A person may be convicted of an offence contrary to subsections (2) – (4) inclusive although the accused either intended to make or made a gain on behalf of another.

Dishonestly obtaining services

Section 11 of the Fraud Act 2006 provides:-

- (1) A person is guilty of an offence under this section if he obtains services for himself or another -
 - (a) by a dishonest act, and
 - (b) in breach of subsection (2).
- (2) A person obtains services in breach of this subsection if -
 - (a) they are made available on the basis that payment has been, is being, or will be made for or in respect of them,
 - (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and
 - (c) when he obtains them, he knows -
 - (i) that they are being made available on the basis described in paragraph (a), or
 - (ii) that they might be, but intends that payment will not be made, or will not be made in full.
- (3) A person guilty of an offence under this section is liable -
 - (a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);
 - (b) on conviction on indictment to imprisonment for a term not exceeding 5 years or to a fine (or to both).
- (4) Sub-section (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority²⁰.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY OBTAINING SERVICES DISHONESTLY CONTRARY TO SECTION 11(1) OF THE FRAUD ACT 2006.

[AB] on, dishonestly obtained certain services from Limited, namely the hire of a Ford Mondeo motor vehicle by falsely representing that he was in lawful possession of a credit card in the name of [CD] (give details)

3. Ingredients of the offence

Obtains

The offence requires the actual obtaining of the service. Therefore there must be evidence to prove that the accused did obtain the service alleged.

Services

The meaning is wide enough to embrace professional services, commercial services and financial services. The essential conditions are that a service must confer a benefit and be

²⁰ Section 54 Schedule 1 Part 2 of the Act.

rendered on the understanding that it has been or will be paid for. It can therefore include the dishonest obtaining of a bank or building society account, or the dishonest use of a credit card. It could also include the obtaining of a hire purchase agreement, since the finance company confers some benefit by agreeing to enter into such an agreement with the accused on the understanding that this benefit had been or would be paid for.

Dishonest act

The term *dishonest* bears its normal dictionary meaning, but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what he was doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either question is no, the element of dishonesty is not proved.

Intends

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Knows

Knows should be given its normal dictionary meaning. Actual knowledge on the part of the accused that the service was being made available to him on the basis that payment had been, was being, or would be made for or in respect of it must be proved, and the officer hearing the charge must be satisfied so that he is sure that this is so, before finding the charge proved. This question is a subjective one. This is proved, either directly, by the evidence of the principal accused, and/or through circumstantial evidence, see [Chapter 11](#) (Summary hearing – dealing with evidence).

Suspicion that the accused knew the basis on which the service was being provided to him is not enough. It is always open to the officer hearing the charge however, to base a finding of knowledge on evidence that the accused had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed. It is vital therefore that the officer hearing the charge takes all the surrounding circumstances into account when deciding whether or not the necessary knowledge or belief existed.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused may seek to show that he did not act intentionally but that his conduct was accidental or mistaken and that he was not acting dishonestly.

No dishonesty on the part of the accused in these circumstances would entail:

- a. A belief by the accused that he had a right in law to the service provided; or
- b. A belief by the accused that he would have had the victim's consent for the provision of the service to himself; or
- c. A belief that full payment for the service had been or would be made.

5. Notes

Where the accused uses a cheque, cheque card or credit card to obtain the service and it subsequently proves to be the case that the accused had no such account, insufficient funds in his account or had exceeded his credit limit, it is perfectly reasonable for the officer hearing the charge to assume that by using these purported means of payment, the accused was representing both that he had an account with the bank or credit card company concerned, and that in the ordinary course of events the cheque, cheque card or credit card would be honoured.

A person may be convicted of an offence contrary to subsections (2) – (4) inclusive although the accused either intended to make or made a gain on behalf of another.

Alternative charges

In certain circumstances, consideration may be given to alternative charges. For example, where an accused's obtaining of a service appears to be motivated more by inexperience or a lack of knowledge of the correct procedures or borne out of naivety, so that his conduct only borders on being dishonest, (in respect of a Service person only) a charge contrary to section 19 (conduct prejudicial to good order and discipline) of the Act may be more appropriate - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). Alternatively where there is doubt of guilty intention administrative action may be considered.

Miscellaneous offences

Unlawful possession of a controlled drug

Section 5 of the Misuse of Drugs Act 1971 provides: -

- (1) Subject to any regulations under section 7 (relating to authorisation of activities otherwise unlawful) for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.
- (2) Subject to section 28 (relating to proof of lack of knowledge) of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.
- (3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.
- (4) [Defence to s5(2)] In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove [on the balance of probabilities]—
 - (a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or
 - (b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.[4(a) only relevant to an offence under s. 5(3) which may not be heard summarily]
- (5) . . . [Repealed by the Criminal Attempts Act 1981]
- (6) Nothing in subsection (4) ... above shall prejudice any defence which it is open to a person charged with an offence under this section to raise apart from that subsection.

Section 28 applies to s5(2): -

28 Proof of lack of knowledge etc to be a defence in proceedings for certain offences

- (1) [Defence to s5(2)]
- (2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove [on the balance of probabilities] that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

- (3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove [on the balance of probabilities] that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—
- (a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
- (b) shall be acquitted thereof—
- (i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or
- (ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.
- (4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.

1. Type of offence

The offence under subsection (2) (possession of a controlled drug) of the Misuse of Drugs Act 1971 **may be** heard summarily **without** permission of higher authority²¹.

The offence under subsection (3) (possession of a controlled drug with intent to supply) of the Misuse of Drugs Act 1971 is a Schedule 2 offence and may not be heard summarily²². For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section he must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY UNLAWFUL POSSESSION OF A CONTROLLED DRUG CONTRARY TO SECTION 5(2) OF THE MISUSE OF DRUGS ACT 1971

[AB] on, unlawfully had in his possession a controlled drug of Class, namely, in contravention of section 5(2) of the Misuse of Drugs Act 1971.

3. Ingredients of the offence

Controlled drug

A controlled drug is defined by section 2 of the Misuse of Drugs Act 1971(c.38). These include for example; Cannabis, Cocaine, Ecstasy and Heroin. Further guidance on controlled drugs may be found in JSP 835 (Alcohol and Substance Misuse and Testing).

²¹ Section 53 Schedule 1 Part 1 of the Act.

²² Section 53 Schedule 2 of the Act.

Possession

A person is in possession of a drug if he has both control over it and the knowledge that it was under his control. Knowledge is an essential element for an offence under this section and a person cannot be said to be in possession of something without his knowledge. For example an offence would not be made out where drugs are put by another into an accused's house or pocket and the accused had no knowledge that they were there. However, a mistake as to the nature of the substance under the accused's control is not enough to prevent him being in possession, for example, believing heroin to be a lesser class of drug such as cannabis or a legal substance such as aspirin does not prevent the offence.

The possession of a package or a box leads to a strong inference of possession of the contents. However, if the contents are quite different in kind from what the accused believed them to be then he may not be in possession of them. In this case the accused must prove that either:

- a. He had no right to open the package and no reason to suspect that its contents were drugs; or
- b. He had no knowledge of, or had made a genuine mistake as to the nature of the contents even though he was the owner, and he had received the package innocently and had no opportunity to acquaint himself with the contents.

A person will not be out of possession merely because the drug concerned is not physically held by him or about his person. He will remain in possession even when it is in the custody of another (e.g. in the accused's locker or elsewhere) if he has effective control over it.

A person will not be in possession of a controlled drug if at the material time he had consumed it, although traces were found in their urine. This is because, when consumed, the drug's character will change and as such is not then in a person's possession.

Quantity

It is not necessary to prove possession of a usable quantity of the drug; possession of any quantity, provided it is measurable, will suffice. However, a mere droplet which can only be seen under a microscope is not sufficient. Quantity may also be relevant to the issue of evidence. For example where the issue is the accused's knowledge and the amount of the illegal drug found is minute (grains of heroin powder on clothing) this may support the accused's defence that he did not know he possessed it.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Defences are provided by section 5(4) and section 28 of the Misuse of Drugs Act 1971. Section 5(4) is subject to section 28.

5. Notes

Spare.

Criminal damage

Section 1 of the Criminal Damage Act 1971 provides: -

- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—
 - (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
 - (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;shall be guilty of an offence.
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

Section 2

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried, -

- (a) To destroy or damage any property belonging to that other or a third person; or
- (b) To destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person; shall be guilty of an offence.

Section 3

A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it-

- (a) To destroy or damage any property belonging to some other person; or
- (b) To destroy or damage his own or the users property in a way which he knows is likely to endanger the life of some other person; shall be guilty of an offence.

(Section 4 (omitted))

Section 5

- (1) This section applies to any offence under section 1(1) ...(remainder of this subsection is omitted).
- (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

- (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; or
 - (b) if he destroyed or damaged the property in question in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—
 - (i) that the property, right or interest was in immediate need of protection; and
 - (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
- (3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.
- (4) For the purposes of subsection (2) above a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.
- (5) This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

(Section 6-9 omitted)

Section 10

- (1) In this Act “property” means property of a tangible nature, whether real or personal, including money and—
- (a) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but
 - (b) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.
- For the purposes of this subsection “mushroom” includes any fungus and “plant” includes any shrub or tree.
- (2) Property shall be treated for the purposes of this Act as belonging to any person—
- (a) having the custody or control of it;
 - (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
 - (c) having a charge on it.
- (3) Where property is subject to a trust, the persons to whom it belongs shall be so treated as including any person having a right to enforce the trust.
- (4) Property of a corporation sole shall be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.
- (5) For the purposes of this Act a modification of the contents of a computer shall not be regarded as damaging any computer or computer storage medium unless its effect on that computer or computer storage medium impairs its physical condition.

(Subsequent sections omitted)

1. Type of offence

An offence under section 1(1) may be heard summarily without permission of higher authority²³.

An offence under section 1(2) of the Criminal Damage Act 1971 i.e. damaging or destroying property with the intent to endanger life is listed in Schedule 2 of the Act and may not be heard summarily²⁴. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate a Schedule 2 offence may have been committed he must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under section 1(3), section 2 or section 3 may not be heard summarily. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these sections he should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DAMAGING PROPERTY CONTRARY TO SECTION 1(1) OF THE CRIMINAL DAMAGE ACT 1971

[AB] on, did without lawful excuse damage a caravan belonging to [CD], intending to damage such property or being reckless as to whether such property would be damaged, thereby occasioning a loss to [CD] of £300.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DESTROYING PROPERTY CONTRARY TO SECTION 1(1) OF THE CRIMINAL DAMAGE ACT 1971

[AB] on, did without lawful excuse destroy a Sparto Airjet pair of skis belonging to [CD], intending to destroy such property or being reckless as to whether such property would be destroyed, thereby occasioning a loss to [CD] of £500.

3. Ingredients of the offence

Destroys or damages

Damage is interpreted widely to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness. Destroy goes beyond damage and has its normal dictionary meaning, including total demolition.

Property

See section 10 (above) of the Criminal Damage Act 1971.

Belonging to another

For the purposes of this offence, property *belongs* to any person who has custody or control of it, has any proprietary right or interest in it or has a charge on it.

Intending

²³ Section 53 Schedule 1 Part 1 of the Act.

²⁴ Section 53 Schedule 2 of the Act.

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessness

An accused acts recklessly with respect to:

- a. A circumstance when he is aware of a risk that it exists or will exist; and
- b. A result when he is aware of a risk that it will occur and it is, in the circumstances known to him, unreasonable to take the risk.

For example, if an accused throws a stone at a person walking past a glass window and the stone breaks the window. Assuming the accused is aware that there is a risk that given the circumstances the result will be that the window will shatter, he will be reckless if, in the circumstances, it was unreasonable for him to throw the stone.

Without lawful excuse

For lawful excuse generally see [Chapter 12](#) (Defences, Mitigation and Criminal Responsibility).

See section 5 (above) of the Criminal Damage Act 1971 and comments under defences below.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Intoxication

The statutory defence under section 5(2) can be applicable to an accused even if he was voluntarily intoxicated at the time. Therefore an accused may have a defence if through drink he mistakenly but honestly believed that he owned the property that he damaged or destroyed.

Where the defence under section 5(2)(b)(i) of the Criminal Damage Act 1971 is raised by an accused, the requirement of immediacy is satisfied if the threat to the accused's property etc is already happening.

5. Notes

Where the destruction or damage of the property appears to be racially or religiously motivated (see section 30 Crime and Disorder Act 1998), the advice of a staff legal adviser should be sought.

Interference with vehicles

Section 9 of the Criminal Attempts Act 1981 provides:

- (1) A person is guilty of the offence of vehicle interference if he interferes with a motor vehicle or trailer or with anything carried in or on a motor vehicle or trailer with the intention that an offence specified in subsection (2) below shall be committed by himself or some other person.
- (2) The offences mentioned in subsection (1) above are—
 - (a) theft of the motor vehicle or trailer or part of it;
 - (b) theft of anything carried in or on the motor vehicle or trailer; and
 - (c) an offence under section 12(1) of the Theft Act 1968 (taking and driving away without consent);and, if it is shown that a person accused of an offence under this section intended that one of those offences should be committed, it is immaterial that it cannot be shown which it was.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority²⁵.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY INTERFERENCE WITH VEHICLES CONTRARY TO SECTION 9 OF THE CRIMINAL ATTEMPTS ACT 1981

[AB] on, at interfered with the front passenger window of a motor vehicle registration HC98 XCB with intent to steal from that vehicle.

3. Ingredients of the offence

Interferes with

Interferes has no statutory definition and should be construed using the normal dictionary meaning as it relates to the facts of the particular case. For example, looking into a vehicle is not interference, but looking in and applying pressure to the door handle may constitute interference.

Motor vehicle

This is defined as *a mechanically propelled vehicle intended or adapted for use on roads*²⁶. Whether a vehicle is intended for use on roads does not depend on the intent of the user or manufacturer. It is a question of fact for the officer hearing the charge to determine from the evidence whether a vehicle is intended or adapted for use on roads. In most cases this will be obvious.

Trailer

This is defined as *a vehicle drawn by a motor vehicle*²⁷. To be drawn, a trailer must be attached to a motor vehicle.

4. Defences

²⁵ Section 53 Schedule 1 Part 1 of the Act.

²⁶ Road Traffic Act 1988 section 185(1).

²⁷ Road Traffic Act 1988 section 185(1).

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lack of intention

Mere recklessness on the part of the accused as to whether he is committing an offence under section 9 of the Criminal Attempts Act 1981 is not sufficient.

The accused may assert that he intended to interfere with a vehicle, but not with the intention of committing one of the stipulated offences, for example, due to some reason of necessity.

5. Notes

This offence is not applicable to pedal cycles, however, a pedal cycle fitted with an engine is a motor vehicle as would be a motor cycle²⁸.

²⁸ Road Traffic Act 1988 section 185(1).

Road traffic offences

Careless and inconsiderate driving

Section 3 of the 1988 Road Traffic Act provides:

- (1) If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.²⁹ A person convicted of an offence under this section shall be liable to a fine not exceeding level 5 on the standard scale (£5000).

1. Type of offence

An offence under section 3 of the Road Traffic Act 1988 (c.52) **may be** heard summarily **without** permission of higher authority³⁰.

Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42 because they are not public roads. Where local orders or standing orders create driving offences a charge of contravening standing orders drawn under section 13 of the Act may be preferred see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on, drove a mechanically propelled vehicle on a road [or other public place] namely without due care and attention.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY INCONSIDERATE DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988.

[AB] on, drove a mechanically propelled vehicle on a road [or other public place] namely without reasonable consideration for other persons using the said road [or place].

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on, drove a mechanically propelled vehicle, namely a Red Vauxhall Astra Vehicle Registration Number HV52 HOT1 on a road [or other public place] without due care and attention.

²⁹ This section is printed as substituted by Road Traffic Act 1991, section 2.

³⁰ Section 53 Schedule 1 Part 1 of the Act.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITHOUT REASONABLE CONSIDERATION CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on, drove a mechanically propelled vehicle, namely a Red Vauxhall Astra Vehicle Registration Number HV52 HOT1 on a road [or other public place] without reasonable consideration for other persons using the road [or place].

3. Ingredients of the offence

The offence may take one of two forms:

Careless driving ('driving without due care and attention')

The test is whether the accused was exercising the degree of care and attention that a reasonable, competent and prudent driver would exercise in the circumstances. If the conduct was not inconsistent with that of a reasonably prudent driver, the offence is not proved. Therefore the test is an objective one where the safety of other road users should be considered. The police and CPS have issued an agreed Driving Offences Charging Standard in which the following are given as examples which may support an allegation of careless driving: overtaking on the inside, driving too close to another vehicle, driving through a red light, reading a map, nodding off etc.

Driving without reasonable consideration

The test is whether other road users were actually inconvenienced by the accused's inconsiderate driving. Therefore if no one was actually inconvenienced the offence will not be made out. While such driving will usually also constitute driving without due care and attention (described in (a) above) this is not necessarily the case. For example a motorist who jumps a queue of vehicles in order to force his way to the head of a line of waiting vehicles; such behaviour might constitute driving without reasonable consideration, depending on the evidence available from other road users. Other examples include: flashing of lights to force drivers in front to give way, braking without good cause, or driving through a puddle causing pedestrians to be splashed. The *other persons using the road or place* will include the accused's own passengers.

The facts of a particular case (e.g. failing to negotiate a curve in the road and hitting a telegraph pole) may be such that, in the absence of any explanation (e.g. skidding on a patch of oil that was impossible to foresee), the only proper inference is that the driving was careless.

Drives

The test of whether a person is driving a vehicle is whether he is controlling the movement and direction of the vehicle. A passenger could be said to be driving a vehicle if he takes control of the steering wheel, but the determinant as to whether someone is driving a vehicle is a question of fact and degree. The word *drives* must be construed in accordance with its normal dictionary meaning.

Mechanically propelled vehicle

Whether a vehicle is mechanically propelled is a question of fact and is for the prosecution to prove, but has a broad meaning and can cover mopeds and motorcycles.

Road or other public place

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*³¹. There is no separate definition of public place and this should be given its normal dictionary meaning.

Although there may be exceptional circumstance in which roads on Service establishments can be regarded as accessible to the public, this will rarely be the case. Where an accused has driven carelessly on a road within a Service establishment, consideration should be given to charging him under section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline) of the Act. MOD property will not generally qualify as a public place.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Automatism

In an ordinary case, once it has been shown that the accused was in the driver's seat of a vehicle, there is a strong inference that he was the driver. The accused may have a defence if he can bring evidence that tends to support his contention that he was rendered incapable of controlling the car, e.g. by being knocked unconscious. Falling asleep at the wheel may constitute reckless driving.

Mechanical defect

Where the apparently careless driving was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the driver.

No offence is committed under section 3 where the driving took place in the course of an authorised motoring event³² under regulations made from time to time by the Secretary of State by Statutory Instrument.

5. Notes

Spare.

³¹ Road Traffic Act 1988, section 192(1).

³² Road Traffic Act 1988, section 13A..

Driving or being in charge with excess alcohol

Section 5 of the Road Traffic Act 1988 provides:

- (1) A person is guilty of the offence of driving or being in charge of a motor vehicle if:
 - (a) drives or attempts to drive a motor vehicle on a road or other public place, or
 - (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.
- (2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.
- (3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³³. Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42 because they are not public roads. Where local orders or standing orders create driving offences a charge under section 13 (contravention of standing orders) of the Act may be preferred - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITH EXCESS ALCOHOL CONTRARY TO SECTION 5(1)(a) OF THE ROAD TRAFFIC ACT 1988

[AB] on, [drove] [attempted to drive] a motor vehicle on [a road][at, a public place] having consumed alcohol in such a quantity that the proportion thereof in his [blood][urine][breath] exceeded [80 milligrammes of alcohol in 100 millilitres of blood][107 milligrammes of alcohol in 100 millilitres of blood][35 microgrammes of alcohol in 100 millilitres of breath] the prescribed limit.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITH EXCESS ALCOHOL CONTRARY TO SECTION 5(1)(b) OF THE ROAD TRAFFIC ACT 1988

[AB] on, was in charge of a motor vehicle on [a road][at, a public place] having consumed alcohol in such a quantity that the proportion thereof in his [blood][urine][breath] exceeded [80 milligrammes of alcohol in 100 millilitres of blood][107 milligrammes of alcohol in 100 millilitres of blood][35 microgrammes of alcohol in 100 millilitres of breath] the prescribed limit.

³³ Section 53 Schedule 1 Part 1 of the Act.

3. Ingredients of the offence

Drives

The test of whether a person is driving a vehicle is whether he is in a substantial sense controlling the movement and direction of the vehicle. Where a passenger intentionally grabs the wheel, he is not driving, but interfering with the driving of the vehicle.

Attempts

See notes under Sections 39, 43, 44 and 48 for offence of Attempt.

Mechanically propelled vehicle

Whether a vehicle in question is mechanically propelled is a question of fact and it is for the prosecution to prove that it was.

Road or other public place

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*³⁴. The question of whether or not a particular road is one to which the public has access is one of fact and degree. There is no separate definition of public place, this should be given its normal dictionary meaning. For example, if a restricted class of person only is permitted or invited to have access, the place is a private place, whereas if only a restricted class of person is excluded, the place is a public place. For a dual use place – sometimes with private access, sometimes with public access – the offence can only be committed during the time there is public access.

In charge

A person is in charge of a vehicle if he acts in a manner which shows that he assumes control or intends to assume control of the vehicle preparatory to driving it. A person can be in charge of a vehicle that is immobile, e.g. through clamping. It is not necessary for the person to be in the vehicle to be in charge of it. The circumstances to be taken into account for determining whether a person is in charge will vary infinitely, but the following will be relevant: (a) whether and where the accused is in the vehicle or how far he is from it; (b) what he is doing at the relevant time; (c) whether he is in possession of a key that fits the ignition; (d) whether there is any evidence of an intention to take or assert control of the car by driving it or otherwise; and (e) whether any other person is in, at or near the vehicle and, if so, the like particulars in respect of that person.

The prescribed limit

The prescribed limits are (a) 35 microgrammes of alcohol in 100 millilitres of breath; (b) 80 milligrammes of alcohol in 100 millilitres of blood; (c) 107 milligrammes of alcohol in 100 millilitres of urine.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There is a statutory defence at subsection (2) above to the offence of being in charge. The burden of proof is on the accused and it is for him to prove on the balance of probability that there was no likelihood of him driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

³⁴ Road Traffic Act 1988 section 192(1).

5. Notes

The charge must state which specimen (breath/blood/urine) is to be relied on for the purposes of proving the charge.

Tampering with motor vehicles

Section 25 of the 1988 Road Traffic Act provides:

- (a) Everyone who without lawful authority or reasonable cause gets on to a motor vehicle or tampers with the brake or other part of its mechanism while the vehicle is on a road or a parking place provided by a local authority commits an offence against the Road Traffic Act 1988, s.25.
- (b) A person would not be liable to be convicted of the offence if he had the authority of the owner or released the brake of a vehicle in order to move it when it was causing an obstruction.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³⁵. Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create driving offences a charge under section 13 (contravention of standing orders) of the Act may be preferred, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas cannot be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY [GETTING ON TO] [TAMPERING WITH] A MOTOR VEHICLE WITHOUT LAWFUL AUTHORITY OR REASONABLE CAUSE CONTRARY TO SECTION 25 OF THE ROAD TRAFFIC ACT 1988

[AB] on, without lawful authority or reasonable cause [got on to a motor cycle] [released the handbrake of motor vehicle], registered number in [Victory Road] [Hardy municipal car park].

3. Ingredients of the offence

Road or parking place designated by a local authority

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*³⁶. The question of whether or not a particular road is one to which the public has access is one of fact and degree.

A parking place designated by a local authority

Would not include a parking place provided by a local authority outside the UK.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

³⁵ Section 53 Schedule 1 Part 1 of the Act.

³⁶ Road Traffic Act 1988 section 192(1).

Spare.

Dangerous cycling

Section 28 of the Road Traffic Act 1988 provides:

- (1) A person who rides a cycle on a road dangerously is guilty of an offence.
- (2) For the purposes of subsection (1) above a person is to be regarded as riding dangerously if (and only if) —
 - (a) the way he rides falls far below what would be expected of a competent and careful cyclist, and
 - (b) it would be obvious to a competent and careful cyclist that riding in that way would be dangerous.
- (3) In subsection (2) above ‘dangerous’ refers to danger either of injury to any person or of serious damage to property; and in determining for the purpose of that subsection what would be obvious to a competent and careful cyclist in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to be in the knowledge of the accused.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³⁷.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create cycling offences a charge under section 13 (contravention of standing orders) of the Act may be preferred, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DANGEROUS CYCLING CONTRARY TO SECTION 28 OF THE ROAD TRAFFIC ACT 1988

[AB] on, rode a cycle dangerously on a road.

3. Ingredients of the offence

Rides

This term is to be given its normal dictionary meaning but an offence will not be committed where the accused is merely *wheeling* the cycle.

Cycle

Cycle means a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle.

³⁷ Section 53 Schedule 1 Part 1 of the Act.

Road

Road for the purposes of this offence means any highway and any other road to which the public has access, and includes bridges over which a road passes.

In this context, *the public* means the general public and not members of a limited class and access must be lawful access. In many instances therefore this will exclude roads that go through a Service establishment.

Whether a particular area of land is a road is a matter of fact but guidance might be found by considering its physical character and function. The proper function of a road is to enable traffic to move along it to a destination. Therefore a car park does not qualify as a road as its primary function is to enable vehicles to stop and wait within it.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Automatism

The accused may have a defence if he can bring evidence that tends to support his contention that he was rendered incapable of controlling the cycle, e.g. by being distracted by a swarm of bees.

Mechanical defect

Where the apparently dangerous cycling was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the cyclist.

5. Notes

This offence takes no account of the accused's personal circumstances, for example his age, proficiency or experience as a cyclist. For this charge to be proved, the accused must ride a cycle in a manner that falls below the standards that would be expected of a competent and careful cyclist. This is an objective test. It focuses on the manner that a bicycle is ridden and not on the accused's state of mind. It is however also necessary to prove that in riding the bicycle in the manner alleged it would have been obvious to a competent and careful cyclist that riding in the way alleged was dangerous. In determining this matter, the officer hearing the charge must therefore take into account the circumstances at the time of the incident.

Minor cycling errors would not amount to an offence under this section of the Road Traffic Act 1988 but might amount to careless or inconsiderate cycling, see Careless and Inconsiderate Cycling.

Careless and inconsiderate cycling

Section 29 of the Road Traffic Act 1988 provides:

If a person rides a cycle on the road without due care and attention, or without reasonable consideration for other persons using the road, he is guilty of an offence.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³⁸.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create cycling offences a charge under section 13 (contravention of standing orders) of the Act may be preferred - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS CYCLING CONTRARY TO SECTION 29 OF THE ROAD TRAFFIC ACT 1988

[AB] on, rode a cycle on a road without due care and attention.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY RIDING A CYCLE WITHOUT CONSIDERATION FOR OTHER ROAD USERS CONTRARY TO SECTION 29 OF THE ROAD TRAFFIC ACT 1988

[AB] on, rode a cycle on a road without reasonable consideration for other persons using the road.

3. Ingredients of the offence

Cycle

Cycle means a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle.

Road

Road for the purposes of this offence means any highway and any other road to which the public has access, and includes bridges over which a road passes. In this context, 'the public' means the general public and not members of a limited class and access must be lawful access. In many instances therefore this will exclude roads that go through a Service establishment.

Whether a particular area of land is a road is a matter of fact but guidance might be found by considering its physical character and function. The proper function of a road is to enable traffic to move along it to a destination. Therefore a car park does not qualify as a road as its primary function is to enable vehicles to stop and wait within it.

³⁸ Section 53 Schedule 1 Part 1 of the Act.

Due care and attention

It must be proven that the accused's standard of cycling fell below that which could be expected of a reasonable, prudent and competent cyclist in all the attendant circumstances and that his actions were voluntary. An objective standard is applied and so the, proficiency or experience of the cyclist is irrelevant. However, the officer hearing the charge may take into account local factors for example the level of traffic, the conditions of the road etc.

Inconsiderate cycling

In order to prove that an accused cycled in an inconsiderate manner, it must be proven that some other persons on the road were inconvenienced.

Other persons on the road

This will include other road users and might also include pedestrians who are affected by the manner of cycling. It refers to persons actually on the road at the material time and not those who might reasonably be expected to be there

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Automatism

The accused may have a defence if he can bring evidence that tends to support his contention that he was rendered incapable of controlling the cycle, e.g. by being distracted by a swarm of bees.

Mechanical defect

Where the apparently careless and inconsiderate cycling was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the cyclist.

5. Notes

Careless cycling and inconsiderate cycling are distinct offences and therefore when drafting the charge, it is necessary to indicate which form of misconduct the accused is alleged to have carried out. A charge which alleges that an accused has cycled on a road without due care and attention and without reasonable consideration for other road users is bad for duplicity.

The officer hearing the charge may find a charge proven if in the absence of a satisfactory explanation, and in the absence of a reasonable explanation to the contrary, the facts point inferentially to carelessness beyond reasonable doubt.

Section 43 – 48 offences (Armed Forces Act 2006)

Attempting criminal conduct

43. Attempting Criminal Conduct

- (1) Subsection (2) applies for the purpose of determining whether an attempt is an offence under section 42.
- (2) For that purpose section 1(4) of the Criminal Attempts Act 1981 (c. 47) (offences that it is an offence to attempt) has effect as if for the words from “offence which” to “other than” there were substituted “offence under section 42 of the Armed Forces Act 2006 consisting of an act punishable by the law of England and Wales as an indictable offence or an act that, if done in England or Wales, would be so punishable by that law; but “indictable offence” here does not include”.
- (3) Section 42(6) applies for the purposes of section 1(4) of the Criminal Attempts Act 1981 as modified by this section.

1. Type of offence

An offence under this section **may be** heard summarily **as long as** the full offence may also be heard summarily³⁹.

Where the offence appears in Schedule 2 (paragraphs 12 and 13(a)) of the Act, or an offence which has been committed in prescribed circumstances, it may not be heard summarily⁴⁰. For the handling of cases in relation to Schedule 2 and prescribed circumstances offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed in prescribed circumstances or be a Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence attempted is not in Schedule 2 or committed in prescribed circumstances but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An attempt to commit an offence which is listed at Schedule 1 Part 1 of the Act may be dealt with summarily. Permission is required from HA to deal summarily with an attempt to commit an offence set out in Schedule 1 Part 2 of the Act.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ATTEMPTING TO COMMIT [state crime e.g. THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968 CONTRARY TO SECTION 1(1) OF THE CRIMINAL ATTEMPTS ACT 1981]

[AB] on, did attempt to steal a watch, the property of.....

³⁹ Section 53 of the Act.

⁴⁰ Section 53, section 114 and Schedule 2 of the Act.

3. Notes

The effect of this section substitutes the words in section 1 of the Criminal Attempts Act 1981, so that it reads:

- (1) If, with intent to commit an offence to which this Attempting section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.**
- (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.**
- (3) In any case where—**
 - (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but**
 - (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.**
- (4) This section applies to any offence under section 42 of the AFA 06 consisting of an act punishable by the law of England and Wales as an indictable offence or an act that, if done in England and Wales, would be so punishable by that law; but “indictable offence” here does not include-**
 - (a) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment);**
 - (b) aiding, abetting counselling and procuring or suborning the commission of an offence;**
 - (c) offences under section 4(1) and 5(1) of the Criminal Law Act 1967.**

(s.1 CAA 1981)

This section applies to any attempt to commit a civil offence under section 42 of the Act. An attempt is where an accused has embarked upon an offence but where the offence has not been completed. To be guilty of this offence an accused must intend to commit the offence and in relation to that offence, he must have done acts which are more than merely preparatory. For example, if an accused arms himself with a gun and forces his way into an office block and subsequently draws his gun towards his intended victim but is disarmed before he could shoot his victim, he would be charged with attempted murder. An accused who uses a crow bar to prise a window but is arrested before he can enter the building could be charged with attempted burglary.

The case can be found proved even where the accused was attempting the impossible. For example, if an accused attempted to sell what he believed to be ecstasy tablets, however they were in fact paracetamol, although it would be impossible for him to supply a class A drug contrary to section 4(3) of the Misuse of Drugs Act 1971, the case would be found proved in respect of attempting to supply a controlled drug.

Any attempt to commit a non-criminal conduct (disciplinary) offence as detailed in section 53(2) is dealt with under section 39 above.

Trial of section 42 offence of attempt

44. Trial of section 42 offence of attempt

- (1) Where, in proceedings for a section 42 offence of attempt, there is evidence sufficient in law to support a finding that the defendant did an act falling within subsection (1) of section 1 of the Criminal Attempts Act 1981, the question whether his act fell within that subsection is a question of fact.
- (2) In this section “a section 42 offence of attempt” means an offence under section 42 consisting of an act that is, or that would be if done in England or Wales, an offence under section 1(1) of the Criminal Attempts Act 1981 (c. 47).
- (3) References in subsections (1) and (2) to section 1(1) of the Criminal Attempts Act 1981 are to that provision as it has effect by virtue of section 43 above.

1. Notes

See the notes at section 43 of this chapter for further information on the offence of attempt.

Where there is evidence to support a finding that the accused did an act which amounted to an attempt contrary to section 42, it is a question for the officer hearing the charge or the CM as to whether the act was an attempt, as distinct from mere preparation for the commission of an offence.

Conspiring to commit criminal conduct

45. **Conspiring to commit criminal conduct**
- (1) **For the purpose of determining whether an agreement that a course of criminal conduct be pursued is an offence under section 42—**
- (a) **sections 1(1) and 2 of the Criminal Law Act 1977 have effect as if any reference to an offence included a reference to an act that, if done in England or Wales, would be punishable by the law of England and Wales; and**
- (b) **section 1(2) of that Act has effect as if it read—**
- “(2) **Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of it, a person is nevertheless not guilty by virtue of subsection (1) above of conspiracy to commit—**
- (a) **that offence, or**
- (b) **an act that would amount to that offence if done in England or Wales, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence, or the act, is to take place.”**
- (2) **Section 42(6) applies for the purposes of section 1(2) of the Criminal Law Act 1977 as substituted by this section.**

1. Type of offence

An offence under this section **may be** heard summarily **as long as** the full offence may also be heard summarily⁴¹.

Where the offence appears in Schedule 2 (paragraphs 12 and 13(b)) of the Act, or an offence which has been committed in prescribed circumstances, it may not be heard summarily⁴². For the handling of cases in relation to Schedule 2 and prescribed circumstances offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed in prescribed circumstances or be a Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not in Schedule 2 nor committed in prescribed circumstances but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter.

In all cases, legal advice should be sought at an early stage. Framing of conspiracy charges is especially complex and COs should not bring a conspiracy charge without legal advice. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Notes

In an offence of conspiracy agreement is essential. The agreement must propose a course of action that results in one of the parties to the agreement committing an offence.

The effect of the above section amends the Criminal Law Act 1977 to read:

⁴¹ Section 53 of the Act.

⁴² Section 53, section 114 and Schedule 2 of the Act.

1. (1) Subject to the following provisions of this Part of this Act if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.
 - (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of it, a person is nevertheless not guilty by virtue of subsection (1) above of conspiracy to commit—
 - (a) that offence, or
 - (b) an act that would amount to that offence if done in England or Wales, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence, or the act, is to take place.
2. (1) A person shall not by virtue of section 1 above be guilty from liability of conspiracy to commit any offence if he is an intended victim for conspiracy of that offence.
 - (2) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say—
 - (a) his spouse;
 - (b) a person under the age of criminal responsibility; and
 - (c) *an intended victim of that offence or of each of those offences.*
 - (3) A person is under the age of criminal responsibility for the purposes of subsection (2)(b) above so long as it is conclusively presumed, by virtue of section 50 of the Children and Young Persons Act 1933, that he cannot be guilty of any offence

Encouraging or assisting criminal conduct

46. Encouraging or assisting criminal conduct

- (1) Subsection (2) applies if a person subject to service law, or a civilian subject to service discipline, encourages or assists the doing of an act (or one or more of a number of acts) that, if done in England or Wales would be punishable by the law of England and Wales.
- (2) Regardless of where that act (or those acts) might be done and of his state of mind with respect to that question, his encouragement or assistance shall be treated for the purposes of section 42(1) as an act that is punishable by the law of England and Wales (so far as it is not such an act in any event).
- (3) Reference in this section to encouraging or assisting is to an act that would constitute an offence under Part 2 of the Serious Crime Act 2007 disregarding any provision in that Part about the place where the act (or acts) being encouraged or assisted might be done or the accused's state of mind with respect to that question.

(AFA06 s.46)

1. Type of offence

Encouragement and assistance to commit an offence which is listed at Schedule 1 Part 1 **may be** heard summarily. Encouragement and assistance to commit an offence which is listed at Schedule 1 Part 2 of the Act may be dealt with summarily with permission from HA. Given the nature of this offence, legal advice should be sought from a staff legal adviser.

Encouragement and assistance to commit an offence which is listed in Schedule 2 (paragraph 12 and 13(c)) may not be heard summarily⁴³. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate a Schedule 2 offence may have been committed they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ENCOURAGING OR ASSISTING THE COMMISSION OF [state crime e.g. THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968 CONTRARY TO SECTION 44(1) OF THE SERIOUS CRIME ACT 2007].

[AB] on, did unlawfully encourage or assist to steal, property belonging to

3. Notes

A charge of encouraging or assisting may be found proved if:

- a. He encourages or assists another to do or cause to be done an act or acts which would amount to an offence by the other; and
- b. He intends or believes that the other, if he acts as encouraged or assisted, shall or will do so with the fault required for the offence or offences.

⁴³ Section 53 Schedule 2 of the Act.

This is not limited to urging or spurring on with advice or persuasion but includes encouraging or assisting another to do an act by threats or by pressure or by bribing a person to commit an offence.

Aiding, abetting, counselling or procuring criminal conduct

47. **Aiding, abetting, counselling or procuring criminal conduct**
- (1) **Subsection (2) applies if—**
- (a) **any person (“A”) does an act that is punishable by the law of England and Wales or would be so punishable if done in England or Wales; and**
 - (b) **a person subject to service law, or a civilian subject to service discipline, aids, abets, counsels or procures A’s doing of that act.**
- (2) **Regardless of where the act aided, abetted, counseled or procured was done, the aiding, abetting, counseling or procuring shall be treated for the purposes of section 42(1) as an act that is punishable by the law of England and Wales.**
- (3) **For the purpose of determining whether an attempt is an act that falls within subsection (1)(a) above, section 1(4) of the Criminal Attempts Act 1981 (c. 47) has effect with the modification made by section 43.**

1. Type of offence

An individual who aids, abets, counsels or procures the commission of any criminal conduct offence (section 42) is treated under section 47 as though he committed the offence himself (as a principal offender) and charged with the principal offence. Therefore the guidance for the principal offence in this chapter applies.

2. Specimen charges

No offence will be charged under this section. The accused will always be charged as the principal offender under the section of the principal offence.

3. Notes

A person may be responsible for criminal action, either as the person who commits the offence or as an accessory. An accessory may aid, abet counsel or procure the commission of the offence.

The words *aid* or *abet* describe the action of a person who is present at the time of the commission of the offence and takes some part in it. However it could include, for example, providing equipment to use in a burglary, which has already been decided upon. In these circumstances a person is aiding and abetting even though they are not present at the scene of the offence. Therefore, where a person (the principal offender) damages Service property (section 24) then an accused who has aided or abetted the damaging of the property would also be charged with the same offence, a person who aids and abets a theft under section 1 of the Theft Act 1968 will be charged as committing an offence contrary to section 42 of the Act, that is to say theft under that section. If a person is present at the scene and has the right and ability to control the person committing the offence, if he fails to exercise that control, it could make him an accomplice to the offence.

Counselling relates to advice to the offender which takes place before the commission of the offence, and *procuring* means to produce by endeavour.

An example of procuring is the *spiking* of drinks following which the victim drives and commits the offence of driving a motor vehicle with an alcohol concentration above the prescribed limit.

Provisions supplementary to sections 43 to 47

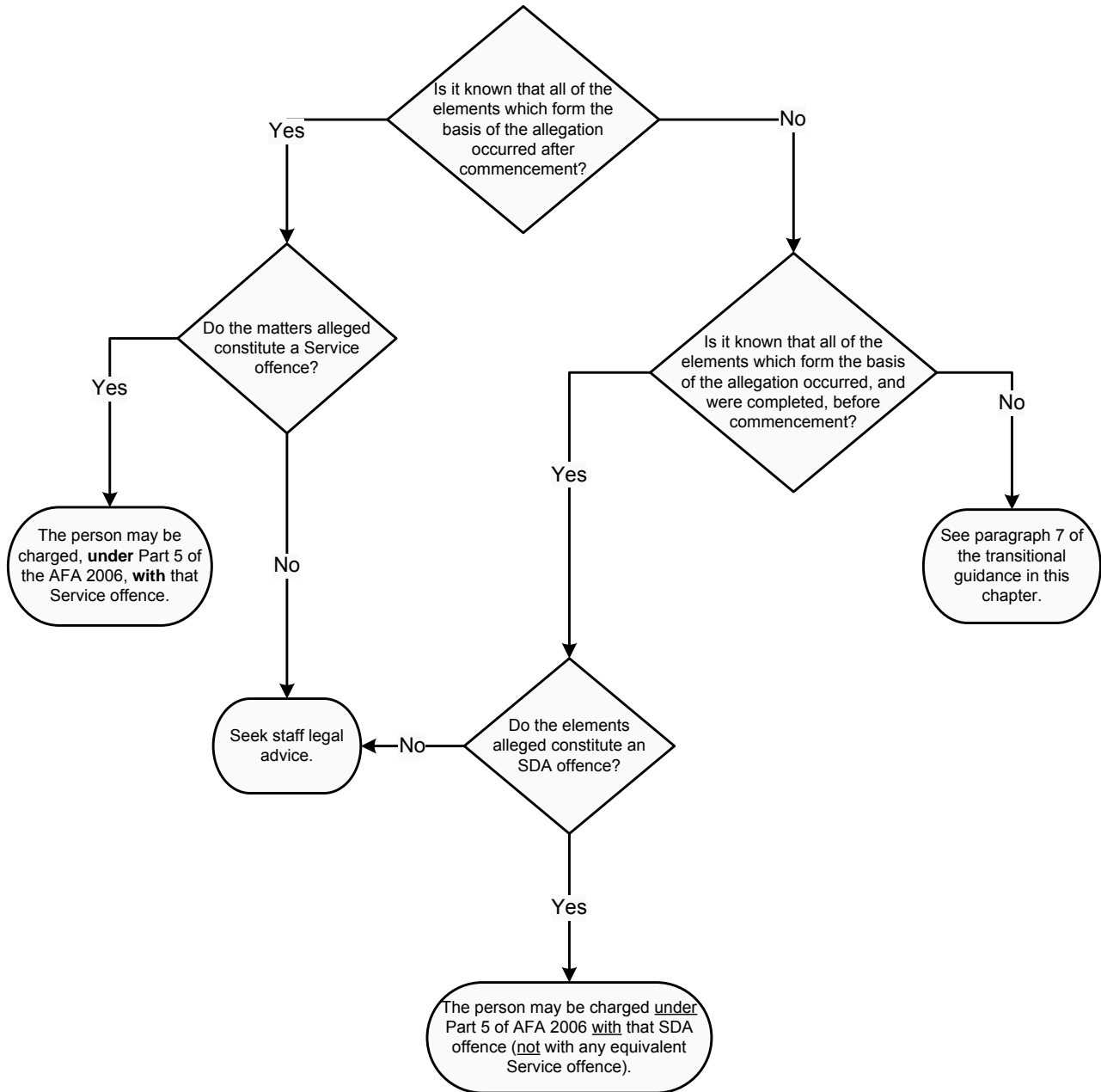
- 48. Provisions supplementary to sections 43 to 47**
- (1) This section applies where—**
- (a) an attempt, agreement or encouragement or assistance, or a person’s aiding, abetting, counselling or procuring, is an offence under section 42 by reason of section 43, 45, 46 or 47; and**
 - (b) the act to which it relates (“the contemplated act”) is not an act that is (or that if done would have been) punishable by the law of England and Wales.**
- (2) For the following purposes it shall be assumed that the contemplated act amounted to the offence under the law of England and Wales that it would have amounted to if it had been the equivalent act in England or Wales.**
- (3) Those purposes are—**
- (a) the purpose of determining what punishment may be imposed for the offence under section 42;**
 - (b) the purpose of determining for the purposes of any of the following provisions of this Act whether the act constituting the offence under section 42, or the equivalent act done in England or Wales, is or would be—**
 - (i) an offence under the law of England and Wales;**
 - (ii) any particular such offence;**
 - (iii) such an offence of any particular description.**

1. Notes

The effect of this section is that for the purposes set out in section 48(3) it is assumed that a contemplated act (as defined) amounted to an offence in England and Wales, it would have been equivalent to had it occurred there. It means that an offence can be committed under section 42 by virtue of an attempt, agreement or encouragement or assistance, or a person’s aiding, abetting, counselling or procuring even though the contemplated act was outside of the jurisdiction.

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TRANSITIONAL GUIDANCE



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Chapter 9

Summary hearing and activation of suspended sentences of Service detention

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Chapter 9

Summary hearing and activation of suspended sentences of Service detention

Introduction

1. This chapter provides guidance on summary hearing procedure including activation by COs of suspended sentences of detention. It is aimed at all officers with summary powers of punishment and also those persons who are required to advise them in the performance of this function. It sets out the procedures that are to be followed once a charge has been brought and allocated for summary hearing, see [Chapter 6](#) (Investigation, charging and mode of trial). It also guides COs through the process when an offender is under a suspended sentence of detention, which was imposed by a CO or Summary Appeal Court (SAC) and an activation of that sentence may be necessary. This chapter uses the term 'CO' to include the CO and subordinate commander unless there is a reason to specify one or the other.
2. Summary discipline enables the chain of command to exercise immediate and effective authority in all situations including on operations. It provides procedures under which Service offences, both criminal and non-criminal (disciplinary) conduct offences (see [Chapter 7](#) (Non criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences)) can be dealt with swiftly and fairly in support of operational effectiveness.
3. A summary hearing is an inquisitorial process and differs in this respect from adversarial proceedings in, for example, the Court Martial (CM) and civilian criminal courts. There is no prosecutor and in a contested summary hearing¹ the role of the officer hearing the charge is to determine the facts of the case, based on evidence heard from the accused and any witnesses.
4. When an offender is under a suspended sentence of detention that has been imposed by a CO or SAC and he commits another offence, whether in the Service or civilian jurisdictions, the suspended sentence may be activated. The procedure that is followed differs depending on whether the subsequent offence is dealt with by a civilian court or a CO. This chapter details how a CO must deal with such a situation should it arise.
5. The procedures in this chapter are unique to the Service Justice System and many are on a statutory basis under the Armed Forces Act 2006 (the Act); therefore where it is stated that a procedure must² be followed or a factor must be considered, a CO is under a legal duty to follow that procedure or consider such a factor. [Chapter 13](#) (Summary hearing - sentencing and punishments) sets out the procedures to be followed, the factors that should be considered when sentencing and gives detailed guidance on each punishment that may be awarded. [Chapter 15](#) (Summary hearing review and appeal) contains the procedures to be followed when an offender wishes to appeal finding and/or punishment at summary hearing to the SAC, as well as the process to be followed in respect of the summary hearing being reviewed.

¹ A summary hearing in which the accused denies the charge.

² See Glossary, 'must' is used throughout MSL Volume 1 to refer to a legal requirement and 'should' refers to an instruction that ought to be followed as a matter of policy.

Part 1 – Delegations and applications to higher authority

Delegation and revocation of CO's disciplinary powers

6. A CO, see [Chapter 2](#) (Meaning of CO), is responsible for all the charges brought in his ship/unit but need not be familiar with the full details of all of them. A CO may delegate his relevant disciplinary functions³ to subordinate commanders (see paragraph 7) and he may make conditions on such delegations. The delegation will endure until the CO expressly revokes it; a CO may revoke a delegation orally or in writing if, for example, the CO feels that a subordinate commander's powers are insufficient to deal with a particular charge and he wishes to deal with it himself. Only one subordinate commander may hold the CO's delegation in relation to a particular charge at any one time. Wherever possible, notice of officers who have had disciplinary functions delegated to them should be promulgated in the ship/unit and a record of any such delegation retained.

7. In order to have the power to exercise disciplinary functions a subordinate commander must be an officer under the command of the CO who is of at least the rank of naval lieutenant, military or marine captain or flight lieutenant⁴. Charges may be allocated to be heard by appropriate commanders depending on their seriousness and the potential severity of the sentence. A delegation to hear a charge must include the powers to:

- a. Amend or substitute a charge, or bring an additional charge;
- b. Refer the charge to the Director of Service Prosecutions (DSP)⁵; and
- c. Discontinue proceedings on a charge.

8. These may be subject to such conditions that the CO deems appropriate; for example, the CO may limit the type of charge that the subordinate commander may hear by excluding any offences of criminal conduct, or charges that relate to particular offences.

9. It should be noted that the CO cannot delegate any of his powers in relation to⁶:

- a. Offences⁷ that require HA permission to deal with.
- b. Offences alleged to have been committed during the operational⁸ period of a suspended sentence of detention⁹.
- c. Charges brought against a person above the rank or rate of chief petty officer, military or marine colour sergeant or flight sergeant.
- d. Charges brought against a person of or above the rank or rate of petty officer marine sergeant or air force sergeant, where the subordinate commander is of the rank of naval lieutenant, military or marine captain or flight lieutenant.

³ See rule 3(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216

⁴ See rule 2(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216 – this means either Acting or Substantive rank.

⁵ When considering this course of action the subordinate commander should consult his CO or take legal advice.

⁶ The powers outlined in Part 6, of the Act and Part 2 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷ Those within section 54(2), of the Act.

⁸ A period of between 3 – 12 months specified in the order suspending the sentence. If the offender commits a further offence during this period the suspended sentence may be activated.

⁹ Rule 3(3)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

Where a delegation is made to a subordinate commander, that officer's powers of punishment are more limited than those of a CO. See [Chapter 13](#) (Summary hearing sentencing and punishments).

10. **Revocation.** A CO may revoke the delegation of his functions in relation to a charge at any time before a decision is made as to whether the charge is proved. Where the CO revokes the delegation after election has been offered, the decision on election stands. Similarly, if the CO revokes the delegation after the accused has been asked to admit or deny the charge, the accused's decision stands. Where a revocation has been made the CO may deal with the matter or allocate the charge to another subordinate commander. They should then proceed from the point in the proceeding at which the CO revoked the delegation, unless the revocation was made after the accused had been asked to admit or deny the charge. In the latter case, all the evidence or the case summary should be heard, as appropriate.

11. Thus, if after the commencement¹⁰ of the summary hearing a subordinate commander considers that he should not continue to hear the charge (e.g. his powers of punishment may not be sufficient should he find the charge proved), he may:

- a. Inform the CO, who may revoke the delegation before a determination is made as to whether the charge is proved;
- b. Refer the charge to the DSP¹¹, see [Chapter 6](#) (Investigation, charging and mode of trial) but before doing so he should consult the CO or take legal advice; or
- c. Discontinue proceedings on the charge.

This is not an exhaustive list. If in doubt, the subordinate commander is advised to adjourn the hearing and take advice on the most appropriate course of action.

12. **Nullity.** If a subordinate commander hears a charge which was not or could not be delegated to him, the hearing would be a nullity, i.e. legally, as if it had not taken place. The CO may decide to hear the charge and if he does so, must comply with all the usual preliminary procedures. However, if the CO considers that hearing the charge would be inappropriate or unfair to the accused he may discontinue the charge. Staff legal advice should be taken in such circumstances.

Application to higher authority

13. **Application to hear certain charges summarily.** When a CO considers that any of the serious¹² criminal conduct offences listed below should be heard summarily¹³, if he is below the rank of rear admiral, major-general or air vice-marshal, he must apply to higher authority (HA) for permission to do so. A template of a letter of application for this purpose is at [Annex A](#). The offences to which this requirement applies are:

- a. Assault occasioning actual bodily harm (Section 47 of the Offences against the Person Act 1861);

¹⁰ The CO does not start a summary hearing until the accused has been given the opportunity to elect CM trial and has declined. Thus, there is no obligation for the CO to complete a Record of Summary Hearing (RSH) should the accused elect CM trial.

¹¹ Section 123(2)(e) of the Act.

¹² It is within section 54(2) of the Act.

¹³ Such charges can only be heard summarily by the CO in person with HA permission.

- b. Possession in a public place of an offensive weapon (Section 1 of the Prevention of Crime Act 1953);
- c. Abstracting of electricity (Section 13 of the Theft Act 1968);
- d. Possession in public place of point or blade (Section 139 of the Criminal Justice Act 1968);
- e. Dishonestly obtaining electronic communications services; eg using MOD telephones for private calls (Section 125 of the Communications Act 2003);
- f. Possession or supply of apparatus for obtaining electronic communications services (Section 125 of the Communications Act 2003);
- g. Fraud (Section 1 of the Fraud Act 2006);
- h. Dishonestly obtaining services (Section 11 of the Fraud Act 2006); and
- i. Attempting to commit one of the indictable¹⁴ offences above¹⁵.

14. The application to HA must be made as soon as is reasonably practicable after the charge is brought¹⁶ and must contain¹⁷:

- a. The CO's reasons for considering that the charge should be heard summarily.
- b. A copy of the charge sheet.
- c. A copy of the written evidence relevant to the charge.
- d. A copy of any unused written evidence gathered as part of the investigation of the charge.
- e. A copy of any disciplinary record of the accused.
- f. Any other material that may, in the opinion of the CO, be relevant to the application.

15. Where an application for permission to hear a serious criminal conduct offence listed above has been granted, the CO must provide¹⁸ the accused with a copy of the notification from HA to this effect (see paragraph 26 below).

16. Where an application for permission to hear a serious criminal conduct offence has not been granted the charge may be referred to the DSP, or exceptionally discontinued. The options for substituting, amending or discontinuing charges are set out in Part 4 of [Chapter 6](#) (Investigation charging and mode of trial). In any of these circumstances staff legal advice should be followed.

17. **Application for extended powers in relation to punishment.** If a CO is below the rank of rear admiral, major-general or air vice-marshal and considers that a charge against a

¹⁴ See glossary.

¹⁵ Section 43 of the Act.

¹⁶ In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

¹⁷ Rule 5(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁸ Rule 5(4) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

person should be dealt with summarily and that his powers of punishment might be insufficient to deal with the accused if the charge were proved, he must apply to HA for extended powers¹⁹. A template of a letter of application for this purpose is at [Annex B](#). When deciding whether to apply for extended powers, the CO should consider the following factors:

- a. The nature of the charge;
- b. His basic powers of punishment (i.e. without extended powers);
- c. The sentencing guidelines for such an offence, see [Chapter 14](#) (Summary hearing sentencing guide);
- d. The accused's formal disciplinary record, which will include whether the accused is under a suspended sentence of detention; and
- e. All the evidence presented in the case papers.

18. The application must be made as soon as is reasonably practicable after the charge is brought²⁰ (which may be after the CO has complied with the preliminary procedures (see part 2 below) and must contain²¹:

- a. The CO's reasons for considering his powers of punishment might be insufficient, should the charge be found proved, unless he has extended powers;
- b. A copy of the charge sheet;
- c. A copy of the written evidence relevant to the charge;
- d. A copy of any unused written evidence gathered as part of the investigation of the charge;
- e. A copy of any disciplinary record of the accused;
- f. Specific details of all provisions for the purpose of which the CO considers he needs extended powers²². This should include details of the punishment for which he is asking for extended powers (e.g. loss of seniority for officers or more than 28 days detention for other ranks) (see [Annex B](#)); and
- g. Any other material that may, in the opinion of the CO, be relevant to the application.

19. Where the CO's application to HA for extended powers has been granted, the CO must provide the accused with a copy of the notification from HA (see paragraph 23 below and paragraph 28)²³.

20. In the exceptional event that the CO considers it necessary to apply for extended powers after he has complied with the preliminary procedures but before he proceeds to hear

¹⁹ For the extended powers that are available see section 133(1) of the Act.

²⁰ In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

²¹ Rule 6 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

²² Rule 6(2)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

²³ Rule 6(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

the charge summarily (ie before he has offered the accused the right to elect CM trial), the CO must notify the accused if the application has been granted and provide the offender with a copy of the notification from HA to this effect. Further, if an application is made after a time is fixed for the hearing, a new time must be fixed. If the application is granted, the new time must be fixed at not less than 24 hours after a copy of the notification is given to the accused. This situation should arise only rarely, for example, when new information (that could not have been known beforehand) emerges that makes such an application for extended powers necessary.

21. It is important to note that an application for extended powers cannot be made after the summary hearing has started (see paragraph 43). If the CO during the hearing, learns of something that leads him to believe that his powers of punishment are insufficient and that extended powers may have been appropriate, he may take one of the following actions:

- a. Discontinue proceedings and bring a fresh charge against the accused, to allow an application for extended powers to be made before holding a fresh summary hearing.
- b. Refer the case to the DSP.
- c. If the charge is determined to have been proved, sentence the accused using his basic powers.

22. In these circumstances the CO should adjourn the hearing and seek staff legal advice in considering which course of action to take.

23. **Applications for extended powers in relation to activation orders²⁴.** Where a CO is to hear the charge against an accused who is subject to a suspended sentence of detention, he must consider whether his powers of punishment are sufficient for the purposes of activating the suspended sentence should the subsequent charge be found proved. The CO may activate a suspended sentence for up to 28 days detention using his basic powers or up to 90 days with extended powers. Therefore, if he is below the rank of rear admiral, major-general or air vice-marshal and considers that his powers might be insufficient to activate a suspended sentence of detention if the subsequent charge (see Part 8 of this chapter) were proved, he must²⁵ apply to HA for extended powers. The application is normally to be made as soon as is reasonably practicable after the charge is brought and must contain²⁶:

- a. The CO's reasons for considering that his basic powers might be insufficient to deal with the offender if the charge were found to be proved;
- b. A copy of the written record of the summary hearing (RSH) ([Annex C](#)) or a copy of any record of proceedings before the SAC at which the suspended sentence of detention was awarded;
- c. Details that are known to the CO of all proved offences²⁷ committed by the offender during the operational period of the suspended sentence of detention;

²⁴ See part 8 on activation hearings.

²⁵ Rule 7 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

²⁶ Rule 30(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

²⁷ In Service proceedings or civilian court.

- d. Copies of the following, at which reasons were given for any decision(s) not to make an order to activate the suspended sentence:
- (1) All RSH;
 - (2) Any written records of activation hearings²⁸ (RAH) (see Part 8 of this chapter) held as a consequence of the accused having been convicted in a civil court; and
 - (3) Any records of proceedings before any of the SAC, the CM or the Court Martial Appeal Court;
- e. A copy of any disciplinary record of the accused;
- f. A copy of the charge sheet;
- g. A copy of the written evidence relevant to the charge;
- h. A copy of any unused written evidence gathered as part of the investigation of the charge; and
- i. Any other material that may in the opinion of the CO be relevant to the application.

24. Where the application for extended powers has been granted, the CO must provide the offender with a copy of the notification from HA (see paragraph 20).

25. **Multiple applications to HA.** Depending on the circumstances of the charge being heard by the CO, the CO may be required to make one or more of the above types of application to HA in relation to it. Where the CO makes more than one application he may submit one consolidated submission to HA. For example, where a CO is to hear a charge of assault occasioning actual bodily harm (ABH) and the accused has committed that offence whilst already the subject of a suspended sentence of 60 days, the CO will be required to apply for permission to hear the charge summarily. He may also consider that he needs extended powers of punishment for the ABH charge and if he considers that the suspended sentence might need to be activated for a term in excess of 28 days, he must²⁹ also make an application for extended powers in that regard. In addition, extended powers may be required where any aggregate of sentence for the later offence plus an activated suspended sentence of detention may exceed 28 days. For example, accused is under a suspended sentence of detention for 28 days. The CO considers that an appropriate sentence for the new offence might be 14 days. He must make an application for extended powers in order to be able to award this combination of sentences.

²⁸ Rule 7(2)(d) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

²⁹ Rule 7(1)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

Part 2 - Preliminary procedures for a summary hearing

26. **Action to be taken when a charge is brought.** As soon as practicable after the charge has been brought, the CO or a person authorised by him must³⁰:

- a. Prepare a summary of the evidence (the case summary) relevant to the charge (see paragraph 34 below regarding the compilation of a case summary);
- b. Inform the accused in writing³¹ of his right:
 - (1) To elect CM trial³²;
 - (2) To be represented by an accused's assisting officer (AAO)³³ (see paragraph 37);
 - (3) To question witnesses whose evidence is requested by the CO³⁴;
 - (4) To give evidence³⁵;
 - (5) To provide evidence of witnesses³⁶; and
 - (6) To appeal to the SAC³⁷;
- c. If appropriate, provide the accused with information about the activation of suspended sentences of detention³⁸ (see Part 8 for further guidance);
- d. Provide the accused with³⁹:
 - (1) A copy of the charge sheet;
 - (2) A copy of the case summary;
 - (3) A copy of the written evidence relevant to the charge;
 - (4) Details of any exhibits that form part of the evidence relevant to the charge and where and when they may be inspected;
 - (5) A copy of any unused material gathered as part of the investigation of the charge;

³⁰ Rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

³¹ All of the information in this paragraph will be contained within the 'Your rights if you are accused of an offence under the Service justice system' booklet, the issue of which to the accused will discharge the CO's duty under this paragraph.

³² Section 129 of the Act.

³³ Rule 10 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

³⁴ Rule 15 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

³⁵ Rule 16 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

³⁶ Rule 17 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

³⁷ Section 141 of the Act.

³⁸ Section 193 of the Act.

³⁹ Rule 8(1)(c) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

(6) Written details of any unused exhibits gathered as part of the investigation and where and when unused exhibits may be inspected to allow the accused or his AAO the opportunity to inspect such exhibits;

(NB for items (3) to (6): The accused should be informed what material the CO considers relevant to the charge and what is unused).

(7) A copy of any disciplinary record of the accused;

(8) A copy of any notification from HA that permission to hear the charge has been granted (see paragraph 13); and

(9) A copy of any notification from HA that extended powers have been granted (see paragraph 19); and

e. Fix a time for the hearing and notify the accused (see paragraph 32 below).

27. In addition, the CO or a person authorised by him should inform the accused that he may consider seeking legal advice and that this should be a matter that he discusses with his AAO, if he has nominated one (see paragraph 35 on the availability of legal advice within the Services).

28. If the CO is satisfied that the accused already has a copy of a documents listed in paragraph 26, he need not provide a further copy⁴⁰ e.g. where the charge has been amended but the evidence in support of that charge remains the same.

29. The CO should use the form T-SL-SH03 ([Annex D](#), Summary hearing – check sheet of mandatory information provided to the accused/receipt for summary hearing) to assist in ensuring that the above actions and other mandatory actions prior to summary hearing have been completed.

30. **Person under suspended sentence of detention.** There may be rare circumstances where an accused who is being dealt with for a Service offence at a summary hearing committed that offence whilst subject to a suspended sentence of detention awarded by the CO or the SAC. In these circumstances, the CO must take the additional steps set out below. (For more information on suspended sentences see part 8)⁴¹:

a. The CO must inform the accused in writing⁴² of:

(1) His power to make an order⁴³ to activate a suspended sentence of detention (an ‘activation order’);

(2) The accused’s right of appeal⁴⁴;

(3) The accused’s right to make a submission⁴⁵ to the CO either orally or in writing about⁴⁶:

⁴⁰ Rule 8(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁴¹ Note if the accused is subject to a suspended sentence of detention awarded by the CM see [Chapter 6](#) (Investigation, charging and mode of trial).

⁴² All of the information in this paragraph will be contained within the ‘Your rights if you are accused of an offence under the Service justice system’ booklet therefore providing the accused with a copy of this will discharge the CO’s duty under this paragraph

⁴³ Section 193 of the Act.

⁴⁴ Sections 141 and 195 of the Act.

- (a) The appropriateness of making an activation order; and
 - (b) The terms of the order;
- b. The CO must provide the accused with the following documents⁴⁷ unless the CO, or the person authorised by him, is satisfied that the accused already has a copy of such a document:
- (1) A copy of the written RSH, or a copy of any record of the proceedings before the SAC, at which the suspended sentence of detention was awarded;
 - (2) Such details as are known to the CO of all proven offences committed by the offender during the operational period of the suspended sentence of detention, see paragraph 59 below; and
 - (3) Copies of the following, at which reasons were given for any decision(s) not to make an order to activate the suspended sentence:
 - (a) The written records of all summary hearings;
 - (b) The written records of any activation hearings⁴⁸ held as a consequence of the accused having been convicted in a civil court; and
 - (c) Any records of proceedings before any of the SAC, the CM and the Court Martial Appeal Court (CMAC).

31. The CO should use the form T-SL-SH04 at [Annex D](#) (Summary Hearing – check sheet of mandatory information provided to the accused/receipt for summary hearing) to assist in ensuring that the above actions and other mandatory actions prior to summary hearing have been completed.

Fixing the time for a hearing

32. The CO must give the accused written notice of the time and place of the hearing. In fixing the time, the CO must allow the accused reasonable time to prepare for the hearing. In any event, the time is not to be less than 24 hours after the accused receives all the information outlined in paragraph 26 b - d above (as appropriate) and not less than 24 hours after notice is given of the time fixed. The accused may not waive this 24 hour period. Where the CO has made an application to HA for permission to hear a charge, for extended powers in relation to punishment or for extended powers in relation to an activation order, he may not fix a time for the hearing until he has received notification of the outcome of the application.

33. **Changing the time for a hearing⁴⁹.** If the CO considers it necessary to change the time of a hearing he must do so observing the need to ensure the accused receives a

⁴⁵ Rule 23(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁴⁶ This information is provided in the 'Your rights if you are accused of an offence under the Service justice system' booklet, Annex G to [Chapter 6](#) (Investigation, charging and mode of trial).

⁴⁷ Rule 8(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁴⁸ Part 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁴⁹ Rule 9, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

minimum of 24 hours notice. If the CO has applied to HA for the following, he must not fix a time for a new hearing until he has received the result of the application:

- a. Permission to hear a charge summarily⁵⁰, see paragraph 13;
- b. Permission to use extended powers of punishment⁵¹, see paragraph 17; or
- c. Permission to use extended powers for the purposes of activating a suspended sentence of detention⁵², see paragraph 23 above.

Where any such application is made the time of the hearing must not be less than 24 hours after the CO has provided the accused with a copy of the notification from HA (see paragraph 37 for guidance on changing the time for a hearing where the accused has requested the assistance of the CO in finding an AAO).

34. Compilation of the case summary. A case summary is prepared for all charges but it is only used for summary hearings where the accused admits the charge. It is a summary of the evidence which the CO considers relevant to the charge or a précis of the evidence that forms the basis of the charge brought against the accused. The facts should be distilled from the evidence contained in the investigation report/witness statements and outlined in sufficient detail to support each element of the Service offence that is alleged against the accused. These elements are set out under each offence in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences⁵³). Whilst it is not necessary or desirable for the case summary to dwell at length on evidence in support of the charge(s), it should provide sufficient information to put the offence in context and indicate any particular aggravating or mitigating features. The case summary should also contain, where relevant, a brief summary of any interview conducted during the investigation, including any account given by the accused at interview. An example of a case summary is at [Annex E](#). The case summary must be compiled by the CO or a person authorised by him for example adjutant/OC P1 or other appropriate person and its content agreed by the officer hearing the charge.

35. Legal advice. Legal advice to the accused is ordinarily at the accused's expense, but there are many potential sources of free legal advice from firms of solicitors who offer a free initial consultation. Advice may be available from a Service lawyer. The AAO may be in a position to advise the accused whether he is able to get free legal advice contacting a staff lawyer if he himself requires guidance in this respect. A legal adviser is not allowed to be present during the summary hearing.

36. Representation. The accused may nominate an AAO (see Annexes [F](#) and [G](#)) to represent him at the hearing. An individual may only be nominated as an AAO if:

- a. He is a Service person⁵⁴ and remains as such while carrying out this function;
- b. He is of at least the rank or rate of petty officer or military, marine or air-force sergeant; and

⁵⁰ Rule 5 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁵¹ Rule 6 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁵² Rule 30 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁵³ Section 42 of the Act.

⁵⁴ Subject to Service law.

c. He consents to the nomination.

37. Where the accused has difficulty in finding a suitable person to represent him, he may request the assistance of the CO. In this event, the CO must provide a pool of at least two potential nominees for this purpose and allow the accused a free choice from the pool. The accused is under no obligation to nominate an individual from the pool. The CO is not prevented from hearing the charge where the accused is unable to find an AAO himself and he is unwilling to nominate one from the pool of potential nominees. The accused may ask for the CO's assistance in finding an AAO at any time. Where the CO is asked to provide an AAO 24 hours or less before the hearing he must cancel the hearing and provide a pool of suitable candidates. He is then to re-fix the hearing for a time not less than 24 hours after he provided the pool of suitable candidates.

38. **Co-accused and multiple charges.** A CO may, at a single hearing, hear charges brought against more than one accused in respect of one offence. He may also hear, at a single hearing, a number of charges against one or more accused if the charges are founded on the same facts⁵⁵. A CO may, at a single hearing, hear all charges brought against an accused that are founded on the same facts or that form or are part of a series of offences of the same or similar character. Where an accused pleads differently to charges that are heard together, the CO must hear the evidence in relation to both/all of the charges (admitted and denied). Questions as to which charges can be joined in one charge sheet and heard together can be complex. Legal advice should be sought if the CO is in any doubt.

39. In the event that during the hearing of co-accused ((A) and (B)), (A) admits the offence and co-accused (B) does not, the CO is advised to adjourn the hearing in order to seek staff legal advice as there may be complexities involved and normally, the CO would be advised to consider referring both accused to the DSP. If, however, the CO decides not to refer the case to the DSP but to go on and hear the case himself, co-accused (A) should be heard first. The CO will hear the charge against co-accused (A), make a finding that the charge is proved and impose a sentence on the basis of the Case Summary. The CO can then hold the summary hearing for co-accused (B). However, in the event co-accused (A) admits the charge but disputes some of the facts in the case summary and the CO considers that any of the disputed facts are relevant to sentencing, the CO should refer the case to the DSP. The CO should also be aware that when both co-accused contest the charge complexities may arise and he is advised to refer such cases to the DSP.

40. In the event that co-accused (A) elects CM trial and co-accused (B) does not, the CO should refer the charge in respect of co-accused (A) to the DSP. If co-accused (B) admits the charge and does not dispute the case summary, the CO should deal with him. In all other cases including where (B) denies the charge, the CO should adjourn and seek legal staff advice.

41. **Amendment, substitution and addition of charges.** Where a charge is added, substituted or amended after the start of a summary hearing, the hearing will need to be adjourned in order for the preliminary procedures to be carried out in relation to that charge. See paragraph 26 above.

42. **Correcting a charge sheet.** The CO may, at any time, correct a minor typographical error in the charge sheet, such as a mistake in the accused's Service number. Such a correction would not be considered an amendment of the charge. However, if the CO corrected an error of substance or fact, the time of the offence for example, that would amount to an amendment of the charge and guidance on the procedure to follow where a

⁵⁵ Rule 11(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

charge is amended in the preceding paragraph should be followed. The CO should adjourn to take staff legal advice on this issue if he is in any doubt as to the status of the correction.

43. **Legal commencement of summary hearing.** The CO must not start the summary hearing unless the accused has been given the opportunity to elect CM trial and has declined. The CO then starts the hearing by reading the charge or charges to the accused and asking him to state whether he admits or denies each charge.

Part 3 – General considerations for summary hearing and preliminary actions, including where activation of suspended sentence of detention may be required

44. **Adjournments.** The CO may adjourn a hearing at any point⁵⁶, for as short a time as possible, if he considers that to do so would be:

- a. In the interests of fairness to the accused; or
- b. Expedient and not unfair to the accused.

If there is a good reason for adjourning and the adjournment does not actually prejudice the accused's ability to defend himself or lead to excessive delay in concluding the proceedings, the CO may adjourn. There may also be rare occasions when a summary hearing has to be adjourned for operational reasons. Such cases are to be decided on their own individual merits. However, the importance of completing the disciplinary process with the minimum of delay in order to minimise stress on the individual and for justice to be done will be key factors in deciding on an adjournment on operational or other grounds. Unless there had already been considerable delay it is unlikely that an adjournment for operational reasons would be considered to be unfair. From the deterrent viewpoint, it is important that the punishment of offenders is swift. It is to be borne in mind that the resumption of a hearing following an adjournment is not a fresh hearing and therefore there is no requirement, by virtue of the resumption, for the CO to offer the accused a further opportunity to elect CM trial. The CO should resume where he left off. However, if the CO has revoked a delegation, the CO or officer who goes on to hear the charge must proceed as if the hearing had gone no further than giving his indication as to whether he admits or denies the charge⁵⁷.

45. **Rectification of errors.** If during the summary hearing, before the CO has determined whether a charge has been proved, there has been a failure to comply with any part of the summary hearing procedure, the CO may if it is possible to do so, rectify the failure unless to do so would, in his opinion, be unfair to the accused⁵⁸. In considering fairness to the accused, the CO must decide whether the error, had it not occurred, was one that might have been a relevant factor in the accused's decision to elect CM trial. The overriding principle is that the rectification must not be unfair to the accused. The CO may rectify such errors with or without an adjournment. For example, if the accused has not been given his rights then an adjournment may be necessary in order to give the accused his rights and comply with the associated time limits.

46. If the CO is in any doubt about whether his intended action is fair to the accused or expedient, he should adjourn the hearing in order to obtain staff legal advice. If the CO decides that his error might have been a relevant factor in the accused's decision on whether to elect CM trial, he may do one of the following 3 things:

- a. Refer the charge to the DSP with an explanation of the referral (if a subordinate commander is hearing the charge he may only refer if this power has been delegated to him by the CO). See paragraph 50 below;

⁵⁶ Rule 24 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁵⁷ Rule 3(7) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁵⁸ Rule 25 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

b. Discontinue proceedings on the charge and take no further action in relation to the case (if a subordinate commander is hearing the charge he may only discontinue proceedings if this power has been delegated to him by the CO); or

c. Discontinue proceedings on the charge and bring an identical charge by starting the summary process afresh (if a subordinate commander is hearing the charge he may only discontinue proceedings if this power has been delegated to him by the CO).

47. Similarly, where the CO has determined that the charge is proved but has not yet awarded a punishment and there has been a failure to comply with any provisions as to sentencing, the CO may if possible rectify the failure unless to do so would in his opinion be unfair to the accused. For example if the CO has neglected to give the opportunity to present any character evidence he may invite the accused to do so before sentencing (the opportunity must be given before recording a finding that the charge is proved, where the charge had been admitted).

48. It is in the interest of fairness that procedural errors do not occur during the course of the summary hearing, for example, not allowing the accused to question a witness. Every effort should be made to ensure that the preparations for the hearing and the hearing itself are professional and efficient. Repeated errors should be scrupulously avoided and should this occur in the same charge against an accused it will generally be appropriate for the CO to take staff legal advice on the most appropriate course of action.

49. Exceptionally, where the order of the RSH has not been followed and the CO realises during the hearing that he did not afford the accused the opportunity to elect CM trial, the hearing will be a nullity, i.e. as if it did not take place. The CO should adjourn to seek staff legal advice in this event.

50. **Dismissal of a charge, discontinuing a charge or referring a charge to the DSP.** The CO may dismiss⁵⁹ the charge at any stage of the hearing, unless he determines that the charge has been proved. He may not determine that the charge has been proved unless, on the basis of all the evidence heard, he is sure that the accused committed the offence charged. For the CO to be sure, he must believe that the charge is proved beyond reasonable doubt; this is the criminal standard of proof. A CO has a power to discontinue⁶⁰ a charge which has been allocated⁶¹ for summary hearing at any time up to the start of summary hearing and during the course of the summary hearing itself, up to the point at which a decision on finding has been made. A charge may be discontinued where:

- a. It is no longer appropriate to take disciplinary action against the accused;
- b. A more appropriate charge has been substituted;
- c. The case is to be handed over to the civilian authorities;
- d. A fresh charge is to be brought in order to rectify an error in the conduct of the hearing; or
- e. A witness cannot be located but it is possible that he will be in future.

⁵⁹ Section 131(2) of the Act.

⁶⁰ The effect of doing so is that the matter remains unresolved. The CO should only use this power with staff legal advice.

⁶¹ Section 120(4) of the Act.

The accused is to be notified that a charge is being discontinued. A CO has a power to refer a charge to the DSP at any time up to the start of summary hearing and during the course of the summary hearing itself up to the point of the decision on whether the charge has been proved, see [Chapter 6](#) (Investigation, charging and mode of trial).

Witnesses

51. **Oaths and affirmations.** No witness may give evidence orally unless the CO has administered to him one of the oaths, the promise or the affirmation in the form and manner set out at [Annex H](#).

52. **Attendance of witnesses.** If witnesses are to be called, they are to be given advance warning so that they are available should they be required; this also applies when witnesses for the accused are providing written evidence because the CO may call such witnesses in order to question them.

53. **Civilian witnesses.** Civilian witnesses cannot be compelled to attend a summary hearing. If the accused or the CO requires the attendance of a civilian witness, who is not prepared to attend voluntarily, the CO should consider referring the case to the DSP.

54. **Recall of witnesses.** Where the CO considers that it would be in the interests of fairness to the accused, he may give the accused a further opportunity to question a witness whose evidence has already been heard. Where the accused has had that further opportunity to question a witness, the CO may then question that witness also. Fairness to the accused is the CO's principal consideration.

Early indication of admission of the charge

55. Where the accused gives an indication that he intends to admit the charge prior to the start of the summary hearing, the CO may decide that he wishes to stand down those witnesses who are able to give evidence in support of the charge. However, it should be noted that the accused's indication in respect of the charge is not binding in any way.

Record of summary hearing (RSH)

56. The RSH at [Annex C](#) serves two important purposes:

- a. It is an aide memoire to highlight, for recording purposes, the actions required to be performed by the CO; and
- b. Once completed, it provides the official record of the summary hearing, which may be used for the purposes of review and appeal, see [Chapter 15](#) (Summary hearing review and appeal).

57. The RSH should be annotated appropriately during the hearing and the front page, which includes the sentence and the reasons for sentence, is to be completed. The completed RSH should contain the following⁶²:

- a. The name rank/rate and Service number of the accused;

⁶² Rule 27 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.

- b. The date and time of the hearing;
- c. The charge heard;
- d. Whether the accused admitted or denied the charge;
- e. Any determination that a charge is proved;
- f. Any dismissal of a charge;
- g. Discontinuance of any charge;
- h. The referral of a charge to the DSP;
- i. Details of all punishments awarded, whether suspended and the reasons for sentence⁶³;
- j. Such other matters that the CO considers should be recorded;
- k. The decision of the CO as to whether to make an activation order (if applicable);
- l. The reasons either for making an activation order or for not making an activation order (if applicable); and
- m. All orders made e.g. activation orders, fine, detention, SSPO.

58. The RSH should also contain the rank and name of the officer who heard the charge and in what capacity (CO or subordinate commander). Where a delegation is revoked during proceedings and a different officer proceeds to deal with the charge this should also be recorded. Any time spent in post charge custody should also be recorded.⁶⁴ Where there is more than one accused being dealt with simultaneously at a summary hearing, a RSH is required for each accused.

Activation of suspended sentences of detention

59. A CO (but not a subordinate commander) may activate a suspended sentence of detention awarded by the SAC or at a summary hearing⁶⁵ by making an order ([Annex I](#) - Record of Activation Hearing) if, during the operational period⁶⁶ of the suspended sentence, the offender commits a subsequent Service offence which a CO hears summarily and finds proved. It is not necessary that the offence that triggers the activation of the suspended sentence is heard summarily during the operational period. It is essential, however, that the trigger offence is committed during the operational period. Where an offender is subject to a suspended sentence of detention and the CO has determined that the charge he has just heard has been proved, he is to sentence the offender at the same time as he considers whether to activate the suspended sentence of detention. The procedure is laid down below and the guidance in [Chapter 13](#) (Summary hearing sentencing and punishment) should be followed.

⁶³ Section 252(1)(a) of the Act.

⁶⁴ See [Chapter 14](#) (The summary hearing sentencing guide)

⁶⁵ A CO does not have the power to activate a suspended sentence awarded by the Court Martial or the Service Civilian Court. Offenders under such sentences should be referred to the DSP for trial by court martial in these circumstances.

⁶⁶ A period of between 3 – 12 months specified on the order suspending the sentence. If the offender commits a further offence during this period the suspended sentence may be activated.

60. The CO is not permitted to delegate a charge to a subordinate commander if that charge is in respect of an offence alleged to have been committed during the operational period of a suspended sentence⁶⁷. Therefore, a subordinate commander should not find himself having to deal with activation of suspended sentences.

Preliminary questions for the accused

61. Before commencing the hearing, the CO should confirm the Service number, rank/rate and name of the accused. He should then confirm that not less than 24 hours before the hearing, the accused received a set of case papers and a 'Your rights if you are accused of an offence under the Service justice system' booklet. In addition, the CO must satisfy himself that the accused understands the charge or charges, that the accused has had a reasonable time to prepare for the hearing⁶⁸ and that (if applicable) the accused understands that the suspended sentence of detention he is under may be activated. The CO should then check that the accused understands his rights in relation to electing CM trial⁶⁹.

Election for CM - decision

62. Where the accused confirms that he has received a set of case papers within the required time, understands his rights in relation to electing CM trial, understands the charge, and has had reasonable time to prepare for the hearing, the CO must give the accused the opportunity to elect CM trial (but see also part 7 and part 1 for circumstances in which the opportunity to elect is not to be given). Where two or more charges against the accused are to be heard together, an election for CM trial of one charge has effect as an election for CM trial of all of the charges (see part 7 of this chapter).

Starting the hearing

63. Before starting the hearing the CO will have satisfied himself that the accused understands the charge and has had a reasonable amount of time to prepare for the hearing. If the accused does not elect CM trial, the CO, or a person authorised by him, must start the hearing by reading the charge to the accused and asking him to state whether he admits or denies the charge (see [Annex C](#)). Where the accused neither admits nor denies the charge or there is any confusion as to whether the accused has admitted or denied the charge, he must be treated as if he denied the charge.⁷⁰ The procedure to be followed for the hearing varies depending on whether the accused has admitted or denied the charge as follows:

- a. Part 4 provides details on the procedure to be followed when an accused has denied the charge; and
- b. Part 5 provides details on the procedure to be followed when an accused has admitted the charge.

⁶⁷ Rule 3(3)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁶⁸ Rule 12(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁶⁹ Rule 12(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216. It is one of the responsibilities of the AAO to ensure that the accused is prepared in this way and the booklet entitled 'Your rights if you are accused of an offence under the Service justice system' will also be of assistance here.

⁷⁰ Rule 12(5) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

Part 4 – Procedure where charge is denied

Hearing evidence

64. If the accused denies the charge or denies at least one charge where two or more are to be heard together, the CO must proceed to hear evidence on all charges in the following order⁷¹:

- a. Evidence given by the CO's witnesses⁷²;
- b. Evidence of the accused if he chooses to give evidence;
- c. Evidence given by the accused's witnesses and
- d. Evidence given by witnesses in relation to unforeseen issues of fact arising from evidence given by the accused or his witnesses⁷³ (see paragraph 72).

65. Guidance in relation to factors which a CO may consider when hearing evidence is contained within [Chapter 11](#) (Summary hearing dealing with evidence).

66. **Evidence from CO's witnesses.** In general, the CO must not hear the evidence of his witnesses unless those witnesses have made written statements⁷⁴ and those statements have been provided to the accused⁷⁵ along with the rest of the case papers at least 24 hours before the summary hearing, but see paragraph 72. Similarly, where the witness is to produce an exhibit, the CO may not rely on that evidence unless it has been disclosed to the accused at least 24 hours beforehand. Further, the CO should satisfy himself as to the authenticity of the written statement and if he is not so satisfied, he may adjourn to take advice. The written statement should include the Service number, rank/rate and full name of the witness and be signed and annotated with the date and time by the witness.

67. If neither the CO nor the accused require the attendance of a witness, there is no need for that witness to attend in person. In this event, the witness evidence is read out by the CO or a person authorised by him and will stand as the evidence of the witness. However, if the CO or the accused wishes to question the witness the CO will call the witness⁷⁶ and his evidence is read by the CO or a person authorised by him (this can be the witness himself). The CO can ask questions of the witness after the statement has been read and before the accused has had an opportunity to question the witness. He must then allow the accused (or the AAO) to ask questions of the witness. The CO may then question the witness himself if he so desires. Once the witnesses have given their evidence, the CO should warn all witnesses not to discuss their evidence outside the hearing.

⁷¹ Rule 13 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷² Rule 15(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷³ Rule 13(1)(d) as it applies to Rule 15(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷⁴ Rule 15(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷⁵ Rule 8(1)(c)(iii) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷⁶ If the CO knew in advance that he wanted to question a witness he should inform the accused at least 24 hours prior to the hearing for example after the CO was given an early, informal indication that the accused intended to deny the charge - see also paragraph 53 (informal indication of plea)

68. **Evidence of accused**⁷⁷. The accused is given the option of giving evidence, but he cannot be compelled to give evidence. If the accused:

- a. Chooses not to give evidence, the CO must not draw any adverse inference from his silence;
- b. Chooses to give evidence, he may submit a written statement or give evidence orally; or
- c. Gives evidence in writing, his evidence must be read to the CO by the accused or the AAO.

The CO may question the accused in relation to his written or oral evidence. The accused may choose not to answer these questions; the CO should use his own judgement in deciding the significance of the accused's wishes not to answer such questions.

69. **Evidence of accused's witnesses**⁷⁸. The accused may introduce the evidence of witnesses. Where the accused has been given at least 48 hours notice of the hearing, he may not introduce the evidence of a witness unless he has notified the CO at least 24 hours in advance of the hearing, or the CO has given permission. The CO might give permission if he considers that it has not been reasonably practicable for the accused to give the necessary 24 hours notice and may, in the interests of fairness, adjourn a hearing to allow such a witness to attend or to submit a written statement. The accused should be encouraged to co-operate in this respect because it is in everyone's interests to know in advance what witnesses are being called and will assist with the smooth running of the hearing.

70. Where the accused introduces the evidence of a witness, the evidence may be given orally or in writing⁷⁹. If it is given in writing it must be read to the CO by the accused or the AAO, and the accused must provide the CO with a copy. Whether the evidence is given orally or in writing, the CO must give the accused an opportunity to question the witness, and may question the witness himself after the accused has had the opportunity.

71. Where the accused does not require his witness to attend a hearing and intends to rely on his written evidence the CO has the right to call the witness should he wish to question him. There may be circumstances where the CO will not require the witness to attend in person. For example, if the written evidence of the witness is not relevant to the central issue, the CO may choose to accept the evidence and not to call the witness. Further, the CO should satisfy himself as to the authenticity of the written statement and if he is not so satisfied, he may adjourn to take advice. The written statement should include the Service number, rank/rate (where appropriate) and full name of the witness and be signed and annotated with the date and time by the witness.

72. **Dealing with unforeseen issues arising from evidence.** If evidence given by the accused or by an accused's witness gives rise to issues of fact⁸⁰ which the CO could not have foreseen and about which none of the CO's witnesses can give evidence, the CO may call another witness who can give evidence about the issue. Evidence can be provided by

⁷⁷ Rule 16, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷⁸ Rule 17 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁷⁹ Rule 17(2)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁸⁰ Rule 15(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

witnesses called in these circumstances either orally or in writing. Oral evidence may be more suitable where the new issue that has been raised in evidence is straightforward. Where the evidence is more complex or lengthy, it may be more appropriate for the CO to arrange for the provision of a written statement during a short adjournment and then proceed with the hearing as soon as it is convenient to do so. There is no requirement to allow 24 hours for disclosure to the accused for his consideration of this evidence. However, as a matter of good practice the statement should be disclosed to the accused and the accused given a reasonable period of time to consider it before the hearing is resumed. Where such a witness gives oral evidence, the CO has the opportunity of questioning the witness before he allows the accused or the AAO the opportunity of doing so. The CO may then question the witness further.

73. The CO should take staff legal advice if in any doubt as to the most appropriate steps to take where he calls new evidence. It is imperative, however, that the power to call for new evidence under this heading is used exclusively for this purpose and not for any other and especially not as a mechanism to correct an inadequately prepared case.

74. **Further questioning of witnesses.** Where the CO considers it would be in the interests of fairness to the accused to do so, he may at any time before determining whether or not the charge is proved allow the accused a further opportunity to question any witness whose evidence has been adduced⁸¹. When the accused has had the opportunity to question such a witness, the CO may also do so.

75. **Procedure at the conclusion of the evidence.** At the conclusion of all the evidence, the accused or his AAO may address the CO on any matter⁸² relevant to the case. This is an opportunity for the accused to make a submission, for example, on why the CO should not find the charge proved.

76. **Determination of a charge.** The CO is then to determine whether or not each charge denied by the accused has been proved. He may not determine that the charge has been proved unless, on the basis of all the evidence heard, he is sure that the accused committed the offence charged. For the CO to be sure, he must believe that the charge is proved beyond reasonable doubt; this is the criminal standard of proof. In carrying out this duty, the CO must consider all of the elements of the offence and whether each was present. If there is no evidence to prove a particular element of the charge or he is not sure that the element was present, the CO must dismiss the charge. If the CO is not sure that the charge has been proved, he must dismiss the charge.

77. **Sentencing a charge found to be proved.** When the CO has determined whether or not the charge has been proved, he should announce his finding. He should record his finding in the RSH. A finding must be recorded in relation to each charge separately and the CO should proceed with sentencing in accordance with the following paragraphs. Where the offender is subject to a suspended sentence of detention, the CO should sentence for the offence he has just heard at the same time as he determines whether he should activate the suspended sentence. Before he sentences for the charge he has just heard or considers activation (if applicable), the CO must give the accused the opportunity to⁸³:

a. **Adduce evidence as to his character.** The accused may call witnesses to provide evidence as to character. The evidence of such a witness may be given

⁸¹ Rule 18 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁸² Rule 20(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

⁸³ Rule 22(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

orally or in writing. If such evidence is given in writing, the evidence must be read to the CO by the accused or the AAO and a copy of it must be given to the CO. If the witness is present at the hearing, the CO will give the accused an opportunity to question the witness before asking any questions himself. The CO may control the questioning of the witness to ensure that it is done in an orderly fashion, i.e. one question at a time ensuring that an answer is given before the next question is posed. The CO may only re-phrase a question in order to clarify it. He should ensure fairness at all times;

b. Make a plea in mitigation. After hearing evidence as to character (if there has been any), the CO must allow the accused to make a plea in mitigation of any sentence that he may award before he goes on to consider sentence. The plea may be given orally or in writing. If the latter, it should be read to the CO by the accused or the AAO (see [Annex G](#) (Brief for the AAO) for further guidance on mitigation). The accused, the AAO or another appropriate officer⁸⁴ may, if the accused so wishes, introduce orally or in writing his appraisal reports or an assessment of his performance as part of his mitigation; and

c. Make a submission regarding activation of suspended sentence of detention (if applicable). In the circumstances where an accused is already subject to a suspended sentence of detention, he may address the CO on the appropriateness of making an activation order and the appropriate terms of such an order if it were made. This submission may be given orally, or in writing. In the latter case it should be read to the CO by the accused or the AAO (see [Annex F](#)) and a copy provided to the CO.

78. When the CO has heard evidence as to character, any plea in mitigation and if applicable, any submission regarding activation, he should sentence the accused⁸⁵. If he is considering a punishment with financial consequences, the CO should enquire into the accused's financial circumstances (if the information is not already provided within the mitigation), to ascertain his ability to pay. The CO should also, before sentencing, consult the Sentencing Guide see [Chapter 14](#) (Summary hearing sentencing guide) and read any disciplinary record of the accused. The CO may, if he considers it necessary, adjourn to consider his sentence and the reasons for that sentence. The CO should annotate the RSH to the effect that the charge has been proved and sentence the accused by awarding one or more punishments.⁸⁶ When sentencing the accused the CO must give and record his reasons for awarding the sentence. If the CO has decided to activate a suspended sentence of detention, he must give and record his reasons for doing so at the same time.

Reasons for sentence

79. When the CO passes sentence he must explain in ordinary language and in general terms the reasons for the sentence. For example, if the CO imposes a custodial sentence, he must explain why the offence is sufficiently serious to warrant such a sentence⁸⁷. He must include in his reasons, the following:

a. Any credit given for admitting the offence (if applicable)⁸⁸;

⁸⁴ This may be the divisional officer, the sub-unit commander, the flight commander or other employing officer, or an officer outside the line management chain such as the chaplain, education or welfare officer.

⁸⁵ Section 131(4) of the Act.

⁸⁶ Section 132 of the Act.

⁸⁷ Section 252 of the Act.

⁸⁸ This will only be relevant under this procedure where the accused admits the charge part way through the hearing having initially denied the charge.

- b. Any aggravating or mitigating factors the CO regarded as being of particular importance;
- c. The effect of the sentence, i.e. how the sentence works in practice. The detail on the effects of punishments are contained within [Chapter 13](#) (Summary hearing sentencing and punishments);
- d. Where the offender is required to comply with any order⁸⁹ forming part of the sentence, the effects of any failure to comply with that order;
- e. Where the sentence consists of or includes a fine, the CO must explain the effects of failing to pay the fine (although fines will almost always be deducted direct from pay);
- f. Any power to vary or review any order forming part of the sentence on application⁹⁰ see [Chapter 13](#) (Summary hearing sentencing and punishment) and Part 6 of this chapter for the procedure. For example, an SSPO is reviewed periodically at which time the conditions of the order may be varied; and
- g. That where an award of detention is made, what deductions have been made for any time spent in post charge custody.

80. Once the sentence has been passed the CO must remind the offender of the following:

- a. His right to appeal to the SAC⁹¹;
- b. His right to seek independent legal advice on whether to exercise his right of appeal. The CO should also inform the offender that he may be legally represented at any appeal and he may apply for legal aid for this purpose; and
- c. That where an award of detention is made, the offender may choose to commence the sentence immediately⁹² (see Part 6, Post hearing action, paragraph 106).

81. Most punishments awarded at summary hearing take effect immediately⁹³. However, a sentence of detention cannot take effect immediately unless the offender elects to do so at the time the punishment is awarded. The CO should ask the offender whether he wishes to elect to commence the sentence immediately ensuring that the offender is aware of the consequences of his decision. If the offender wishes to consult his AAO or seek legal advice to assist him in making a considered decision, the CO may grant the offender a brief adjournment. If the offender gives no indication of his decision or it becomes apparent that a longer adjournment would be necessary for the offender to make his decision, it should be assumed that he does not wish to elect to start the sentence immediately. If the offender does not elect to commence the sentence at the time of the award, the sentence will not commence until the initial period has expired which will usually be 14 days after the sentence was awarded. Should the offender consider that he is unable to make a decision whether to

⁸⁹ E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO order, suspended sentence order etc.

⁹⁰ Section 252 of the Act.

⁹¹ Section 141 of the Act.

⁹² Section 290 of the Act.

⁹³ The CO may delay the date on which some punishments will take effect, see [Chapter 13](#) (Summary hearing - sentencing and punishments).

appeal within that period, he may apply for extra time. Full guidance can be found in [Chapter 15](#) (Summary hearing review and appeal).

Suspended sentences of detention

82. **Considerations.** When considering whether to activate a suspended sentence of detention and if appropriate, what length the sentence should be, the CO should consult [Chapter 13](#) (Summary hearing sentencing and punishments) and [Chapter 14](#) (Summary hearing – punishments). The factors he must take into account when deciding whether to activate the order are as follows:

- a. The details of the offence(s) for which the suspended sentence of detention was imposed (including its seriousness);
- b. Such details as are known to the CO of all proven offences committed by the accused during the operational period of the suspended sentence;
- c. The reasons given for any decision or decisions, taken on earlier occasion(s), not to activate the suspended sentence;
- d. The offender's disciplinary record;
- e. Any submission made by the offender about the appropriateness of making an order and the appropriate terms of such an order if one were made;
- f. Any character evidence introduced by the offender; and
- g. Any other matters that appear to the CO to be relevant. These might include the following:
 - (1) Any similarity with the subsequent offence, which may indicate a lack of rehabilitation (commission of a dissimilar offence may indicate that a reduced period of activation should be imposed rather than not activating at all);
 - (2) The details of the sentence awarded for the original offence (indicative of seriousness of offence);
 - (3) Any reasons given for sentencing by the CO or the SAC when awarding the earlier sentence;
 - (4) The details of the subsequent offence(s), including its seriousness; and
 - (5) The degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed. The later into the operational period the subsequent offence is committed, the less appropriate it may be to activate.

83. The CO must look at the totality of all the above factors in relation to the subsequent and the original offences to determine whether to activate the suspended sentence and if so, how long the activation period should be. If he decides to activate, he should award a punishment for the subsequent offence(s) and then make the activation order, including where appropriate, an order as to whether the activated sentence should run consecutively

to or concurrently with a period of detention awarded in relation to the subsequent offence(s); for guidance on this see [Chapter 13](#) (Summary hearing - sentencing and punishments). The CO should give his reasons for his decision and annotate the RSH accordingly. If an order is made he must also:

- a. Inform the accused of the terms⁹⁴ of the order;
- b. Remind the accused of his right of appeal⁹⁵; and
- c. Remind the accused that he may choose to commence the sentence of detention immediately⁹⁶ (see post hearing action Part 6).

84. Making an activation order. If the CO is awarding a sentence of detention for the subsequent offence as well as activating the sentence of detention, the same rule applies in that a sentence of detention cannot take effect immediately unless the offender elects to do so at the time the punishment is awarded (see paragraph 101 below). The CO should ask the offender whether he wishes to elect to commence the sentence immediately ensuring that the offender is aware of the consequences of his decision. If the offender wishes to consult his AAO⁹⁷ or seek legal advice to assist him in making a considered decision, the CO may grant the offender a brief adjournment. If after a brief adjournment the offender gives no indication of his decision or it becomes apparent that a longer adjournment would be necessary for the offender to make his decision, it should be assumed that he does not wish to elect to start the sentence immediately. If the offender does not elect to commence the sentence immediately, the sentence will not commence until the initial period has expired, usually 14 days after the sentence was awarded, to allow him to consider whether he wishes to appeal. Should the offender consider that he is unable to make a decision whether to appeal within that period he may apply for extra time. Full guidance can be found in [Chapter 15](#) (Summary hearing review and appeal).

85. If the CO decides to activate a suspended sentence and that sentence is to run consecutively to a sentence of detention awarded for the subsequent offence, the offender will be able to make an election in respect of commencing the latter sentence immediately the activation order is made. If he does not elect to commence the activated sentence immediately he will commence the sentence on expiration of the initial period⁹⁸ or the sentence of detention for the subsequent offence, whichever is the later (subject to any appeal that is brought being determined or abandoned). The suspended sentence will always be served on conclusion of the sentence for the subsequent offence unless the offender successfully appeals the activated sentence. Staff legal advice should be sought as to when such sentences should commence.

86. Decision not to make an activation order. If the CO decides not to activate the suspended sentence of detention, he should announce his decision giving reasons for that decision and annotate the RSH accordingly.

⁹⁴ How much of the suspended sentence will be activated and for how long.

⁹⁵ Section 141 of the Act.

⁹⁶ Section 290 of the Act.

⁹⁷ See [Annex G](#) (Brief for an accused assisting officer)

⁹⁸ Which will usually be 14 days or any longer period permitted by the SAC.

Part 5 – Procedure where charge is admitted

Establishing the facts

87. **Determination of the facts**⁹⁹. If the accused admits the charges, the CO or a person authorised by him must read the case summary to the accused and ask him whether he disputes any of the facts contained therein. The CO is not to determine or record that the charge is proved at this stage.

88. If the accused accepts the facts in the case summary, the CO will treat those accepted facts as the facts of the case for the purposes of sentencing¹⁰⁰.

Disputed facts

89. **Where some facts are disputed.** If the accused admits the charge but disputes any of the facts contained in the case summary and the CO considers that any of the disputed facts are relevant to sentencing, the CO must determine the disputed facts of the case for the purpose of sentencing. The determination of the facts will be established under the disputed facts procedure¹⁰¹ (see paragraph 90 to 92). See also paragraph 94 where mitigation discloses a defence.

90. **Disputed facts procedure.** Where facts are disputed the CO must hear evidence on the disputed facts from such witnesses as he considers can give relevant evidence and from the accused if he wishes to give evidence. In determining which witnesses can give relevant evidence, the CO must take account of any submission from the accused on this matter, but he is not bound by it. If he thinks the accused is correct that a certain witness can give relevant evidence, he is bound to hear it. An adjournment may be necessary to secure the attendance of a witness. Witnesses are to give evidence orally and on oath. When the witness has given his evidence, the CO must give the accused, or if the accused wishes the AAO, the opportunity of questioning the witness. The CO may then question the witness once the accused has had the opportunity of doing so.

91. When hearing evidence during the disputed facts procedure the CO may consider that the accused is not simply disputing the facts but has raised a defence. In these circumstances the CO should follow the procedure following a denial of the charge, see paragraph 64.

92. Once the CO has heard all the evidence, he must determine the facts of the case for the purposes of sentencing. For example, the accused has admitted a battery (i.e. an assault where actual physical contact takes place as opposed to verbal threats). The case summary states that the accused had kicked and punched the victim. Kicking might merit a higher sentence than punching. However, the accused says he only punched the victim. The CO makes a determination on these facts and if he finds that, beyond reasonable doubt, only punches were involved, he should record this in his reasons for sentence and sentence the accused in accordance with [Chapter 14](#) (The summary hearing sentencing guide). The CO does not need to amend the charge in this instance.

Sentencing

⁹⁹ Rule 21 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁰⁰ Rule 21(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁰¹ Rule 21(3)-(6) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

93. When the CO has determined the facts of the case he must give the offender an opportunity to address him. Where the offender is subject to a suspended sentence of detention, the CO is to sentence for the offence he has just heard at the same time as he determines whether he should activate the suspended sentence. Therefore, before he sentences for the charge on which he has just determined the facts or before he considers activation (if applicable), the CO must give the accused the opportunity to¹⁰²:

a. **Adduce evidence as to his character.** The accused may call witnesses to provide evidence as to character. The evidence of such a witness may be given orally or in writing. If such evidence is to be given in writing, the evidence must be read to the CO by the accused or the AAO and a copy of it must be given to the CO. If the witness is present at the hearing, the CO will give the accused an opportunity to question the witness before asking any questions himself;

b. **Make a plea in mitigation.** After hearing evidence as to character, the CO must allow the accused to make a plea in mitigation of any sentence that he may award before he goes on to consider sentence. The plea may be given orally or in writing. In the latter case, it should be read to the CO by the accused or the AAO. The accused, the AAO or another appropriate officer¹⁰³ may, if the offender so wishes, introduce orally or in writing his appraisal reports or an assessment of his performance as part of his mitigation; and

c. **Make a submission regarding activation of suspended sentence of detention (if applicable).** In the circumstances where an accused is already subject to a suspended sentence of detention, he may address the CO on the appropriateness of making an activation order and the appropriate terms of such an order if it were made¹⁰⁴. This submission may be given orally or in writing. In the latter case, it should be read to the CO by the accused or the AAO.

94. **Mitigation that discloses a defence.** The CO should consider any facts brought out in the mitigation that may constitute a defence. For example, an accused on a charge of assault may state in mitigation that he was reacting to an attack on his person, which may amount to the defence of self-defence. If the CO is of the opinion that any fact asserted by the accused after admitting the charge would have amounted to a defence to the charge if it had been raised as such and proved, he must proceed as if the accused had denied the charge¹⁰⁵ (see paragraph 64 for when the accused denies the charge).

95. **Recording the finding.** If the CO is satisfied that the plea in mitigation does not reveal facts that may constitute a defence (he may adjourn for legal advice if he is unsure), he must determine that the charge is proved and record his finding.

96. **Considering the sentence.** The CO is then to sentence the accused¹⁰⁶. If he is considering a punishment with financial consequences the CO should (if the information is not already provided within the mitigation) enquire into the accused's financial circumstances, to ascertain his ability to pay. Before sentencing the CO should also consult the Sentencing Guide see [Chapter 14](#) (The summary hearing sentencing guide) and read

¹⁰² Rule 22(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁰³ This may be the divisional officer, the company commander, the flight commander or other employing officer, or an officer outside the line management chain such as the chaplain, education or welfare officer.

¹⁰⁴ See the 'Your rights if you are accused of an offence under the Service justice system' booklet Annex G to [Chapter 6](#) (Investigation charging and mode of trial).

¹⁰⁵ Rule 19 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁰⁶ Section 131(4) of the Act.

any disciplinary record of the accused. The CO may, if he considers it necessary, adjourn to consider his sentence and the reasons for that sentence.

97. The CO should annotate the RSH to the effect that the charge has been proved and sentence the accused by awarding one or more punishments¹⁰⁷. When sentencing the accused the CO must give and record his reasons for awarding the sentence. If the CO has decided to activate a suspended sentence of detention he must give and record his reasons for doing so at the same time.

Reasons for sentence

98. When the CO passes sentence he must explain in ordinary language the general terms of and the reasons for the sentence. For example, if the CO imposes a custodial sentence, he must explain why the offence is sufficiently serious to warrant such a sentence¹⁰⁸.

99. He must include in his reasons, the following:

- a. Any credit given for admitting the offence;
- b. Any aggravating or mitigating factors the CO regarded as being of particular importance;
- c. The effect of the sentence, i.e. how the sentence works in practice. The detail on the effects of punishments are contained within [Chapter 13](#) (Summary hearing sentencing and punishments)
- d. Where the offender is required to comply with any order¹⁰⁹ forming part of the sentence, the effects of any failure to comply with that order;
- e. Where the sentence consists of or includes a fine, the CO must explain the effects of failing to pay the fine (although fines will almost always be deducted directly from pay);
- f. Any power to vary or review any order forming part of the sentence on application¹¹⁰ (see part 6 of [Chapter 13](#) (Summary hearing – punishments) and paragraph 117 of this chapter for the procedure);
- g. That where an award of detention is made, what deductions have been made for any time spent in post charge custody.

100. Once the sentence has been passed the CO must remind the offender of the following:

- a. His right to appeal to the SAC¹¹¹;
- b. His right to seek independent legal advice on whether to exercise his right of appeal. The CO should also inform the accused that he may be legally represented at his appeal and he may apply for legal aid for this purpose; and

¹⁰⁷ Section 132 of the Act.

¹⁰⁸ Section 252 of the Act.

¹⁰⁹ E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO, suspended sentence order etc.

¹¹⁰ Section 252 of the Act.

¹¹¹ Section 141 of the Act.

- c. That where an award of detention is made, the offender may choose to commence the sentence immediately¹¹².

101. Most punishments awarded at summary hearing take effect immediately¹¹³. However, a sentence of detention cannot take effect immediately unless the offender elects to do so at the time the punishment is awarded. The CO should ask the offender whether he wishes to elect to commence the sentence immediately ensuring that the offender is aware of the consequences of his decision. If the offender wishes to consult his AAO or seek legal advice to assist him in making a considered decision, the CO may grant the offender a brief adjournment. If the offender gives no indication of his decision or it becomes apparent that a longer adjournment would be necessary for the offender to make his decision, it should be assumed that he does not wish to elect to start the sentence immediately. If the offender does not elect to commence the sentence at the time of the award, the sentence will not commence until the initial period has expired which will usually be 14 days after the sentence was awarded. Should the offender consider that he is unable to make a decision whether to appeal within that period, he may apply for extra time. Full guidance can be found in [Chapter 15](#) (Summary hearing review and appeal).

Suspended sentence of detention

102. **Considerations.** When considering whether to activate a suspended sentence of detention and, if appropriate, what the term (i.e. how many days detention) should be, the CO should consult [Chapter 14](#) (The summary hearing sentencing guide). The factors he must take into account when deciding whether to make the order are as follows:

- a. The details of the offence(s) for which the suspended sentence of detention was imposed, including its seriousness;
- b. Such details as are known to the CO of all proven offences committed by the accused during the operational period of the suspended sentence;
- c. The reasons given for any decision or decisions, taken on earlier occasion (s), not to activate the suspended sentence;
- d. The offender's disciplinary record;
- e. Any submission made by the offender about the appropriateness of making an order and the appropriate terms of such an order if one were made;
- f. Any character evidence adduced by the offender; and
- g. Any other matters that appear to the CO to be relevant. These might include the following:
 - (1) Any similarity with the subsequent offence, which may indicate a lack of rehabilitation (commission of a dissimilar offence may indicate that a reduced period of activation should be imposed rather than not activating at all);
 - (2) The details of the sentence awarded for the original offence (indicative of seriousness of offence);

¹¹² Section 290 of the Act.

¹¹³ The CO may delay the date on which some punishments will take effect, see [Chapter 13](#) (Summary hearing sentencing and punishments).

- (3) Any reasons given for sentencing by the CO or the SAC when awarding the earlier sentence;
- (4) The details of the subsequent offence(s), including its seriousness; and
- (5) The degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed. The later into the operational period the subsequent offence is committed, the less appropriate it may be to activate.

103. The CO must look at the totality of all the above factors in relation to the subsequent offence and the original offence to determine whether to activate the sentence and if so, how long the activation period should be. If he decides to activate, he should award a punishment for the subsequent offence(s) and then make the activation order, including where appropriate an order as to whether the activated sentence should run consecutively to or concurrently with a period of detention awarded in relation to the subsequent offence(s), see [Chapter 13](#) (Summary hearing sentencing and punishments). He should give his reasons for his decision and annotate the RSH accordingly. If an order is made he must also:

- a. Inform the accused of the terms¹¹⁴ of the order.
- b. Remind the accused of his right of appeal¹¹⁵.
- c. Remind the accused that he may choose to commence the sentence of detention immediately¹¹⁶ (see post hearing action Part 6).

104. **Making an activation order.** If the CO is awarding a sentence of detention for the subsequent offence as well as activating the sentence of detention, the same rule applies in that a sentence of detention cannot take effect immediately unless the offender elects to do so at the time the punishment is awarded (see paragraph 101 above). The CO should ask the offender whether he wishes to elect to commence the sentence immediately ensuring that the offender is aware of the consequences of his decision. If the offender wishes to consult his AAO¹¹⁷ or seek legal advice to assist him in making a considered decision, the CO may grant the offender a brief adjournment. If after a brief adjournment the offender gives no indication of his decision or it becomes apparent that a longer adjournment would be necessary for the offender to make his decision, it should be assumed that he does not wish to elect to start the sentence immediately. If the offender does not elect to commence the sentence immediately, the sentence will not commence until the initial period has expired, usually 14 days after the sentence was awarded, to allow him to consider whether he wishes to appeal. Should the offender consider that he is unable to make a decision whether to appeal within that period he may apply for extra time. Full guidance can be found in [Chapter 15](#) (Summary hearing review and appeal).

105. If the CO decides to activate a suspended sentence and that sentence is to run consecutively to a sentence of detention awarded for the subsequent offence, the offender will be able to make an election in respect of commencing the latter sentence immediately the activation order is made. If he does not elect to commence the activated sentence

¹¹⁴ How much of the suspended sentence will be activated and for how long.

¹¹⁵ Section 141 of the Act.

¹¹⁶ Section 290 of the Act.

¹¹⁷ See [Annex G](#) (Brief for an accused's assisting officer)

immediately he will commence the sentence on expiration of the initial period¹¹⁸ or the sentence of detention for the subsequent offence, whichever is the later (subject to any appeal that is brought being determined or abandoned). The suspended sentence will always be served on conclusion of the sentence for the subsequent offence, unless the offender successfully appeals the activated sentence. Legal advice should be sought as to when such sentences should commence.

106. **Decision not to make an activation order.** If the CO decides not to activate the suspended sentence of detention, he should announce his decision, give reasons for that decision and annotate the RSH accordingly.

¹¹⁸ Which will usually be 14 days or any longer period permitted by the SAC.

Part 6 - Post hearing action

Action following decision to start a sentence of detention immediately

107. Summary sentences of detention do not commence for 14 days unless the offender opts to begin the sentence immediately¹¹⁹. If he so chooses, the offender is to sign form T-SL-SH05 at [Annex J](#) (Election to commence a sentence of detention immediately on date of award of punishment). The CO is then to sign the Committal Order at [Annex K](#), form T-SL-CUS05 (Committal Order for use at CM, summary hearing or SAC) and the sentence of detention will begin to run from the day on which the punishment is awarded. The offender may subsequently change his decision, and be released from detention until the end of the 14-day appeal period, which starts on the date the punishment is awarded. In this event, the remainder of the un-served sentence of detention is held in abeyance until the expiry of the appeal period or the appeal is abandoned or determined¹²⁰.

108. Thus a sentence of detention will normally start on the 15th day after the punishment is awarded unless the offender, not having opted for it to commence immediately but having appealed: withdraws his appeal, in which case the sentence begins on the day the appeal is withdrawn; or the SAC hears his appeal and rules that a sentence of detention is appropriate; in which case the sentence begins on the day the appeal is determined. The CO should sign form T-SL-CUS05 at [Annex K](#) (Committal Order for use at CM, summary hearing or SAC) in order to start the sentence of detention.

109. For further guidance on appeals, the interaction of appeals and the commencement of sentences of detention and the activation of suspended sentences of detention, see [Chapter 15](#) (Summary hearing review and appeal).

Post hearing action - record of summary hearing

110. The paperwork connected with the summary hearing should normally be processed within 24 hours following the hearing, including completing all parts of the RSH. Where the charge has been found proved, a copy of the RSH should be given to the accused as soon as reasonably practicable after the hearing¹²¹.

111. Once the RSH has been completed, the Summary hearing review form ([Annex A](#) to [Chapter 15](#) Summary hearing review and appeal) should be completed and despatched by fastest possible means to the RO¹²² for the purposes of review, normally not later than 24 hours after the summary hearing.

112. Where an offender is under a suspended sentence of detention at the time he is assigned to another unit, a copy of the relevant RSH at which that sentence was awarded should be forwarded to the new unit.

113. The RSH should be retained under single-Service¹²³ arrangements for a minimum period of 2 years; this is especially important where a suspended sentence of detention has been awarded at the summary hearing because it will form a part of the case papers for an activation hearing should a subsequent offence be committed (see Part 8 of this chapter).

¹¹⁹ Section 290(2) of the Act.

¹²⁰ Section 290(5) of the Act.

¹²¹ Rule 27(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹²² [Chapter 15](#) (Summary hearing review and appeal).

¹²³ RN PLAGOS, Army AGAI 62 Annex G, RAF QR 1057

Legal aid for appeal

114. In the interests of the accused and avoidance of delay, if the individual wishes to apply for legal aid for an appeal, he should be provided with the necessary forms and given any help he may require in completing and sending them to the Armed Forces Criminal Legal Aid Authority (see JSP 838 - The Armed Forces Legal Aid Scheme).

Recording of offences on police national computer (PNC)

115. Recordable offences are those offences under section 42 of the Act for which the corresponding offences under the law of England and Wales are also offences that are recordable under regulation 3 of the National Police Records (Recordable Offences) Regulations 2000. In addition, there are also a number of Service offences that are recordable. These are:

- a. Section 11(1) - Misconduct towards a superior officer;
- b. Section 14 - Using force against a sentry, etc;
- c. Section 24(1) - Damage to or loss of public or service property;
- d. Section 27 - Obstructing or failing to assist a service policeman;
- e. Section 28 - Resistance to arrest, etc (only in relation to a conviction under section 28(1)(b) or (c) – using violence or threatening behaviour);
- f. Section 29 - Offences in relation to service custody;
- g. Section 30 - Allowing escape, or unlawful release of prisoners, etc (but only where the conviction is under section 30(4)(a));
- h. Section 39 - Attempts to commit any offences specified above; and
- i. Section 40 – Encouraging or assisting the commission of any offence above (apart from an attempt).

The Service Police Crime Bureau (SPCB) will receive to REDCAP every 24 hours an upload from JPA of proven offences. This upload will trigger the necessary action to record appropriate recordable offences on PNC and recover fingerprints and DNA samples if not already recovered. If in doubt the SPCB can be contacted by telephoning (93835 5170) or fax (93835 5244).

Recording of information on JPA

116. All summary hearing cases are to be recorded on JPA to provide both an audit trail and the single-Service disciplinary chain of command with management information. The information required is detailed in the business process guides on the SPVA Info Centre. The following actions are to be taken on completion of the summary hearing

- a. **Initial Action by Unit.** As soon as is reasonably practical after the hearing of a charge (normally within 24 hours), which may or may not include a decision to activate a suspended sentence of detention, the unit should ensure that a JPA 'SL

Progress to SH Review' task is created and assigned to the relevant Service RO. The SL Suspect Service Request should contain all the information detailed in form T-SL-SHR01 at [Chapter 15](#) (Summary hearing review and appeal) [Annex A](#), which may be used and faxed or emailed as a fallback, if JPA is unavailable.

b. **Activation hearing.** Likewise, following an activation hearing as a result of a conviction by a civilian court in the British Islands, where a suspended sentence has been activated, unit staffs should complete an Activation hearing review form (T-SL-AHR01) [Chapter 15](#) (Summary hearing review and appeal) [Annex B](#) and forward it to the RO within the same timelines (normally not later than 24 hours).

Variation of orders made – Fines and Service compensation orders (SCOs)

117. When awarding a fine or SCO the CO will make an order by specifying on the RSH how the fine or compensation order is to be recovered¹²⁴ see [Chapter 13](#) (Summary hearing sentencing and punishments). Following a summary hearing an offender can apply to his CO for the variation of such an order¹²⁵ for example where his circumstances have changed such that he is no longer able to satisfy the fine in full; a subordinate commander may also vary any such order. The forms at Annexes [L](#) and [M](#) respectively should be used to record any decision in relation to variation and should be kept with the relevant RSH. In varying an order in respect of a fine, care must be taken not to extend the period of repayment so that the punitive effect of the fine is lost. At the same time, regard should be had to the potential effects of the punishment on the offender's dependents.

Review of award of SCO

118. When a SCO is imposed the CO will inform the offender of his right to apply for a review¹²⁶. When carrying out such a review the CO may discharge the SCO or he may reduce the amount payable under certain circumstances, for example: in the case of a SCO in respect of the loss of any property, that the property has been recovered by the victim, see [Chapter 13](#) (Summary hearing sentencing and punishments). When conducting such a review the form at [Annex M](#) should be used to record any decision and should be kept with the relevant RSH. It should be noted that while a subordinate commander may review a SCO he may not do so in relation to a SCO in respect of personal injury as such compensation may only be awarded by the CO.

¹²⁴ In full immediately or by instalments or by deductions made for the offender's pay in full on one occasion or by instalments

¹²⁵ Section 251 of the Act.

¹²⁶ Section 177 of the Act

Part 7 - Election for CM trial

119. **Election.** If the accused elects CM trial¹²⁷, the summary hearing will not be commenced and action will be taken by the CO to refer the charge to the DSP. The DSP will then consider whether the matter should proceed to CM trial, see [Chapter 6](#) (Investigation charging and mode of trial). Where an accused has elected CM trial of a charge:

a. The charge (whether or not amended), a charge substituted for it or a charge additionally brought, may be referred by the DSP to the CO only where the accused has given his written consent. If the accused gives his written consent to the DSP for the charge (whether or not amended), a substituted or additionally brought charge to be heard by the CO the accused may not elect CM trial in respect of any such charge. If the accused gives his written consent to the DSP for a charge to be referred back to the CO and that charge is amended after referral, the accused must be given the option to elect CM trial of that charge; and

b. The sentencing powers available to the court will be the sentencing powers of the CO, regardless of whether the election was made before a subordinate commander.

120. **Withdrawal of an election for CM trial.** If, after electing CM trial the accused decides he wishes to be dealt with summarily, there is nothing to prevent him making a representation to the DSP for referral of the charge back to the CO. This will be a matter entirely for the discretion of the DSP.

121. **Access to legal aid following an election for CM trial.** On election for CM trial, the accused should be advised by his AAO that he may apply immediately for legal aid, see JSP 838 (The Armed Forces Legal Aid Scheme).

¹²⁷ Section 129 of the Act.

Part 8 – Activation hearing - activation by CO of suspended sentences of detention where offender is subsequently convicted of an offence in the British Islands¹²⁸ by a civilian court¹²⁹

Introduction

122. A CO may activate a suspended sentence of detention awarded by the SAC or at a summary hearing by making an order ([Annex I](#) Record of activation hearing (RAH), form T-SL-SH02) if, during the operational period of the suspended sentence, the offender is subsequently convicted of an offence by a civilian court in the British Islands. It is not necessary that the offence that triggers the activation of the suspended sentence is tried by a civilian court during the operational period. It is essential, however, that the subsequent offence is committed during the operational period. Where an offender who is under a suspended sentence of detention is subsequently convicted of an offence by a civilian court in the British Islands, an activation hearing must be convened in accordance with the guidance below and [Chapter 13](#) (Summary hearing sentencing and punishments)

123. **Legal position of subordinate commanders.** Where an offender is subject to a suspended sentence of detention and he is subsequently convicted by a court in the British Islands, the CO may not delegate the power to conduct an activation hearing¹³⁰.

124. **Timing of activation hearing.** In order that the offender is not unfairly treated by being vulnerable to activation of a suspended sentence of detention for a protracted period, the activation hearing that has been triggered by a subsequent conviction should take place as expeditiously as possible after the CO is informed of the conviction.

125. **Extended powers.** Where a suspended sentence of detention is to be activated, the term of an activated sentence is limited to 28 days with basic powers or 90 days with extended powers. Therefore, if the CO is below the rank of rear admiral, major general or air vice-marshal and he considers he needs extended powers for the purposes of activation because he is likely to order the period of activation to exceed 28 days he must make an application to HA for extended powers¹³¹. The application must contain¹³²:

- a. The CO's reasons for considering that he needs extended powers for the purposes of activating the suspended sentence of detention;
- b. A copy of the written RSH or a copy of any record of the proceedings before the SAC¹³³ at which the suspended sentence of detention was awarded;
- c. Such details as are known to the CO of all proven offences committed by the offender during the operational period of the suspended sentence of detention. This includes the conviction that has triggered the power to activate. Such details would ordinarily be supplied by an officer who attended the court on behalf of the Unit. However, where there is any dispute as to the details of the conviction, a court record should be obtained;

¹²⁸ See glossary.

¹²⁹ Sub-section 193(2)(b) of the Act. A conviction for an offence in the British Islands by a civilian court means a Magistrates Court or the Crown Court in England and the Scotland or Northern Ireland equivalents.

¹³⁰ Rule 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹³¹ NB the application for extended powers will be needed for activation of sentences over 28 days even if extended powers were granted for the original charge.

¹³² Rule 30(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹³³ These records may be obtained from the MCS.

- d. Copies of¹³⁴:
- (1) The written records of all summary hearings;
 - (2) The written records of any activation hearings (see Part 6 of this chapter) held as a consequence of the accused having been convicted in a civil court; and
 - (3) Any records of proceedings before any of the SAC, the CM and the Court Martial Appeal Court,

at which reasons were given for any decision(s) not to make an order to activate the suspended sentence;

- e. Any disciplinary record of the offender; and
- f. Any other material that may be, in the opinion of the CO, relevant to the application.

126. Where an application for extended powers is successful, the CO must provide the offender with a copy of the notification from HA that extended powers have been granted.

Preliminary procedures¹³⁵

127. The offender's CO is to, as soon as is reasonably practicable after being notified of a conviction triggering an activation hearing, inform the offender in writing of:

- a. The CO's power to make an order¹³⁶ to activate a suspended sentence of detention (an activation order);
- b. His right to representation¹³⁷ (see paragraph 131 below);
- c. His right of appeal to the SAC¹³⁸; and
- d. His right to make a submission¹³⁹ (see paragraph 137 below).

128. The CO is to use form T-SL-SH03 at [Annex N](#) (Activation hearing – check sheet of mandatory information provided to the offender) to confirm that the following mandatory information has been passed to the offender:

- a. A copy of the written RSH, or a copy of any record of the proceedings before the SAC, at which the suspended sentence of detention was awarded;
- b. Details known to the CO of all proved offences committed by the offender during the operational period of the suspended sentence of detention. This includes

¹³⁴ Rule 31(1)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹³⁵ Rule 31 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹³⁶ Under section 193 of the Act.

¹³⁷ Rule 33, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹³⁸ Section 141 of the Act.

¹³⁹ Rule 34(1)(c) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

the report of the officer who attended the civil court on behalf of the unit that gives details of the offence committed;

c. Copies of:

(1) The written records of all summary hearings;

(2) The written records of any activation hearings (see Part 6 of this Chapter) held as a consequence of the accused having been convicted in a civil court; and

(3) Any records of proceedings before any of the SAC, the CM and the Court Martial Appeal Court,

at which reasons were given for any decision(s) not to make an order to activate the suspended sentence;

d. A copy of the disciplinary record of the offender;

e. A copy of any notification from HA that the CO has been granted extended powers¹⁴⁰; and

f. Written notification of the time and place of the hearing.

129. Fixing a time for the hearing. The CO is to give the accused written notice of the time and place of the hearing. In fixing the time for the hearing, the CO must allow the accused reasonable time to prepare for the hearing. In any event, the time is not to be less than 24 hours after the accused receives the information above and not less than 24 hours after notice is given of the time fixed. Where the CO has made an application for extended powers in relation to an activation order, he may not fix a time for the hearing until he has received notification of the result. Where he has received notification that an application has been granted, the time fixed for the hearing shall be not less than 24 hours after the accused has been provided with notification from the HA. The accused may not waive this 24 hour period.

130. Changing the time for a hearing¹⁴¹. A CO may, at any time before the hearing, fix a different time for the hearing. The new time fixed for the hearing is not to be less than 24 hours after the accused receives all the information outlined in paragraph 129 above (as appropriate) and not less than 24 hours after notice is given of the time fixed. The CO shall not fix a time for a new hearing if he has applied to HA for permission to use extended powers for the purposes of activating a suspended sentence of detention¹⁴² until he has received notification of the result of the application. Where any such application is made, the time of the hearing must be no less than 24 hours after the CO has provided the accused with a copy of the notification from HA (see paragraph 131 for guidance on changing the time for a hearing where the accused has requested the assistance of the CO in finding an offender's assisting officer (OAO)).

131. Representation – the offender's assisting officer. In the same way that an accused may nominate an AAO for a summary hearing, the offender may nominate an OAO

¹⁴⁰ For the purposes of Section 194, of the Act.

¹⁴¹ Rule 32, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁴² Rule 32(1)(b), of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

to represent him at an activation hearing. The brief for an offender's assisting officer at an activation hearing can be found at [Annex O](#). Where the offender has difficulty in finding a suitable person to represent him, he may request the assistance of the CO¹⁴³. In this event, the CO must provide a pool of at least 2 potential nominees for this purpose and allow the offender a free choice from the pool. The offender is under no obligation to nominate an individual from the pool. The CO is not prevented from holding the activation hearing where the offender is unable to find an OAO himself and he is unwilling to nominate one of the pool of potential nominees. The offender may ask for the CO's assistance in finding an OAO at any time; where the CO is asked 24 hours or less before the hearing he must cancel it and provide a pool of suitable candidates. He is then to re-fix the hearing for a time not less than 24 hours after he provided the pool of suitable candidates. Information regarding the appointment of an OAO is at [Annex P](#). An individual may only be nominated as an OAO if:

- a. He is a Service person¹⁴⁴ and remains as such while carrying out this function. The accused may select another OAO if the original person selected has to relinquish his function;
- b. He is of at least the rank or rate of petty officer or military, marine or air-force sergeant; and
- c. He consents to the nomination.

132. **Adjournments.** The CO may adjourn a hearing at any point if he considers that to do so would be in the interests of fairness to the offender or expedient for any purpose and not unfair to the offender (see Part 3 paragraph 44)

133. **Record of activation hearing.** The RAH, which the CO should complete during and immediately after the hearing, also acts as a guide for the officer conducting the hearing (see [Annex I](#)). The record is to include:

- a. The name, rank or rate and Service number of the offender;
- b. The date of the hearing;
- c. The decision of the CO as to whether to make an order;
- d. The reasons either for making the order or for not making the order; and
- e. A copy of the order where one is made.

The activation hearing

134. At the beginning of the hearing the CO must satisfy himself that the offender:

- a. Understands the purpose of the activation hearing. This should involve the CO reading out the relevant details of the conviction from the report of the officer who attended the court or other details in the possession of the CO. If there is any dispute over the details of the conviction, the CO may wish to adjourn in order to obtain a memorandum of conviction from the court; and
- b. Has had sufficient time to prepare for the hearing.

¹⁴³ Rule 33(5), of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁴⁴ Subject to Service law.

135. **Character evidence.** The CO must give the offender the opportunity to produce evidence as to his character. Where the offender requires the attendance of a witness to give evidence as to his character¹⁴⁵:

- a. The witness may give evidence orally or in writing; and
- b. If the witness gives evidence in writing:
 - (1) His evidence must be read to the CO by the offender or by the OAO and the offender must provide the CO with a copy of the evidence; and
 - (2) The CO must give the offender the opportunity of questioning the witness and the CO may question the witness after the offender has had the opportunity of doing so.

136. The offender, the OAO or another appropriate officer¹⁴⁶ may, if the offender so wishes, introduce orally or in writing his appraisal reports or an assessment of his performance as part of his mitigation.

137. **Submission.** The CO must give the offender or his OAO the opportunity to make a submission either orally or in writing about:

- a. The appropriateness of making an activation order; and
- b. The appropriate terms of such an order if it were made.

Activation order

138. **Factors to be considered by the CO when determining whether to make an activation order.** When considering whether to make an activation order and if the order is to be made, what its terms should be, the CO should consult [Chapter 13](#) (Summary hearing - sentencing and punishments). The factors he must take into account when deciding whether to activate the order are as follows:

- a. The details of the offence(s) for which the suspended sentence of detention was imposed (including its seriousness);
- b. Such details as are known to the CO of all proven offences committed by the accused during the operational period of the suspended sentence;
- c. The reasons given for any decision or decisions, taken on earlier occasion(s), not to activate the suspended sentence;
- d. The offender's disciplinary record;
- e. Any submission made by the offender about the appropriateness of making an order and the appropriate terms of such an order if one were made;

¹⁴⁵ Rule 34(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁴⁶ This may be the divisional officer, the sub-unit commander, the flight commander or other employing officer, or an officer outside the line management chain such as the chaplain, education or welfare officer.

- f. Any character evidence introduced by the offender; and
- g. Any other matters that appear to the CO to be relevant. These might include the following:
 - (1) Any similarity with the subsequent offence, which may indicate a lack of rehabilitation (commission of a dissimilar offence may indicate that a reduced period of activation should be imposed rather than not activating at all);
 - (2) The details of the sentence awarded for the original offence (indicative of seriousness of offence);
 - (3) Any reasons given for sentencing by the CO or the SAC when awarding the earlier sentence;
 - (4) The details of the subsequent offence(s), including its seriousness; and
 - (5) The degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed. The later into the operational period the subsequent offence is committed, the less appropriate it may be to activate.

139. **Making an activation order.** Where the CO decides to activate a suspended sentence of detention after a subsequent conviction in the British Islands, he must go on to make the activation order at [Annex I](#) form T-SL-SH02 (Record of activation hearing). In doing so, he must determine the length of the period of detention and whether it should be activated for the original term, i.e. the full amount of the suspended sentence or any shorter period. In the unusual circumstances that the accused is already serving a period of detention, he should decide whether the sentence activated should run concurrently with or consecutively to that period of detention, see [Chapter 13](#) (Summary hearing – sentencing and punishments). In such circumstances, staff legal advice should be sought.

140. **Decision not to make an activation order.** If the CO decides not to activate the suspended sentence of detention, he should annotate his reasons accordingly on the record of activation hearing (RAH).

141. **Actions by the CO once he has decided to make an order.** The CO must inform the offender of his decision whether or not to make an order and he is to give the offender his reasons for his decision. If an order is made he must also:

- a. Inform the accused of the terms¹⁴⁷ of the order;
- b. Remind the accused of his right of appeal¹⁴⁸; and
- c. Remind the accused that he may choose to commence the sentence of detention immediately¹⁴⁹ (see post hearing action Part 6).

142. A sentence of detention cannot take effect immediately unless the offender elects to do so at the time the punishment is awarded. The CO should ask the offender whether he wishes to elect to commence the sentence immediately, ensuring that the offender is aware

¹⁴⁷ How much of the suspended sentence will be activated and for how long.

¹⁴⁸ Section 141 of the Act.

¹⁴⁹ Section 290 of the Act.

of the consequences of his decision. If the offender wishes to consult his OAO¹⁵⁰ or seek legal advice to assist him in making a considered decision, the CO may grant the offender a brief adjournment. If the offender gives no indication of his decision or it becomes apparent that a longer adjournment would be necessary for the offender to make his decision, it should be assumed that he does not wish to elect to start the sentence immediately. If the offender does not elect to commence the sentence immediately, the sentence will not commence until the initial period has expired, usually 14 days after the sentence was awarded, to allow him to consider whether he wishes to appeal. Should the offender consider that he is unable to make a decision whether to appeal within that period, he may apply for extra time. Full guidance can be found in [Chapter 15](#) (Summary hearing review and appeal).

Post activation hearing actions

143. The paperwork connected with the activation hearing normally should be processed within 24 hours following the hearing and all parts of the RAH completed. A copy of the RAH should be given to the accused as soon as reasonably practicable after the hearing¹⁵¹.

144. Once the RAH has been completed the activation hearing review form ([Annex B](#) to [Chapter 15](#) Summary hearing review and appeal, form T-SL-AHR01) should be completed and despatched by fastest possible means to the Reviewing Officer (RO)¹⁵² for the purposes of review, normally not later than 24 hours after the activations hearing. The RAH should be retained under single-Service¹⁵³ arrangements for a minimum period of 2 years.

145. Where the CO decides not to activate a suspended sentence of detention and the offender is assigned to another unit, a copy of the RAH from the activation hearing should be forwarded to the new unit

Legal aid for appeal

146. In the interests of the accused and avoidance of delay, if the individual wishes to apply for legal aid for an appeal, he should be provided with the necessary forms and given any help he may require in completing and sending them to the Armed Forces Criminal Legal Aid Authority, see JSP 838 (The Armed Forces Legal Aid Scheme).

Recording of information on JPA

147. All activation hearing cases are to be recorded on JPA to provide both an audit trail and the single-Service disciplinary chain of command with management information. The information required to be input is detailed in the business process guides on the SPVA Info Centre.

¹⁵⁰ [Annex O](#) (Brief for offender's assisting officer at an activation hearing).

¹⁵¹ Rule 27(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁵² [Chapter 15](#) (Summary hearing review and appeal)

¹⁵³ RN PLAGOS, Army AGAI 62 Annex G, RAF QR 1057

Part 9 – Transitional guidance

Charge found proved before commencement

148. If a charge has been found proved at a summary dealing or trial before commencement, but punishment has not yet been awarded, punishment must be awarded as if the SDAs (and regulations made under them) were still in force. See annex E to [Chapter 13](#) (Summary hearing and sentencing and punishment).

Charge part heard

149. If an accused's CO began to hear a charge before commencement but did not record a finding, and he is still the accused's CO after commencement,¹⁵⁴ the hearing may continue (unless article 49 of the Armed Forces Act 2006 (Transitional Provision etc) Order 2009 prevents the charge from being heard summarily: see Annex S to [Chapter 6](#) (Investigation, charging and mode of trial)¹⁵⁵. The CO may take account of evidence heard before commencement, without having to hear it again. However, the remainder of the hearing must be conducted in accordance with the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.

- a. Any documents required by rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 must therefore be served, if they have not already been served (even if they relate to evidence heard before commencement).
- b. The accused is entitled to an accused's assisting officer under rule 10 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.
- c. Before proceeding further with the hearing, the CO must:
 - (1) Satisfy himself that the accused understands the charge or charges, and has had a reasonable time to prepare for the hearing;¹⁵⁶
 - (2) Give the accused the opportunity to elect Court Martial trial (despite having already offered him the right to elect court-martial trial);
 - (3) If the accused again does not elect, read the charge or charges to him (despite having already read them at the start of the summary dealing or trial); and
 - (4) Ask the accused to state whether he admits or denies each charge (which, in the case of a summary dealing under AA/AFA55, the accused may not yet have been asked).

150. If an officer other than the accused's CO¹⁵⁷ began to hear a charge before commencement but did not record a finding, he may continue the hearing (subject to article 49 of the Armed Forces Act 2006 (Transitional Provision etc) Order 2009) - see Annex S to

¹⁵⁴ If the officer who began the hearing is no longer the accused's CO after commencement, the charge must be heard afresh under AFA06 by the accused's new CO.

¹⁵⁵ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 54(3).

¹⁵⁶ This requirement may be satisfied if the accused has had a reasonable time to prepare since the summary dealing or trial was adjourned, even if he did not have a reasonable time to prepare before the summary dealing or trial began.

¹⁵⁷ This includes an appropriate superior authority.

[Chapter 6](#) (Investigation, charging and mode of trial) - provided that (unless that officer is himself the accused's CO after commencement) the officer who is now the accused's CO has delegated to him the CO's relevant functions in respect of the charge¹⁵⁸. Subject to that, paragraph 149 above applies.

Right to elect

151. The accused must be given the opportunity to elect Court Martial trial before a summary hearing under AFA06 begins, even if he was given the opportunity to elect court-martial trial on the charge before commencement¹⁵⁹. If the hearing began before commencement, he must similarly be given the opportunity to elect Court Martial trial before the hearing continues, even though he will necessarily have been given the opportunity to elect court-martial trial before the hearing began.

152. If the accused elected court-martial trial before commencement but withdrew the election with leave, the hearing may begin or continue under AFA06 (once the accused has been given the opportunity to elect Court Martial trial: see paragraph 151 above) as if the accused had declined the opportunity to elect¹⁶⁰.

153. If the accused elected court-martial trial under AA 1955 or AFA 1955 but withdraws¹⁶¹ the election after commencement, any summary hearing will be held under AFA06. The CO may not apply for extended powers¹⁶². The accused has no right to elect Court Martial trial unless the charge is amended after it is referred back¹⁶³.

154. If the accused elected court-martial trial under NDA57 and withdraws the election after commencement, any summary hearing will be held under AFA06, and in this case the CO may apply for extended powers for the purposes of AFA06 section 133(1) or (2), 134, 135(1) or 136(1)(b). If extended powers are granted for any or all of these purposes, the accused must be given the opportunity to elect Court Martial trial before the charge is heard¹⁶⁴. If extended powers are not sought, or are sought but not granted, the accused has no right to elect unless the charge is amended.

Delegation

155. A CO may not delegate his functions under the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 in relation to a charge if the accused is subject to a suspended sentence of imprisonment or detention imposed under the SDAs¹⁶⁵. This is in addition to the restrictions imposed by rule 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.

156. For the exercise before commencement of a CO's power to delegate his functions under the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009, see paragraph 158f below.

¹⁵⁸ Such a delegation may have been made before commencement, and will take effect from commencement.

¹⁵⁹ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 54(2).

¹⁶⁰ But, if the case had been referred to the SPA before the election was withdrawn with leave, the charge will not be allocated for summary hearing unless the SPA had referred the case back before commencement.

¹⁶¹ "Withdraws" is shorthand: more accurately, the DSP refers the charge back to the CO with the accused's consent.

¹⁶² But he will already have extended powers for the purposes of section 133(1) if permission to award extended detention was granted before the accused elected: see paragraph 160d below.

¹⁶³ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 61(2).

¹⁶⁴ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 61(3).

¹⁶⁵ Schedule 2 paragraph 5(1) Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216. This includes a sentence of detention passed and suspended under NDA 1957 after commencement, because the finding of guilt was recorded before commencement.

Proven offences

157. Where the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 require details of “proven offences” to be provided, this includes offences found proved (by court-martial or at summary dealing or trial) before commencement¹⁶⁶.

Pre-commencement preparations for a summary hearing

158. Where a summary hearing is to be held after commencement, preparations for the hearing may be made before commencement.

a. If under AFA06 section 54 the CO requires permission to hear the charge, he may apply for permission before commencement¹⁶⁷. Higher authority may give permission before or after commencement¹⁶⁸.

b. An application for extended powers for the purposes of AFA06 section 133(1) or (2), 134, 135(1) or 136(1)(b)¹⁶⁹ may be made before commencement.¹⁷⁰ Higher authority may grant such an application before or after commencement.¹⁷¹

c. The documents which rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 requires to be served before the hearing may be served before commencement¹⁷².

d. The time for the hearing may be fixed under rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 before commencement, and the time so fixed may be changed under rule 9 before commencement.

e. The accused’s assisting officer may be nominated before commencement. A person is deemed to be subject to service law for this purpose (and thus eligible for nomination as an accused’s assisting officer, if of sufficient rank or rate) where he would be subject to service law if AFA06 were already in force.

f. The accused’s CO may delegate his functions under the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 before commencement (so that the subordinate commander can begin to exercise those functions immediately on commencement) and may revoke such a delegation before commencement¹⁷³. In this context “the accused’s CO” means the officer who will be the accused’s CO after commencement. That officer may delegate his functions before commencement even if he is not yet the accused’s CO at the

¹⁶⁶ Schedule 2, paragraph 2, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁶⁷ It is the officer proposing to hear the charge (i.e. the officer who will be the accused’s CO after commencement) who must apply. That officer can apply even if he is not yet the accused’s CO when he makes the application.

¹⁶⁸ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 59(2).

¹⁶⁹ But not section 194 (maximum term for which a CO may activate a suspended sentence of detention). A CO may not activate a suspended sentence passed under AA 1955 or AFA 1955, and the activation of a suspended sentence passed under NDA 1957 requires the approval of higher authority: see paragraph 161 below.

¹⁷⁰ It is the officer proposing to hear the charge (i.e. the officer who will be the accused’s CO after commencement) who must apply. That officer can apply even if he is not yet the accused’s CO when he makes the application.

¹⁷¹ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 59(2).

¹⁷² Schedule 2, paragraph 6, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁷³ Schedule 2, paragraph 5(2), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

time when he makes the delegation. Conversely, a delegation made by an officer before commencement has no effect after commencement if that officer is not the accused's CO after commencement.

159. Where the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 impose a time limit by reference to the time at which a particular step is taken, and that step is taken before commencement, the time limit runs from the time when the step was actually taken (*not* from commencement).

Hearing delayed until after commencement

160. Where a summary dealing or trial was to be held before commencement but is delayed until after commencement, the following points should be considered.

a. The charge cannot be heard summarily after commencement unless it is 'capable of being heard summarily'¹⁷⁴. If the charge was to be tried under NDA57, it will not necessarily be "capable of being heard summarily" under AFA06. If the opportunity to elect court-martial trial was offered before commencement, however, the charge may be heard summarily (after offering the opportunity to elect Court Martial trial) even if it would not otherwise have been 'capable of being heard summarily'¹⁷⁵.

b. Article 49 of the Armed Forces Act 2006 (Transitional Provision etc) Order 2009 may prevent the charge from being heard summarily after commencement, even though it is "capable of being heard summarily" and could have been heard summarily before commencement. See Annex S to [Chapter 6](#) (Investigation, charging and mode of trial).

c. If the documents served for the purpose of the summary dealing or trial do not comply with rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009, such further documents as are required by that rule must be served in addition to those already served. This may be done before or after commencement.

d. If permission to award extended detention has been granted, the CO has extended powers for the purposes of section 133(1) of AFA06¹⁷⁶. This means he may award up to 90 days' detention, even though he could not have awarded more than 60 days if the charge had been dealt with before commencement. Higher authority may treat an application for permission to award extended detention as an application for extended powers for the purposes of section 133(1), and may grant such an application before or after commencement¹⁷⁷. If higher authority considers the application before commencement and it is not clear whether the hearing will take place before or after commencement, higher authority may grant *both* permission to award extended detention *and* extended powers for the purposes of section 133(1). The CO will then be able to award up to 60 days if he finds the charge proved at a summary dealing before commencement (see Annex E to [Chapter 13](#) Summary hearing sentencing and punishments), or up to 90 days if he finds it proved at a summary hearing after commencement.

¹⁷⁴ For SDA offences which are "capable of being heard summarily", see Annex B to [Chapter 6](#) (Investigation, charging and mode of trial).

¹⁷⁵ See Annex C to [Chapter 6](#) (Investigation, charging and mode of trial).

¹⁷⁶ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 60.

¹⁷⁷ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059 article 59(4).

Activation of suspended NDA57 sentence

Finding of guilt before commencement

161. If a person is subject to a suspended sentence of detention passed under NDA57 and is found guilty of another offence at a summary trial before commencement, but punishment is not awarded until after commencement, the CO may activate the sentence under NDA57 section 91B at the same time as awarding punishment under NDA57. See annex E to [Chapter 13](#) (Summary hearing sentencing and punishments).

Civilian conviction: application for approval made before commencement

162. If, before commencement, approval was given under NSDR regulation 49A for a proposed activation order under NDA57 section 91B on the basis that the offender had been convicted of a civilian offence, the proposed order may be made under NDA57 section 91B after commencement. If the CO applied for approval before commencement, approval may be granted after commencement, and the proposed order may then be made¹⁷⁸.

Summary hearing after commencement

163. If a charge is found proved at a summary hearing after commencement, and the offence was committed while the offender was subject to a suspended sentence of detention passed at a summary trial (or by the SAC) under NDA57, and the offender is still subject to the suspended sentence¹⁷⁹, the CO may activate the sentence under AFA06 section 193¹⁸⁰. But he may not do so without the written approval of one of the officers listed in paragraph 7 of Schedule 2 to the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 (who are the same as those listed in NSDR regulation 66).

164. Where a CO is to hear a charge under AFA06 and, if he finds the charge proved, will have power to activate a suspended sentence passed under NDA57, rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 requires that the accused be provided with:

- a. A copy of the form S241 and the punishment warrant relating to the sentence (or, if the sentence was passed by the SAC, the record of the proceedings in the SAC);
- b. Details of proven offences committed by the offender since the sentence was suspended; and
- c. Copies of the records of any summary hearings under AFA06 (but *not* summary trials under NDA57), activation hearings (under NDA57 or AFA06) or court proceedings (under NDA57, AFA06 or CMAA68) in which reasons were given for not activating the sentence¹⁸¹.

165. Where a CO finds a charge proved and has power to activate a suspended sentence passed under NDA57, rule 23 of the Armed Forces (Summary hearing and activation of

¹⁷⁸ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 62.

¹⁷⁹ That is it is not more than one year since the sentence was suspended.

¹⁸⁰ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 97(1).

¹⁸¹ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009, Schedule 2, paragraph 8.

suspended sentences of Service detention) Rules 2009 is modified to take account of the fact that the CO cannot activate the sentence without the approval of higher authority. In deciding whether to seek approval, the CO must take into account the matters which (if no approval were required) he would under rule 23(4) be required to take into account in deciding whether to activate the sentence, including:

- a. Such details as are known to the CO of all proven offences committed by the offender since the sentence was suspended;
- b. Any reasons given at summary hearings under AFA06 (but *not* summary trials under NDA57), activation hearings (under NDA57 or AFA06) or court proceedings (under NDA57, AFA06 or CMAA68) for not activating the sentence¹⁸².

166. If the sentence is activated, the CO must give the offender his own reasons for seeking approval and any reasons given by higher authority for giving approval¹⁸³. If the sentence is not activated because the CO did not seek approval, the CO must give his reasons for not seeking approval. If the sentence is not activated because approval was not given, the CO must give his reasons for seeking approval and any reasons given by higher authority for refusing approval¹⁸⁴. In each case the written record of the hearing must contain the reasons that the CO is required to give¹⁸⁵.

167. If a charge is found proved at a summary hearing after commencement, and the offence was committed while the offender was subject to a suspended sentence of detention passed by a court-martial (or the CMAAC) under NDA57, the CO cannot activate the sentence himself. He must, however, notify the court administration officer of the finding so that the Court Martial can consider whether to do so¹⁸⁶.

Activation hearing

168. If a person has been convicted of an offence by a civilian court in the British Islands, and the offence was committed while he was subject to a suspended sentence of detention passed at a summary trial (or by the SAC) under NDA57, and he is still subject to the suspended sentence¹⁸⁷, the CO may hold a hearing under Part 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 for the purpose of deciding whether to activate the sentence under AFA06 section 193¹⁸⁸. But, if the CO decides that in his view the sentence should be activated, he may not activate it without the written approval of one of the officers listed in paragraph 7 of Schedule 2 to the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.

169. For the purposes of a Part 3 hearing to be held in these circumstances, the documents to be provided to the accused are the same as those for a summary hearing: see paragraph 164 above¹⁸⁹. The matters that the CO must take into account in deciding

¹⁸² Schedule 2, paragraphs 10(2) to (5), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁸³ That is, higher authority need not give reasons, but the offender must be informed of any reasons that higher authority does give.

¹⁸⁴ Schedule 2, paragraph 10(6), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁸⁵ Schedule 2, paragraph 11, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁸⁶ Schedule 2, paragraph 12, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

¹⁸⁷ i.e. it is not more than one year since the sentence was suspended.

¹⁸⁸ The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 97(2).

¹⁸⁹ Schedule 2, paragraph 14, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

whether to seek approval for an activation order, and the reasons he must give (and include in the written record) for the making or non-making of the order, are the same as in the case of a summary hearing: see paragraphs 165 and 166 above¹⁹⁰.

¹⁹⁰ Schedule 2 paragraphs 15 and 16 Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

APPLICATION BY THE CO TO HEAR A CHARGE SUMMARILY

Higher Authority
Address

HMS WALES
BFPO 000

26 Oct 09

APPLICATION BY COMMANDING OFFICER FOR PERMISSION TO HEAR A CHARGE SUMMARILY – B123456 PETTY OFFICER R PERRIN

1. Application is made under Rule 5 of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009 to hear summarily the charge detailed on the enclosed charge sheet.

2. Case against the accused

Insert a summary of the alleged facts of the offence; include brief details of the evidence of key witnesses; details of injuries given by medical professional; whether alcohol was involved; brief details of accused's evidence if an interview was conducted.

3. Service history

Include: length of Service; disciplinary record¹⁹¹; any recent commendations.

4. Reasons for considering that the charge should be heard summarily:

Include for example: uncomplicated charge; first offence; no previous disciplinary record; impending operational tour.

R Jones
Captain Royal Navy
HMS WALES
Commanding Officer

Enclosures:

1. A copy of the charge sheet.
2. A copy of the written evidence relevant to the charge.
3. A copy of any unused material gathered as part of the investigation of the charge.
4. A copy of any disciplinary record of the accused.
5. Other material that may, in the opinion of the CO, be relevant to the application

¹⁹¹ Not to include any record of Administrative Action

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APPLICATION BY A CO TO HA FOR EXTENDED POWERS

Higher Authority
Address

HMS WALES
BFPO 000

26 Oct 09

APPLICATION BY COMMANDING OFFICER FOR EXTENDED POWERS IN RELATION TO PUNISHMENT – B123456 PETTY OFFICER R PERRIN

1. Application is made under Rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009 for extended powers of punishment for the purposes of section 133 (detention), section 134 (forfeiture of seniority), section 135 (reduction in rank/disrating), or section 136 (fine)* of the Armed Forces Act 2006 in relation to the charge(s) detailed in the enclosed charge sheet.

2. Case against the accused

Insert a summary of the alleged facts of the offence; include brief details of the evidence of key witnesses; details of injuries given by medical professional; whether alcohol was involved; brief details of accused's evidence if an interview was conducted.

3. Reasons for considering that the CO's powers of punishment might be insufficient

Include your consideration of: the nature of the charge; the maximum penalty for the charge; the sentencing guidelines for the offence; the accused's previous disciplinary record; the accused's position of responsibility (where appropriate) and appropriateness of an alternative punishment.

4. Service history

Include: length of Service; recent professional performance; any recent commendations; family circumstances.

R Jones
Captain Royal Navy
HMS WALES
Commanding Officer

* Delete as appropriate

Enclosures:

1. A copy of the charge sheet.

PROTECT – PERSONAL DATA (WHEN COMPLETED)

2. A copy of the written evidence relevant to the charge.
3. A copy of any unused material gathered as part of the investigation of the charge.
4. A copy of any disciplinary record of the accused.
5. Other material that may, in the opinion of the CO, be relevant to the application.



MINISTRY OF DEFENCE

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ANNEX C TO
VOL1 CH 9
JSP 830 MSL
revised 08/09

RECORD OF SUMMARY HEARING

T-SL-SH01

Case of Accused

Rank/Rate

Family name

First name

Ship/unit/establishment

Service number

Date and time hearing commenced

Charge1

Admitted

Denied

Charge2

Admitted

Denied

Charge3

Admitted

Denied

Outcome

Charge 1 Proved/Dismissed/Discontinued/Referred to

Charge 3 Proved/Dismissed/Discontinued/Referred to

Charge 2 Proved/Dismissed/Discontinued/Referred to

Sentence (punishments awarded)

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Orders made

Detention (committal order)

Check if order made

Number of days awarded

Days already spent in post charge custody

Has detention been suspended? Yes No

If Yes, length of operational period in months

Service Supervision and Punishment Order (SSPO)

Requirements (at least one of these must be selected)

Duration of Punishment (30/60/90 days)

Extra duties as directed, subject to a maximum of 5½ hours in 24 hr period. This will be modified in secondary period to be subject to maximum of 1 hr in each 24 hr period.

Latest date for initial review

Offender prevented from leaving ship, establishment or station unless he has permission of his CO

Unless permitted by CO Offender prevented from entering

Fine order

Amount of fine

Enquiry made into offender's financial circumstances Yes No

- Order made to pay in full immediately
- by instalments
- by deductions from pay either in full or by instalments

Detail of instalments / deductions (amount and period fine is to be recovered over)

Service Compensation Order (SCO)

Enquiry made into offender's financial circumstances?

Amount of SCO

Yes

No

Order made to pay

in full immediately

by instalments

by deductions from pay either in full or by instalments

Detail of instalments / deductions (amount and period fine is to be recovered over)

Reasons for sentence (state whether and if so what credit has been given for admission of the offence(s)).

Particular Mitigating Factors

Particular Aggravating Factors

The effect of this punishment is: (state how punishment actually applies): [Chapter 13](#) (Summary hearing - sentencing and punishments)

Where an activation order for a suspended sentence of detention has been considered:

Decision on activation order: Not activate / activate in full / activate in part as follows

Reasons for making an activation order or for not making an activation order of a suspended sentence of detention

Miscellaneous Matters

This is a free text box which is to be completed to indicate other matters of record. E.g. to record revocation of delegation by CO (see paragraphs 10 of this Chapter).

Heard by

Rank

Name/Initials

Unit

Date (of completion of hearing)

Signed

In capacity of

CO

Subordinate Commander

THE SUMMARY HEARING

Introduction

1. Introduce the Summary Hearing:

**"As you Commanding Officer/.....(insert capacity or role)
I will be hearing the charge(s) against you."**

2. **Mandatory question** - identify accused - read from Charge Sheet.

"Are you....."(Service number, Rank/Rate, Full name of accused)

Yes

No

If NO establish correct details. If necessary defer the hearing.

Accused's Assisting Officer

3. Statement to the accused where an AAO is present:

**"....."(Rank/Rate & Name of AAO)
is acting as your Assisting Officer to help you during this hearing. If at any time you
want to talk to him about any matter indicate to me that you want to do so."**

"Do you understand"

Yes

No

Statement to the AAO

"Do you understand your role?"

Yes

No

Statement to the accused where an AO is not present:

You do not have an Assisting Officer. Do you wish to have an Assisting Officer?"

Yes

No

If the accused requires an AAO delay the hearing to make the necessary arrangements

4. **Mandatory questions** - Question to accused:

"Have you received a copy of the case papers and the 'Your rights if you are accused of an offence under the Service justice system' not less than 24 hours ago?"

Yes No

Check whether accused has signed form T-SL-SH03. If necessary, adjourn the hearing to allow this requirement to be satisfied

"Do you understand the charge(s) against you?"

Yes No

"Have you had sufficient time to prepare for this hearing?"

Yes

No

If **No** check whether the accused has signed form T-SL-SH04. If necessary, delay the hearing to allow this requirement to be satisfied.

If the accused is being dealt with a summarily having withdrawn his election for Court Martial trial go to serial 6.

Election

5.

"Do you understand that you have a right to elect Court Martial trial"

Yes

No

If **No** delay the hearing to explain areas of difficulty to the accused or to make arrangements to ensure the accused is briefed as necessary.

Mandatory question

"Do you elect Court Martial trial"

Yes

No

If the accused does not elect Court Martial trial, go to the next paragraph.

Commencement of Summary Hearing

6. Mandatory statement

"You are charged as follows"

Read the charge(s) from the Charge Sheet.
First charge.....

"Do you admit or deny the charge?"

Admit Deny

7. Repeat the procedure for the second and any further charges

Second charge.....

"Do you admit or deny the charge?"

Admit Deny

8. If the accused **denies the charge(s)** call the first of the CO's witnesses and go to serial 10 of Appendix 1; if documentary evidence only go to serial 19 of Appendix 1.

9. If the accused **admits the charge(s)** go to Appendix 2.

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MINISTRY OF DEFENCE

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PROCEDURE WHERE CHARGE IS DENIED T-SL-SH01A

Evidence in support of the charge

Where CO's witness provides evidence in person

10. Question to witness: **"Are you.....?"** (Rank/Rate Name of witness)

11. Statement to witness: **"Your evidence is to be given on oath, under solemn affirmation or promise. What method do you choose?"**

Method

(Under 18 year olds may either make a promise or affirm)

12. Oath, affirmation or promise to be administered.

13. The written evidence of the witness is to be read out by the CO or a person authorised by him (which can be the witness himself). The witness may produce any exhibit (e.g. a document or an item).

14. Once the witness evidence has been read the witness may be questioned by the CO. On completion state to the accused:

"You or your Assisting Officer may now ask questions of the witness. This may include questions about any exhibits that have been produced"
"Further, you should be aware that if I consider it is in the interests of fairness to you, I will give you the opportunity to recall any witness whose evidence has been given in this hearing for you to ask any additional questions"

15. When the accused has finished questioning the witness further questions of the witness may be asked by the CO.

16. When the CO has finished questioning the witness, before releasing him to wait outside, the witness shall be warned as follows: **"You are not to discuss your evidence with anyone until the hearing has finished."**

17. Each of the CO's witnesses is then to be dealt with in the same manner as above.

18. Is there documentary evidence from CO's witnesses?

- Yes
 No

If YES go to serial 19.
 If NO go to serial 20 after stating:

"There is no documentary evidence in this case to be read out."

Where no requirement for a witness to attend

19. **"There is documentary evidence in this case to be read out."**

The written evidence is to be read out by the CO or a person authorised by him.

Decision

20. All the evidence from the CO's witnesses and any further information from additional questions have now been brought out.

If the accused does not wish to provide any evidence the CO must now decide whether or not there is sufficient evidence to continue with the charge i.e. he must decide whether he is sure that he has heard sufficient evidence to prove each element of the charge.

Each charge is to be considered separately.

If there is sufficient evidence to prove the charge go to serial 22.

21. If the CO is not sure that the charge has been proved or he determines that there is insufficient evidence (as above) to prove the charge it must be dismissed and the following should be stated:

"Charge dismissed"

The hearing is then concluded.

22. If the CO is of the opinion that there is sufficient evidence (as above) upon which to find the charge proved he is to continue by hearing evidence for the accused.

Evidence for the accused

23. Statement to the accused:

"You may now give your evidence. You have 3 options available to you. You may give evidence orally; you may submit evidence ; or you may say nothing. If you decide not to give evidence on your own behalf this will not count against you. Whether or not you decide to give evidence yourself you may call witnesses on your behalf.

Do you wish to give evidence?"

If the accused decides not to give evidence himself go to serial 27.

If the accused wishes to give evidence:

"How do you wish to give your evidence?"

If the accused decides to give evidence orally go to serial 25.

If the accused wishes to submit a written statement, allow him or his AAO to read the statement.

Where the accused decides to give his own evidence in writing

24. Before the statement is read state to the accused or his AAO:

"Your evidence is to be given on Oath, under Solemn Affirmation or promise. What method do you choose?"

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.
The accused, or the AAO on his behalf, is to read the written evidence
If the CO wishes to question the accused go to serial 26
If the CO does not wish to ask questions of the accused go to serial 27.

Where the accused decides to give his own evidence orally

25. Statement to accused:

"Your evidence is to be given on Oath, under Solemn Affirmation or promise. What method do you choose?"

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.

"You may now give me your evidence."

The accused is to give his evidence orally.

26. The CO may now question the accused regarding the evidence he has given either in writing or orally. When the CO has finished questioning the accused he is to be warned as follows:

"You are not to discuss your evidence with anyone until the hearing has finished"

Where the accused wishes to adduce evidence from witnesses

27. Question to accused:

"Do you wish to call any witnesses on your behalf?"

Yes If YES go to serial 28

No If NO go to serial 31

Where witnesses for the Accused are called to give evidence

28. Call first witness and ask:

"Are you.....?" (Service Number, Rank/Rate, Full Name)

Statement to witness: **"Your evidence is to be given on Oath, under Solemn Affirmation or promise. What method do you choose?"**

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.

29. Statement to witness:

"You have 2 options available to you. You may give evidence orally or you may submit written evidence; How do you wish to give your evidence, orally or in writing?"

If the witness wishes to give evidence by written statement it is to be read out by the CO or a person authorised by him.

30. If the witness wishes to give evidence orally state to the accused:

"You may now give your evidence"

The witness is to give his evidence.

The accused is then to be asked:

"You, or your Assisting Officer, may now ask questions of this witness should you wish to do so."

Once the accused has asked questions of the witness the CO may ask questions of the accused's witness.

At the end of the evidence of each witness, before releasing him to wait outside, warn the witness:

"You are not to discuss your evidence with anyone until the hearing has finished."

Repeat the above for each witness.

Documentary evidence

31. The accused may present written statements from witnesses and should be asked:

"Do you wish to provide written witness statements?"

Yes No

The accused, or his AAO on his behalf, may read statements of his witnesses.

Issues of fact, arising out of evidence, that could not have been foreseen by the CO

32. In the event that evidence given by the accused or by an accused's witness gives rise to an issue of fact which could not have been foreseen in advance of the summary hearing and about which none of the CO's witnesses can give evidence, the CO may call a witness who can give evidence in relation to the issue. It may be necessary to adjourn in order to arrange for the witness to attend. See paragraph 72 of this Chapter for the methods of introducing such evidence to the hearing.

If no such issues of fact arise go to serial 33.

To deal with issues of fact the CO may provide evidence to address the new issue by calling a witness to give evidence orally or by producing a signed, written statement by such a witness.

All evidence must be given on oath (etc) where appropriate.

Where the witness gives evidence the CO may take the opportunity of questioning the witness.

On completion he may allow the accused to question the witness by asking him:

Either:

"That concludes my questioning of the witness. Do you or your Assisting Officer wish to question the witness?"

Or:

"I have no questions for this witness. Do you or your Assisting Officer wish to question the witness?"

Final questions for the accused

33. If the CO considers that it would be in the interests of fairness to the accused to do so he may, at any time before determining that the charge is proved, allow the accused a further opportunity to question any witness whose evidence has been adduced.

Question to accused:

"Do you require a further opportunity to question any of the witnesses who have given evidence?"

Recall witnesses and question as required

When the accused has questioned any witness the CO may also question the witness.

34. Question to accused:

"Do you or your Assisting Officer wish to address me on any matter relevant to this case?"

No

Yes

If Yes state to the accused:

"You may do so now"

The CO may now wish to adjourn the hearing to consider all the evidence.

Decision

35. The CO must now decide whether he is satisfied so that he is **sure** that each individual charge is found proved (ie the charge has been found proved beyond reasonable doubt).

If the charge is not proved go to serial 36.

If the charge is proved go to serial 37.

36. CASE NOT PROVED

In relation to each individual charge, if the CO is not satisfied so that he is sure that the elements / ingredients of the charge(s) have been found proved, then he must dismiss the charge:

Statement to accused:

"I find the charge not proved and therefore dismiss it."

The hearing is then concluded.

37. CASE PROVED

In relation to each individual charge, if the CO is satisfied so that he is sure that the charge(s) have been proved, he will say.

Statement to Accused:

"I find the charge proved"

Before sentencing the charge the CO is to hear evidence of the accused's character, any plea in mitigation, any submission as to activation (if applicable) and he is to look at the accused's discipline record.

Evidence as to character, plea in mitigation and discipline record

38. If the accused is already subject to a suspended sentence of detention the CO must consider both the offence that has just been heard and whether activation is appropriate.

39. **Mandatory question** - statement and question to the accused:

"Before I consider any sentence that I may award, or any activation of a suspended sentence of detention (if applicable), you or your Assisting Officer may offer evidence as to your character, make a plea in mitigation and (if applicable) make a submission on activation; you may call witnesses for these purposes. Do you wish me to consider evidence as to your character?"

Yes No

If no character evidence go to paragraph 42.

Evidence of the Accused's character

40. If the character evidence is given in writing it is to be read to the CO by the accused or by the AAO; a copy of any written statement should be given to the CO.

The accused may call the witness who has provided a written statement or any other witness to give evidence orally or in writing.

Question to the accused:

"Do you wish to call any witnesses to give evidence as to your character?"

Yes

No If NO go to serial 42

Once any written statement from that witness has been read the accused may question the witness.

Statement to the accused:

"Do you wish to ask questions of this witness?"

Yes If YES the witness is to be called by the CO:

No

"Are you.....?" (Service Number, Rank/Rate, Full Name)

Statement to witness:

"Your evidence is to be given on Oath, under Solemn Affirmation or promise. What method do you choose?"

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.

The accused may now question the witness.

41. Once the accused has been given the opportunity to question the witness, the CO may then question the witness.

Plea in mitigation

42. Statement to the accused:

"Do you, or your AAO on your behalf, wish to make a plea in mitigation?"

If NO go to serial 43 (if subject to suspended sentence) or serial 44 (if not subject to suspended sentence)

If YES the plea in mitigation may be made orally or in writing. The accused may submit documents to support his plea in mitigation which may include his Service appraisal reports or a performance assessment.

On completion the CO may ask questions of the accused. If he is considering a punishment with financial consequences the CO should take this opportunity (if the information is not already provided within the mitigation) to enquire into the accused's financial circumstances.

Submission on activation of suspended sentence of detention

43. (ONLY IF APPLICABLE) Where the accused is subject to a suspended sentence of detention he is to be given the opportunity to make a submission in relation to activating that sentence which may be made orally or in writing:

"Do you, or your AAO on your behalf, wish to make a submission in relation to my decision as to whether I should activate the suspended sentence of detention to which you are currently subject?"

Yes

If Yes continue to hear the submission

No

Sentencing

44. The summary hearing procedure is now complete apart from sentencing the offender and, if applicable, activating a suspended sentence of detention.

Paragraph 77 (sentencing) of this Chapter and [Chapter 14](#) (The summary hearing sentencing guide) should be consulted before the sentence is announced and the accused's disciplinary record is to be read.

The CO may wish to adjourn to consider the sentence he is to award and (if applicable) whether he should activate the suspended sentence of detention and to complete page 2 of this Record.

Mandatory statement:

"Having found the charge(s) against you proved, I award you..... (State Sentence) for the following reasons"

Go to page 2 of 'Record of Summary Hearing' (annex C) and read out the reasons for the sentence before returning to this paragraph

"If you fail to comply with any part of this sentence further disciplinary or administrative action may be taken against you"

If activation of a sentence of detention has been considered the CO should then announce:

"Furthermore, I have considered whether to activate your suspended sentence of detention and have decided that it will"

- Not to be activated
- Be activated in full
- Be activated in part by the substitution of a term of.....Days' detention

Where two periods of detention have been awarded the CO is to announce whether they are to run concurrently (at the same time) or consecutively (one following the other). In these circumstances he is to state:

"The activated sentence of detention will run consecutively / concurrently to the sentence of detention imposed for the offence I have just heard"

In all cases the CO is to state:

"The reasons for my decision regarding the activation/non activation* of the suspended sentence are as follows....."

Read reasons from page 2 of 'Record of Summary Hearing' Annex C'

Notification of Rights

45. Where any punishment is awarded state to the accused:

"You have the right to appeal to the summary appeal court against my finding or sentence within 14 days (including today). You have the right to seek independent legal advice on whether you should appeal and have the right to be legally represented at the summary appeal court. You may apply for legal aid."

If detention is not awarded go to paragraph 47.

46. Where detention is awarded go on to state to the accused:

"Having awarded you a sentence of detention as (part of*) your punishment, I must now inform you that the sentence will not commence before the end of 14 days, beginning today, during which time you may appeal to the summary appeal court against my finding or sentence.

However you may choose to start your sentence of detention immediately. If you do choose to start your detention immediately, you have an absolute right to change your mind within the 14 day period.

Should you for any reason be unable to make a decision as to whether to appeal during that initial period you may apply for extra time. If that is the case your AAO / I will let you know how to make such an application.**

You may now have a brief break to consult with your AAO if you require it. "

* * if the accused is unrepresented

Should the offender consider that he is unable to make a decision whether to appeal within that period he may apply for extra time. If the offender gives no indication of his decision or it becomes apparent that a longer adjournment would be necessary for the offender to make his decision it should be assumed that he does not wish to elect to start the sentence immediately. Full guidance can be found in [Chapter 15](#) (Summary hearing review and appeal).

“Would you like to consult with your AAO before I ask you whether you choose to commence your sentence of detention immediately?”

- Yes If Yes then adjourn for a brief period to allow the accused to consult with his AAO.
- No

“Do you choose to commence your sentence of detention immediately?”

- Yes If Yes go to serial 47
- No If No state to the accused:

“If you do not submit an appeal during the next 14 days, you are to report to.....on (insert date)to start your sentence of detention.”

A sentence of detention will normally start on the 15th day after the punishment is awarded unless the accused has elected to commence his sentence immediately.

47. Statement to the Accused:

"The hearing is now concluded."

Effect the exit of the AAO and the accused in accordance with single-Service protocols



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PROCEDURE WHERE CHARGE IS ADMITTED T-SL-SH01B

Case summary

10. The officer hearing the charge, or a person authorised by him, is to read out the case summary to the accused. Question to the accused:

"You have heard the case summary, do you agree with all the facts it contains or do you dispute any facts?"

Agrees Disputes

If the accused **agrees** all of the facts contained within the case summary go to serial 17.

Disputed facts

11. If the accused **disputes** any of the facts contained within the case summary, the CO is to assume that the undisputed facts are true. If the CO considers that any of the disputed facts are relevant to sentencing he is to take evidence from such witnesses who he considers can give relevant evidence and from the accused if he chooses to give evidence.

The accused may now make a submission on which witnesses may be able to give relevant evidence on the disputed facts.

"Do you wish to address me on which witnesses may be able to give evidence on the disputed facts?"

Yes

If Yes allow the accused to make a submission.

No

If No, and after the accused submission (if applicable), continue to call the first witness who the CO believes can give evidence on the disputed facts and whose evidence is to be given orally and on oath. The witness may produce any exhibit (e.g. a document or an item)

12. Call the witness and ask:

"Are you.....?" (Service Number, Rank/Rate & Name of Witness)

Statement to witness:

"Your evidence is to be given on Oath, under Solemn Affirmation or promise. What method do you choose?"

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.

13. On completion state to the accused:

“You or your Assisting Officer may now ask questions of the witness. This may include questions about any exhibits that may have been produced”

14. Once the accused has finished questioning the witness the CO may question the witness.

15. When the CO has finished questioning the witness, before releasing him to wait outside, the witness shall be warned as follows:

“You are not to discuss your evidence with anyone until the hearing has finished.”

Each witness is then to be dealt with in the same manner as above.

16. The CO will now make a determination on the disputed facts which will inform his decision as to the correct sentence.

Evidence as to character, plea in mitigation and discipline record

17. If the accused is already subject to a suspended sentence of detention the CO must consider both the offence that has just been heard and whether activation is appropriate.

18. **Mandatory question** - Statement and question to the accused:

“Before I consider any sentence that I may award, or any activation of a suspended sentence of detention (if applicable), you or your assisting officer may offer evidence as to your character, make a plea in mitigation and (if applicable) make a submission on activation; you may call witnesses for these purposes. Do you wish me to consider evidence as to your character?”

Yes

No

(If no character evidence go to paragraph 22)

Evidence of the accused's character

19. If the character evidence is given in writing it is to be read to the CO by the accused or by the AAO; a copy of any written statement should be given to the CO.

The accused may call the witness who has provided a written statement or any other witness to give evidence orally or in writing.

Question to the accused:

“Do you wish to call any witnesses to give evidence as to your character?”

Yes

No

(If NO go to serial 22)

Once any written statement from that witness has been read the accused may question the witness.

Statement to the accused: **"Do you wish to ask questions of this witness?"**

Yes No If YES the witness is to be called by the CO:

"Are you.....?" (Service Number, Rank/Rate, Full Name)

Statement to witness: **"Your evidence is to be given on oath, under solemn affirmation or promise. What method do you choose?"**

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.

The accused may now question the witness.

20. Once the accused has been given the opportunity to question the witness, the CO may then question the witness.

When the CO has finished questioning the witness, before releasing him to wait outside, the witness shall be warned as follows:

"You are not to discuss your evidence with anyone until the hearing has finished."

21. Each witness is then to be dealt with in the same manner as above.

Plea in mitigation

22. Statement to the accused:

"Do you, or your AAO on your behalf, wish to make a plea in mitigation?"

No If No go to serial 24 (if subject to suspended sentence) or serial 25 (if not subject to suspended sentence)

Yes If YES the plea in mitigation may be made orally or in writing. The accused may submit documents to support his plea in mitigation which may include his Service appraisal reports or a performance assessment.

On completion the CO may ask questions of the accused. If he is considering a punishment with financial consequences the CO should take this opportunity (if the information is not already provided within the mitigation) to enquire into the accused's financial circumstances.

23. If the CO considers that a defence has been raised to the charge during the plea in mitigation he is advised to adjourn to take legal advice.

In these circumstances state to the accused:

"This case is adjourned."

Submission on activation of suspended sentence of detention

24. (ONLY IF APPLICABLE) Where the accused is subject to a suspended sentence of detention he is to be given the opportunity to make a submission in relation to activating that sentence which may be made orally or in writing:

“Do you, or your AAO on your behalf, wish to make a submission in relation to my decision as to whether I should activate the suspended sentence of detention you are currently subject to?”

Yes No If Yes continue to hear the submission.

Decision

25. Once the CO has heard the evidence of the accused and has determined that there is no defence to the charge he is to decide whether he is satisfied so that he is sure that each individual charge is found proved (ie the charge has been found proved beyond reasonable doubt).

26. CASE NOT PROVED

In relation to each individual charge, if the CO is not satisfied so that he is **sure** that the elements / ingredients of the charge(s) have been found proved, then he must dismiss the charge:
Statement to accused:

“I find the charge not proved and therefore dismiss it.”

The hearing is then concluded.

27. CASE PROVED

In relation to each individual charge, if the CO is satisfied so that he is **sure** that the elements / ingredients of the charge(s) have been found proved, he will say:

Statement to Accused:

“I find the charge proved”

Sentencing

28. Now that the charge has been found proved the CO is to sentence the offender and, if applicable, consider activating a suspended sentence of detention.

Part 8 [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) and [Chapter 13](#) (Summary hearing sentencing and punishment) should be consulted before the sentence is announced and the accused’s disciplinary record is to be read.

The CO may wish to adjourn to consider the sentence he is to award and (if applicable) whether he should activate the suspended sentence of detention and to complete Page 1 of this Record.

29. Mandatory statement

**“Having found the charge against you proved, I award you.....
(State sentence) for the following reasons”**

Go to page 2 of this record and read out the reasons for sentence before returning to this paragraph.

“If you fail to comply with any part of this sentence further disciplinary or administrative action may be taken against you”

If activation of a sentence of detention has been considered the CO should then announce:

“Furthermore, I have considered whether to activate your suspended sentence of detention and have decided that it will:

- Not be activated
- Be activated in full
- Be activated in part by the substitution of a term of.....days detention

Where two periods of detention have been awarded the CO is to announce whether they are to run concurrently (at the same time) or consecutively (one following the other). In these circumstances he is to state:

“The activated sentence of detention will run consecutively/concurrently to the sentence of detention imposed for the offence I have just heard”

- In all cases the CO is to state:
- activation
 - non activation

“The reasons for my decision regarding the activation/non activation* of the suspended sentence are as follows.....(insert date)”

If you go to page 2 of 'Record of Summary Hearing' (Annex C) note the reasons already stated.

Notification of rights

30. Where any punishment is awarded state to the accused:

“You have the right to appeal to the summary appeal court against my finding or sentence within 14 days (including today). You have the right to seek independent legal advice on whether you should appeal and have the right to be legally represented at the summary appeal court. You may apply for legal aid.”

If detention is not awarded go to serial 32.

31. Where detention is awarded go on to state to the accused:

“Having awarded you a sentence of detention as (part of*) your punishment, I must now inform you that the sentence will not commence before the end of 14 days, beginning today, during which time you may appeal to the summary appeal court against my finding or sentence. However you may choose to start your sentence of detention immediately. If you do choose to start your detention immediately, you have an absolute right to change your mind within the 14 day period.

Should for any reason you decide that the 14 day period will be inadequate for you to make your decision you may apply for an extension of time. If that is the case your AAO / I will let you know how to make such an application. You may now have a brief break to consult with your AAO if you require it.**

** If the accused is unrepresented

Would you like to consult with your AAO before I ask you whether you choose to commence your sentence of detention immediately?”

- Yes If Yes then adjourn for a brief period to allow the accused to consult with his AAO.
- No

“Do you choose to commence your sentence of detention immediately?”

- Yes If ‘Yes’ go to serial 32.
- No If ‘No’ state to the accused:

“If you do not submit an appeal during the next 14 days, you are to report to on (insert date)to start your sentence of detention.”

A sentence of detention will normally start on the 15th day after the punishment is awarded unless the accused has elected to commence his sentence immediately.

32. Statement to the Accused:

“The hearing is now concluded.”

Effect the exit of the AAO and the accused in accordance with single-Service protocols



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX D TO
VOL1 CH 9
JSP 830 MSL
revised 08/09

SUMMARY HEARING - CHECKSHEET OF MANDATORY INFORMATION PROVIDED TO THE ACCUSED/RECEIPT FOR SUMMARY HEARING DOCUMENTATION

T-SL-SH03

Details of accused

Rank/Rate

Service number

First name

Family name

Part 1 (to be completed at least 24 hours before the date and time fixed for the hearing)

1. I have received a copy of the following:

The charge sheet.

The case summary.

The written evidence relevant to the charge.

The unused evidence gathered as part of the investigation of the charge.

Details of any exhibits that form part of the evidence and information as to when and where they may be inspected by the accused or his Assisting Officer.

Details of any unused exhibits gathered as part of the investigation of the charge and information as to when and where they may be inspected by the accused or his Assisting Officer.

My disciplinary record.

A copy of the written record of the summary hearing, or a copy of any record of the proceedings before the SAC, at which the suspended sentence of detention was awarded (if applicable).

Details known to the CO of all proved offences committed by the offender during the operational period of the suspended sentence of detention. This includes the CM trial result notification see Chapter 29 (Court Martial proceedings) Annex Q the report of the officer who attended the civil court on behalf of the unit that gives details of the offence committed (if applicable).

Copies of the written records of all summary hearings, the written records of any activation hearings, and any records of proceedings before the SAC, at which reasons were given for any decision not to make an activation order in relation to this suspended sentence of detention (if applicable).

Signature of Accused

Date and time of receipt of case papers

PROTECT - PERSONAL DATA (WHEN COMPLETE)

2. I have received the 'Your rights if you are accused of an offence under the Service Justice System' booklet.

Rights of an Accused received Yes No

Signature of Accused

Date and time received

3. I have been informed that:

The CO has been granted extended powers of punishment in this case and I have been given a copy of the notification from HA

The CO has been granted permission by HA to hear this charge summarily and I have been given a copy of the notification from HA

The CO has been granted extended powers of punishment for the purpose of activation of a suspended sentence of detention in this case and I have been given a copy of the notification from HA

Signature of Accused

Date and time

4. I have been asked whether I require any witnesses to attend in my defence or any character witnesses to attend.

Witnesses to attend
 Witnesses not to attend

Signature of Accused

Date and time

5. I have been informed of my right to an 'Accused Assisting Officer'.

Signature of Accused

Date and time

6. I have been informed that I may make a submission to the CO in regard to:

- a. The appropriateness of making an activation order.
- b. The appropriate terms of such an order if it is to be made.

Signature of Accused

Date and time

7. I have been informed that I may appeal to the Summary Appeal Court.

Signature of Accused

Date and time

Part 2 (to be completed before the summary hearing commences)

1. I have nominated an AAO
 I have not nominated an AAO

Signature of Accused

Date and time

2. I do require the CO's assistance in finding an AAO
 I do not require the CO's assistance in finding an AAO

Signature of Accused

Date and time

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EXAMPLE OF A CASE SUMMARY

The Case summary (i.e. summary of the evidence relevant to a charge) below relates to the following charges: one offence of contravention of Ship's General Orders by knowingly consuming intoxicating liquor in licensed premises whilst under the legal age and two offences of common assault resulting from the same incident.

Case summary

1. On 31 May 07, A123456 AB S J Smith proceeded on leave from HMS ROYAL in Base Port. He proceeded to HMS LORD where he wished to meet some of his Service friends. He was expecting to remain there with them overnight in Service accommodation. Smith was 17 years and 7 months old, only turning 18 years old on 23 August 2007.
2. At approximately 2100 that day, Smith went to the HMS LORD all ranks Tavern Bar where he bought and consumed alcohol. Various witnesses saw him purchase and consume alcohol reporting that Smith appeared to be under the effects of alcohol. These included slow reactions, slurred speech and inability to walk well unaided and his overall manner caused the bar staff to refuse his request for further drinks later in the evening. In interview, Smith admitted knowing that he was under the legal age to both buy and consume alcohol and further that he was committing an offence by doing so. (These facts form the basis of the first charge.)
3. Between 2230-2300, the Duty Bar Rating, AB(CIS) Jones, who observed this recommended that Smith sit back with his friends or go back to his mess. Smith immediately left and headed for HMS Lord's Main Gate. At approximately 2300, he was stopped by the Gate Staff at the behest of the Officer of the Day (OOD), Lieutenant Large Royal Navy as Smith looked "worse for wear". At this point, Smith's manner changed and his subsequent actions led to the second and third offences of the evening.
4. Private Meredith of the Military Provost Guard Service (MPGS) was on duty in the Guard Room that evening. On the OOD's instruction, Smith was brought inside and then taken into the rest room. Private Meredith stated that whilst there, Smith became agitated and repeatedly said that he was in trouble and that he was going to throw himself off a bridge. Smith then rushed at him, head butted him in the chest which caused them both to fall into the hallway. Private Meredith grabbed hold of Smith's right arm and shoulder, and was pulled down the corridor until Smith was eventually restrained. During interview, Smith stated that he had been instructed by one of the guard staff to wait in the TV Room and while there he had panicked and rushed out of the room. He admitted that bumping into Private Meredith and that act was reckless, but claimed that it had been an accident. He did not remember head butting anyone. (These facts form the basis of the second charge.)
5. Civilian Security Officer (CSO) G Wilson of the Ministry of Defence Police and Guarding Agency was also on duty in the front office of the Guard Room that same night when he heard shouting coming from behind him. He turned around and witnessed Smith running down the corridor towards his position with his arms flailing and Private Meredith in pursuit. CSO Wilson barred Smith's way into the office and as he did so, Smith punched him in the left hand side of his rib cage. CSO Wilson grabbed Smith's hand to restrain him during which Smith continued shouting and struggling, refusing to obey any commands given to him. CSO Wilson and Private Meredith forced Smith to the ground where he was eventually restrained using cable ties and the assistance of

PROTECT – PERSONAL DATA (WHEN COMPLETED)

Corporal Henson. In interview, Smith accepted CSO Wilson's version of events. (These facts form the basis of the third charge.)

1-9-E-2

PROTECT – PERSONAL DATA (WHEN COMPLETED)

APPOINTMENT OF AN ACCUSED'S ASSISTING OFFICER (AAO)

1. At a summary hearing the accused is entitled to the appointment of an AAO to advise and represent him. The AAO is an important role and can provide valuable assistance to the accused. He is to perform his duties entirely independently of the CO. The Unit is to do everything it can reasonably do to facilitate the AAO's functions.

Appointment of the AAO

2. Subject to the exclusions outlined in paragraph 4 below, an accused may ask for any suitable person to assist him (see paragraph 3). However, that person is under no obligation to help if he does not wish to do so. Where the accused has difficulty in finding a suitable person to represent him he may request the assistance of the CO. In this event, the CO must provide a pool of at least 2 potential nominees for this purpose and allow the accused a free choice from the pool. The accused is under no obligation to nominate an individual from the pool. It will be the duty of the CO to arrange for the release of the requested individual from his normal duties unless there are operational reasons not to do so.

3. A person may not be an AAO unless he:

- a. Is a Service person and remains as such whilst carrying out this function;
- b. Is of at least the rank or rate of petty officer or military, marine or air-force sergeant; and
- c. Consents to be nominated.

4. It would be inappropriate for personnel in the following categories to consent to be nominated as AAOs:

- a. Subordinate commanders who have previously heard the evidence against the accused.
- b. Members of the Unit's administrative staff who have been personally involved in advising the CO or subordinate commander about the case.
- c. A person who has participated in the investigation and is likely to be called as a witness for the CO or for the accused.
- d. Lawyers. The only circumstances in which a lawyer would appear at a summary hearing is a RN lawyer in his capacity of a Divisional Officer.

Note: Professionally qualified officers such as doctors and chaplains are not automatically excluded from acting as AAOs. It is for them to decide whether to do so would compromise their professional duties. Service Police may act as an AAO with the same proviso.

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BRIEF FOR AN ACCUSED'S ASSISTING OFFICER (AAO)

1. You have been asked to act as an AAO at a summary hearing; for more detail on this role see the main body of this chapter. In accepting the responsibility of becoming the AAO, your task is to advise and assist the accused in preparing for the hearing and presenting his proper defence and/or mitigating circumstances as clearly as possible at the hearing. Where the accused is already subject to a suspended sentence of detention, awarded at a previous summary hearing or by the Summary Appeal Court (SAC) you will also be required to assist him in preparing for the possible activation of this sentence. You may seek advice from any source. However, you will not be given access to any privileged correspondence in relation to the case between the Unit and HA, or the Director of Service Prosecutions or Services legal staff. The conversations you have with the accused and/or his legal adviser are confidential and you should normally not disclose any of the information to the chain of command or anyone else without the accused's permission. If in doubt seek legal advice.
2. Your individual tasks and responsibilities are as follows:
 - a. **Understand the charge.** The accused will be given a set of case papers at least 24 hours before the summary hearing. You should identify the charge(s) that is being brought against the accused and read the relevant section of the Manual of Service Law [Chapters 7](#) (Non-criminal (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences) so that you understand the charge(s), and what is required to prove it. If written orders are referred to on the charge sheet ensure that you read and understand them.
 - b. **Understand the procedures.** You will need to be sufficiently aware of the summary hearing procedures in order that you can concentrate on what is being said rather than the mechanics of the hearing. You will need to read the relevant sections of this chapter.
 - c. **Understand that the CO will determine whether to activate a suspended sentences of detention (if applicable).** If the accused is already subject to a suspended sentence of detention at the summary hearing ensure he understands what the CO will consider when determining whether to activate the sentence.
 - d. **Before the hearing.**
 - (1) **Procedure.** Ensure the accused understands the summary hearing procedure and if necessary, take him through the relevant sections of the booklet 'Your rights if you are accused of an offence under the Service justice system'. Advise the accused that he may seek legal advice before the hearing. Legal advice is ordinarily at the accused's expense but there are many potential sources of free legal advice from firms of solicitors who offer a free initial consultation. Legal advice from Service lawyers is also available to RN personnel and to all personnel serving overseas. The AAO is to advise the accused whether he is able to get free legal advice contacting a staff lawyer if he himself requires guidance in this respect. A legal adviser is not allowed to be present during the hearing itself.

- (2) **Charge.** Ensure that the accused understands the charge and the evidence that must be adduced to prove the charge. Note: the accused will be asked by the CO whether he understands the charge at the start of the hearing.
- (3) **Disputed facts.** If the accused disputes any or all of the facts then you should consider which witnesses can provide relevant evidence as to those facts and if you wish those witnesses to be present you should advise the CO of this. During the hearing you should insure that you or the accused question any witnesses where it would be in the accused's interests to do so.
- (4) **Indication of admission.** Where the accused gives an indication that he intends to admit the charge prior to the beginning of the summary hearing you should inform the unit staff responsible for arranging the hearing in order that witnesses are not needlessly inconvenienced. Where an accused has admitted certain matters in relation to an offence, the CO will have to satisfy himself that any admission not made in an interview under caution was not made under pressure (that the accused was under no pressure to make an admission). Where an admission or a confession is made, the CO will have to exercise care in using that evidence. The accused's indication of plea is not binding in any way.
- (5) **Election for CM trial.** You should discuss the consequences of the accused opting to elect CM trial rather than being dealt with by a summary hearing. See Chapter 9 Part 7 above. If the accused does elect CM trial you may need to assist him with his application for legal aid if appropriate. See JSP 838 The Armed Forces Legal Aid Scheme.
- (6) **Extended powers of punishment.** If the accused is notified in advance of the hearing that the CO has been granted Extended Powers of Punishment for the purposes of the summary hearing and/or the possible activation of a suspended sentence of detention (if applicable), ensure that the accused understands what this means. See [Chapter 13](#) (Summary hearing sentencing and punishments)
- (7) **Charges that require a CO to obtain permission to hear.** There are a number of charges which due to their level of seriousness require the CO to request the permission of HA to hear them summarily¹⁹⁵. If this is the case the accused will be informed in advance of the hearing. When the CO has been granted permission to hear such an offence, the accused will be served notice in the papers that are disclosed to him. You are to ensure the accused understands the significance of the CO having such permission; clearly a more serious offence may result in a more serious sentence if the charge is proved. See [Chapter 13](#) (Summary hearing sentencing and punishments). Thus, legal advice may be more appropriate in the circumstances
- (8) **Activation of suspended sentence of detention.** If the accused is already subject to a suspended sentence of detention he should have been given the relevant set of papers in relation to activation at least 24 hours before the hearing. You should be aware of the original offence at which a suspended sentence of detention was awarded by the CO or SAC and check

¹⁹⁵ Section 54(2) of the Act.

that this is announced correctly in the hearing. If it is not then you may request an adjournment to verify the details. You should familiarise yourself with the matters that the CO will take into account when deciding whether to activate the suspended sentence and if so, whether in part or in full. You are to be aware that, where he decides it appropriate, the CO will activate the suspended sentence by way of a separate order after he has sentenced the accused for the offence he is about to hear. You are to ensure that the accused has had sufficient time to prepare for the determination of activation.

(9) **Reduction in sentence for early admission of charge.** In every case where an offender admits the charge, the CO must take into account the stage in the proceedings at which he indicated his intention to admit the offence at summary hearing. A reduction of one third would be appropriate when the indication was given at the 'first reasonable opportunity'. At the other end of the scale, a reduction of only 10% might be appropriate for a guilty plea entered at the last moment. The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea not only to witnesses and victims, but also in enabling the Commanding Officer and other authorities to deal more quickly with other outstanding cases. Although 'the first reasonable opportunity' may be the summary hearing itself, in many cases the Commanding Officer will consider that it would have been reasonable to have expected an indication of willingness earlier, for example during the first police interview. An admission at the last moment before the trial starts, when the witnesses are waiting outside ready to give their evidence, would attract the smaller discount (10%). An admission after the trial starts would attract very little discount. As AAO you should, however, stress to the accused that he should not admit the charge if he did not commit the offence.

(10) **CO's witnesses.** Discuss the events that led to the charge being brought and read the CO's witness statements. If evidence is to be given verbally, assess what the CO's witnesses are likely to say in support of the charge. You will be given the opportunity to question the CO's witnesses in the event that the CO decides to call a witness or you request their attendance at the summary hearing accordingly you will need to prepare questions that might support the accused's defence and/or clarify any uncertainty. To assist with the smooth running of the hearing it will be of great assistance if you or the accused inform the administrative staff whether the accused requires any of the CO's witnesses to attend in person in order that they may be questioned. You should remember, however, that even if the accused does not indicate that he wants the attendance of a CO's witness, he has the legal right to change his mind at the hearing and ask the CO to arrange for the witness to attend. Clearly, prior information to this effect may save a lot of time.

(11) **Accused's evidence.** Help the accused to decide whether to give evidence at the appropriate time and whether that evidence should be verbal or in the form of a written statement.

(12) **Evidence offered by the accused.** You should ask the accused if there is any evidence or witnesses that will assist his case. Where the time fixed for the hearing is 48 hours or more after the CO has carried out the preliminary procedures outlined at Part 3 to this chapter, you are to notify the CO at least 24 hours in advance of the hearing. You should firstly assess the

witness's evidence, and select those witnesses who best support the accused's case. It is not necessary to repeatedly prove the same point once it has been corroborated. Witnesses for the accused may give written evidence but the CO has the right to call them if he thinks it necessary. Where a witness for the accused submits a written statement you should check that it carries a date name and signature.

(13) **Opportunity to address CO.** Where the accused denies the charge, once all the evidence has been heard, the CO will give the accused the opportunity to address the CO on any matter pertinent to the hearing; e.g. a submission as to why the hearing officer should not find the charge proved. You may assist and address the CO on the accused's behalf.

(14) **Statements as to character and in mitigation.** The accused will be afforded the opportunity to call character witnesses or introduce a written statement as to character and make a plea in mitigation (see paragraphs 4 and 5 below). A character witness may give evidence orally or in writing. The plea in mitigation may be made by the accused or by you on his behalf and you may prepare a written statement in advance, which should include a financial statement for the accused in case the award has a financial consequence. You will also need to consider whether the accused wishes his appraisal reports or an assessment of his performance to be tendered as part of his mitigation. [Chapter 13](#) (Summary hearing sentencing and punishments) and paragraph 76b to this chapter.

(15) **Submission by the accused**¹⁹⁶. The CO will give the accused the opportunity to make a submission, either orally or in writing, about:

- (a) The appropriateness of making an activation order.
- (b) The terms of such an order, i.e. whether it should be activated in full or in part.

If the accused so wishes you may assist by reading a written submission to the CO. If so you should prepare for this submission.

e. **At the hearing.** The accused, or you on his behalf, will be given the opportunity by the CO to ask questions of witnesses. Questions should be directed to the witness but the CO may control the questioning to ensure that one question is answered before the next is asked. The CO may only re-phrase your questions for the sake of clarity and fairness. If at any time during the hearing, you consider that the accused needs your advice; you are to request an adjournment.

f. **Sentencing (including activation where applicable).** If the charge is found proved the CO will go on to sentence the offender and he will give reasons for that sentence. Once the CO has given his reasons he will, if applicable, go on to inform the offender of his decision on whether he is making an order for full or partial activation of the suspended sentence of detention and he will give his reasons for his decision. Finally, the CO will go on to inform the offender whether a sentence of detention awarded for the latest offence and any suspended sentence of detention

¹⁹⁶ See the 'Your rights if you are accused of an offence under the Service justice system' booklet at Annex G to [Chapter 6](#) (Investigation, charging and mode of trial).

which has now been activated will run consecutively (one after the other) or concurrently (at the same time).

g. At the end of the hearing.

(1) If the charge is found to be proved, the offender has been awarded detention ensure that he understands that the sentence will not commence until the end of the 14 day appeal period unless he chooses otherwise. The offender will be given the opportunity to request a brief adjournment to consider with you his option to start his sentence of detention immediately. If the offender has elected to commence his sentence of detention immediately, ensure that he is aware that he can subsequently change his mind, within the 14-day appeal period .

(2) If the charge is not proved then you are to ensure that the accused understands that he cannot be charged for the same offence again. You must also inform him that he may be charged or have to face administrative action for any other outstanding matters which came to light during the investigation.

h. After the hearing. After the hearing, you are to ensure that the accused understands the outcome and, if the charge is proved, ensure that he is provided with a copy of the RSH at the earliest opportunity after the conclusion of the hearing. Further, discuss his right to appeal and take him through the relevant sections of the 'Your rights if you are accused of an offence under the Service justice system' booklet. See paragraph 2i below on legal aid that may be available for appeal. Ensure he is aware of his right to ask for the appeal period to be extended, where he feels he needs more time to decide whether to appeal or to be able to take legal advice. When the offender lodges an appeal you may consider continuing in your role of Assisting Officer for the subsequent appeal.

i. Legal aid for appeal. If the charge is proved, the CO will advise the offender that he may be entitled to Legal Aid should he decide to appeal to the SAC. You should be able to provide any further advice that the offender may need and be prepared to assist with the completion of the application for legal aid. (JSP 838 The Armed Forces Legal Aid Scheme).

j. Further representation. Where a Service supervision and punishment order (SSPO) is awarded as a punishment the AAO may be asked to represent the accused at any review of the punishment. If you are asked to represent the offender at such a review you should consult [Chapter 13](#) (Summary hearing - sentencing and punishments).

Mitigation

3. In simple terms, a defence contests the allegation contained in the charge. Mitigation, on the other hand, accepts that the accused did commit the offence and attempts to provide reasons that tend to lessen the severity of the offence. The difference between the two must be carefully assessed when considering whether to admit or deny the charge, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

4. Confusion most commonly occurs in cases of unauthorised absence. It would be a defence on such a charge that the accused had been granted leave of absence for the day in question. On the other hand, the fact that the accused's did not travel back to his unit when he was supposed to because his next of kin was seriously ill, is not legally a defence, but

would be a very relevant factor in mitigation. The following list contains points which tend to mitigate sentence and may be relevant when preparing a statement in mitigation:

- a. The offender's age, rank/rate and Service experience, particularly where there has been long Service and good conduct and / or a record of devotion to duty and to the Service.
- b. Evidence of his professional performance;
- c. Detail of his character;
- d. Background information as to why offence was committed e.g. provocation, financial problems, behaviour foolish rather than vicious, lead astray by other individuals, weak character, a momentary lapse after arduous or trying Service;
- e. How early in the proceedings the accused admitted wrongdoing and overall co-operation from the outset;
- f. Any admission of the offence and/or remorse shown/articulated;
- g. Domestic circumstances relevant to the offence or offender e.g. married or with other dependants, family problems, exceptionally long absence from home or inadequate leave. etc;
- h. Financial circumstances, which may include information on dependents. See paragraphs 77 above. Inquiring into the offender's financial circumstances is a mandatory legal requirement if the CO is considering imposing detention, a fine or a Service compensation order;
- i. Voluntary reparations made.

Refer to [Chapter 13](#) (Summary hearing - sentencing and punishments) for further guidance on this subject.

OATHS AND AFFIRMATIONS

No witness may give evidence orally at a summary hearing or an activation hearing unless an oath has first been administered to him or he has made a solemn affirmation.

Oaths

An oath is to be administered in the following form and manner without question, unless the person about to take it voluntarily objects, or is physically incapable of taking it in this way:

The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the person administering the oath the words "I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth".

The form and manner set out above is used in the civilian courts in England, Wales and Northern Ireland. If any person to whom an oath is administered wishes to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted to do so, and the oath shall be administered to him in that form and manner without further question. The form of Scottish oath for a witness is "I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth"¹⁹⁷

In the case of a person who is neither a Christian nor a Jew, the oath should be administered in such form and with such ceremonies as he has declared to be binding on him. If an oath has been administered to a person in a form and manner other than those set out above, he is bound by it if it has been administered in such form and with such ceremonies as he has declared to be binding on him.

Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, does not for any purpose affect the validity of the oath.

Solemn Affirmations

If a person objects to swearing an oath he shall be permitted to make a solemn affirmation instead of taking an oath.

In a case where it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to a person's religious belief, he shall be permitted to make a solemn affirmation instead of taking an oath. Moreover, in such a case the person may be required to make a solemn affirmation.

A solemn affirmation has the same force and effect in law as an oath.

Every solemn affirmation shall be as follows:

"I, do solemnly, sincerely and truly declare and affirm the evidence I shall give shall be the truth, the whole truth, and nothing but the truth".

¹⁹⁷ For Scottish oaths in criminal proceedings see the Act of Adjournment (Criminal Proceeding Rules) 1996/513.

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MINISTRY OF DEFENCE

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ANNEX I TO
VOL1 CH 9
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revised 08/09

RECORD OF ACTIVATION HEARING

T-SL-SH02

Offender

Rank/Rate

Service number

First name

Family name

Unit

Is subject to a Summary Sentence of ...days detention

Suspended for...months

Awarded on...date

For the following offence:

Summary/CM/SAC/civil court convictions for offences committed in the operational period.

Activation Hearing held at

Location

Date

Time

Outcome:

Decision made by CO

This suspended sentence is:

- Not Activated
- Activated in full
- Activated in part (state)

Activated in part by the substitution of a term of

Reasons for the Decision:

Other matters that the CO wishes to record:

Heard by:

Rank

Name/initials

CO

Signed

ACTIVATION HEARING

Introduction

1. Introduce the Activation Hearing:

“As your commanding officer, I will be conducting this hearing, which has become necessary following your conviction for on date..... for which you were sentenced to..... This offence was committed during the operational period of the suspended sentence of (number of days) detention that you were awarded by.....on date.....

Are these details correct?”

Yes No

If the details are disputed you may consider it appropriate to adjourn (e.g. to obtain the memorandum of conviction where the offender disputes the details of the court conviction).

Preliminary questions

2. Identify offender

"Are you.....?" (Service Number, Rank/Rate, Full Name)

Yes No

If **No** establish correct details. If necessary, adjourn the hearing.

3. Statement to the offender where an OAO is present

"..... (Rank/Rate & Name of Offender's Assisting Officer) Is acting as your Assisting Officer to help you during this hearing. If at any time you want to talk to him about any matter simply indicate to me that you wish to do so. Do you understand?"

Yes No

Statement to OAO:

"..... (Rank/Rate & Name of OAO)
Do you understand your role?"

Yes No

Statement to the offender where an OAO is not present:

"You do not have an Assisting Officer, do you wish to have an Assisting Officer?"

Yes No

If the offender requires an AAO delay the hearing to make the necessary arrangements.

4. Question to the Offender:

"Have you received a copy of the case papers not less than 24 hours ago?"

Yes
 No

If 'No' check whether the offender has signed Form T-SL-SH03. If necessary, adjourn the hearing to allow this requirement to be satisfied.

"Have you had sufficient time to prepare for this hearing?"

Yes
 No

If 'No' consider whether adequate time has been given to the offender to prepare. If not you may wish to consider an adjournment.

5. State to the offender:

"Before I go on to consider whether to activate the suspended sentence of detention you or your OAO may offer evidence as to your character and make a submission; you may call witnesses for these purposes. Do you wish me to consider evidence as to your character?"

Yes No

If 'No' go to serial 8

Evidence of the Offender's Character

6. If the character evidence is given in writing it is to be read to the CO by the offender or by the OAO; a copy of any written statement should be given to the CO.

The offender may call the witness who has provided a written statement or any other witness to give evidence orally or in writing.

Question to the offender:

"Do you wish to call any witnesses to give evidence as to your character?"

Yes No

If No go to serial 8

Once any written statement from that witness has been read the accused may question the witness.

Statement to the offender:

"Do you wish to ask questions of this witness?"

Yes No

If Yes the witness is to be called by the CO:

"Are you.....?" (Service Number, Rank/Rate & Name of witness)

Statement to witness:

"Your evidence is to be given on Oath, under Solemn Affirmation or Promise. What method do you choose?"

Method

(Under 18 year olds may either make a promise or affirm)

Administer oath, affirmation or promise to accused.
The offender may now question the witness.

7. Once the offender has been given the opportunity to question the witness, the CO may then question the witness.

Submission on Activation

8. Statement to the offender:

"Do you, or your OAO on your behalf, wish to make a submission in relation to my decision as to whether I should activate the suspended sentence of detention?"

Yes No

If Yes continue to hear the submission. The offender may submit documents to support his submission which may include his Service appraisal reports or a performance assessment.

Decision

9. Part 8 of [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) and [Chapter 14](#) (The summary hearing sentencing guide) should be consulted before decision as to activation is made and the accused's disciplinary record is to be read.

The CO may wish to adjourn to consider whether he should activate the suspended sentence of detention and to complete Page 1 of this Record.

10. Statement to the offender:

**"I have decided:
To activate the sentence of detention in full/in part (as follows)
.....
or Not to activate the sentence of detention"**

"The reasons for my decision are as follows....."

If the sentence of detention has been activated go to serial 11.

If it has not been activated state to the offender:

"The hearing is now concluded"

Notification of rights

11. State to the offender:

"You have the right to appeal to the summary appeal court within 14 days (including today) against my decision to activate your suspended sentence of detention. You have the right to seek independent legal advice on whether you should appeal and have the right to be legally represented at the summary appeal court. You may apply for legal aid."

"I must now inform you that the sentence will not commence before the end of 14 days, beginning today, during which time you may appeal to the Summary Appeal Court against my decision to activate your suspended sentence of detention. However you may choose to start your sentence of detention immediately. If you do choose to start your detention immediately, you have an absolute right to change your mind within the 14 day period. Should you for any reason be unable to make a decision as to whether to appeal during that initial period you may apply for extra time. If that is the case your OAO / I will let you know how to make such an application. You may now have a brief break to consult with your OAO if you require it."**

** If the offender is unrepresented

"Would you like to consult with your OAO before I ask you whether you choose to commence your sentence of detention immediately?"

Yes No

If YES then adjourn for a brief period to allow the offender to consult with his OAO.

"Do you choose to commence your sentence of detention immediately?"

Yes

If 'Yes' go to paragraph 12

No

If 'NO' state to the offender the following:

"If you do not submit an appeal during the next 14 days, you are to report to on (insert date)to start your sentence of detention."

A sentence of detention will normally start on the 15th day after the suspended sentence is activated unless the offender has elected to commence his sentence immediately.

12. Statement to the offender:

"The hearing is now concluded."

(Effect the exit of the OAO and the offender in accordance with single-Service protocols)



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ANNEX J TO
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**ELECTION TO COMMENCE A SENTENCE OF
DETENTION IMMEDIATELY ON DATE OF AWARD
OF PUNISHMENT**

T-SL-SH05

1. Having been awarded a sentence of detention, my CO has informed me:
 - a. That the sentence will not start for 14 days unless I choose to start my sentence of detention immediately.
 - b. If I do not choose to start my sentence of detention immediately it will commence on the expiry of the 14-day appeal period.
 - c. If I choose to start my sentence of detention immediately, I may change my mind within the 14-day appeal period and be released from custody until the appeal period expires or I appeal.
 - d. If I appeal within the 14-day appeal period, the sentence of detention may only start when the appeal has been decided or if I abandon my appeal.
 - e. I may be allowed to appeal after the expiry of the 14-day appeal period.
 - f. I have been advised to discuss all my options in relation to appeal with my assisting officer before making my decision. I also understand that I may seek legal advice on whether to appeal.
2. I choose to commence my sentence of detention immediately.

Signature

Service number

Rank/Rate

First name

Family name

Unit

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ANNEX K TO
VOL1 CH 9
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**COMMITTAL ORDER FOR USE AT COURT MARTIAL,
SUMMARY HEARING, ACTIVATION HEARING, SERVICE
CIVILIAN COURT OR SUMMARY APPEAL COURT**

T-SL-CUS05

Under section 132(1), 164(1),191(1) and 193(2) of the Armed Forces Act 2006

To: Commandant Military Corrective Training Centre Governor Of Prison

Offender

Service number

Rank/Rate

Family name

First name

Army only Regt/Corp

Type of trial/hearing

Court Martial Summary Hearing Activation Hearing Service Civilian Court Summary Appeal Court*

*Under section 147(3) of the Act the SAC may quash a sentence and award a new lesser sentence of detention.

Place trial/hearing held

Date of trial/hearing

Offence(s) of which convicted at trial/hearing

Period of sentence (in words)

Imprisonment

Detention

Date of commencement (in words)

Election to commence sentence of detention (Summary/Activation Hearing Only)

Declaration 1 by (the offender) - insert name

I hereby elect to serve my sentence of detention immediately. I am aware of my Right to Appeal within the 14 day initial period. (s.141(2)(a) AFA 06)

Signed

Date

Declaration 2 by (the offender) - insert name

(May be made only within 14 days of punishment being awarded)

I wish to withdraw my election to serve my sentence of detention immediately.

Signed

Date

The offender has:

a. elected to serve his sentence immediately in accordance with s.141(2) AFA 06 and

therefore has the right to appeal until expiry of the initial period on

b. has appealed this award to the Summary Appeal Court and his appeal is not allowed.

c. not brought an appeal within the 14 day period.

Dismissal from Her Majesty's Service is is not included in this sentence.

At the trial held as above the person named was found guilty of the offence shown and sentenced as above. You are hereby required and directed to receive and keep in your custody the said person to be dealt with in accordance with the said sentence and to deliver him in due course of law [when he is to be set at his liberty*]

*These words should be added when dismissal from HM Service forms part of the sentence.

Signed

Date (not to be dated before the commencement of the sentence)

Rank

Name

Appointment

CO to sign

Medical certificate

Certified that the person to whom the above committal order relates has been medically examined and found to be physically fit to undergo the sentence awarded.

Signed

Date

A medical officer/doctor must sign the medical certificate no more than 24 hours prior to committal. In no circumstances are certificates to be signed by unit medical staff. Should a medical officer/ doctor be unable to sign this certificate because of some disability of the accused, MCTC should be contacted immediately by telephone or signal, informing of the nature of disability and what training or duties the accused is able to perform.

Rank

Appointment

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ANNEX L TO
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FINE – REQUEST TO VARY PAYMENT

T-SL-SH06

Part 1 (to include details specified in the RSH)

Rank/Rate

Service number

Family name

First name

Amount of fine

Date of fine order

Order made to pay:

- In full immediately
 By instalments
 By deductions from pay either in full or by instalments

Detail of instalments/deductions (amount and period fine is to be recovered over):

Part 2

Date of Review of Fine Order

Result of application to vary payment of Fine

Vary Order

Not Vary Order

Order made to pay

In full immediately

By instalments

By deductions from pay either in full or by instalments

Detail of instalments/deductions (amount and period fine is to be recovered over)

Signed

Date

Rank

Name

Appointment



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ANNEX M TO
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REQUEST TO VARY/REVIEW SERVICE COMPENSATION ORDER (SCO)

T-SL-SH07

Part 1 (to include details specified in the RSH)

Rank/Rate

Service number

Family name

First name and initials

Amount of SCO

Date of SCO

Order made to pay

In full immediately

By instalments

By deductions from pay either in full or by instalments

Detail of instalments/deductions (amount and period fine is to be recovered over)

1-9-M-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Part 2 (Section 251 of the Act)

Result of application to vary payment of SCO:

Vary Order Not Vary Order

Order made to pay

In full immediately
 By instalments
 By deductions from pay either in full or by instalments

Detail of instalments/deductions (amount and period fine is to be recovered over):

Signed

Date

Rank

Name

Appointment

Part 3 (Section 177 of the Act)

Result of review of SCO

No change to order
 Discharge order
 Reduce the amount which remains to be paid to*

* amount

Signed

Date

Rank

Name

Appointment



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ANNEX N TO
VOL1 CH 9
JSP 830 MSL
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ACTIVATION HEARING - CHECKSHEET OF MANDATORY INFORMATION PROVIDED TO THE OFFENDER

T-SL-SH04

Details of offender

Rank/Rate

Service number

Family name

First name

Part 1 (to be completed at least 24 hours before the date and time fixed for the hearing)

1. I have received a copy of the following:
 - a. A copy of the written record of the summary hearing, or a copy of any record of the proceedings before the SAC, at which the suspended sentence of detention was awarded;
 - b. Details known to the CO of all proved offences committed by me during the operational period of the suspended sentence of detention;
 - c. Copies of the written records of all summary hearings, the written records of any activation hearings, and any records of proceedings before the SAC, at which reasons were given for any decision not to make an activation order in relation to this suspended sentence of detention.
 - d. A copy of my disciplinary record;
 - e. A copy of any notification from higher authority that the CO has been granted extended powers.

Date of receipt of case papers

Signature of offender

2. I have received the 'Your rights if you are accused of an offence under the Service Justice System' booklet.

Signature of offender

Date and time received

3. I have been asked whether I require a character witness to attend.

Witness to attend Witness not to attend

Signature of offender

Date and time

PROTECT - PERSONAL DATA (WHEN COMPLETE)

4. I have been informed of my right to an 'Offender's Assisting Officer.'

Signature of offender

Date and time

5. I have been informed that I may make a submission to the CO in regard to:

- a. The appropriateness of making an activation order.
- b. The appropriate terms of such an order if it is to be made.

Signature of offender

Date and time

6. I have been informed that, should an activation order be made, I may appeal to the Summary Appeal Court.

Signature of offender

Date and time

Part 2 *if applicable (to be completed before the activation hearing commences)

1. I have nominated an OAO
 I have not nominated an OAO

Signature of offender

Date and time

2. I do not require the CO's assistance in finding an OAO
 I do require the CO's assistance in finding an OAO

Signature of offender

Date and time

BRIEF FOR OFFENDER'S ASSISTING OFFICER AT AN ACTIVATION HEARING

1. You have been asked to act as an offender's assisting officer in relation to the possible activation of a suspended sentence of detention. This hearing arises when an offender is convicted by a court in the British Islands of an offence committed during the operational period of a suspended sentence of detention awarded at the summary hearing or the SAC. See part 8 of this chapter.
2. In accepting the responsibility of becoming the OAO, your task is to advise and assist the offender in preparing for the hearing and presenting any submission that the offender may wish to make at the hearing. You may seek advice from any source. However, you will not be given access to any privileged correspondence in relation to the case between the Unit and HA, or the Director of Service Prosecutions or Services legal staff. The conversations you have with the offender and/or his legal adviser are confidential and you should not normally disclose any of the information to the chain of command or anyone else without the offender's permission. If in doubt you are to seek legal advice.
3. Your individual tasks and responsibilities are as follows:
 - a. **Understand the purpose of the hearing.** The offender will be given a set of case papers at least 24 hours before the hearing. You should be aware of the original offence at which a suspended sentence of detention was awarded by the CO or SAC and the subsequent offence that acted as the trigger for the hearing. When the CO reads out relevant details of the conviction from the report of the officer who attended the court or other details in the possession of the CO and there is a dispute over the details of the conviction, you may request an adjournment so that the memorandum of conviction from the court can be obtained unless the CO has already decided to do so. You should also familiarise yourself with the matters that the CO will take into account when deciding whether to activate the suspended sentence and if so, whether in part or in full. You are to be aware that the CO activates the suspended sentence by way of an order. You are to ensure that the offender understands the purpose of the hearing and has had sufficient time to prepare for it. The CO, at the beginning of the hearing, will ask the offender to confirm his understanding and whether he has had sufficient preparation time.
 - b. **Extended powers of punishment.** If the offender is notified in advance of the hearing that the CO has been granted extended powers of punishment for the purposes of activation, ensure that the offender understands what this means. See [Chapter 13](#) (Summary hearing - sentencing and punishments).
 - c. **Character evidence.** The offender will be given the opportunity to provide the CO with evidence as to his character. The evidence may be provided in writing or the character witness may attend in person to provide oral evidence. If the evidence is in writing, you or the offender may read the statement to the CO. When the evidence is given orally by the witness, you or the offender will be given the opportunity by the CO to question the witness in order to clarify any part of his statement. The CO may then also question the witness.

d. **Submission by the offender**²⁰⁶. The CO will give the offender the opportunity to make submissions, either orally or in writing, about:

- (1) The appropriateness of making an activation order.
- (2) The appropriate terms of such an order, i.e. whether it should be activated in full or in part.

The offender, or yourself if the offender so wishes, may read a written submission to the CO.

e. **At the end of the hearing.** If the offender has had his sentence of detention activated ensure that he understands that the sentence will not commence until the end of the 14 day appeal period unless he chooses otherwise. The offender will be given the opportunity to request a brief adjournment to consider with you his option to start his sentence of detention immediately. If the offender has elected to commence his sentence of detention immediately, ensure he is aware that he may subsequently change his mind .

f. **After the hearing.** After the hearing, you are to ensure that the accused understands the outcome and, ensure that he is provided with a copy of the RAH at the earliest opportunity after the conclusion of the activation hearing. Further, discuss his right to appeal and take him through the relevant sections of 'Your rights if you are accused of an offence under the Service justice system' booklet see paragraph 6 below. Ensure he is aware of his right to ask for the appeal period to be extended, where he feels he needs more time to decide whether to appeal or to be able to take legal advice. When the offender lodges an appeal you may consider continuing in your role of Assisting Officer for the subsequent appeal.

Adjournments

4. You may ask the CO for an adjournment at any time where you think it is in the interests of fairness to the offender.

CO's decision

5. When the CO has considered character evidence and any submission, he will inform the offender of his decision on whether he is making an order for full or partial activation of the suspended sentence of detention and he will give his reasons for his decision. The CO will then inform the offender of the effect of the sentence.

Legal aid for appeal

6. If the suspended sentence of detention is activated the CO will advise the offender that he may be entitled to Legal Aid should he decide to appeal to the SAC. You should be able to provide any further advice that the offender may need and be prepared to assist with the completion of the application for Legal Aid (JSP 838 the Armed Forces Legal Aid Scheme).

²⁰⁶ See the 'Your rights if you are accused of an offence under the Service justice system' booklet at Annex G to [Chapter 6](#) (Investigation, charging and mode of trial).

APPOINTMENT OF AN OFFENDER'S ASSISTING OFFICER (OAO)

1. At an activation hearing the offender is entitled to the appointment of an OAO to advise and represent him. The OAO is an important role and can provide valuable assistance to the offender. He is to perform his duties entirely independently of the CO. The Unit is to do everything it can reasonably do to facilitate the OAO's functions.

Appointment of the OAO

2. Subject to the exclusions outlined in paragraph 4 below, an offender may ask for any suitable person to assist him (see paragraph 3). However, that person is under no obligation to help if he does not wish to do so. Where the offender has difficulty in finding a suitable person to represent him he may request the assistance of the CO. In this event, the CO must provide a pool of at least 2 potential nominees for this purpose and allow the offender a free choice from the pool. The offender is under no obligation to nominate an individual from the pool. It will be the duty of the CO to arrange for the release of the requested individual from his normal duties unless there are operational reasons not to do so.

3. A person may not be an OAO unless he:

- a. Is a Service person and remains as such whilst carrying out this function.
- b. Is of at least the rank or rate of petty officer or military, marine or air-force sergeant.
- c. Consents to be nominated.

4. It would be inappropriate for people in the following categories to consent to be nominated as OAOs:

- a. Members of the unit's administrative staff who were personally involved in advising the CO or subordinate commander about the offence where the suspended sentence of detention was awarded.
- b. A person who participated in the investigation for the offence where the suspended sentence of detention was awarded.
- c. Lawyers. The only circumstances in which a lawyer would appear at an activation hearing is in the RN where a lawyer is acting in his capacity of a divisional officer.

Note: Professionally qualified officers such as doctors and chaplains are not automatically excluded from acting as OAOs. It is for them to decide whether to do so would compromise their professional duties. Service Police may act as an OAO with the same proviso.

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Chapter 10

Absence and desertion

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Chapter 10

Absence and desertion

Introduction

1. This chapter draws together the legislative provisions under the Armed Forces Act 2006 (the Act) and tri-Service guidance contained elsewhere in the MSL, as well as single Service guidance, applicable to individuals subject to Service law (see [Chapter 3](#), Jurisdiction and time limits) who are absent without authorisation or have deserted. This should enable the commanding officer (CO) (see [Chapter 2](#), Meaning of commanding officer) to take appropriate action. This chapter does not contain, therefore, detail on all aspects of the law, policy and administrative procedures but indicates where that detail can be found.

2. The specific legislative provisions relating to absence and desertion are contained in parts 8 and 9 of the Act; guidance in respect of the specific offences in terms of charges, ingredients of the offences and defences is at [Chapter 7](#) (Non-criminal conduct offences). Single Service unit level guidance and procedures are contained in: RN QRRN Chapter 40, TI 35 and FLAGO Chapter 16; Army LANDSO 3200; and RAF AP3392 Volume 4. Joint procedures for absence without authority are contained in JSP 760, Chapter 11.

3. This chapter relates only to Service persons (those subject to Service law) although a person no longer subject to Service law may be charged with an offence committed when so subject. Members of the reserve forces are only subject to Service law under certain conditions (see [Annex A](#)).

Action on discovering suspected unauthorised absence

4. A reasonable amount of time must normally be allowed for a Service person to report for duty or to explain the absence before declaring the individual's absence to be unauthorised. However, if the individual fails to report or contact the unit, the following actions should be taken¹, usually within 4 hours² of the absence being detected:

- a. An internal absentee report, see [Annex B](#) (initial absence report) may be raised by the relevant unit/sub-unit, if appropriate, and passed to the unit HQ for the CO, J1 and relevant unit level welfare staff. The report should include a brief statement from the person who discovered the potential absence.
- b. Determined efforts³ are to be instituted to contact the Service person in order to establish:
 - (1) The reason for the unauthorised absence,
 - (2) The absentee's location and intentions.
 - (3) Whether circumstances indicate that the absentee is at high risk of harm.

¹ In addition to any other actions specified in RN QRRN Chapter 40 and TI 35, Army LANDSO 3200 and RAF AP3392 Volume 4.

² This is not an absolute requirement and COs should apply judgement to determine the most appropriate time to commence action to locate the absentee.

³ This may include obtaining mobile telephone numbers from the absentee's associates and telephoning next of kin and external contacts.

- c. Where it is possible to contact the individual, and the circumstances are appropriate, the absence can be authorised and an agreed return to duty date confirmed.

Action when unauthorised absence is confirmed

5. **Certificate of absence.** On the eighth day of absence the CO⁴, if he has not already done so, is to raise a certificate of absence (see [Annex C](#)) and the individual's JPA absence record is to show the individual as a long term absentee⁵ from the first day of absence. The effect will be that pay is suspended retrospectively from the first day of unauthorised absence⁶. The certificate has 4 purposes:

- a. It aids recovery of the Service person by the appropriate single Service mechanisms⁷;
- b. It allows the details of the absent Service person to be entered on the Police National Computer (PNC);
- c. It is the authority to suspend the issue of pay during the period of absence beginning on the date on which the unauthorised absence began and ending on the date that the Service person is arrested or surrendered in respect of that absence, is discharged or is declared to no longer be absent from duty; and
- d. Where there are proceedings before a civilian court, it provides the court with evidence of a description prescribed by regulations made by the Secretary of State⁸.

6. The certificate of absence will remain in force until appropriate enquiries have taken place regarding the absence and the Defence Council or authorised officer has determined whether or not to authorise a forfeiture of pay in respect of the period of absence or until the certificate is cancelled⁹.

7. Copies of the certificate of absence should be sent to the following external addressees:

⁴ CO means the CO of the 'relevant person' or a person acting on behalf of or with the authority of the CO. The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108, regulation 2.

⁵ This category is used when a serviceperson is shown under Unauthorised Absence on JPA and there is no reasonable expectation that they will report for duty on the foreseeable future. The selection of this type of absence will ensure that correct career, pay, allowances and charges actions are taken. The category should not be used when another category is more appropriate, for example, medical, custodial or special unpaid leave.

⁶ For detail on suspension and forfeiture see paragraph 40.

⁷ RN QRRN Chapter 40, TI 35 and FLAGO Chapter 16; Army LANDSO 3200; and RAF AP3392 Volume 4.

⁸ Section 316(2)(b) of the Act.

⁹ A certificate will be cancelled where a Service person is found not to have been absent without leave during the relevant period.

RN	RM	Army	RAF
1. NPM(E) A & D for RNMPU 2. Area NPM 3. PSyA RN for SO2 CI 4. Service Police Crime Bureau 5. for Absentees on sailing, addressees listed in FLAGO 1614. 6. Theatre HQ for J1 staff (if overseas)	1. DRM 2. NPM(E) A & D for RNMPU 3. Area NPM 4. PSyA RN for SO2 CI 5. NCHQ for SO2 G1 RM Disc 6. Service Police Crime Bureau 7. Theatre HQ for J1 staff if overseas.	1. FLC/Theatre HQ (for J1 discipline staff and Service police) – officers only. 2. Formation HQ (for J1) 3. Service Police Crime Bureau. 4. Defence Vetting Agency - where absentee holds a sensitive post. 5. HQ Intelligence and Security for the Command (and Division if in UK).	1. PJOBS. Overseas Theatres: Formation HQ for J1 Staff/Service Police (for all ranks). 2. UK units: HQ AIR Command (Air Pers Cswrk). 3. Service Police Crime Bureau.

Where, in joint units, the missing person is of a different Service to the lead Service of that unit, the certificate should be despatched to the Service distribution list of that Service person.

8. Where there are grounds that suggest the absentee is unlikely to return before the eighth day¹⁰ or when the absentee is under investigation/wanted for trial, a certificate of absence is to be initiated and distributed on the first day of absence and he will be classed as a Long Term Absentee from that point. The individual's JPA absence record is to show the individual as long term absent from the first day of absence. The report should also specify¹¹ if the absentee falls within one of the following categories:

- a. Wanted for Court Martial trial.
- b. Wanted for summary hearing.
- c. Wanted for Summary Appeal Court case.
- d. Under Investigation.

9. **Notification to civil police.** The Service Police Crime Bureau (SPCB)¹²/Royal Navy Missing Persons Unit (RNMPU) will notify appropriate civil police forces of unauthorised absentees. This evidence of unauthorised absence¹³ should be in the form of the certificate of absence at [Annex C](#).

¹⁰ For example, where the serviceperson has informed friends of his/her long term intentions or where he/she has removed sufficient possessions and equipment from their accommodation to suggest they are unlikely to return in the foreseeable future.

¹¹ Annex C, Paragraph 15 'Other Information'.

¹² SPCB Ops Room is contactable by telephone on 93835 5170/5180 and by fax on extension 5179, e-mail: SPCB-CCRIO-SPOC-Group Mailbox.

¹³ Section 316(2)(b) of the Act.

10. **Notification to the next of kin and external contacts.** If not already contacted (see paragraph 4b) the unit should notify the next of kin (NOK) and/or any known external contacts (if considered appropriate by the CO) as follows:

a. **Service persons under 18 years of age.** To be notified by the CO¹⁴, as soon as absence is confirmed and advised that they will be informed once the absentee is located.

b. **Other absentees.** To be notified by CO not later than the twenty first clear day of absence unless an individual is categorised as Missing¹⁵ and the relevant casualty procedures have been initiated or it is known that the NOK is already aware of the absence. The notification is to:

(1) Include a statement that the individual has been declared a Long Term Absentee from his unit from the date found absent.

(2) Advise the NOK that they will be notified when the absentee returns to the unit.

(3) Advise dependents that the absentee's pay has been suspended.

11. **Unauthorised absence of less than 48 hours.** Unauthorised absence of less than 48 hours may be dealt with under minor administrative action, see JSP 833 (Minor administrative action). Administrative action would not be appropriate in any circumstances where absence was aggravated; for example, if the individual was absent without proper authorisation when required for a major exercise, an operational deployment, a unit move, or any other significant undertaking. In such circumstances where the person is intentionally or negligently absent, disciplinary action should be taken.

Arrest

12. **Arrest by Service Police on suspicion of having committed a Service offence or reasonably suspected of being about to commit a Service offence (arrest under section 67 or section 69 of the Act).** Service Police may effect an arrest under section 67 of the Act of a person reasonably suspected of committing or having committed the offence of absence or desertion. The power of arrest may be exercised personally, by giving an order to another person or by ordering that person into arrest. Service Police may also effect an arrest under section 69 of the Act of a person reasonably suspected of being about to commit the offence of absence or desertion. See [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention), Part 1.

13. **Application for a warrant for arrest.** If, for example, a Service person has been absent in excess of 24 hours, there is reasonable information as to the whereabouts of the Service person and no contact has been made with the parent or duty unit, an application for a warrant of arrest may be made to a judge advocate. A warrant in this context is effectively a specific authorisation by and on behalf of the State for the arrest of that person¹⁶, see [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention), Part 1. Such a warrant has the advantage of authorising police to enter premises and arrest absentees or deserters. This course of action should be considered when other options for recovering the Service person have failed. Application may be made by: the individual's CO or a person acting on his authority, the Service Police or the prosecutor.

¹⁴ CO here includes subordinate commanders.

¹⁵ The absence type of Missing refers to when a serviceperson has not reported for duty in an operational environment. See JSP 760, Chapter 11, paragraphs 11.010 -11.012.

¹⁶ The Armed Forces (Warrants of Arrest for Service Offences) Rules 2009/1110, rule 2.

14. **Arrest by civilian police under a warrant for arrest.** When a person is arrested by civilian police under a warrant for arrest issued by a judge advocate he is to be transferred to Service custody as soon as possible¹⁷.

15. **Arrest by civilian police without a warrant.** An officer of a UK¹⁸ or British overseas territory¹⁹ police force may arrest without a warrant a person who is reasonably suspected of being a person subject to Service law who has deserted or is absent without leave²⁰. Where a person is arrested in these circumstances, he must be brought as soon as practicable before the magistrates' court or other court of summary jurisdiction where he is arrested²¹. The court has powers to transfer the person to Service custody or release the person²².

16. **Surrender to civilian police.** When a person who is an absentee or deserter surrenders to civilian police, he must be taken to a police station forthwith²³. At the police station his case will be considered and he may be: brought, as soon as practicable before a court of summary jurisdiction; released subject to reporting conditions for the purpose of enabling him to be taken into Service custody²⁴; or transferred directly into Service custody.

17. **Transfer to Service custody.** Where the civilian police transfer an absentee or deserter to Service custody, a certificate of arrest by or surrender to the civilian police²⁵ is to be completed (see [Annex D](#)) and passed to the SPCB who will pass a copy to the individual's CO. The certificate should also be passed on handover into Service custody²⁶. See [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention), Part 1.

18. **Release subject to reporting conditions.** Where the civilian police release an absentee or deserter subject to reporting conditions, a certificate of release subject to conditions²⁷, (see [Annex E](#)) will be passed to the SPCB who will, in turn, pass a copy to the individual's CO. A copy of the certificate should be provided to the person released with the instruction that it be handed to his CO on return to his unit (the CO at the place of reporting²⁸). See Part 1 of [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention).

Proceedings before a civilian court

19. Where an absentee or deserter is brought before a court of summary jurisdiction following arrest without a warrant on the grounds of being a person reasonably suspected of being subject to Service law and absent or a deserter the court must release him unless:

¹⁷ Section 313(4) of the Act.

¹⁸ References to the UK include England and Wales, Scotland, Northern Ireland and the Isle of Man.

¹⁹ The British Overseas Territories are fourteen territories that are under the sovereignty of the United Kingdom, but which do not form part of the United Kingdom itself: British Antarctic Territory, South Georgia and the South Sandwich Islands, British Indian Ocean Territory, Sovereign Base areas of Akrotiri and Dhekelia, Pitcairn Islands, Falkland Islands, Saint Helena (including Ascension and Tristan da Cunha), Anguilla, British Virgin Islands, Montserrat, Gibraltar, Bermuda, Turks and Caicos Islands, Cayman Islands.

²⁰ Section 314 of the Act.

²¹ Section 314(4) of the Act.

²² Section 316 of the Act.

²³ Section 315(1) of the Act.

²⁴ Section 315(4) of the Act.

²⁵ The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

²⁶ The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

²⁷ The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

²⁸ The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

- a. He admits to the court to being a person subject to Service law who has deserted or is absent without leave.
- b. The court has in its possession evidence of illegal absence as follows:
 - (1) A certificate of absence ([Annex C](#)), stating that the person is subject to Service law and is illegally absent (see paragraph 5).
 - (2) In relation to members of the Army, any signalled declaration of absence.
 - (3) A print or other document appearing to be the results of any search of the Police National Computer which shows that the person is wanted for being illegally absent.
- c. He is in civil custody for some other cause.

20. Where an absentee or deserter admits to the court that he is a person subject to Service law who has deserted, is absent without leave or the court has in its possession evidence of illegal absence ([Annex C](#)), the court must either:

- a. arrange for him to be transferred to Service custody; or
- b. release him subject to a condition that he reports, at or by such time as may be specified in the condition, to such place or person as may be so specified for the purpose of enabling him to be taken into Service custody²⁹.

21. Where the absentee or deserter is in civil custody for some other reason, the court may arrange for him to be transferred to Service custody³⁰.

22. An absentee or deserter who is to be transferred to Service custody must be handed over with a certificate of appearance before a court of summary jurisdiction³¹ (see [Annex F](#)). If there is likely to be a delay before a person can be transferred to Service custody the court may commit the absentee or deserter to be held in civil custody, pending his transfer, in a prison, police station or in any other place provided for the confinement of persons in custody³².

23. When an absentee or deserter is released subject to reporting conditions, a certificate of release subject to conditions ([Annex E](#)) must be passed to the SPCB who will, in turn, pass the copy to the CO. A copy will be provided to the person released with the instruction that it be handed to the CO at the place of reporting³³.

24. **Warrant for the arrest of persons released subject to reporting conditions.** As explained above a person may be released subject to reporting conditions where:

- a. he has surrendered to a civilian policeman as being a person subject to Service law who has deserted or is absent without leave; or

²⁹ Section 316(3) of the Act.

³⁰ Section 316(3) of the Act.

³¹ The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

³² Section 316(5) of the Act.

³³ The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

- b. he appears before a court and admits that he is a person subject to Service law who has deserted or is absent without leave or the court has in its possession evidence of illegal absence ([Annex C](#)).

25. A warrant for the arrest of an absentee or deserter may be issued should the absentee, released subject to reporting conditions, fail to comply with a condition of his release³⁴. Such a warrant may be issued by a judge advocate and, where the failure is to comply with reporting conditions imposed by a court, by the court which imposed the conditions. Further guidance in this regard is contained at Part 1 of [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention) and The Armed Forces (Failure to Report for Custody) Rules 2009.

Termination of absence

26. **Termination.** Long term absence is deemed to have terminated when the absentee:

- a. Rejoins his unit or authorised absence is determined;
- b. Is apprehended by, or surrenders to, the Service or civilian authorities; or
- c. Is discharged.

27. **Reporting Requirements.** The return to duty of a long term absentee is to be reported immediately to ensure:

- a. The correct and timely adjustment of the individual's pay account, including maintenance payments to any dependants.
- b. The civil and Service Police cease their search.
- c. Next of kin are informed where appropriate.

28. **External Reporting.** Immediately absence ceases the unit is to:

- a. Record the event on the individual's JPA absence record.
- b. Despatch the Stop AWOL form ([Annex G](#)) referring to the original certificate of absence. The form should be distributed to the same addressees as the certificate of absence. SPCB/RNMPU will notify the civil police and PNC.

Custody

29. **Custody without charge.** Once an offender arrested for absence or desertion is transferred into Service custody, the guidance at [Chapter 5](#) (Custody), which addresses both custody without charge (pre-charge custody) and custody after charge (post-charge custody), should be followed. However, in most cases of absence without leave the custody without charge provisions are unlikely to be applicable because a person may be kept in custody without charge only if the person who made the arrest has reasonable grounds for believing that such custody is necessary to:

- a. Secure or preserve evidence relating to a Service offence for which the suspect is under arrest.

³⁴ Section 317 of the Act.

- b. Obtain evidence relating to a Service offence for which the suspect is under arrest, by questioning the suspect³⁵.

In most straightforward cases of absence without leave, the evidence to prove the case already exists at the point of arrest and a police interview under caution may not be necessary. In cases of doubt, staff legal advice should always be sought.

30. **Custody after charge.** Once charged, it may be appropriate for the Service person to be held in custody if a judge advocate considers any of the following criteria apply³⁶:

- a. There are substantial grounds for believing that the accused, if released from Service custody, would:
 - (1) Fail to attend any hearing in the proceedings against him; or
 - (2) Commit an offence while released; or
 - (3) Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or
- b. The accused should be kept in Service custody for his own protection or, if he is under 17 years of age, for his own welfare or in his own interests; or
- c. Because of lack of time since the accused was charged, it has not been practicable to obtain sufficient information for the purpose of deciding whether condition a or b above is met.

Pay will not be suspended for Service persons retained in custody after charge, however following conviction pay may be forfeit for the relevant period spent in custody, see paragraph 44 below.

31. **Release from custody after charge with conditions imposed by a judge advocate.** A judge advocate has the power to release an accused from custody subject to his compliance with certain conditions. A CO should therefore consider what conditions he would wish to be applied to the accused's release in the event the judge advocate is minded not to authorise custody after charge, see [Chapter 5](#) (Custody). Significantly, if the CO considers there is a substantial risk of a person charged with AWOL offences failing to attend future hearings he may wish to invite the judge advocate to impose a requirement that the accused does not leave his ship, unit or establishment.

32. **Release from custody after charge with conditions imposed by a CO.** If a person is to be released from custody there is nothing to prevent the CO imposing conditions on an administrative basis by ordering that the accused complies with certain requirements or refrains from particular activities, see [Chapter 5](#) (Custody).

33. **The relevant time for custody.** Note: 'relevant time' means; in relation to a person arrested under section 67 (the general power of arrest) or section 69(1) of the Act or arrested by a civilian policeman and subsequently transferred into custody under sections 313(4), 316(3) or 317(4) of the Act, the time of the arrest; or in relation to a person delivered into custody following surrender under section 315 of the Act, the time of the surrender. For full details see [Chapter 5](#) (Custody).

³⁵ Section 99 of the Act.

³⁶ Section 106 of the Act.

Dispensing with Service proceedings

34. Whilst desertion remains a serious offence there are circumstances in which it would be of no benefit to try someone for this offence see [Chapter 18](#) (Terms and conditions of enlistment and service). The main provisions are outlined at paragraphs 35 to 37 below.

35. **Confession of desertion.** If a Service person makes a confession of desertion³⁷, the CO may decide, with the consent of the Director of Service Prosecutions, to dispense with Service proceedings, having taken into account the circumstances of the case and of the person who made the confession. In such cases, the CO must inform the person who made the confession of his decision and of the period of service to be forfeited³⁸. Confessions of desertion (see [Annex H](#)) must be made in writing, to a Service policeman during an interview conducted in accordance with the Service Police Code of Practice for the Treatment and Questioning of Persons by the Service Police³⁹. The written confession must be signed and dated and must include:

- a. The date on which the person deserted.
- b. The place from which desertion occurred.
- c. The date on which and the place at which the person surrendered or was arrested.

36. **Forfeiture of service following confession of desertion.** If a Service person makes a confession of desertion and the CO decides to dispense with Service proceedings, service is forfeited according to the following rules:

- a. The date of enlistment will be deemed to have been the date which precedes the date of the CO's decision by the period of service that has not been forfeited.
- b. The Service person who confessed will be liable to serve for an additional period equal to the period admitted as desertion.
- c. The date of entitlement to discharge from the regular forces, to end service with the regular forces or to be transferred to a reserve force, will be postponed by an equal period.
- d. The CO may decide that the person who confessed is not required to serve for an additional period under sub-paragraph 36b above⁴⁰.

37. **Period of absence.** As a matter of policy, dispensation should not be sought where a Service person has been absent for less than 5 years.

³⁷ The Armed Forces (Forfeiture of Service) (No.2) Regulations 2009/1090, regulation 3.

³⁸ Forfeiture of service applies only to desertion and not absence without leave.

³⁹ Code C made under sections 113(3) and (4) of the Police and Criminal Evidence Act 1984, 1984 c.60. See JSP 397 (Service Police Codes of Practice).

⁴⁰ For example, when it is unlikely the serviceperson will be reintegrated into service life and it would not be in the exigency of the service to retain him for that period.

38. **Identifying of a CO.** In the unusual circumstance that it is difficult to identify the correct CO, the Service person's CO for all purposes will be the officer in command of the last unit of which he was a member unless a bespoke appointment is made.

39. **Discharge.** Where discharge is recommended following dispensation and where the engagement of the deserter has not expired, the appropriate means of discharge would be services no longer required (SNLR).

Forfeiture of service

40. For full details on forfeiture of service, see [Chapter 18](#) (Terms and conditions of enlistment and service). The main provisions are outlined at paragraphs 41 and 42 below.

41. **Forfeiture of service following conviction for desertion.** If a Service person is convicted of desertion, the period of service for which he was convicted as a deserter will be forfeited. If service is forfeited, the following rules apply:

- a. The date of enlistment will be deemed to have been the date which precedes the date of conviction by the period of service that has not been forfeited.
- b. The Service person convicted will be liable to serve for an additional period that is equal to the period in respect of which convicted of desertion.
- c. The date on which the Service person convicted will be entitled to be discharged from the regular forces, to end service with the regular forces or to be transferred to a reserve force, will be postponed by an equal period.
- d. If the Service person convicted had previously extended the term of service so as to end at a specified time, the forfeiture will not have the effect of requiring the person to serve for any period after that time.

In effect, the Service person's date of enlistment and the date on which he is entitled to be discharged will be deemed to have been postponed by a period of additional service equal to the period.

42. **Restoration of forfeited service⁴¹.** Where service has been forfeited for desertion, the Defence Council may restore the whole or part of the forfeited service if they consider it expedient to do so because of any circumstances which they consider to be relevant, for example, the person's distinguished, gallant or other conspicuous conduct during the period since the desertion ended. If the forfeited service is restored by the Defence Council, the following rules apply:

- a. The additional period of service equal to the period of desertion will be reduced by the period of restored service.
- b. The date of entitlement to discharge from the regular forces or transferred to the reserve will be adjusted accordingly.

⁴¹ [Chapter 18](#) (Terms and conditions of enlistment and service).

- c. The date on which regular service ends or of transfer to the reserve force in accordance with the person's engagement will not be affected by the restoration of service.

Unauthorised absence due to civil custody (custodial absence)

43. In addition to the requirement to report incidents or matters of Parliamentary, media and public interest as laid down by single Service instructions⁴² the following absentee procedures apply when a Service person is placed in civil custody:

a. **Further action following the preferring of a charge.** If charged with an offence, no further action is normally required until the completion of civil proceedings.

b. **Further Action if placed in civil custody (custodial absence).** Custodial absence is dealt with by the appropriate authorised unit HR administration staff as part of the disciplinary process⁴³. The individual is to remain on the strength of his parent unit throughout the proceedings.

44. **Action required following civil proceedings.** The following procedures apply when a Service person is absent due to proceedings in a civil court:

a. **If found guilty.** If a Service person is found guilty by a civil court of the offence which led to the arrest and remand in civil custody, the CO is to consider whether administrative action should be taken. If the CO does not consider that the offence warrants administrative action, he must consider whether the offence warrants a discipline entry⁴⁴. The individual's JPA disciplinary history is to be updated accordingly. If the CO decides that the offence warrants neither administrative action nor a discipline entry, he is to raise a 'warnings and sanctions' case on JPA and close the case as 'no further action required'. This JPA action will allow the audit process to be maintained, but no entry will be recorded against the individual's discipline history. Additionally, if a sentence of imprisonment exceeds 4 calendar months and discharge is not authorised, the individual will be assigned non effective by the appropriate Service.

b. **If found not guilty.** If a Service person is found not guilty by a civil court of the offence which led to the arrest and remand in civil custody, any period spent in civil custody pending trial cannot be regarded as absence without leave.

Effect of suspending pay and stopping allowances.

45. The effect of a certificate of absence, *i.e.*, suspension of pay, is separate from forfeiture of pay⁴⁵, see [Chapter 20](#) (Forfeitures and deductions). Suspension means that payments of pay are suspended during the period of absence, but not that entitlement to pay for that period is lost. The certificate of absence is a mechanism by which the issue of pay can be suspended when a member of the regular forces is absent and that absence is unauthorised. When the Service person returns from absence by either arrest or surrender, the suspended pay must either be restored to him (whether or not the Service person is taken into custody on return) or, if he was absent from duty within the meaning of the forfeitures and deductions regulations, it may be forfeited, see [Chapter 20](#) (Forfeitures and

⁴² QRRN Chapter 39, Army LFSO 3200 and RAF QR J2459C.

⁴³ See JSP 760, Chapter 12 (Custodial Absence)

⁴⁴ RN FLAGO Ch 16, Army QRs 6.178, 6.179 and Annex H to QR Chapter 5, RAF QR 1027.

⁴⁵ See the Armed Forces (Forfeitures and Deductions) Regulations 2009/1109.

deductions). Allowances and charges will be stopped as appropriate for the period of absence.

Administration

46. For details on matters of administration (including assignment, despatch of documents held by units, denial of JPA Employee Self Service access, termination of long term absence, movement of absentees and updating of records), see single Service guidance⁴⁶ and JSPs 760 and 754.

⁴⁶ RN QRRN Chapter 40 and TI 35, Army PAM Part 3 and LANDSO 3200 and RAF AP3392 Volume 4.

Members of the reserve forces and individuals liable to recall – liability to Service law

Liability to Service law

1. **Members of the reserve forces.** Members of the reserve forces⁴⁷ are subject to Service law under the Armed Forces Act 2006 (the Act) when⁴⁸:
 - a. In permanent service on call-out under any provision of the Reserve Forces Act 1980 (RFA 80) or the Reserve Forces Act 1996 (RFA 96) or under any other call-out obligation of an officer.
 - b. In home defence service on call-out under section 22 of RFA 80.
 - c. In full-time reserve service under a commitment entered into under section 24 of RFA 96.
 - d. Undertaking any form of training or duty (whether or not in pursuance of an obligation).
 - e. Serving on the permanent staff of a reserve force⁴⁹.
2. **Recall.** A person who is recalled⁵⁰ into service under any provision of RFA 80 or RFA 96 or any other recall obligation of an officer is regarded as being a member of the regular forces from the time of acceptance into service⁵¹ to release or discharge⁵².

Offences under the Armed Forces Act 2006

3. A member of a reserve force or a person subject to recall who, whilst subject to Service law, commits an offence under the Act may be dealt with summarily by his commanding officer (CO) or by Court Martial (CM) trial. If he ceases to be subject to Service law, he can be brought back for the purpose of disciplinary action and is treated as continuing to be subject to Service law.
4. **Time limits.** There are time limits⁵³ imposed on the commencement of such proceedings. These limits apply where the offence is other than one under RFA 96 and are:
 - a. Where a person ceases to be a member of a regular or reserve force, that person cannot be charged with a Service offence committed whilst a member of a force after the end of six months from the date he ceased to be a member of that force⁵⁴.

⁴⁷ Section 1(2) RFA96.

⁴⁸ Section 367(2) of the Act.

⁴⁹ Permanent member of a reserve force, see RFA 1996, section 6; this is a reference to the Non Regular Permanent Staff of the TA.

⁵⁰ Liable to recall, see section 51 (7) of the Act; Persons liable to recall are from: the Recall Reserve (Naval and Marine); the Army Long Term Reserve; Army Pensioners (Other Ranks); RAF Retired Officers; RAF (Airmen) Pensioners.

⁵¹ Acceptance into service, see RFA 1996 section 71

⁵² Section 368(2) of the Act.

⁵³ See [Chapter 3](#) (Jurisdiction and time limits).

⁵⁴ Section 55 of the Act.

b. A member of an ex-regular reserve force⁵⁵ who has ceased to be subject to an additional duties commitment⁵⁶ may not be charged with a Service offence after the end of six months from the date he ceased to be subject to the commitment⁵⁷.

c. A person who ceases to be subject to Service law and was neither a member of a volunteer reserve force nor a member of an ex-regular reserve force subject to an additional duties commitment when the offence was committed, may not be charged after the end of six months from the date of ceasing to be subject to Service law even if that person becomes subject to Service law again⁵⁸.

Offences under RFA 96

5. **Offences against good order and discipline.** RFA 96, section 95 makes provision for a number of offences against orders and regulations made under section 4. The offences include: failure without reasonable excuse to comply with orders or regulations made under section 4; failure to attend without reasonable excuse when required to do so in pursuance of orders or regulations under section 4⁵⁹.

6. **Failure to attend for service on call out or recall.** Members of the reserve forces and persons liable to recall who, without leave or reasonable excuse, fail to appear at the time or place specified by a call-out or recall notice may be charged under RFA 96, section 96 with the offence of desertion or absence without leave, according to the circumstances. These provisions apply, whether or not the accused is subsequently accepted into service⁶⁰.

7. **Failure to attend for duty or training.** A reservist who fails to appear at the time and place, at which he is required to attend to begin a full-time Service commitment,⁶¹ or begin a period of service under an additional duties commitment,⁶² may be charged under RFA 96, section 97 with the offence of desertion or absence without leave, according to the circumstances. RFA 96, section 97, also provides for a reservist who is required to undergo a period of training under section 22 of RFA 96, or under a special agreement,⁶³ or an employee agreement,⁶⁴ to be charged with being absent without leave if he fails, without leave lawfully granted or reasonable excuse, to appear at any time and place at which he is required to attend.

Disposal of RFA 96 offences

8. A person charged with an offence under RFA 96 sections 95, 96 and 97 may be tried by the CM or by a civilian court, but not both. Advice should be obtained from the staff legal adviser and Service personnel branches⁶⁵ (regardless of jurisdiction) regarding the appropriate jurisdiction for dealing with a case under section 96 where an individual has failed to attend for service on call out or recall⁶⁶.

⁵⁵ Ex-regular reserve force, see RFA 1996, section 2(2).

⁵⁶ Additional duties commitment, see RFA 1996, section 25.

⁵⁷ Section 56 of the Act.

⁵⁸ Section 57 of the Act.

⁵⁹ Regulations made under section 4, include: BR 60, BR 61, BR 63, BR 64, TA Regulations 1978, the Regular Reserve Regulations 1997, the Reserve Forces (Army) Regulations 1997, Regulations for the Reserve Air Forces (AP 3392, Vol 7).

⁶⁰ Accepted into service, see RFA 96 sections 33, 44, 59 and 71.

⁶¹ Full-time service commitment, see RFA 96 section 24.

⁶² Additional duties commitment, see RFA 96 section 25.

⁶³ Special Agreement, see RFA 96 section 28.

⁶⁴ Employee agreement, see RFA 96 section 39.

⁶⁵ NPT(Res), PS2(Army), ACOS Pers Pol(RAF).

⁶⁶ The policy for dealing with those who fail to report for mobilisation (rather than those who report a day or so late) is for the civil police to make the arrest and the CPS to make the prosecution in the Magistrates' courts (or equivalent in Scotland).

9. **The Court Martial and summary hearing.** An offence under RFA 96, sections 95 to 97 is classed as a Service offence under section 50 of AFA 06 and is therefore within the jurisdiction of the CM. An offence of absence without leave under section 96 or 97 of the RFA 96 may also be dealt with by the Services at a summary hearing⁶⁷ provided that the conditions set out in section 52 of the Act are met.

10. **Time limits.** The time limits for charging an RFA 96 offence which is to be dealt with summarily or by the CM are whichever of the following periods ends last:

- a. Six months beginning with the date of commission of the offence.
- b. Two months beginning with the date the offence becomes known to the person's CO.
- c. Two months beginning with the date the person is apprehended.
- d. Six months beginning with the date the person ceased to be:
 - (1) A member of a volunteer reserve force; or
 - (2) A member of an ex-regular reserve force in full-time reserve service⁶⁸ or subject to an additional duties commitment under RFA 96, section 25.

The periods above are not extended if a person charged ceases to be subject to Service law but becomes subject to Service law again within 6 months beginning the date he so ceased.

11. **Proceedings before a civilian court.** Proceedings for offences charged under RFA 96 in a civilian court must be instituted within two months after the time at which the offence becomes known to his CO or at the time the accused is apprehended, whichever is the later⁶⁹.

- a. Advice should be sought from the staff legal adviser and Service personnel branches⁷⁰ regarding notification to and liaison with the civilian police forces and the Crown Prosecution Service (CPS), offences under RFA 96, section 96 involving persons who fail to attend for service on call out or recall.
- b. Advice should also be obtained from staff legal advisers regarding evidential requirements for bringing proceedings before the civilian courts. Service records, Defence Council Instructions or Regulations and Defence Council Certificates may be admissible as evidence in a civilian court in respect of an offence under RFA 96, as provided for in the Reserve Forces (Evidence in Proceedings before Civil Courts) Regulations 2009. The regulations also provide for the admissibility of a certificate stating that a member of a reserve force who failed to attend for duty in accordance with a requirement under RFA 96 section 4, as evidence before a civilian court in respect of an offence under section 95 of the Act.

⁶⁷ Section 53 of the Act

⁶⁸ Full-time reserve service, see RFA 96, section 24

⁶⁹ RFA 96 section 107.

⁷⁰ NPT(Res), PS2(Army), ACOS Pers Pol(RAF)

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

ANNEX B TO
VOL1 CH 10
JSP 830 MSL
revised 08/09

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INITIAL ABSENCE REPORT

T-SL-AD01

Reference and DTG:

From (sub-unit/department)

Security Classification

To (unit HQ)

Details of Absentee:

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corps)

Date of Absence

Time (24 hr clock)

This should state the first known date of illegal absence

Clothing worn

When suspected of going absent

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Vehicle details

Make, model, cc rating, colour and vehicle registration number.

Other information (include possible reason for absence)

WITNESS STATEMENT

(CJ Act 1967, s9, MC Act 1980, ss.5a(3a) and s.5b, MC Rules 1981, r70)

Statement of

Age Under 18 Over 18

Occupation

This statement (consisting of _____ page(s) each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated anything which to be false or do not believe to be true.

Signature

Date

Name

Rank/Rate



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

ANNEX C TO
VOL1 CH 10
JSP 830 MSL
revised 08/09

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CERTIFICATE OF ABSENCE

T-SL-AD02

In accordance with The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009 Regulation 3

Reference and DTG:

Ship/unit/establishment

Security Classification

(Copies of the certificate of absence should be sent to the following external addressees)

- | | | | |
|--|---|---|--|
| <p>RN</p> <ol style="list-style-type: none"> 1. NPM(E) A & D for RNMPU. 2. Area NPM. 3. PSyA RN for SO2 CI. 4. Service Police Crime Bureau. 5. for Absentees on sailing, addressees listed in FLAGO 1614. 6. Theatre HQ for J1 staff (if overseas). | <p>RM</p> <ol style="list-style-type: none"> 1. DRM. 2. NPM(E) A & D for RNMPU. 3. Area NPM. 4. PSyA RN for SO2 CI. 5. NCHQ for SO2 G1 RM Disc. 6. Service Police Crime Bureau. 7. Theatre HQ for J1 staff if overseas. | <p>Army</p> <ol style="list-style-type: none"> 1. FLC/Theatre HQ (for J1 discipline staff and Service police) – officers only. 2. Formation HQ (for J1) 3. Service Police Crime Bureau. 4. Defence Vetting Agency - where absentee holds a sensitive post. 5. HQ Intelligence and Security for the Command (and Division if in UK). | <p>RAF</p> <ol style="list-style-type: none"> 1. PJOBS. Overseas Theatres: Formation HQ for J1 Staff/Service Police (for all ranks). 2. UK units: HQ AIR Command (Air Pers Cswrk). 3. Service Police Crime Bureau. |
|--|---|---|--|

To

Details of Absentee:

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corps)

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Ship/unit/establishment

To include full unit title, address and post code/BFPO Number

Date of Absence

This should state the first known date of illegal absence

Time (24 hr clock)

Place of Absence

Last known location. If evidence suggests other possible location(s) absentee may be heading towards, details are to be included.

Date and place of birth

If place is not known insert 'Not Known' after DOB

Height and build

Show height in metric, build as 'slim, medium or heavy'

Home address

If different from paragraphs 2, 4 or 10

Ethnic appearance

Colour of hair

Colour of eyes

Distinguishing marks

Any visible marks such as scars/tattoos

Likely addresses in UK

E.g. girl/boyfriend, parents (to allow SPCB to notify the civil police HQ covering each address)

Vehicle details

Make, model, cc rating, colour and vehicle registration number

Passport found

Yes

No

Passport No

Other information (include any relevant information; e.g. broken engagement)

Also include whether the serviceperson is: wanted for Court Martial trial; wanted for summary hearing; wanted for Summary Appeal Court case; or under investigation

Commanding officer's certificate of absence

In pursuance of Part 2 of The Armed Forces Act (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009 and The Armed Forces (Forfeitures and Deductions) Regulations 2009, I the undersigned, being the Commanding Officer of the Service person specified in paragraph 1, hereby certify that he/she is absent from his/her unit, has no leave to be absent from the unit and has remained absent since the date specified in paragraph 3 and is therefore suspected of being illegally absent at the time of signature of this certificate.

Signature

Date

Name

Rank/Rate

CO means the CO of the relevant person or a person acting on behalf of or with the authority of the CO.
The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009 regulation 2.

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ANNEX D TO
VOL1 CH 10
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CERTIFICATE OF ARREST BY OR SURRENDER TO CIVIL POLICE

T-SL-AD03

In accordance with The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009

I certify that (full names)

Either

Surrendered him/herself at (place)

on Date

at Time (24 hr clock)

As being illegally absent from (unit)

at (place)

Or

Was arrested by (insert name of the person who effected the arrest)

on Date

at Time (24 hr clock)

As being illegally absent from (unit)

at (place)

As the person named under warrant (insert No)

Signed by Judge Advocate (insert name of JA)

Name

Date

1-10-D-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

At the time of arrest surrender he she was was not wearing the uniform of any of Her Majesty's armed forces

The individual gave the following particulars/appears to be

Service number

Rank/Rate

First name

Family name

Ship/unit/establishment

I attach a certified true copy of all custody records raised and maintained for this individual in the course of their retention in the Police Station.

Signature

Date

Name

Signature of Police officer in charge of police station where the above named person surrendered or was taken on arrest or surrender

Signature

Name

(as to the person qualified to sign, see section 315(3) of the Armed Forces Act 2006)



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ANNEX E TO
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CERTIFICATE OF RELEASE

T-SL-AD04

In accordance with The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009

Part 1 Release by Civil Police

I certify that

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corp)

Ship/unit/establishment

Either

Was arrested by (name)

Rank

Number

Date

Time (24 hr clock)

Place

Warrant number

Only if the arrest was on execution of a warrant

Dated

Issued by

Or

Surrendered to (name)

Rank

PROTECT - PERSONAL DATA (WHEN COMPLETE)

1-10-E-1

Number

Date

Time (24 hr clock)

Place

And

At the time of the arrest or surrender the relevant person was was not wearing the uniform of any of Her Majesty's armed forces and was was not in possession of an identity card issued by any of Her Majesty's Forces.

And

After consideration, was released (under the following condition(s) as applicable)

That they report:

to (person)

at (place)

by (time)

on (date)

Certificate of authorised person

The person in charge of the police station to which the relevant person is brought after arrest or to where the relevant person surrendered or a person authorised by the person in charge of that police station to act on his behalf

Signature

Name

Rank and position

Part 2 Release by a Summary Court of Jurisdiction

I certify that the person named below was brought before the

Court (name and description of court)

at (place)

being a court of summary jurisdiction:

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corp)

Ship/unit/establishment

Either

Was arrested by (name)

Rank/Rate

Number

Date

Time (24 hr clock)

Place

Warrant number (only if the arrest was on execution of a warrant)

Dated

Issued by

Or

Surrendered to (name)

Number

Rank

Date

Time (24 hr clock)

Place

And

At the time of the arrest or surrender the relevant person was was not wearing the uniform of any of Her Majesty's armed forces and was was not in possession of an identity card issued by any of Her Majesty's forces.

And

Admitted to the court that he was a person subject to Service law had deserted:

or
 was absent without leave and or the court had in its possession evidence provided for in Part2 of the Armed Forces (Evidence of Illegal Absence and Transfers to Service Custody) Regulations 2009

After consideration, was released (under the following condition(s) as applicable)

That they report:

to (person)

at (place)

by (time)

on (date)

Certificate of authorised person.

Name

Signature

Rank and position

NOTES

General

1. The certificate is to be handed over with the relevant person to the person receiving the relevant person into custody.
2. Where they are available, a certified true copy of any custody records raised and maintained for the relevant person whilst he was under arrest, shall be provided with the certificate.

Certificate of release subject to conditions

3. Where the relevant person to be released under section 315(4)(c) or 316(3)(a)(ii) of the Armed Forces Act 2006 subject to a condition that he report at or by such time, to such place or person as may be specified to enable him to be taken into Service custody the certificate must be passed as soon as practicable to the Service Police Crime Bureau.
4. A copy of the certificate is to be provided to the relevant person when he is released, with the instruction that it be handed to the commanding officer at the place of report.



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CERTIFICATE OF APPEARANCE BEFORE A COURT OF SUMMARY JURISDICTION

T-SL-AD05

In accordance with The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009

I certify that on

Date

at (place)

the person named below was brought before the

Court (name and description of court)

being a court of summary jurisdiction

Service number

Rank/Rate

First name

Family name

Ship/unit/establishment

A member of the regular forces alleged to be a deserter or absentee without leave who had:

been arrested by surrendered to

name of the person who affected the arrest or to whom the surrender was made

at (place)

at (time)

on date

At the time of the arrest or surrender the person was was not wearing the uniform of any of Her Majesty's forces

The said person admitted that they are subject to Service law, and/ or further admitted that they had deserted/ were absent without leave from:

place where he/she absented him/herself if known

(delete this paragraph if no admission made/ delete as appropriate for any admissions made)

Signature

Date

Description of person surrendering or arrested



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX G TO
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revised 08/09

STOP CERTIFICATE OF ABSENCE

T-SL-AD06

From (unit)

Security Classification

(Copies of the certificate of absence should be sent to the following external addressees)

- | | | | |
|--|---|---|--|
| <p>RN</p> <ol style="list-style-type: none"> 1. NPM(E) A & D for RNMPU. 2. Area NPM. 3. PSyA RN for SO2 CI. 4. Service Police Crime Bureau. 5. for Absentees on sailing, addressees listed in FLAGO 1614. 6. Theatre HQ for J1 staff (if overseas). | <p>RM</p> <ol style="list-style-type: none"> 1. DRM. 2. NPM(E) A & D for RNMPU. 3. Area NPM. 4. PSyA RN for SO2 CI. 5. NCHQ for SO2 G1 RM Disc. 6. Service Police Crime Bureau. 7. Theatre HQ for J1 staff if overseas. | <p>Army</p> <ol style="list-style-type: none"> 1. FLC/Theatre HQ (for J1 discipline staff and Service police) – officers only. 2. Formation HQ (for J1) 3. Service Police Crime Bureau. 4. Defence Vetting Agency - where absentee holds a sensitive post. 5. HQ Intelligence and Security for the Command (and Division if in UK). | <p>RAF</p> <ol style="list-style-type: none"> 1. PJOBS. Overseas Theatres: Formation HQ for J1 Staff/Service Police (for all ranks). 2. UK units: HQ AIR Command (Air Pers Cswrk). 3. Service Police Crime Bureau. |
|--|---|---|--|

To

Reference

Reference must be made to the original certificate of absence

Details of Absentee

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corps)

Ship/unit/establishment (To include full unit title, address and post code/BFPO Number)

To include full unit title, address and post code/BFPO Number

Occurrence

- Apprehended by civil police at (place) on (date) at (time)
- Surrendered to civil police at (place) on (date) at (time)
- Apprehended by Service Police at (place) on (date) at (time)
- Surrendered to Service Police at (place) on (date) at (time)
- Returned to unit of own accord on (date) at (time)
- Granted extension of leave by (authority)
- Sickness
- Other (specify)

other (specified)

Place

Date

Time (24 hr clock)

Commanding Officer's certificate

In pursuance of Part 2 of The Armed Forces Act (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009 and The Armed Forces (Forfeitures and Deductions) Regulations 2009, I the undersigned, being the Commanding Officer of the Service person specified at here, hereby certify that he/she is no longer illegally absent.

Name

Signature

Rank

Date

CO means the CO of the relevant person or a person acting on behalf of or with the authority of the CO.
The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009 regulation 2.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Save as

Print Form

ANNEX H TO
VOL1 CH 10
JSP 830 MSL
revised 08/09

CONFESSION OF DESERTION

T-SL-AD07

In accordance with regulation 3 of The Armed Forces (Forfeiture of Service)(No.2) Regulations 2009

Confession of Desertion

I confess that I am guilty of the offence of desertion contrary to section 8 of the Armed Forces Act 2006

Service number

Rank/Rate

First name

Family name

Ship/unit/establishment

For the period:

from

to

I intended to avoid a period of active service/remain permanently absent

Signature

Date

I hereby certify that

On (date)

Service number

Rank/Rate

First name

Family name

made the confession to a Service policeman during an interview conducted in accordance with the Service Police Code of Practice for the Treatment of Questioning of Persons by Service Police

Service policeman's details

Service number

Rank/Rate

First name

Family name

Ship/unit/establishment

Signature

Date

Chapter 11

Summary hearing - dealing with evidence

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Chapter 11

Summary hearing - dealing with evidence

Introduction

1. The establishment of facts in a civilian criminal court is governed by the law of evidence which is a large and complex branch of the law, the detail of which lies beyond the scope of this chapter. This chapter deals with evidence as it applies to summary hearings conducted by a CO or subordinate commander. The intention is to provide those involved in the administration of Service discipline at unit level with the ability to recognise and deal with the most common issues that may arise where the officer hearing the charge is attempting to establish the facts of a case and to recognise when it will be necessary to seek staff legal advice.

2. The summary hearing is not a court. It is an inquisitorial process in which the CO endeavours to discover facts by actively searching for evidence and questioning the witnesses. No rules of evidence apply as such, but the principles ensure both best practice and fairness to the accused.

Best evidence rule

3. As a fundamental principle, the officer hearing the charge should always seek to ensure that the best evidence available is used at summary hearing. For example, the officer hearing the charge should try to ensure that any document relating to a case is the original rather than a copy. Similarly, where there is an exhibit, such as the alleged stolen property (where this has been recovered) in a case of theft, the officer hearing the charge should seek to have the property physically produced at the summary hearing to assist, for example, in establishing whether it has any obviously identifiable features. This ensures fairness to the accused, which is another fundamental principle of the summary hearing process. This does not mean that if the evidence provided to the officer hearing the charge is not the best, it cannot be used; but if it is not the best, it may affect the weight the officer hearing the charge attaches to it.

4. Where in any doubt as to what amounts to best evidence, the officer hearing the charge should seek staff legal advice to determine how best to deal with evidential issues that arise at summary hearing.

The meaning and purpose of evidence

5. **Proving the facts.** If an accused denies a charge, all the elements of the offence in question are put in issue. The officer hearing the charge must be satisfied that all aspects of the charge are proved to the requisite standard (i.e. beyond all reasonable doubt) before he can find a case proved.

How evidence is introduced

6. Evidence is introduced (with a view to proving a charge) in one of three ways:
- a. By witness evidence;
 - b. By documentary evidence; or

c. By the production of real evidence.

7. For the procedure concerning how evidence should be introduced at a summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). The officer hearing the charge should, in whatever form the evidence is presented, ensure that it is relevant and admissible (see paragraphs 23 to 30 below).

8. **Witness Evidence.** Witness evidence is simply an account by an individual and takes one of two forms:

a. **Oral.** Oral evidence is spoken evidence given by a witness at summary hearing; or

b. **Written.** Written evidence is a statement made by a witness that is read out at summary hearing.

9. **Documentary evidence.** Documentary evidence is any evidence contained in a document and produced for consideration by the officer hearing the charge. Documents include, for example: orders, maps, plans, drawings and photographs. There are rules relating to the origin and relevance of documents which the officer hearing the charge should seek to apply both as best practice and because the Summary Appeal Court will require documentary evidence to be produced in a form that will make the evidence legally admissible. For the purposes of the summary hearing, having established the relevance of the document to the charge, the officer hearing the charge should then, as a matter of best practice, ensure where possible that either the original document or where appropriate, a certified true copy of the document is produced.

10. In most cases the document(s) will need to be produced, for example, simply to confirm that a standing order existed and exactly what it stated, see section 13 of [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). In relation to an offence of failing to attend for a duty, for example, a copy of the relevant order with the accused's name on it may need to be produced, see section 15 of [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

11. The officer hearing the charge may seek staff legal advice where he intends to use a document in order to help directly to prove an offence from the contents of the document itself (e.g. a letter purportedly written by the accused confessing to a theft) and in any case of doubt concerning documentary evidence.

12. **Real evidence.** Evidence in the form of an object is called real evidence. Little evidential weight can be attached by the officer hearing the charge to such evidence in the absence of some accompanying evidence (which could be in statement form) identifying the object in question, if possible stating how it came to be before the CO and explaining its connection with or significance in relation to the case. Real evidence can include weapons, or objects found in the possession of the accused.

13. **Circumstantial evidence.** Circumstantial evidence is not a separate source of evidence, but rather a classification into which any type of evidence may fall. This is evidence of one or more facts (such as motive or opportunity) from which other facts may then be inferred or deduced – hence such evidence is sometimes referred to as indirect evidence.

Case study – how evidence is introduced

A theft has taken place from a locker in Service accommodation and the accused is stopped by the Service Police ten minutes after the offence, in a car, half a mile down the only road leading to the accommodation. In the boot of the car are found a crow bar, gloves and a mobile phone allegedly taken from the accommodation. The following evidence might be considered:

- a. **Witness evidence.** There may be a witness who can give evidence that he saw the accused in the accommodation at the time of the alleged theft.
- b. **Real evidence.** The mobile phone could be offered in evidence to help prove both it was the item taken, (if it is identified by the owner) and that it was the accused who took it.
- c. **Circumstantial evidence.** The crow bar itself is real evidence, but its possession by the accused, without further explanation, amounts to evidence of circumstances which make it more probable that the accused was connected with the theft – i.e. the crow bar is circumstantial evidence. The accused's presence a short distance from the crime scene – if this is stated in the witness evidence of the Service policeman who apprehended him may also amount to circumstantial evidence.

14. The case study above shows that many facts often involve proof by more than one of the methods of presenting evidence. Real evidence may be combined with witness evidence to make the fact in issue intelligible, such as production of the mobile phone with a statement on oath by the Service policeman that it was found in the possession of the accused.

Burden and standard of proof

15. 'Burden of proof' describes who is obliged to prove facts. The burden of proof usually lies on the prosecution in criminal trials. However, for summary hearings there is no 'prosecutor'. Therefore the burden lies upon the officer hearing the charge to call sufficient evidence to establish that there is a charge to answer and, if the defence calls evidence to refute the charge, to rebut any defence. 'Standard of proof' describes the degree to which the proof must be established. These two concepts are discussed further in paragraphs 16 – 18 and 19 below.

16. **Burden of proof.** The accused does not have to prove his innocence or disprove the charge against him. If an accused raises sufficient evidence to suggest that he may have a defence, then the officer hearing the charge must consider this evidence. What is sufficient will vary and in some cases it might be enough for the accused merely to rely upon evidence from any other source (including the officer hearing the charge's witnesses) which suggest he might not have committed the offence. This is a complicated area of the law where there are statutory exceptions (see paragraph 17 below) to the general rule that the burden of proof rests with the officer hearing the charge.

17. **Burden of proof - statutory exceptions.** A number of statutes provide for a specific defence to the offence outlined in that statute. In such cases, it is for the accused to provide some evidence in support of such a defence. For example, in a case of possession of an

offensive weapon, having lawful authority or a reasonable excuse for possessing the weapon are defences to the charge. The accused must be able to provide some evidence on which the officer hearing the charge could find that the possession of the weapon was justified on grounds of lawful authority or reasonable excuse. If he does so, the officer hearing the charge must satisfy himself that the accused's possession of the weapon was not justified (i.e. that the accused did not have such lawful authority or reasonable excuse), before he can find the charge proved.

18. **Burden of proof - defences.** In relation to certain defences that exist in law such as self-defence, for defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility), there is also a burden of proof placed on the accused (if raising such a defence) to provide some evidence in support of such a defence. For example, an accused facing an assault charge and wishing to claim self-defence, will need to provide some evidence from himself, other witnesses or CCTV evidence, that he was attacked or thought he was going to be attacked by the other person. It is then for the officer hearing the charge to decide whether he is satisfied beyond reasonable doubt (see paragraph 19 below on standard of proof), that the accused was not acting in self-defence when he struck the other person.

19. **Standard of proof.** Every allegation at a summary hearing must be established 'beyond reasonable doubt'. In other words, the officer hearing the charge must not find the charge proved unless satisfied beyond reasonable doubt, based on the evidence presented to him, that the offence was committed by the accused. The officer hearing the charge has a duty to have regard to all the evidence produced at summary hearing, both for and against the accused. However, he may draw reasonable inferences from the facts, although if any such inference is against the accused, the officer hearing the charge must be sure that it is the only inference which can properly be drawn. If there is any reasonable doubt as to whether the charge has been proved against an accused, the charge must be dismissed.

20. **Staff legal advice.** In any circumstances where the officer hearing the charge thinks that an exception to the general rule in paragraph 16 might be encountered, he should seek staff legal advice.

Proof of facts without evidence

21. **Presumptions.** Certain matters are presumed and therefore the officer hearing the charge can accept the existence of the fact forming that presumption in the absence of any evidence to the contrary. The most likely examples which may be encountered are as follows:

a. **Presumption of innocence of the accused.** The law presumes that an accused is innocent of the offence with which he is charged until the charge is proven against him. It is this presumption that makes it unnecessary for the accused to establish his innocence.

b. **Presumption of guilty knowledge.** Where a person is charged with theft, evidence is presented that the accused was found in possession of the property soon after it had been stolen and if the accused offered no explanation as to how the property came to be in his possession, the officer hearing the charge may infer guilty knowledge on the part of the accused and presume that he was a thief. The same inference may be made by the officer hearing the charge if the explanation provided by the accused is considered to be unreasonable.

c. **Presumption of intention.** As a general rule, proof that a person knew that his actions were likely to have certain consequences, when considered together with

all the other evidence, is evidence from which the officer hearing the charge can properly infer that the person intended those consequences when he carried out his actions.

22. **Judicial notice.** These are matters that the officer hearing the charge can assume are the case without needing evidence produced to prove them. Such matters form the background to the issues of fact that the officer hearing the charge is considering and mean that he must not ignore common sense and his knowledge of human nature and the ways of the world. Accordingly, the officer hearing the charge should also take judicial notice of matters within his general Service knowledge. Therefore, evidence does not need to be given on such things as the relative rank of officers, general duties and obligations of different members of the Services or as to any matters which any officer or Service person may reasonably be expected to know. However, matters within general Service knowledge do not extend to specialist or professional knowledge and it is necessary to rely upon the evidence of experts who are qualified by reason of their specialist knowledge (see subparagraph 25b below). For example, in the case of a disputed negligent discharge, it would be necessary for the officer hearing the charge to have evidence produced to him from an ammunition technician. If the officer hearing the charge is in any doubt as to whether to take judicial notice of a particular fact, that fact should be proved at summary hearing in the ordinary way.

Relevance of evidence

23. **Relevance.** As a matter of principle, evidence received and considered by the officer hearing the charge should be relevant and so far as is possible, be admissible. Although, as a general principle, evidence which is relevant is therefore admissible, there are a number of exceptions that are discussed at paragraphs 26 to 30 below. Accordingly, relevance and admissibility, whilst intrinsically linked, are distinct concepts and need to be considered separately.

24. **General rule as to relevance.** In principle, nothing should be admitted in evidence that does not tend immediately to prove or disprove the charge. For example, on a charge of contravening standing orders by having no car insurance, evidence that the accused's car had defective lights would not be relevant. However, if the charge was one of contravening standing orders by driving a vehicle with defective lights, the evidence clearly would be relevant.

25. **Opinion evidence.** Generally speaking, witnesses must testify as to particular facts which they have seen, heard or otherwise observed, but are not allowed to state their opinion on those facts. Witness opinion as to facts in issue is considered irrelevant since it is for the officer hearing the charge to draw any necessary inferences from proved facts. For example, a witness cannot, on a charge of contravening standing orders by negligent or careless driving, state whether the accused drove 'negligently' or 'carelessly'. He must only give a factual description of the driving, for example, that the car was being driven on the wrong side of the road. It is then for the officer hearing the charge to decide whether the manner in which the accused drove was negligent *etc*, having regard to all the circumstances of the case. There are, however, exceptions to this rule:

a. **Drunkness.** Unfitness through alcohol (drunkenness) under section 20 of the Act is an exception where a witness may state whether in his opinion the accused was drunk and should also qualify his reasons for holding such an opinion, for example, because the accused's eyes were glazed, he was unsteady on his feet or he smelled of alcohol. Where a medically qualified witness (such as a doctor) has examined a Service person for the purpose of ascertaining his condition he may be called in the same way as any other witness (as may a Duty Officer) to describe what

he saw when the Service person was brought before him and state whether in his opinion the Service person was drunk.

b. **Expert evidence.** Expert evidence is also an exception where a person with specialist knowledge in a particular field may be called to give his opinion on any point within the range of his specialist knowledge. Therefore, an expert can give opinion on matters irrespective of whether he was an eyewitness to those matters and may also refer to information from textbooks, reports etc., as well as detailing experiments he has carried out to test or verify his opinion. Examples of expert evidence would be as follows:

(1) In respect of a charge of assault occasioning actual bodily harm, a doctor may state that in his opinion an injury is consistent or not consistent with that person being struck with a weapon.

(2) Any Service person can give an opinion on a point which is within his specialist Service knowledge, provided such knowledge is not of the kind which would be expected to be generally known in a Service environment. For example, an ammunition technician could provide his opinion on the cause of a negligent discharge.

Admissibility of evidence

26. **Admissibility.** Evidence should, so far as is possible, be admissible, see paragraphs 23 and 24 above. Admissibility is a complicated area of the law but the following principles should be followed as a matter of best practice.

27. **Best evidence rule.** See paragraph 3 above.

28. **The rule against hearsay.** The legal rule against hearsay forbids a witness from relating what somebody else told him if tendered as evidence to prove the truth of what was said. For example, (A) cannot be called as a witness merely to state what (B) told him. Rather, (B) must be called to tell the officer hearing the charge himself what he knows about the facts in dispute. Likewise, (A) is not permitted to be called as a witness merely to present a letter (which contains something with reference to the facts in dispute) written to him by (B), since this would amount to written hearsay. Instead (B), as author of the statements in the letter, must be called to give oral evidence of the letter's contents. Hearsay should not be produced at summary hearings for the following reasons:

a. As the evidence is second-hand evidence, it is not possible to test the reliability of the evidence. In particular, the fact that the evidence consists of repetition of what a third party has written/said carries an obvious risk of distortion or inaccuracy akin to 'Chinese whispers'.

b. The credibility of the person making the statement cannot be tested since they are not a party to the summary hearing proceedings and so cannot be questioned on oath.

29. **Admissions.** Where an accused has admitted certain matters in relation to an offence, the CO should satisfy himself that any admission not made in an interview under caution was not made under pressure (that the accused was under no pressure to make an admission). Where an admission or a confession is made, the CO should exercise care in using that evidence.

30. **Staff legal advice.** Hearsay is a complex area of the law of evidence and it is important that the officer hearing the charge thinks carefully about seeking staff legal advice if he considers that it may be an issue or he should consider carefully referring the charge to the DSP for Court Martial (CM) trial.

Weight of evidence

31. When the evidence is produced at a summary hearing in accordance with the principles above, it is still a matter for the officer hearing the charge to consider what weight the evidence should carry in proving the fact(s) to which it relates.

32. **Assessing the value of oral evidence.** Allowance should always be given by the officer hearing the charge for the inability of some Service personnel to express themselves clearly, particularly in what may be an unfamiliar and daunting environment. Nonetheless, it is for the officer hearing the charge to decide upon the credibility of a witness based upon the evidence he provides (the weight of which may, to some degree, be assessed by the way in which such evidence is delivered by the witness).

33. **Identification.** Whenever a case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, it is important that special care is taken in weighing up such identification evidence. This is because it is quite possible for an honest witness to make a mistaken identification; a mistaken witness can also be a convincing one and even a number of apparently convincing witnesses can all be mistaken. The officer hearing the charge should examine closely the circumstances in which identification by a witness takes place, such as the following:

- a. How long did the witness have the accused under observation?
- b. At what distance?
- c. In what light?
- d. Was the observation impeded in any way?
- e. Had the witness ever seen the accused before?
- f. If so, how often?
- g. If only occasionally, had the witness any special reason for remembering the accused?
- h. How long elapsed between the original observation and the subsequent identification?
- i. Are there any discrepancies between the description of the accused first given by the witness and the accused's actual appearance?

If the identification evidence is poor, the officer hearing the charge should find the offence not proved unless there is sufficiently compelling other evidence to support the allegation against the accused.

34. **Staff legal advice.** Whenever an issue regarding identification arises either prior to or during a summary hearing, the officer hearing the charge is strongly advised to adjourn the proceedings and seek staff legal advice. In most cases, the potential evidential issues

surrounding identification will be sufficient to justify referral of the charge to the DSP for CM trial.

Attendance and compellability of witnesses

35. **Civilian witnesses at summary hearing.** During a summary hearing, only Service personnel can be compelled to attend by virtue of an order to do so; any civilian witness, regardless of the potential value of their evidence, cannot be made to attend the hearing if they do not wish to do so. Consequently, if a civilian witness refuses to attend a summary hearing and the evidence they could offer is relevant to the charge, the officer hearing the charge should consider referring the charge to the DSP for CM trial, since at such proceedings UK civilians can be compelled to attend.

36. **The accused.** An accused, unless he wishes to give evidence, cannot be compelled to give any evidence. At a summary hearing, the officer hearing the charge has a duty to inform the accused that he has a right to give evidence if he so wishes.

37. **Evidence from an accomplice.** Where this issue arises it would normally be appropriate to seek staff legal advice and it may also justify the officer hearing the charge referring the charge to the DSP.

38. **Spouse as a witness.** Where this issue arises staff legal advice should be sought.

39. **Children.** Where this issue arises staff legal advice should be sought.

40. **Witnesses who can neither hear nor speak.** Such witnesses can still be called to give evidence. Evidence by a deaf witness can be received either in writing or through sign language using an interpreter if necessary and will be treated as oral evidence.

41. **Religious belief (or absence thereof).** Religious persuasion has no bearing on whether that witness can give evidence. However, the form of oath or affirmation required to be given by the witness will have to be tailored so as to be applicable to his beliefs and thereby binding on his conscience.

Privilege of witnesses

42. Privilege refers to the right of a witness, when giving evidence, to refuse to answer certain types of questions or to refuse to produce certain types of document when required to do so on the grounds of some special interest recognised by law. The most common examples are as follows:

a. **Self-incrimination.** No witness (other than the accused when giving evidence at his request and in relation to the offence with which he is charged) can be compelled to answer a question if the answer would tend to expose that witness to any criminal charge, penalty or forfeiture or to any relevant Service punishment. In other words, every witness has a privilege against self-incrimination.

b. **Client-lawyer privilege.** A legal adviser (subject to the exception outlined below) is prohibited from disclosing any communication made between him and the accused in his capacity as legal adviser. In addition, a witness should not be questioned during the summary hearing about any such communications. Only if the witness himself (as the 'client' in the client-lawyer relationship) freely volunteers authority for any disclosure, can such privilege be waived.

c. **Medical officer-patient privilege.** When a doctor (or other health care professional, (e.g. a nurse or physiotherapist) is fulfilling a role as a witness at a summary hearing, he is under a legal duty not to disclose information obtained in his professional capacity¹ about his patient's medical condition unless his patient consents to such disclosure. In the absence of such consent, as a matter of policy, such information can be disclosed to the officer hearing the charge if it is in the public interest to do so², e.g. where the patient is a potential danger to others. Where such an issue arises staff legal advice should be sought.

d. **Communications with chaplains.** Communications made to a member of the clergy in his professional capacity are, strictly speaking, not privileged if the padre has to be a witness at a summary hearing. However, although not formally recognised as such, the civilian courts have respected confidentiality in communications between a member of the clergy and an individual. Chaplains should not as a matter of policy, ordinarily therefore be required to give evidence at summary hearing as to something told to them in their professional capacity³. Where such an issue arises staff legal advice should be sought.

Use of evidence from Service and other inquiries

43. Evidence given to a Service inquiry panel cannot be used in a summary hearing (see paragraph 44) unless the accused asks for this evidence to be used because it assists his case at summary hearing. More guidance on Service inquiries is also set out in JSP 832 (Service Inquiries). However, evidence from non-statutory inquiries such as local/unit inquiries and EOIT inquiries may generally, potentially be used at summary hearing, whether adverse to the accused or not (this would include evidence of inconsistency between a statement made at a non-statutory inquiry and at summary hearing). In such cases the officer hearing the charge should be cautious in so doing and should seek staff legal advice. In the case of other evidence not taken on oath, as no rules of evidence as such pertain to summary hearing, such evidence can be used, but again the officer hearing the charge should be cautious in so doing and should seek staff legal advice.

44. **Admissibility.** Other than perjury⁴, evidence given by any person to a Service inquiry panel is not admissible against a person at a summary hearing or in proceedings before a civilian court or Service court⁵. Evidential limitations also apply where evidence has been gained before a Board of Inquiry convened under the SDAs or QRRN and staff legal advice may be sought.

45. Staff legal advice should be sought where an accused may wish to rely on evidence given by a person to a Service inquiry panel because the evidence in nearly all cases is excluded.

46. **Exhibits provided to a Service inquiry panel.** Evidence may also be admitted at a summary hearing or in proceedings before a civilian court or Service court if the evidence in question existed independently of the Service inquiry. For example, a log book produced to a Service inquiry as an exhibit may be, subject to other rules on admissibility, produced in evidence against an accused in subsequent disciplinary proceedings.

¹ But not for example where he had been asked to give his opinion as to whether an accused was drunk.

² See DGPL 76/03 – Confidentiality and the Protection of Patient Information written by the Army Medical Directorate which has tri-Service application.

³ See Protocol E of Armed Forces Chaplaincy Policy Board/MFWG/03 dated 21 Oct 05 – Chaplaincy Protocol for the Armed Forces, which has tri-Service application.

⁴ Sections 2 or 5, the Perjury Act 1911.

⁵ The Armed Forces (Service Inquiries) Regulations 2008/1651 regulation 12.

Use of evidence from drug and alcohol testing

47. Testing can be carried out in relation to post incident drug and alcohol testing and compulsory drug testing in specific circumstances on Service personnel and relevant civilians⁶. The results of such tests are not admissible⁷ as evidence in disciplinary proceedings for a Service offence. Also see JSP 835 (Alcohol and Substance Misuse and Testing).

⁶ Sections 305 to 308 of the Act.

⁷ Section 308(3) of the Act.

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Chapter 12

Defences, mitigation and criminal responsibility

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Chapter 12

Defences, mitigation and criminal responsibility

Introduction

1. This chapter is divided into three parts:
 - a. Part 1 - Defences (paragraphs 4 - 28);
 - b. Part 2 - Mitigation (paragraphs 29 - 31); and
 - c. Part 3 - Criminal responsibility (paragraphs 32 - 44).
2. This chapter provides guidance on these matters to those involved in the administration of Service discipline at unit level. Related chapters are [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention), [Chapter 6](#) (Investigation, charging and mode of trial), and [Chapter 11](#) (Summary hearing - dealing with evidence).
3. This is not a detailed analysis of the law on the most common defences likely to be put forward by an accused, but when read in conjunction with the chapters mentioned above, should provide enough information for straightforward cases to be dealt with and ensure that staffs can identify when a case should be referred for Court Martial (CM) trial. It is not intended to replace the need to seek legal advice in specific cases or where individuals are uncertain as to interpretation of the guidance or the correct course of action.

Part 1 – Defences

4. Part 1 of this chapter covers those defences which are of general application. When a defence is raised¹ by the accused or is apparent from the facts put forward by him or on his behalf² a charge can only be found proved if it is shown to the required standard³ that the defence has not been established. There are specific defences which are sometimes available to certain offences; these are detailed within [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

5. The officer hearing a charge should be clear on the distinction between what is a defence and what constitutes mitigation (for more information pertaining to mitigation and defences see paragraph 29 - 31 below). To aid those administering Service discipline, listed below are those general defences which the officer hearing the charge could be expected to deal with at a summary hearing and those other defences for which he may wish to seek staff legal advice. This should assist the officer hearing the charge in identifying, in each case, whether it is a defence he could be expected to consider at summary hearing.

a. The general defences dealt with in this chapter are as follows:

- (1) Intoxication/drunkenness due to drugs/alcohol.
- (2) Self defence.
- (3) Mistake.
- (4) Duress.
- (5) Necessity.
- (6) Insanity.
- (7) Automatism.

b. Other defences detailed in this chapter are:

- (1) Alibi.
- (2) Provocation.
- (3) Diminished responsibility.
- (4) Consent.
- (5) Superior orders.

6. When deciding if a charge is to be heard summarily, those involved in the administration of discipline should consider whether a likely defence will raise issues which would be more

¹ Until the issue of a possible defence is raised by the accused, its relevance to the charge does not arise.

² The accused is not required to assert that he is raising a specific defence, such as self defence for example. If it is apparent from the evidence put forward to prove the charge (e.g. what the accused said when arrested) or by the accused when presenting his evidence, that a defence might apply the officer hearing the charge must be satisfied that the defence has not been established before he can find the charge proved.

³ An officer hearing a charge must, having considered all of the evidence, be sure (sometimes expressed as being satisfied beyond reasonable doubt) that the charge is proved.

appropriate to deal with at CM trial, for example insanity. See [Chapter 6](#) (Investigation, charging and mode of trial) for factors affecting mode of trial.

General defences

7. Intoxication/drunkenness due to drugs/alcohol.

a. **Voluntary.** The principle is that it is not a defence to say that the accused would not have acted in the way he did but for the fact that his inhibitions were reduced due to the effect of alcohol/drugs which he had voluntarily consumed. In other words, if the accused chose to consume the alcohol/take the drugs in the first place, it is no excuse to be intoxicated and cannot be relied on as a defence. Self-induced intoxication from alcohol or drugs or both, may however, be a defence to an offence requiring a 'specific intent'⁴. The most likely offence where this issue may arise at a summary hearing is theft. In such a case, intoxication may amount to a defence if the mind of the accused was so affected by alcohol/drugs that he was (or may have been) incapable of forming the necessary intent. Evidence of intoxication falling short of this and merely establishing that the mind of the accused was affected by drink/drugs, does not provide a defence. It might reasonably be inferred from evidence raised by the accused that he was incapable of forming the necessary intent through intoxication. In such a case, the onus is on the officer hearing the charge to satisfy himself beyond reasonable doubt that the accused was capable of forming the necessary intent at the time of the offence before he can find the charge proved.

b. For other offences which may be committed intentionally, recklessly or negligently⁵, self-induced intoxication is not a defence. Such offences which may be heard summarily include:

- (1) Assault occasioning actual bodily harm.
- (2) Common assault/battery.
- (3) Criminal damage.
- (4) Taking a conveyance without authority.

c. **Involuntary.** If, however, the primary cause of the intoxication is involuntary, e.g. where a person has his drink laced unbeknown to him, he will not necessarily, whilst under the influence of such drink, be accountable for all his actions. In these circumstances the advice of the staff legal adviser should be sought.

d. In the case of a non-criminal conduct offence, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) where there is doubt as to whether an accused's intoxication may or may not afford a defence, staff legal advice should be sought.

8. **Self defence.** Where violence is threatened or used against a person, it is lawful for the person threatened or attacked, to use such force as is necessary in order to resist or defend himself and/or another against the attack, but only if the force used by him is reasonable. In such circumstances the law recognises that the person acts in self defence. In assessing whether the accused's actions in defending himself were reasonable, the officer hearing the charge should consider what the accused himself thought at the time. Where this defence is

⁴ That is an offence that can only be committed intentionally (or deliberately) as opposed to an offence that can be committed recklessly.

⁵ These offences are known legally as offences of 'basic intent'.

raised, the officer hearing the charge must find it proved beyond reasonable doubt that the actions of the accused did *not* amount to self-defence if the charge is to be found to be proved.

9. A person does not have to wait until he is struck before striking in self defence. In each case everything will depend upon the particular facts and circumstances. It may be, in some cases, only sensible and clearly possible for the person attacked to take some simple avoiding action. If there is some relatively minor attack, it is not permissible for the person attacked to respond with an act of retaliation which is out of proportion to the force or threat of force levelled against him. For example, a person who is punched in the face by another person cannot legally draw a gun and shoot that person dead. Lethal force can only be used by an individual when he reasonably believes he or another is about to be killed or seriously injured and the use of lethal force is the only means available with which to defend himself or another.

10. There is no legal requirement that a man must retreat as far as he can when threatened, but his ability to do so will be relevant to the reasonableness of the force used in his defence. If an attack is sufficiently serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the attack is over and no sort of peril remains, then the use of force may be by way of revenge, punishment, or pure aggression, and there would no longer be grounds to claim self-defence. In all cases it should be remembered that the person defending himself cannot precisely assess the exact measure of his defensive action.

11. **Use of force in prevention of crime.** A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large⁶. This will apply to the great majority of cases of self-defence and defence of others and many cases of defence of property because in these cases the person who uses lawful force will be doing so for the purpose of preventing crime.

12. **Mistake.** A mistake as to the criminal law or ignorance of it is no defence to a criminal charge. However, a mistaken belief that an act is not criminal may afford mitigation. Staff legal advice should be sought if this defence is raised in circumstances where a belief in the existence of certain facts appears to be honestly held. This is because the genuinely held (but mistaken) belief of the accused could make his conduct innocent and may afford a defence.

13. This issue could arise, for example, in relation to a charge contrary to section 28 (resistance to arrest) of the Act. An accused may claim that at the time of his arrest by the Service Police he honestly (but mistakenly) believed that the persons seeking to make the arrest were not Service policemen but were impersonating Service policeman. In deciding whether he finds the charge proved or not, the officer hearing the charge will have to assess whether a mistaken view of the facts by the accused was genuinely held. In helping him to decide whether the accused genuinely held that belief he will need to consider the reasonableness or unreasonableness of the accused's belief, taking into account all of the surrounding circumstances - see section 28 of [Chapter 7](#) (Non-criminal conduct (disciplinary offences)).

14. In respect of a charge for any offence⁷ a mistaken but honest and reasonable belief in circumstances which if true would render the act of the accused an innocent act will afford a defence. The reasonableness of the belief will probably go only to the issue of whether the belief was genuinely held. Where the issue is raised the officer hearing the charge must be sure that no such belief was held before he can find the charge proved.

⁶ Section 3, Criminal Law Act 1967.

⁷ Apart from offences of strict or absolute liability where no defence will be available. These are offences for which there is no requirement to prove a particular state of mind, for example an offence contrary to section 36 (inaccurate certification) of the Act.

15. **Duress.** Duress may form a defence to all offences which may be heard summarily. However, the exact scope of this defence is not clearly defined in law and staff legal advice should be sought if it is raised. This defence covers the situation where a person is threatened by another with death or grievous bodily harm⁸ if he does not undertake a criminal act. For example, where an accused claims that another person threatened to seriously harm him unless he stole a digital camera for him.

16. The fact that the accused believes that a threat of death or grievous bodily harm will be carried out if he does not commit the offence is not of itself sufficient if a person 'of reasonable firmness'⁹ sharing the characteristics of the accused would not have given way to the threats. Whether this defence is available will depend entirely upon the individual circumstances of the case including, in particular, whether the person belongs to a group of persons less able to resist pressure (e.g. youth, physical disability, mental impairment, including post traumatic stress).

17. The threat (as in the example above) does not in all cases need to be against the individual who undertakes the criminal act; it may be against someone for whom they feel responsible (e.g. the accused's spouse or child).

18. **Necessity.** Closely related to the defence of duress and sometimes legally called duress of circumstances, is the defence of necessity. This defence may arise in a situation where the accused justifiably chose to commit the offence only because of the consequences had he not committed the offence. For example, a rock climber falls and is dangling at the end of the rope held by a person who has the choice of dying with his companion (as he is unable to pull the accused to safety) or cutting the rope and saving himself, but accelerating the death of his companion.¹⁰

19. An accused may have a defence of necessity to an act which would otherwise be criminal if he can show that:

- a. Committing the crime was necessary, or the accused reasonably believed it to be necessary, in order to avoid or prevent serious injury or death to himself or another;
- b. He did no more than was necessary for that purpose; or
- c. The commission of the crime, viewed objectively, was reasonable and proportionate having regard to the injury he was seeking to avoid or prevent.

20. **Insanity.** Every person is presumed by law to be sane and to be accountable for his actions, unless the contrary is proved. Staff legal advice should be sought where this defence may be an issue.

21. **Automatism.** Closely related to the defence of insanity, is another defence, legally known as automatism. The distinction between them is that automatism is a defence to actions committed by the accused based on the failure of the accused's mind and not due to disease of the mind (as is the case for insanity). This defence is a concept involving the involuntary movement of the accused's body or limbs and is often raised in driving cases. It most commonly arises in relation to persons prone to sleepwalking or hypoglycaemia (a trance-like state caused by lack of insulin most commonly suffered by diabetics) or where for example a driver is stung by a hornet and loses control of his vehicle.

⁸ It is possible that a fear of false imprisonment might suffice.

⁹ i.e. a person who is not put in fear by the slightest threat.

¹⁰ Archbold 2009 17-128.

22. This defence may be rendered invalid where the accused is responsible for falling into such a condition, as for example by driving whilst suffering from exhaustion or by abusing alcohol or drugs. If the accused has some, albeit impaired, control over his actions this defence may not be available,

23. Whether there is sufficient evidence to establish a defence of automatism is a question of law. If there is such evidence, the officer hearing the charge must find the charge not proved unless he is satisfied beyond reasonable doubt that the accused's conduct was not involuntary. In such a case staff legal advice should be sought.

Other defences

24. **Provocation.** Provocation does not provide a defence for any charge which may be heard summarily¹¹ but can, nevertheless, be a strong mitigating factor. Although a commonly claimed 'defence' particularly in cases of assault, the claim by an accused that he was 'provoked' or 'wound up' by the victim/co-accused must only be taken into account by the officer hearing the charge (if he is satisfied this occurred) as the background to the offence. For example, an accused might claim that his victim 'provoked' him into hitting him because he called his girlfriend "a slag" in front of him and others, or had been making a succession of derogatory comments to him immediately before the accused punched the victim in the face. Neither of these excuses would provide the accused with a defence to a charge of battery, but the officer hearing the charge may well regard such an excuse as a mitigating factor.

25. **Alibi.** Rather than a defence put forward to justify or provide an excuse for why a person committed a certain act, alibi is a common defence which is relied upon to assert that a person did not in fact commit the offence at all, because he was not present when the offence was committed. However, an alibi is more than an assertion that he was not in a particular place at a particular time. In order to establish an alibi the accused has to prove that he was somewhere else at the relevant time. Once the accused, by evidence, shows that he was somewhere else at the given time, the officer hearing the charge must call evidence to disprove the alibi or determine that the offence was committed at some other time in order to find the charge proved. Where such a defence is put forward, it is often linked to a claim of mistaken identity. For guidance on the approach to be taken to the issue of identity see [Chapter 11](#) (Summary hearing – dealing with evidence).

26. **Diminished responsibility.** Diminished responsibility does not provide a defence for any charge which may be heard summarily¹². This should not be confused with examples of emotional stress such as bereavement, illness of a close relative etc which may, nevertheless, be strong mitigating factors in their own right, see paragraphs 29 to 31 below.

27. **Consent.** Consent is a defence to a charge of assault or battery; however, it is not a defence to a more serious assault, e.g. where actual or grievous bodily harm is caused. This defence commonly arises where an accused claims the injured party was hurt during 'horseplay' to which that person consented. Consent can provide a defence if there was no intention on the part of the accused to injure the person concerned. For intention generally, see paragraph 32 below.

28. **Superior orders.** A person who is bound to obey a superior is under a legal duty to refuse to carry out an order received from that superior, to do some act or make some omission, if the order is manifestly illegal. If the illegal order is carried out, an offence may be committed. Where the order is not manifestly illegal, an accused will not be excused if he

¹¹ It is however a defence to murder, where it reduces the offence to one of manslaughter.

¹² The statutory defence of diminished responsibility [section 2 of the Homicide Act, 1957] is applicable only to the offence of murder. Diminished responsibility reduces a charge of murder to manslaughter.

carries out the order and in doing so commits an offence. However, the accused may have a defence on other grounds because, for example, the order may negate a particular intent on the accused's part (which may provide a complete defence) or it may reduce the offence to one of a less serious nature or it may excuse what otherwise appears to be negligence. Evidence of superior orders which fall short of providing the accused with a defence to the offence may still be a strong mitigating factor.

Part 2 - Mitigation

29. Mitigation is not a defence. For mitigation generally see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) and [Chapter 13](#) (Summary hearing sentencing and punishments).

30. What amounts to a defence and what amounts to mitigation can sometimes be confused; they are, however, quite distinct elements of the summary hearing process. A defence is relevant to the issue as to whether the charge can be proved, whereas mitigation is relevant to the question of punishment. For example, in a case of assault self defence may be a defence but provocation may only be mitigation. Where a charge is proved, mitigation is put forward by or on behalf of the accused to explain the circumstances surrounding the offence for the purpose of either reducing the sentence which might otherwise be awarded, or persuading the officer hearing the charge that he should sentence the offender in a particular way. It is an attempt to put the offence into context by showing a number of factors or circumstances that impacted on the accused at the time.

31. Mitigation may also seek to demonstrate that a particular sentence would have a disproportionately serious effect on the offender or his family (a custodial sentence, for example). By contrast, a defence is an explanation for the accused's actions that legally excuse or justify his conduct. The accused often contests the accuracy of the allegations against him; however, defences do not depend on refuting such allegations, rather a defence raises an issue as to whether the accused has committed an offence at all. If the officer hearing a charge is not satisfied so that he is sure that a defence does not apply he must find the charge not proved.

Part 3 - Criminal responsibility

Intention

32. 'Intention' is a word that is usually used in relation to consequences. A person clearly intends a consequence if he wants that consequence to follow from his action. This is so whether the consequence is very likely or very unlikely to result. Thus, an accused who shoots at another wanting to kill him, intends to kill whether the intended victim is two metres away and an easy target or whether he is 200 metres away and it would have taken an exceptionally good shot to hit him. In either case, even if the accused misses he will be culpable for an offence requiring an intention to kill, such as attempted murder.

33. The meaning of 'intention' is not restricted to consequences which are wanted or desired¹³, but includes consequences which an accused might not want to follow but which he knows are virtually certain to occur. Where there is clear evidence that the accused desired the consequence to occur, the question of whether the accused intended that consequence and whether intent can be proved will depend on the strength of that evidence. Where the accused may not have desired the consequence but may have foreseen it as a by-product of his action, whether intent is proved will require consideration both of the probability, however high, of the consequence occurring as a result of the accused's action, (and in some cases this may be a very significant factor) together with all the other evidence, in order to determine whether the accused intended to bring about the consequence.

34. For the effect of intoxication on intention see paragraph 7 above.

Recklessness

35. A person acts recklessly with respect to:

- a. A circumstance, when he is aware of a risk that exists or will exist; and
- b. A result, when he is aware of a risk that it will occur;

and it is in the circumstances known to him, unreasonable to take that risk¹⁴.

36. Proof is required that the accused was aware of the risk and in circumstances known to him, it was unreasonable for him to take the risk. In other words, to prove a person has been reckless, he must have some foresight that by acting, or failing to act in a given manner there was a risk that the offence would be committed. He must then have gone on, unreasonably, to take that risk and commit the offence. Any reason why the accused did not in fact appreciate the risk is relevant, except for voluntary intoxication through drink or drugs. However, an accused's assertion that he did not think of a certain risk will not be accepted when all the circumstances and probabilities and evidence of what he did and said at the time, show that he did or must have done so.

Negligence

37. The concept of negligence requires the accused to behave in the circumstances as a reasonable man would be expected to. Therefore, an offence involving negligence can be committed unwittingly, but in circumstances where an accused either acted unreasonably or omitted to act reasonably. Few criminal conduct offences can be committed negligently - see

¹³ In other words - consequences which the accused 'directly intends' to follow.

¹⁴ Archbold 2009 para 17-51 (R v G [2004] 1 AC 1034).

[Chapter 8](#) (Criminal conduct offences), although a significant number of non-criminal conduct offences can be - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). This is because non-criminal conduct offences relate wholly to a Service person's professional responsibilities, where certain basic (or reasonable) standards of performance can be expected. Where a Service person fails to meet these standards, his failure to do so may be negligent and the charge against him may therefore be proved.

38. For non-criminal offences, in the case of an offence where negligence suffices to find the charge proved, liability will be avoided if the accused behaves as a reasonable person, with the same skills, professional training, knowledge and experience would have done in the circumstances. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable person would exercise in the same situation. This is an objective test for the officer hearing the charge to apply.

39. For a criminal conduct offence where negligence alone would be sufficient to find the charge proved, careless and inconsiderate driving is a good example. Judged against an objective test, failure by an accused to exercise the degree of care and attention that a *reasonable*, competent and prudent driver would exercise in the circumstances is sufficient for the offence to be proved. An accused may have driven carelessly, either due to a particular driving manoeuvre or method of driving he used or failed to use. If the accused either fails to provide an explanation for his apparently careless driving, or the explanation is objectively inadequate, then the conclusion will be that he was careless (or negligent) and the charge will be proved. Failure to exercise due care and attention may be a deliberate act (overtaking on a bend for example).

Lawful excuse or reasonable excuse - the burden of proof

40. **Evidential burden**¹⁵. A charge is not proved against an accused unless the officer hearing the charge is sure (sometimes expressed as being satisfied beyond reasonable doubt) that the person committed the offence. This will require the officer to be satisfied that each and every element of the offence has been proved to the requisite standard - see [Chapter 11](#) (Summary hearing – dealing with evidence). It follows that the accused is generally not required to prove anything.

41. Where, however, the words 'lawful excuse' or 'reasonable excuse' appear in the charge, it is only if the accused raises some evidence to suggest that he may have such an excuse that the officer hearing the charge will have to be satisfied beyond reasonable doubt that he did not have a lawful or reasonable excuse.

42. **Lawful excuse**. A person will have a lawful excuse if he acts because of some lawful reason. For example, if a Service policeman breaks down the door of a barrack room to arrest a suspect, he will not commit an offence under section 24 (damaging Service property) of the Act because of the statutory powers he is given under section 90 (entry for purpose of arrest etc) of the Act. Similarly, a person will have a lawful excuse if he acted as he did because he was lawfully obliged to do so. For example, if a person intentionally disposes of Service property because he is given a lawful order to do so or because of some other legal requirement (for example, the destruction of records containing personal data because of obligations under the Data Protection Act) he will not have committed an offence.

43. **Reasonable excuse**. A person will have a defence if he has a reasonable excuse for acting in the manner alleged. Thus, a person charged with fighting¹⁶ will have a reasonable excuse for his actions if he acted in self defence. Similarly, a person who fails to

¹⁵ Section 325 of the Act.

¹⁶ Section 21 of the Act.

attend for a duty¹⁷ will have a reasonable excuse if he does not attend because he was involved in an accident and was incapable of attending. Reasonable excuse is a wider concept than 'lawful excuse'. It is unnecessary for the reasonable excuse to be connected to a legal obligation or authorisation. However, in many cases, if a person acts because of a legal obligation or authorisation, he will also have a reasonable excuse.

44. In cases where the accused is charged with criminal conduct offences¹⁸ - see [Chapter 8](#) (Criminal conduct offences) if the words lawful authority, lawful excuse or reasonable excuse appear in the charge, consideration should be given to obtaining advice from a staff legal adviser. This is because what is a lawful authority or a lawful or reasonable excuse will depend on the law (other than the Act) underlying that conduct.

¹⁷ Section 15 of the Act.

¹⁸ Section 42 of the Act.

Chapter 13

Summary hearing sentencing and punishments

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Chapter 13

Summary hearing sentencing and punishments

Introduction

1. This chapter deals with sentencing principles and procedures applicable to Summary Hearings. It is aimed at all officers with summary powers of punishment and also those persons who are required to advise them. It sets out the principles that all officers who are hearing a charge must apply when sentencing and the procedures to be adopted when determining sentence¹. These principles and procedures are on a statutory basis under the Armed Forces Act 2006 (the Act); therefore, where it is stated that a factor must be considered a CO² is under a legal obligation to consider such a factor.
2. This chapter also explains the detail of the different types of punishment which are available at a summary hearing. COs should acquaint themselves with the guidance on each punishment before sentencing.
3. Powers of punishment and extended powers for COs and subordinate commanders can be found at [Annex A](#). The procedure for applying for extended powers is contained within [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

Purposes of sentencing

4. Sentencing means the making of any order when dealing with an offender in respect of his offence or offences. The CO must have regard to the purposes of sentencing when dealing with an offender for a Service offence³. Those purposes are⁴:
 - a. The punishment of offenders.
 - b. The maintenance of discipline.
 - c. The reduction of Service offences and other crime (including reduction by deterrence).
 - d. The reform and rehabilitation of offenders.
 - e. The protection of the public⁵.
 - f. The making of reparation by offenders to persons affected by their offences.
 - g. If the offender is under 18, regard to his welfare.

Sentencing process

5. The CO is to assess the seriousness of the offence and award an appropriate sentence. In doing so, the CO must always take into account all relevant aggravating and

¹ These principles and procedures largely reflect those followed in the civilian courts in England and Wales.

² This includes subordinate commanders unless expressed to the contrary.

³ Non criminal (discipline) and criminal conduct offences.

⁴ Section 237 of the Act.

⁵ The 'public' includes both the Service and civilian communities.

mitigating factors. He must go on to decide which punishment is commensurate with the seriousness of that offence. In considering the seriousness of the offence, the CO must:

- a. Consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or could foreseeably have caused;
- b. Consider treating previous convictions as an aggravating factor, see paragraph 8; and
- c. Treat the fact that the current offence was committed while the offender was charged with another Service offence and released from Service custody, or on bail, as an aggravating factor.

6. The CO should also consider:

- a. The nature of the offence and the consequences;
- b. The effect on discipline on the unit;
- c. The effect on operational effectiveness;
- d. The status of the offender: rank or rate, appointment, level of responsibility and trust.

Factors indicating higher culpability and/or harm

7. The following are some of the more common aggravating features which may lead a CO to conclude that the offence is more serious:

- a. Common offence in unit.
- b. Vulnerability of the victim.
- c. Breach of trust.
- d. Premeditation.
- e. Operational environment.
- f. Experienced Service person/offender in position of responsibility.
- g. Involvement of alcohol. Even though a charge of drunkenness could have been brought, another charge may have been chosen and the evidence may reveal that alcohol was a feature of that other offence. The officer hearing the offence may therefore treat alcohol as an aggravating feature of an offence as opposed to a stand-alone offence of drunkenness in its own right.
- h. Group offence.
- i. Gratuitous offending (especially violence).
- j. Adverse effect on Service discipline.
- k. In the public eye.

I. Offending whilst awaiting disciplinary action on another matter.

8. **Previous convictions.** If the offender has one or more previous convictions, each previous conviction, which the CO considers can reasonably be treated as an aggravating factor, must⁶ be treated as such. In considering whether a previous conviction can reasonably be treated as an aggravating factor the CO must have regard (in particular) to: the nature of the offence to which the conviction relates and its relevance to the current offence; and the time that has elapsed since the conviction⁷. Previous convictions fall into two categories:

- a. A previous conviction for a Service offence (this is any conviction for an offence heard at a summary hearing, Summary Appeal Court (SAC) or by a Court Martial (CM); or
- b. A previous conviction by a court in the British Islands for an offence other than a Service offence.

It is not mandatory for a CO to take into account a previous conviction by a court outside the British Islands; however, he may do so if he considers it appropriate.

9. When considering previous convictions:

- a. The CO should take into account any failure to respond to previous sentences where the facts of the previous conviction are relevant to the facts of the offence for which the sentence is to be imposed. Relevance is a matter for the CO. As a guide, if previous convictions and accompanying sentences are different in kind and/or remote in time to the matters in the charge sheet in hand, they are likely to have limited relevance.
- b. Cautions and warnings may be considered as part of the overall determination of what sentence might be appropriate. For example, evidence of a caution for a like offence may be indicative of a failure to reform, it may provide evidence of the effectiveness of a particular method of disposal adopted previously or it may provide an insight into the offender's disciplinary record.
- c. JPA may indicate that a previous conviction is spent. At summary hearing, spent convictions are not automatically excluded from being considered as previous convictions and the same factors should be applied in determining whether a spent conviction is relevant.

10. **Racial or religious aggravation.** An offence is racially or religiously aggravated⁸ for the purposes of sentencing if⁹ at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group. For the purposes of this factor 'membership' in relation to a racial group, includes association with members of that group; presumed means presumed by the offender; racial group means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins and 'religious group' means a group of persons defined by reference to religious belief or lack of religious belief.

⁶ Section 238(1)(b) of the Act.

⁷ Section 238(2) of the Act.

⁸ Section 240 of the Act.

⁹ Crime and Disorder Act 1998 section 28.

11. **Aggravation related to disability or sexual orientation.** If the offender has demonstrated hostility based on a victim's sexual orientation (or presumed sexual orientation) or disability (or presumed disability), or where the offence was motivated by hostility towards persons of a particular sexual orientation or persons with a disability this would constitute aggravation. For the purposes of this factor, disability means any physical or mental impairment; 'presumed' means presumed by the offender.

12. For the purposes of deciding whether racial or religious aggravation is a feature of an offence (paragraph 10) or whether there is aggravation related to disability or sexual orientation (paragraph 11), it is immaterial whether or not the offender's hostility is also based on any factor other than religion or race, or disability or sexual orientation. If an accused admits the offence but denies that there has been any racial, religious, sexual orientation or disability aggravation a disputed facts procedure (hearing to determine factual basis on which to award a sentence) will have taken place see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

13. If any of the above aggravating factors exist, the CO must tell the offender in ordinary language so that the offender will understand at the time the sentence is awarded they must be recorded on the record of summary hearing (RSH).

14. **Mitigating factors.** Some factors may indicate that an offender's culpability is unusually low, or that the harm caused by an offence is less than usually serious. Such factors might include:

- a. A greater degree of provocation than normally expected;
- b. Youth or age, where it reflects responsibility;
- c. The fact that the offender played only a minor role in the offence; and
- d. If the length of time since the commission of the offence has been significant and that time / delay has been through no fault of the offender.

Other factors including personal mitigation

15. **Personal mitigation.** The offender may wish to provide mitigation prior to the determination of sentence. He may do this himself or through his accused's assisting officer (AAO). Some factors that may be relevant include:

- a. The offender's age, rank/rate and Service experience.
- b. Evidence of his professional performance.
- c. Detail of his character.
- d. Background information as to why the offence was committed e.g. provocation, financial problems, etc.
- e. Any remorse shown/articulated.
- f. Domestic circumstances relevant to the offence or offender.
- g. Financial circumstances, which may include information on dependents. Inquiring into the offender's financial circumstances is a mandatory legal requirement

if the CO is considering imposing detention, a fine or a Service compensation order (SCO) see paragraphs 42,108 and 157 respectively.

h. Voluntary reparations made.

16. **Reduction in sentence for early admission of charge.** In every case where an offender admits the charge, the CO must take into account the stage in the proceedings at which he indicated his intention to admit the offence at summary hearing. The level of reduction should be a proportion of the total sentence imposed. A reduction of one third would be appropriate when the indication was given at the 'first reasonable opportunity'. At the other end of the scale, a reduction of only 10% might be appropriate for a guilty plea entered at the last moment. The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea not only to witnesses and victims, but also in enabling the CO and other authorities to deal more quickly with other outstanding cases. Although 'the first reasonable opportunity' may be the summary hearing itself, in many cases the CO will consider that it would have been reasonable to have expected an indication of willingness earlier, for example during the first police interview. An admission at the last moment before the trial starts, when the witnesses are waiting outside ready to give their evidence, would attract the smaller discount (10%). An admission after the trial starts would attract very little discount. The offender must be told of any credit he has been given for his admission of the offence at the summary hearing when the CO reads out the sentence. The CO should therefore bear in mind that a maximum sentence, whether with extended powers or not and in particular a summary sentence of 90 days detention, should generally be reserved for a conviction after a contested hearing, though this is not an inflexible rule. If there is any doubt staff legal advice should be sought.

17. **Time spent in custody without charge.** There is no legal requirement to count time spent in custody before charge i.e. during the investigation, against any period of detention subsequently awarded. However, a CO may take such periods of custody into consideration. Custody after charge is dealt with differently and guidance can be found at paragraph 51 below.

18. **Career consequences.** The CO may, where appropriate, consider whether any career consequences of the punishment for that individual would be disproportionate to the offending behaviour in all the circumstances.

19. **Sentencing local acting ranks or rates (RN), local ranks (Army and RAF) and acting ranks or rates.** Local acting and acting ranks or rates hold and are paid in the acting rank. When sentencing an offender who holds a local acting or acting rate or rank he must be treated as holding the substantive rate or rank as that which he holds at the time of the summary hearing. Local ranks simply hold the next higher rank but are not paid at that rank. Therefore for the purposes of sentencing they will be treated as holding their substantive rank and punished accordingly.

20. **Sentencing men and women.** There is no difference in the sentencing policy between male and female offenders.

21. **Single sentence for two or more offences.** Where a CO records findings that two or more charges against a person have been proved, the award he must make is a single 'global' sentence (consisting of one or more of those punishments available to him) in respect of all the charges taken together¹⁰.

¹⁰ Section 131 of the Act. This is also the case for the SAC, see section 147 of the Act.

22. **Co-accused from different units or sub units.** Where a charge involves co-accused from different units/sub units or the same charge is brought against two Service personnel in different units and it arises out of the same incident, COs should normally liaise and consult with each other in order that discipline is fairly and evenly administered and context is understood and taken into account.

Duty to give reasons and explain sentence

23. The CO passing sentence must explain in ordinary language the general terms of and the reasons for the sentence. For example, if the CO imposes a custodial sentence, he must explain why the offence is sufficiently serious to warrant such a sentence¹¹.

24. He must include in his reasons, the following:

- a. Any reduction given for admitting the offence.
- b. Any aggravating or mitigating factors the CO regarded as being of particular importance.
- c. The effect of the sentence, i.e. how the sentence works in practice. For example:

“I award you seven days restriction of privileges and seven days stoppage of leave. This means that for the next seven days you will not be allowed to leave the ship and you will follow the restriction of privilege routine as laid down in standing orders. That regime is...”

- d. Where the offender is required to comply with any order¹² forming part of the sentence, the effects of any failure to comply with that order.
- e. Where the sentence consists of or includes a fine, the CO must explain the effects of failing to pay the fine (although fines will almost always be deducted direct from pay).
- f. Any power to vary or review any order forming part of the sentence on application¹³.
- g. What credit, if any, has been given for any time spent in custody¹⁴.

Sentencing of officers

25. The general principles contained in this guide apply equally to the summary punishment of officers. The starting point for punishments is detailed in the guidance in [Chapter 14](#) (The summary hearing sentencing guide).

Punishments available at summary hearing

26. The punishments that may be awarded at summary hearing are¹⁵:

¹¹ Section 252 of the Act.

¹² E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO order, suspended sentence order etc.

¹³ Section 252 of the Act.

¹⁴ See paragraphs 51 and 52.

¹⁵ Section 132(1) of the Act.

- a. Detention (only if offender is of or below rate or rank of leading rate, lance corporal or lance bombardier or corporal in the RAF), see paragraphs 34 - 67.
- b. Service supervision and punishment order (able rates, marines, soldiers or airmen only), see paragraphs 68 - 84.
- c. Forfeiture of seniority (officers only), see paragraphs 88 – 93.
- d. Reduction in rank or disrating (warrant officers or non-commissioned officers only), see paragraphs 94 – 104.
- e. Fine, see paragraphs 105 – 122.
- f. Severe reprimand or a reprimand (officers, warrant officers and NCOs only), see paragraphs 123 – 126.
- g. Service compensation order, see paragraphs 153 – 180.

Additionally the following minor punishments may be awarded¹⁶:

- h. Stoppage of leave (those below the rank or rate of warrant officer only), see paragraphs 127 – 135.
- i. Restriction of privileges (able rates, marines, soldiers, airmen and army officer cadets only), see paragraphs 137 – 149.
- j. Admonition, see paragraphs 150 – 152.

Powers of punishment

27. Except for a CO of or above the rank of rear admiral, major general or air vice-marshal, COs have the same powers of punishment, irrespective of their rank. However a subordinate commander has his powers of punishment capped according to his rank. He is also prohibited from awarding certain punishments (e.g. detention). The powers of punishment¹⁷ available to both a CO and subordinate commanders are detailed at [Annex A](#).

28. **Extended powers.** If a CO is of or above the rank of rear admiral, major general or air vice-marshal he may award any punishment up to the summary maximum, without the need to apply for extended powers. However, other COs must apply to the higher authority (HA) for extended powers of punishment to award punishments beyond a certain limit. Detail of which punishments require extended powers¹⁸ can be found at [Annex A](#).

29. **Punishments available in respect of officers, warrant officers, ratings/other ranks.** Certain punishments are only available if the person being punished is of a certain rank or rate. Full details of which punishments are available in respect of each rank or rate¹⁹ can be found at [Annex B](#). Detail on the permitted combinations²⁰ of punishments can be found at paragraph 32 below.

¹⁶ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009.

¹⁷ Section 132 to 136 of the Act.

¹⁸ Section 132 to 136 of the Act.

¹⁹ Section 132 to 136 of the Act.

²⁰ Section 138 of the Act and the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009, regulation 5.

30. **Appeal from summary hearing – effect on punishments.** Any offender punished summarily has the right to bring an appeal within 14 days, beginning with the date on which the punishment was awarded²¹. This is known as the Initial Period. If an application is made to the SAC within the Initial Period to extend the time, the appeal may be brought within a longer period²², which the court allows or the court may at any later time give leave for an appeal to be brought within such period as it may allow²³.

31. All punishments other than a sentence of detention and an SCO take effect from the date on which they are awarded, regardless of whether an appeal is brought. A sentence of detention will not commence until the end of the appeal period unless the offender elects to commence the sentence of detention immediately see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). If an offender submits an appeal the sentence of detention will commence on the day such an appeal is abandoned or determined. The sentence of detention may also not commence immediately if the CO makes a direction that the sentence is to run consecutively to another sentence of detention passed on the offender on a previous occasion; staff legal advice should be sought on this matter. There is no entitlement to payment under an SCO until there is no further possibility of an appeal in which the order could be varied or cease to have an effect²⁴, see paragraph 164.

32. **Permitted combinations of punishment.** The following combinations of punishments are permitted:

Punishments awarded	Permitted accompanying punishment/s
Detention	SCO only.
Suspended sentence of detention	Disrating/reduction in rank; SCO.
Forfeiture of seniority	Severe reprimand or reprimand; SCO.
Disrating/reduction in rank	Detention (suspended); SCO.
Fine	Severe reprimand or reprimand; Stoppage of leave; Restriction of privileges; SCO.
Severe reprimand or reprimand	Forfeiture of seniority; Fine; Stoppage of leave; SCO.
SSPO	SCO only.
Stoppage of leave	Fine; Severe reprimand or reprimand; Restriction of privileges; SCO.
Restriction of privileges	Fine; Stoppage of leave; SCO.
Admonition	Service compensation order only.

All other combinations are prohibited²⁵.

²¹ Section 141(2)(a) of the Act.

²² Section 141(2)(b) of the Act and [Chapter 28](#) (Summary Appeal Court).

²³ Section 141(3) of the Act.

²⁴ Section 176(1) of the Act.

²⁵ Section 138 of the Act and the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009, regulation 5.

33. In the appropriate circumstances (see paragraph 153 below) an SCO may be awarded with any other punishment.

Detention

34. **General.** Detention is the only custodial sentence available for offences heard summarily. If the seriousness of an offence indicates that if proved the maximum summary sentence of detention will be insufficient, or that imprisonment may be appropriate, consideration should be given at the outset to referring the charge to the DSP.

35. **CO's powers of punishment (detention).** A term of detention is specified as a number of days. Except where the CO is of or above the rank of rear admiral, major general or air vice marshal the maximum period of detention that a CO may award to an able rate, marine, soldier or airman is 28 days²⁶. If he has been granted extended powers²⁷ he may award a maximum term of 90 days' detention²⁸.

36. A CO may not award detention of any length to a leading rate, lance corporal or lance bombardier or corporal in the RAF, unless the CO has been granted extended powers, in which case he may award a maximum term of 90 days' detention²⁹.

37. The table below summarise the CO's powers of punishment in relation to detention. Guidance on how the length of detention should be determined is outlined in [Chapter 14](#) (The summary hearing sentencing guide).

Able rate, marine, soldier or airman only	Basic CO's Powers	1 – 28 days
Able rate, marine, soldier or airman only	Extended Powers (section 133(1) of the Act)	1 – 90 days
Leading rate, lance corporal or lance bombardier or RAF corporal	Basic CO's Powers	Nil
Leading rate, lance corporal or lance bombardier or RAF corporal	Extended Powers (section 133(2) of the Act)	1 – 90 days

38. **Subordinate commander's powers.** Subordinate commanders may not award detention³⁰.

39. **Effect of detention on rank/rate.** An offender sentenced to detention is automatically reduced to the lowest rank or rate to which he could be reduced as a Court Martial punishment³¹. Members of the RAF may not be reduced to a rank which is lower than the highest rank held as an airman³². Accordingly, where a person above the rank/rate of able rate, marine, soldier or airman is sentenced to detention at a summary hearing, he is reduced to that rank/rate with effect from the day on which the sentence takes effect³³. Automatic reduction applies only to committed sentences of detention. Where the CO decides to suspend the sentence of detention, then he may (but need not) award the

²⁶ Section 133(1)(b) of the Act.

²⁷ Section 133(3) of the Act.

²⁸ Section 133(1)(a) of the Act.

²⁹ Section 133(2) of the Act.

³⁰ See Annex A to this Chapter.

³¹ Section 293 of the Act.

³² The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009, Regulation 8

³³ Section 293 of the Act

accompanying punishment of disrating/reduction in rank³⁴. The reason that the CO may not award reduction in rank or disrating as an accompanying punishment to a committed sentence of detention is because reduction/disrating is automatic, and therefore there is no requirement to award it as a separate punishment. Re-advancement following automatic reduction is governed by single service regulations³⁵, but in any event during the time that an offender is in custody at MCTC he is for all purposes to be treated as being of the rank or rate of able rate, marine, soldier or of the highest rank he has held as an airman³⁶.

40. **Military Corrective Training Centre (MCTC) Colchester.** MCTC is established and equipped to carry out corrective training. For further details, see [Annex C](#) and JSP 837 (Service code of practice for the management of personnel in Service custody and committal to Service custody premises and civil prisons).

41. **Consequences of detention.** A sentence of detention carries with it loss of reckonable service for the period of the sentence, in relation to overall days served in detention, less any remission.

42. Offenders serving sentences of detention will forfeit their pay³⁷ for the duration of the time served³⁸. However, a family maintenance grant may be available for those eligible at the discretion of the CO³⁹. For general guidance on forfeiture of pay see [Chapter 20](#) (Forfeitures and deductions) and JSP 754 (The tri-Service regulations for pay and charges).

43. **Detention and other punishments.** Only an SCO may accompany an award of detention. If the sentence of detention is suspended then the punishment may also be accompanied by reduction in rank/disrating.

44. **Remission.** There is no remission for a sentence of detention up to and including 24 days. Therefore, for sentences up to 24 days the sentence awarded is the sentence the person will serve. Sentences of 25 days or more attract remission of up to one third, subject to a minimum period of detention of 24 days. This means that, for sentences of 24 days to 36 days, the minimum sentence that will be served is 24 days. Nevertheless, remission is not a factor to be taken into account by the CO when deciding sentence.

Sentencing considerations

45. **Is detention appropriate?** Before imposing a sentence of detention, the CO must be of the opinion that the offences or offences were serious enough to warrant such a sentence⁴⁰. When deciding this, the CO must take into account all available information about the circumstances of the offence or offences⁴¹. This will include any aggravating or mitigating factors. If the offence is considered serious enough to warrant a sentence of detention the CO must then decide whether, in the circumstances it is appropriate.

46. **Length of sentence of detention.** Where the CO decides to pass a sentence of detention he must then decide on the total length of sentence, ensuring that the sentence properly reflects the overall seriousness of the behaviour revealed by the offence or offences for which the offender is being sentenced. The sentence should be for the shortest term commensurate with the seriousness of the offence or offences⁴² for which the sentence is

³⁴ Section 138(3) of the Act

³⁵ RN BR 1066 Chapters 7 and 29, Army AGAI 62 Annex Q, RAF QR 1199A

³⁶ Section 294 of the Act

³⁷ Section 342(1)(a) of the Act and Regulation 3(1)(b) of the Armed Forces(Forfeiture and Deductions) Regulations 2009.

³⁸ JSP 754 (The tri-Service regulations for pay and charges) Chapter 3, section 13 – Suspension/Cessation/Forfeiture of Pay.

³⁹ JSP 754 (The tri-Service regulations for pay and charges) Chapter 8, section 1 – Statutory Payments and Grants – overview.

⁴⁰ Section 242(4) of the Act.

⁴¹ Section 242(5) of the Act.

⁴² Section 243(3) of the Act.

being awarded. If the offender is being sentenced in respect of two or more offences, the seriousness of them should be taken together when considering sentencing.

47. **Decision to suspend the sentence of detention.** Once the length of detention has been decided upon the decision whether to suspend the sentence of detention should be made. If a sentence of detention is suspended, then the sentence will not be activated unless the offender commits another offence during the period of suspension (the operational period) and the CO or court dealing with that offence orders activation. In deciding whether to suspend a sentence of detention the following factors should be taken into account, where appropriate:

- a. In all cases, is the offender likely to reform without actually undergoing a period of corrective training? This may be the case where there has been very significant delay between the offence and summary hearing during which period the offender appears to have begun reforming, not re-offended, performed his duties above the standard expected and effectively rehabilitated himself.
- b. Does the offender show genuine remorse for his offence, including, where appropriate, making reparation for his offending?
- c. The age of the offender. Due regard must be given to the welfare of personnel under the age of 18 and therefore detention should only be awarded when there is no other appropriate punishment or when other methods of reform have been tried and proved ineffective. For under 18s an SSPO should be considered, see paragraph 68 below for more detail on SSPO.
- d. The previous character and convictions/disciplinary record of the offender. If the offence is clearly 'out of character', or it is the first offence, suspension may be suitable.
- e. Any special domestic circumstances of the offender.
- f. The gravity and type of offence.
- g. The operational requirements/movements of the unit or personnel. If the offender is likely to rehabilitate sufficiently because the unit is deployed then suspension may be appropriate. The convenience of the Service should not be a consideration. However, when it is considered that a sentence of detention is the correct punishment, deployed units should not recommend suspension solely on the grounds of cost of air transport, difficulty of arranging it to the UK or problems of providing escort.

48. **Perceptions of leniency.** COs should not be deterred from suspending a sentence of detention because of any concern that it may give the impression that the offender has been treated leniently. A suspended sentence, if successful, has the long-term corrective effect of keeping an offender out of trouble for up to one year. Furthermore, suspension does not alter the fact that an offender has been sentenced to a major punishment. When explaining the sentence to the offender, when the reasons for sentence are announced, the offender should be left in no doubt as to the meaning and implications of a suspended sentence and the offender should be given advice as to future conduct.

49. **Effect of suspending a sentence of detention.** It is inappropriate to increase the appropriate period of detention on the basis that the sentence is to be suspended. Such an approach would be unfair to the offender in the event the sentence is later activated, and may result in a reduction in the sentence should the matter be considered by the SAC.

50. **Determining the length of the operational period.** The operational period must be a specified period of between 3 and 12 months. The determination of the operational period is a matter of discretion for the CO. He should bear in mind the factors at paragraph 47a - g above. He should also consider what might be a reasonable length of time for the offender to prove that he will not re-offend, can perform his duties to the standard expected and can be rehabilitated through the imposition and impact of the punishment awarded and the supervision he will be subject to.

Crediting of time spent in Service custody

51. **Custody after charge.** It is mandatory⁴³, except in limited circumstances⁴⁴, that where a term of detention is imposed on an offender who has been kept in any form of custody for any period since he was charged in connection with the offence in question or any related offence, that the period of time spent in custody is treated as if it was time already served. Where the offender has been kept in custody after charge, the proper approach is to determine the appropriate length of detention and award that sentence. The CO can then consider the issue of time already spent in custody after charge. In such cases, the CO must state the number of days that the offender has spent in custody, and then go on to state the number of those days which he directs are to be counted as time served. (For these purposes, any part of a day spent in custody is counted as a whole day.) For example, where the CO awards a sentence of 60 days detention and the offender has already served 15 days post charge custody, the CO is to state the following:

“You are awarded 60 days detention; however, you have served 15 days in custody after charge. Therefore, I direct that these 15 days are to count as time served.”

If the CO decides that not all days spent in custody are to count as time served, then he must state why he has so decided.

52. **Custody for other charges.** The calculation for crediting time spent in custody (as detailed at paragraph 51) applies not only where the offender has been kept in Service custody when charged with the offence for which he is being sentenced, but also where he has been kept in Service custody in connection with a related offence based on the same facts or evidence. It is immaterial whether the offender has also been kept in Service custody in connection with other offences, or has also been detained in connection with other matters⁴⁵.

53. **Suspended sentences of detention.** Crediting of time spent in Service custody will not apply when a suspended sentence of detention is passed, but it does apply if the sentence is subsequently activated⁴⁶. When a suspended sentence of detention is imposed the CO should inform the offender at the time the sentence is awarded of the length of time he would expect to serve should the sentence be activated. For example, the CO has decided to award 60 days detention and has decided to suspend that. With automatic remission, the offender would ordinarily serve 40 days. The offender has spent 4 days in custody after charge. The CO may use the following form of words to announce the sentence:

“I sentence you to 60 days Service detention. I further order that the sentence is to be suspended for the period of 9 months. If the sentence is activated, unless the

⁴³ Section 246(2) of the Act.

⁴⁴ See section 246(3)(b) of the Act. If it is considered just in all the circumstances not to credit time spent in custody legal advice should be sought. See also Exemptions at paragraph 54.

⁴⁵ Section 247(2) of the Act.

⁴⁶ Section 247(3) of the Act.

period of detention you are ordered to serve is reduced, the balance of the sentence will be 40 days detention. However, you have already served 4 days in Service custody and this will count as time served. You may therefore serve up to 36 days if you are later committed to detention.”

54. **Exceptions.** Staff legal advice should be sought if the CO does not consider it just to credit time spent in Service custody and if that is the case he must state why at the summary hearing and in the presence of the offender⁴⁷. He must include this in his reasons for sentence on the RSH.

Activation of suspended sentences of detention

55. A suspended sentence of detention awarded summarily or by the SAC may be activated by a CO in either of the following two circumstances:

- a. If another offence committed during the operational period of the sentence is proved against the offender at summary hearing⁴⁸.
- b. If the offender commits an offence during the operational period of the sentence in the British Islands for which he is subsequently convicted and he subsequently appears before his CO.

56. A conviction for an offence in the British Islands means being convicted of a civil offence before a magistrate’s court or the Crown Court or the Scottish or Northern Irish equivalents. Where a person appears before the CM for a subsequent offence, the CM will deal with the issue of the suspended sentence.

57. A CO has no power to activate a suspended sentence of detention that has been imposed by the CM or a civil court. Only the appropriate court may do this. A subordinate commander may not activate a suspended sentence of detention and should not hear a charge in relation to an offender who is under a suspended sentence, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

58. Activation of a suspended sentence by CO⁴⁹ will therefore arise in two distinct ways: during a summary hearing, following a finding of a charge proved in accordance with 55a above; at a separate activation hearing, following conviction before a court in accordance with 55b above.

59. **Crediting time spent in Service custody.** If a consecutive or concurrent sentence is imposed and the offender has spent time in post charge custody, legal advice must be sought to determine how the crediting of time is to be calculated. This is because in certain circumstances consecutive and concurrent sentences are to be treated as a single sentence for the purposes of crediting time spent in Service custody.

60. **Activation during a summary hearing.** When the CO is preparing to sentence an offender who is under a suspended sentence of detention awarded summarily or by the SAC, he must follow a two stage process:

- a. First, determine what sentence he considers is appropriate for the offence that is being heard at the summary hearing in accordance with the principles set out above.

⁴⁷ Section 246(5)(b) of the Act.

⁴⁸ Section 193(2) of the Act.

⁴⁹ The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009, regulation 23.

b. Second, decide whether the suspended sentence should be activated in the circumstances and if so, the length of the sentence to be served (see paragraph 62 for relevant considerations as to activation and paragraph 64 for concurrent/consecutive sentences).

61. The general principle to apply is that where an offender commits a subsequent offence during the operational period, the suspended sentence (or part of it) should be activated unless it would be unjust to do so in all the circumstances. There is therefore discretion as to whether to activate a suspended sentence, but the CO should always have regard to the purpose of suspension which is to encourage rehabilitation. Commission of another offence is indicative of incomplete rehabilitation or recidivism. The suspended sentence need not be activated in all cases where a subsequent offence has occurred and the activation need not be for the full period of the sentence originally awarded.

62. When determining whether the suspended sentence should be activated and for what term (i.e. how many days detention) the CO must take the following into account⁵⁰:

a. The details of the offence(s) for which the suspended sentence of detention was imposed, including its seriousness.

b. Such details as are known to the CO of all proven offences committed by the accused during the operational period of the suspended sentence.

c. The reasons given for any decision or decisions, taken on earlier occasion (s), not to activate the suspended sentence.

d. The offender's disciplinary record.

e. Any submission made by the offender about the appropriateness of making an order and the appropriate terms of such an order if one were made.

f. Any character evidence adduced by the offender.

g. Any other matters that appear to the CO to be relevant. These might include the following:

(1) Any similarity with the subsequent offence, which may indicate a lack of rehabilitation (commission of a dissimilar offence may indicate that a reduced period of activation should be imposed rather than not activating at all).

(2) The details of the sentence awarded for the original offence (indicative of seriousness of offence).

(3) Any reasons given for sentencing by the CO or the SAC when awarding the earlier sentence.

(4) The details of the subsequent offence(s), including its seriousness.

(5) The degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed. The later

⁵⁰ The CO should also consult [Chapter 14](#) (The summary hearing sentencing guide).

into the operational period the subsequent offence is committed, the less appropriate it may be to activate.

63. The term of a suspended sentence activated by a CO must not exceed 28 days unless he has extended powers. In addition, COs are limited to a maximum total period of detention of 28 days when awarding a period of detention for the subsequent offence and activating a period of suspended detention on the same occasion. This period may be increased to a total of 90 days with extended powers. Therefore, the CO must have regard to the totality of the sentence when deciding on the appropriate period of activation that is appropriate, given all the circumstances. If the CO considers that in all the circumstances a sentence in excess of 90 days (with extended powers) is required, the subsequent charge should not be dealt with summarily, but both the charge and the activation of the suspended sentence should be referred to the DSP.

64. **Consecutive or concurrent sentences of detention.** Once the CO has decided on the duration of the sentence that must be activated he must decide whether the suspended sentence should run consecutively to or concurrent with any sentence of detention he awards at the summary hearing for the subsequent offence(s) (i.e. for the offence(s) which trigger activation), or any sentence of detention awarded on a previous occasion and make an order accordingly⁵¹. Where appropriate this decision may be taken in conjunction with the decision as to the length of the period of detention to be activated. However, care must be taken in this regard to avoid awarding a shorter period of activation than is justifiable in all the circumstances, simply to avoid having to pass the matter on to the DSP for CM trial.

65. Activation of a suspended sentence of detention usually means that an offender has failed to take advantage of the opportunity to reform. Whether the sentence is ordered to run consecutively to or concurrently with any new sentence of detention is a matter of discretion for the CO and each case must be decided on its merits. Factors which should be considered are as follows:

a. **Gravity of the offence.** If a comparatively heavier punishment is necessary for the subsequent offence (the trigger offence) then the case for concurrent sentences is strengthened. Conversely, consecutive sentences are more appropriate if the initial offence is of greater or equal gravity, or of the same type as the subsequent offence.

b. **Period between the offences.** The shorter the period between the offences, the more appropriate it may be to make the sentences consecutive.

c. **Total length of sentence.** The total length of sentence should be that judged necessary to achieve a reformatory effect noting the restrictions on the maximum aggregate sentence of detention that can be awarded.

66. **Announcement of sentence and making the activation order.** The CO must look at the totality of all the above factors in relation to the subsequent offence and the original offence to determine whether to activate the sentence and if so how long the activation period should be. If he decides to activate he should then go on to award a punishment for the subsequent offence(s) and then make the activation order, including where appropriate an order as to whether the activated sentence should run consecutively to or concurrently with a period of detention awarded in relation to the subsequent offence(s).

Alternatives to sentences of detention

⁵¹ Section 193(4) of the Act.

67. If it is considered that an offence is not serious enough to warrant a sentence of detention an alternative sentence may be a combination of a fine, stoppage of leave and/or restriction of privileges or if the offender is of the appropriate rank or rate, an SSPO.

Service supervision and punishment order

68. **Introduction.** An SSPO is designed to punish and reform offenders without the need to award detention. It can be awarded at summary hearing to an able rate, marine, soldier or airman only⁵². An SSPO is an appropriate punishment for those of the lowest rank or rate whose continual misconduct does not improve despite the award of lesser punishments. It may also be awarded for any offence punishable by detention when it is likely to have a more corrective effect on the offender or is in the interests of operational effectiveness. An SSPO may particularly be considered as an alternative to detention for offenders under the age of 18 years.

69. The punishment imposes various requirements on the offender (see paragraph 71 below) and provides that during the period of the order the offender is to forfeit 1/6th gross pay. The period of the order is split into an initial period and a secondary period. On or before the conclusion of the initial period the CO must conduct a review of the offender's performance to see whether he should be released from the punishment early or whether it should continue in force. The SSPO is subsequently reviewed no later than every 14 days thereafter until either the offender is released from the punishment or the imposed SSPO period expires.

70. **Operation of SSPO.** An SSPO is imposed for either 30, 60 or 90 days duration⁵³ with the punishment being divided into 2 periods; the initial period and the secondary period (during which the extra duty requirement is subject to modification). These periods are defined as follows:

- a. **Initial period.** The initial period for each duration of the SSPO is as follows:
 - (1) For 30 day SSPO – 14 days.
 - (2) For 60 day SSPO – 18 days.
 - (3) For 90 day SSPO – 21 days.
- b. **Secondary period.** The remainder of the duration of an SSPO after the initial period.

71. **Requirements**⁵⁴. There are both mandatory and discretionary requirements for both periods of the order and upon imposition of this punishment a CO is to include all those discretionary requirements deemed appropriate. It would only be usual to exclude a requirement if operational circumstances or the needs of the Service dictate. The requirements that must be included (mandatory) in the order and those which may be included (discretionary)⁵⁵ are to be annotated on the record of summary hearing form, see Annex C to [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention). The requirements are listed as follows:

- a. **Mandatory:**

⁵² Section 132(1) Row 6 and section 164(1) Row 10 of the Act.

⁵³ Section 173(2) of the Act.

⁵⁴ Section 173 of the Act and the Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3.

⁵⁵ Section 173 of the Act and the Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3.

- (1) Forfeiture of 1/6th gross pay⁵⁶ for that period.
 - (2) Not to use any entitlement to leave without the permission of the CO.
- b. **Discretionary.** The CO should consider whether to impose one or more of these requirements:
- (1) Perform such extra duties as directed, subject to a maximum of 5½ hours in each 24 hour period⁵⁷ during the initial period and subject to a maximum of 1 hour in each 24 hour period⁵⁸ during the secondary period (see paragraphs 73 - 76 for further guidance).
 - (2) For the duration of the punishment, subject to such conditions as may be specified; be prevented from entering specified areas on a ship, unit or establishment, without the permission of his CO.
 - (3) For the duration of the punishment; be prevented from leaving a specified ship, unit or establishment without the permission of the CO (see paragraph 78 for further guidance).

72. **Delegations.** On imposition of the punishment at summary hearing the CO will impose whichever of the discretionary requirements he considers necessary from the list at paragraph 71b above. When such requirements are imposed the CO may delegate the responsibility to permit the offender to either leave the ship, unit, or establishment or enter specified areas of the ship unit or establishment to another officer not below the rank of Lt RN, marine or military captain or flight lieutenant. Should the requirement to undertake extra duties be imposed, the CO or the person authorised by him will detail what extra duties the offender must perform, for how long and when. This function may be delegated to any Service person who is of or above the rank or rate of chief petty officer, marine colour sergeant, military staff sergeant or flight sergeant. If this function is delegated, the person authorised by the CO will be responsible for keeping him informed of the offender's progress on review of the punishment. An offender should be supervised on a day-to-day basis by a person not below the rank or rate of leading hand, corporal, lance corporal or lance bombardier.

73. **Performing extra duties.** Extra duties may include, but are not limited to, mustering or parading, extra work, drill or training. On imposition of the punishment those managing the punishment are advised to produce a day-to-day regime programme for the offender that resembles as closely as possible the regime published in unit orders (see paragraph 71b(1) above).

74. When possible extra work is to be done in the department to which the offender belongs. Care should be taken that such work is in addition to the normal duties of the offender and that it is properly supervised.

75. Where the offender is required to muster or parade he should do so no more than 6 times in any 24 hour period. Any time spent mustering or parading should be included as part of the maximum 5½ hour (initial period) or 1 hour (secondary period) extra duties requirement. The offender may undertake extra duties, work or training during meal break periods; however, he should not be denied the opportunity to have a meal.

⁵⁶ Section 173(1)(b) of the Act.

⁵⁷ The Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3(a).

⁵⁸ The Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3(a).

76. Where the offender is required to perform extra duties as part of the SSPO he should only perform these duties during a continuous 16 hour period of the working day. This period should normally begin 2 hours before the start of the offender's working day and conclude 6 hours after completion of the offender's normal working day. However, the period may be reduced by the CO, in particular if the offender's usual working day is more than 8 hours long. The maximum number of working hours (16 in any 24 hour period) should not be exceeded. If an offender has to keep a night duty he should not be paraded, mustered or turned out before the start of his normal working day.

77. Being prevented from entering specified places on a ship, unit or establishment.

Where the offender is prevented from entering specified places on a ship, unit or establishment under the SSPO this may be waived with the permission of the CO. When the punishment is awarded the CO should state that the offender may enter certain areas in certain circumstances which will usually be relevant for the purposes of the offender carrying out his duties. For example, an offender who has duties in a Service mess may be permitted to enter the all ranks and rates bar if it is in the course of his duty to do so even if he is prevented from entering the bar under an SSPO.

78. Being prevented from leaving a ship, unit or establishment. Where an offender is prevented from leaving a ship, unit or establishment or station he will not be allowed to leave the specified ship, unit or establishment without the permission of his CO. The CO should consider with care whether to permit the offender to leave the ship, unit or establishment at any time. There may be compassionate or operational factors which are relevant to that consideration. There may be circumstances, particularly during the secondary period, where the CO considers it more appropriate to allow the offender to leave the ship, unit or establishment on non-working days which will usually be weekend days or weekend routine days⁵⁹ (however, this is always a matter for the CO's discretion).

79. Subordinate commander's powers. Only the CO may impose or review an SSPO. It is not a punishment available to a subordinate commander.

80. Reviews.

a. **Conduct and criteria for review.** SSPOs imposed at both CM and summary hearing must be reviewed by the CO and the offender should appear in person, if possible accompanied by his AAO. On review, the CO must consider whether an SSPO should continue in force. For the CO to determine whether the SSPO should continue in force he should assess the offender's behaviour and his compliance with the regime since the award. He should also assess the offender's willingness to reform. If he determines that the offender should no longer be subject to the SSPO, he may conclude the punishment. A CO may also determine that the SSPO should no longer continue in force if there are overriding compassionate or medical grounds, the exigencies of the Service dictate or the offender performs an act of gallantry or other exceptionally meritorious act.

b. **Opportunity for CO to review the requirement.** At the same time as the review, the CO may wish to review the requirements that have been imposed so that what is required of the offender reflects his progress. He may determine that a requirement should remain, but he may modify the requirement; for example, he may decide to give permission for the offender to leave his ship, unit or establishment on certain days of the week (see paragraph 78 above). The CO may revoke any such modification either on review or at any other time.

⁵⁹ RN only – this means Saturday or Sunday daily harbour routine days.

c. **Interval.** A review of the SSPO is to occur on or before the last day of the initial period of the punishment and at intervals thereafter of not more than 14 days beginning on the day after the last review. The first review should take place as close to the end of the initial period as possible and preferably on the last day of that period. However, in circumstances where the CO is unable to conduct the review due to other commitments, he may review on the closest day that is convenient prior to the conclusion of the initial period. Should the CO determine that there are suitable compassionate reasons (welfare or illness) for terminating an SSPO he may review the punishment at any time. Similarly, he may also review at any time if the exigencies of the Service dictate, i.e. the unit's operational tasking changes and it is no longer possible to run the SSPO.

d. **Evidence and representations.** The CO may wish to receive evidence in person or in writing from the person who has responsibility for the management of the offender to assist him in making an informed judgement. Should the CO wish to hear representations from the offender he may do so. If the CO exercises that discretion, a representative who will usually be the AAO, but who must be a person chosen by the offender, may make representations on the offender's behalf. The CO should record the result of a review of an SSPO in writing and inform the offender of the reasons for that decision in writing. A record of the review is to be kept in accordance with the form at [Annex D](#).

81. **Offender moving to new unit.** In the event of an offender who is subject to a SSPO moving unit, the CO of the new unit must be informed of the regime the offender was subject to at the old unit and the SSPO will continue in force on arrival at that new unit. At the new unit, the SSPO must be reviewed on or before the last day of the initial period or no more than 14 days since the last review was conducted by the CO of the previous unit.

82. Because the award of an SSPO involves forfeiture of pay, the CO should inquire into the offender's financial circumstances, see paragraph 15g before making such an order.

83. **SSPO and other punishments.** The only punishment that can be awarded with a SSPO is a Service compensation order⁶⁰. If a SSPO is already being served and a sentence of imprisonment or detention is subsequently imposed the SSPO is to cease on the day that the custodial sentence takes effect.

84. **After action.** Unit staff must take the appropriate JPA action to deduct 1/6 gross daily pay for the duration of the SSPO. In this context gross annual basic pay can be calculated by taking the individuals annual salary (excluding specialist pay and allowances) divided by 365.25 divided by 6 (figure X). This pay will be deducted retrospectively so that at the first review figure X is times by the number of days the individual has been under a SSPO. This will happen again at the second review (to take into account the period between the first and second review). This process will continue until the CO orders the punishment to cease. The last day that pay will be deducted from the individual will be the day before the CO ceases the punishment⁶¹.

a. For impact on the individual's food and accommodation charges see JSP 754 (Tri-service Regulations for Pay and Charges).

b. For impact on the individual's LSA, GYH and HTD entitlement see JSP 752 (Tri-Service Regulations for allowances).

⁶⁰ Section 138 of the Act.

⁶¹ Section 174(4)(b) of the Act.

Forfeiture of seniority

85. **General.** This punishment may only be awarded to officers.

86. **Sentencing considerations.** The CO may not award a sentence of forfeiture of seniority unless he is of the opinion that the offence (or offences) was serious enough to warrant forfeiture. In so deciding, the CO must take into account all available information about the circumstances of the offence(s) including any aggravating or mitigating factors⁶².

87. The CO should also determine the financial effects of imposing such a punishment on a Service person of equivalent rank to the offender. He should then inquire into the offender's financial circumstances to determine what effect such a punishment will have on the offender. Nevertheless, the overriding premise for imposing forfeiture of seniority is the offender's fitness or otherwise to hold the seniority level.

88. **Extended powers.** Unless the CO is of or above the rank of rear admiral, major general or air vice-marshal, the CO must obtain extended powers from HA to award this punishment⁶³. In any event, advice should be sought before this punishment is awarded.

89. **Subordinate commander's powers.** Forfeiture of seniority is not a punishment that is available to a subordinate commander

90. **Extent of punishment.** Forfeiture may be for a specified term of seniority or of all seniority, the determination of which is at the discretion of the CO⁶⁴.

91. **Effect of forfeiture.** The effect of the forfeiture will be to reduce pay to the increment level (IL) appropriate to the new seniority with immediate effect. This will result in a reduction to the individual's current IL and if an individual is already on the lowest IL, their pay is to stand still on that level for the period of the loss⁶⁵. See JSP 754 (The tri-Service regulations for pay and charges). There will also be future career implications of the forfeiture of seniority which will follow single-Service instructions⁶⁶. The CO should check the full effects of the forfeiture on the offender with pay staff and career management authorities before he sentences the offender.

92. **After action.** If forfeiture of seniority is awarded, the appropriate JPA action must be taken to record this. Notification must also be given to the single-Service career management authorities⁶⁷.

93. **Forfeiture of seniority and other punishments.** The only punishment that can be awarded with forfeiture of seniority is a severe reprimand or reprimand and/or an SCO.

Disrating/reduction in rank

94. This punishment may be awarded to warrant officers or non-commissioned officers. That is, those of or above the rank or rate of leading hand, lance corporal or lance bombardier or corporal in the RAF⁶⁸.

⁶² Section 248(5) of the Act.

⁶³ Section 134(2) of the Act.

⁶⁴ Section 132(1) Row 2 of the Act.

⁶⁵ For example, if an OF3 (Incremental Base Date (IBD) 20 March 1999) currently on Pay Level 7 loses 2 years seniority on 8 June 2005 (this effectively makes a new IBD of 20 March 2001), they will be moved to Pay Level 5 on that date, and will then move to Pay Level 6 on 20 March 2006 (anniversary of IBD). If the IBD had been 20 March 2005, then the OF3 would be placed on a SSRP and not move on to Pay Level 2 until 20 March 2006.

⁶⁶ RN PLAGO, Army AGAI 62, RAF Manning Staff Instructions.

⁶⁷ RN - Director Naval Career Management, Fleet HQ; Army - Army Personnel Centre (APC), Upavon; RAF - ACOS Manning, HQ Air Command.

95. **Extended powers.** A CO does not need extended powers to reduce in rank a lance corporal or lance bombardier in the Army or RM⁶⁹. These ranks have no equivalent in the RN or RAF and are lower than the first non-commissioned rank or rate in these Services.

96. Unless the CO is of or above the rank of rear admiral, major general or air vice-marshal a CO must obtain extended powers from the HA to reduce in rank or disrate the following⁷⁰:

- a. A warrant officer.
- b. A non-commissioned officer of or above the rank or rate of leading hand in the RN or corporal in the RAF.
- c. A non-commissioned officer above the rank of lance corporal or lance bombardier in the Army or RM.

97. **Subordinate commander's powers.** A subordinate commander may not award reduction in rank/disrating.

98. **Limits to reduction in rank/disrating.** With extended powers, a CO may remove one⁷¹ acting rank⁷² or rate from a warrant officer or non-commissioned officer that holds such a rank or rate, or, if no acting rank or rate is held, one substantive rank or rate. This punishment does not affect local rank, which is governed by single-Service instructions.

99. Where the person being punished is a corporal in the RAF, the reduction in rank authorised is reduction to the highest rank he has held in that force as an airman⁷³. There are four airmen ranks, namely aircraftman, leading aircraftman, senior aircraftman and junior technician. For some branches of the RAF, a junior technician might be the lowest trained rank for a particular specialisation. For example, for a RAF corporal any reduction in rank would be to the next lower rank applicable to his trade and for which he is qualified. Note that a CO is not able to reduce a person in rank within the category of airman so, for example, a junior technician may not be reduced to a senior aircraftman.

100. COs should be mindful of the potential career and future employability consequences of disrating/reduction in rank⁷⁴, for example the impact of disrating a leading Regulator to able rate (effectively requiring him to be returned to his source branch).

101. **Re-advancement.** For guidance on how a Service person may have his rank or rate restored single-Service policy⁷⁵ applies.

102. **Consequences of reduction in rank/disrating.** When an offender is reduced in rank or disrated he will receive the appropriate rate of pay for the new paid rank or rate. However, in all cases an individual's pay is to be reduced by at least the amount awarded on promotion for that group (so that where a minimum 2% increase applies on promotion, a minimum 2% decrease in pay must apply on reduction in rank or rate). Such decreases, if

⁶⁸ Section 132(1) Row 3 of the Act.

⁶⁹ Section 135(1) of the Act.

⁷⁰ Section 135(2) of the Act.

⁷¹ Only a CM can award multi step reduction in rank or disrating.

⁷² This includes local acting rate (RN only) see [Chapter 14](#) (The summary hearing sentencing guide).

⁷³ Section 135(3) of the Act.

⁷⁴ See single-Service guidance.

⁷⁵ RN see BR 1066, Army see QR 9.182 and RAF see QR 1199A.

not equal to an Increment Level (IL) on a pay range, are to be rounded down to the next IL. Full details are contained in JSP 754⁷⁶ (The tri-Service regulations for pay and charges).

103. **Reduction in rank/disrating and other punishments.** Reduction in rank or disrating may only be awarded in combination with a suspended sentence of detention and/or a Service compensation order.

104. **After action.** If reduction in rank or disrating is awarded the appropriate JPA action must be taken to record this. Notification must also be given to the single-Service career management authorities⁷⁷.

Fines

105. **General.** Unless the CO is of or above the rank of rear admiral, major general or air vice-marshal the maximum fine that may be awarded by a CO without extended powers is:

- a. Officers and warrant officers: 14 days' pay⁷⁸.
- b. All other ranks or rates: 28 days' pay⁷⁹.

106. **Extended powers.** If a CO has extended powers he may award an officer or warrant officer a fine of up to 28 days' pay⁸⁰.

107. **Subordinate commander's powers.** A subordinate commander's power to award a fine is limited according to his rank, which is set out at [Annex A](#).

108. **Determination of amount of fine.** If the CO determines that a fine is an appropriate sentence or an appropriate element of a sentence, before fixing the amount of that fine, he must inquire⁸¹ into the offender's financial circumstances in order to ascertain his ability to pay a fine. He must, as far as possible, determine what those circumstances are, take account of those circumstances (whether that means increasing or reducing the fine) and the circumstances of the case. The CO must also ensure that the amount of the fine reflects the seriousness of the offence⁸².

109. Calculations for the purposes of a fine are related to the level of pay (for local, local acting⁸³ and acting ranks and rates see paragraph 19).

110. **Awarding a fine.** The fine should be expressed as a specified sum of money (usually in whole pounds) and not in terms of days' pay. It may be recovered by the following means:

- a. The offender may pay the fine in full immediately.
- b. Payment may be made by instalments⁸⁴.

⁷⁶ JSP 754 (The tri-Service regulations for pay and charges), article 03.0903.

⁷⁷ RN - Director Naval Personnel, Fleet HQ; Army – Army Personnel Centre (APC), Glasgow; RAF – ACOS Manning, HQ Air Command.

⁷⁸ Section 136(1)(b) of the Act.

⁷⁹ Section 136(1)(a) of the Act.

⁸⁰ Section 136(1)(a) of the Act.

⁸¹ Section 249 of the Act.

⁸² Section 249 of the Act.

⁸³ RN only.

⁸⁴ Section 251(2) of the Act.

c. Deductions may be made from the offender's pay⁸⁵ to satisfy the fine in full on one occasion or to satisfy the fine in instalments.

111. The means of recovery is to be recorded on the RSH under orders made. An offender can apply to his CO for the variation of such an order⁸⁶ for example where his circumstances have changed such that he is no longer able to satisfy the fine in full; a subordinate commander may also vary any such order, see Part 6 of [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). In making or varying an order, care must be taken not to extend the period of repayment so that the punitive effect of the fine is lost. At the same time, regard should be had to the potential effects of the punishment on the offender's dependents.

112. If authorised by order of the Defence Council, or an authorised officer, a deduction may be made from the pay of a person subject to Service law and be appropriated in or towards satisfaction of a payment that he is required to make in respect of a fine. Such an order may only authorise a deduction to be made on or after the date on which the payment is required to be made. This means that if an offender is given time to pay a fine or is allowed to pay a fine by instalments, deductions may only be made and be appropriated in or towards satisfaction of a payment (whether that be the fine in full or an instalment) that is actually required to be paid and on or after the date on which it is required to be made.

113. Joint Service pay policy guidance sets out the maximum rate at which deductions, including fines, may be recovered from pay⁸⁷. COs should take account of these regulations when making an order to recover a fine from an offender.

114. **Calculating a day's pay for the purposes of awarding a fine as a punishment – regular personnel.** A day's pay in this context will be the gross annual basic pay payable to the individual (excludes specialist pay and allowances) divided by 365.25.

115. **Calculating a day's pay for the purposes of awarding a fine as a punishment – reserve forces personnel.** Members of the Full Time Reserve Service (FTRS) receive an annual salary like their regular counterparts. A day's pay for FTRS personnel in this context will therefore be calculated as stated in paragraph 114. For reservists who are paid on an attendance basis, e.g. volunteer reservists undertaking obligatory training and those carrying out additional duties commitments, their basic pay is already calculated as a daily rate of one 365.25th of their notional gross annual basic pay (excludes specialist pay and allowances). The daily rate of pay in issue to such personnel will therefore be the rate used in calculating a fine. Where an offender is a member of a reserve force, he should be called back to duty to be awarded the punishment.

116. If the offender is a special member of a reserve force then a day's pay will be the gross pay which would have been issueable to him in respect of that day if he had been an ordinary member of that reserve force of the same rank or rate⁸⁸. If the offender is a member of a reserve force he should be called back to duty to be awarded the punishment.

117. **Two or more charges.** Where two or more charges against a person have been proved and a fine is deemed the appropriate punishment, a single global award is to be made.

⁸⁵ Section 342(1)(d) of the Act.

⁸⁶ Section 251 of the Act.

⁸⁷ JSP 754 (The tri-Service regulations for pay and charges) Chapter 2, Section 4 – Minimum Drawing Rate and Section 6 – Recovery of Items from Pay (except Advances).

⁸⁸ Section 136(4)(b) of the Act

118. **Alternatives to a fine.** It is at the discretion of the CO to award a combination of minor punishments in place of a fine where he deems it appropriate. As a guide the following stoppage of leave and restriction of privilege to fine calculator may be useful:

SoL + RoP (Days)	Fine (Days Pay)
3	2
5	3
7	4
10	5
12	6
14	7

119. **Fines and other punishments.** A fine may only be awarded in combination with any of the following punishments: severe reprimand or reprimand; Stoppage of Leave and/or an SCO⁸⁹.

120. **Losses to the Crown.** A fine is not to be used to reimburse public funds for a loss. Provision can be made to meet such losses by the award of the punishment of an SCO. For details see paragraph 153 below.

121. **Offenders who leave the Service.** Where a fine has been awarded and the person ceases to be subject to Service law before the recovery of the amount due, there is a power to enforce recovery of the fine under a financial penalty enforcement order, see [Chapter 16](#) (Financial penalty enforcement orders).

122. **After action.** If a fine is awarded the appropriate JPA action must be taken to recover the specified amount. The correct method of recovery, which will be directed by the CO, should be actioned (see paragraph 113 above).

Severe reprimand/reprimand

123. **General.** A CO may award a severe reprimand or a reprimand⁹⁰ to officers, warrant officer or non-commissioned officers.

124. A subordinate commander may only award a reprimand to non-commissioned officers.

125. There may be many circumstances where either a severe reprimand or a reprimand will be appropriate, but generally speaking any reprimand will be most applicable in the following circumstances:

- a. In cases of professional negligence where fitness to hold the rank or rate is not an issue.
- b. In cases where neither detention nor disrating/reduction in rank is considered necessary.

126. **Effects of a severe reprimand or reprimand.** Any reprimand will have effects on a Service person's career and these are laid down in single-Service guidance⁹¹.

⁸⁹ Section 138 of the Act

⁹⁰ Section 132(1) Row 5 of the Act

⁹¹ RN – PLAGOs/BR 3; Army – AGAI 62 and RAF – Manning staff Instructions.

Stoppage of leave order

127. A stoppage of leave order (stoppage of leave) can be awarded by a CO at a summary hearing, or by the Court Martial, to offenders below the rank or rate of warrant officer. The effect of stoppage of leave is that the offender may not, on a specified number of days, leave a relevant place without his CO's permission. 'Relevant place' is defined as a naval ship or establishment, a military establishment or an air force station⁹².

128. The effect of stoppage of leave for any period will inevitably vary depending on the ship's movements or the operational commitments within an establishment or air force station or a unit within it, and upon the individual offender's circumstances, including his duty commitments. Stoppage of leave should not impinge on an offender's freedom of association within his unit, or contact with family etc via telephone, e-mail or other means. The CO, however, may wish to impose an accompanying administrative restriction on the offender entering the ship, establishment or air force station bar in appropriate cases where it is reasonable and proportionate to do so. The CO may also wish to require the offender to report a number of times throughout the day to ensure that he is still in the ship, establishment or air station. The award of a long period of stoppage of leave, particularly when units are not deployed, requires careful consideration in view of the effect on family and personal harmony time. A suitable degree of punishment and deterrence may often be achieved by other punishments in lieu of, or in combination with, stoppage of leave without resorting to the maximum period available, for example the award of a restriction of privilege order (ROPs), see paragraph 137 below. Even a short period of stoppage of leave that prevents an offender taking a rare opportunity for leave whilst a ship is deployed for a long period of time can have a significant impact, so a sense of proportion must be kept in sentencing.

129. **Duration of punishment.** The number of days is specified in the order itself and may not exceed 14 days⁹³. The punishment should commence immediately it is awarded and run consecutively. However, if for operational reasons the offender would have been obliged not to leave his ship, establishment or air station in any event the effect of the punishment may be lost. In addition, there may be compassionate factors which make it undesirable for the punishment to commence immediately. Therefore, when awarding the punishment the CO, or the CM where the punishment is awarded by CM, may direct that it shall be treated as if it were awarded not later than 28 days after it was awarded.

130. Once the punishment has been awarded the CO must decide, within 48 hours of that date, on which days the offender will have his leave stopped⁹⁴. The days on which the punishment takes effect should be specified by the person who awards the stoppage of leave⁹⁵. (A commanding officer cannot hear the charge himself and delegate the decision about when the days fall to someone else.) Where the CM awards stoppage of leave the commanding officer must take this action himself. The CO must inform the offender of his decision as soon as practicable after he makes it. This can be specified by either calendar days or days on which certain events or circumstances occur⁹⁶. The days on which leave will be stopped should be continuous; however, if there are good operational reasons to do so, the period can be broken down into smaller periods to suit the operational requirements of the ship etc. For example, a CO may require an offender's leave to be stopped whilst his ship is alongside in a particular foreign port, or in between training exercises to ensure the effect of the punishment is not lost. The date of this visit/exercise may be subject to change due to operational/programmed

⁹² The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(8).

⁹³ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(1).

⁹⁴ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(5)(a).

⁹⁵ Where the sentence is awarded by the CM or SAC, the CO decides the days on which leave is to be stopped. He may not delegate this function in these circumstances.

⁹⁶ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(4).

requirements; therefore, the CO may state that stoppage of leave is to occur during the visit to a specified foreign port, or on conclusion of a training exercise, i.e. specify by event. The final day of the stoppage of leave must be no later than 28 days after the punishment was awarded.

Stoppage of leave example

The CO awards 14 days stoppage of leave on 1 Nov. His ship is at sea on 1 Nov 09. Two port visits are programmed for 19 Nov – 23 Nov 09 and 28 Nov – 1 Dec. The CO wants the offender to miss both port visits instead of one. The CO therefore directs that the punishment shall be treated as if it were awarded on 17 Nov 09. The CO must then decide, no later than 48 hours commencing 17 Nov 09, on which days the leave will be stopped, and inform the offender of that decision as soon as practicable. Unless there is some uncertainty about the visit 28 Nov – 1 Dec, in this scenario the CO should direct that the days will fall in a continuous period from 18 Nov 09 – 2 Dec 09. In any event, the punishment must be complete by 15 Dec 09.

131. If the CO imposes such a punishment, the offender should also be told if and when he will be required to report to confirm that he is still in the ship, establishment or air station. The maximum number of times an offender should be required to report should be no more than 6 times in any 24 hour period.

132. **Permission to leave the relevant place.** The granting of permission to leave the ship, establishment or air station may be delegated by the CO to any other officer who is of or above the rank of lieutenant, military or marine captain or flight lieutenant. Permission to leave the ship, establishment or air force station is entirely at the discretion of the CO or the person authorised by him; appropriate occasions for granting permission may be where it is necessary in the course of the offender's duty or where there are compelling compassionate reasons.

133. **Stoppage of leave and other punishments.** Stoppage of leave may be awarded in combination⁹⁷ with the following punishments; ROPs, severe reprimand or reprimand, a fine and/or an SCO.

134. **Restrictions.** Stoppage of leave is not to be awarded with a sentence of detention, a suspended sentence of detention, reduction in rank, an SSPO or an admonition.

135. **Annual and other leave.** Stoppage of leave does not prevent the person from taking his annual and other leave entitlement at another time. An effect of the punishment may therefore be deferral of leave.

136. **After action.** For impact on the individual's food and accommodation charges see JSP 754 (Tri-service Regulations for Pay and Charges). For impact on the individual's LSA, GYH and HTD entitlement see JSP 752 (Tri-Service Regulations for allowances).

Restriction of privileges order

137. A restriction of privileges order (ROPs) is a useful punishment that can assist with both the reformation and rehabilitation of an offender. It may only be awarded to an able rate, marine, soldier, airman or military officer cadet. The punishment requires the offender to follow a regime which requires him to perform such extra duties as his CO decides. These duties may include work, training or any other Service duty. The maximum amount of time

⁹⁷ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 5(2).

the offender can be required to undertake extra duties under ROPs is 5½ hours on each day of the punishment.

138. **Duration of punishment.** ROPs may be awarded up to a total of 14 days⁹⁸. The punishment should commence immediately it is awarded and run consecutively. If for operational or training reasons the punishment cannot be administered effectively it may be undesirable for the punishment to commence immediately, for example where a Service person has been committed to an exercise. In addition, there may be compassionate factors which make it undesirable for the punishment to commence immediately. Therefore, when awarding the punishment the CO may direct that it shall be treated as if it were awarded not later than 28 days after it was awarded.

139. Once the punishment has been awarded the CO must decide, within 48 hours of that date, on which days the offender will be subject to ROPs⁹⁹. The days on which the punishment takes effect should be specified by the person who awards the ROPs. (A commanding officer cannot hear the charge himself and delegate the decision about when the days fall to someone else.) Where the CM awards ROPs the commanding officer must take this action himself. The CO must inform the offender of his decision as soon as practicable after he makes it. This can be specified by either calendar days or days on which certain events or circumstances occur¹⁰⁰. The days on which ROPs are conducted should be continuous; however, if there are good operational reasons to do so, the period can be broken down into smaller periods to suit the operational requirements of the ship etc. For example, a CO may require an offender to undertake ROPs whilst his ship is alongside in a particular foreign port, or in between training exercises to ensure the effect of the punishment is not lost. The date of this visit/exercise may be subject to change due to operational/programmed requirements; therefore, the CO may state that ROPs is to occur during the visit to a specified foreign port, or on conclusion of a training exercise, i.e. specify by event. The final day of the ROPs must be no later than 28 days after the punishment was awarded.

140. If the CO imposes such a punishment the offender should also be told if and when he will be required to muster or parade to confirm that he is still in the ship, establishment or air station. The maximum number of times an offender should be required to muster or parade should be no more than 6 times in any 24 hour period. The offender must also be told what will be expected of him whilst he is subject to this punishment. The routine must be communicated to the offender at the outset.

141. **Delegation.** A CO may delegate his functions of deciding which extra duties the offender must do to any Service person who is of or above the rank or rate of Chief Petty Officer, marine Colour Sergeant, military Staff Sergeant or Flight Sergeant.

142. **Policy guidance on routine to be followed.** As far as possible units should strive to achieve consistency in the restriction of privileges routine within the unit. However, adjustments may have to be made, depending on the unit's programme and the availability of unit staff to manage the routine.

143. The unit routine should consist of undertaking extra duties, work or training during non-working hours as directed, subject to a maximum of 5½ hours in each 24 hour period. The offender may undertake extra duties, work or training during meal break periods; however, he should not be denied the opportunity to have any meal. An offender may be required to muster/parade at a particular place on the ship, establishment or air station, or as one of his extra duties, but he should not be required to do so more than 6 times in any 24 hour period.

⁹⁸ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(3).

⁹⁹ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(4).

¹⁰⁰ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(5).

144. The requirements above should only take place from 2 hours before the start of the offender's working day to 6 hours after completion of the offender's working day. However, the period may be reduced by the CO, in particular if the offender's usual working day is more than 8 hours long. The maximum number of working hours (16 in any 24 hour period) is not to be exceeded.

145. When possible, extra work is to be done in the department to which the offender belongs. Care should be taken that such work is in addition to the normal duties of the offender and that it is closely and carefully supervised.

146. If an offender has to keep a night duty he is not to be paraded, mustered or turned out before the start of his normal working day.

147. Following the imposition of the punishment and before the offender commences the punishment, the offender should be told the following in relation to his extra duties:

- a. Where he is expected to muster/parade.
- b. If appropriate, once he has attended a muster/parade he must proceed to his departmental work or another pre-arranged place of duty.
- c. He should muster/parade in correct attire, which is to be clean and in good repair.
- d. He must produce at a muster/parade, in advance of any foreseeable absence from the extra duty, an authorised document excusing his attendance for that duty.

148. **Restriction of privileges and other punishments.** ROPs may be awarded in combination with the following punishments; fine, stoppage of leave order and/or an SCO.

149. **Punishment imposed by CM/SAC.** Where ROPs are imposed by a Service court (e.g. the CM or where the punishment has been imposed/substituted by the SAC), the CO must decide, within 48 hours of that date, on which days the offender will perform extra duties. The CO must inform the offender of his decision as soon as practicable after he makes it¹⁰¹ (see paragraph 139 above). The CO may not delegate this function.

Admonition¹⁰²

150. An admonition may be awarded by a CO or subordinate commander. It can be awarded to any rank or rate. The only punishment with which it can be combined with is an SCO.

151. An admonition is recorded on the formal discipline record and may therefore be taken into consideration in relation to any further offences.

152. When an offence is found proved which of itself or in view of mitigating circumstances is not considered to deserve any more serious punishment, the offender should be admonished. It might be appropriate, for example, where the CO hears a charge having been given some information, but during the course of the summary hearing the facts presented appear less serious than was originally indicated by the witness statements, or where the offender has presented exceptional mitigating circumstances.

¹⁰¹ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(6)(b).

¹⁰² The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 2.

Service compensation orders (SCO)

153. An SCO is an order requiring the offender to pay a specified sum by way of compensation. It may be awarded in the case of an offence which has caused any personal injury, loss or damage¹⁰³. An SCO is not, however, to be awarded to produce compensation relating to loss of, or damage to, Service property resulting from traffic accidents involving Service personnel driving non-Service vehicles covered by valid insurance policies on Service property¹⁰⁴. Nor is it to be made to cover the expenses for arresting or conveying an offender.

154. Before an SCO can be awarded the CO must have satisfied himself that the personal injury, loss or damage was occasioned by the offence and evidence provided of the value of the loss or cost of repair.

155. Where property has been unlawfully obtained and the property in question is recovered, any damage to the property occurring while it was out of the owner's possession is to be treated as having resulted from the offence, however and by whomever the damage was caused¹⁰⁵.

156. Where an SCO is awarded, special consideration must be given of the financial effects of the punishment¹⁰⁶; therefore, the CO must always enquire as to the offender's financial circumstances in order to ascertain his ability to pay an SCO.

157. **CO's powers.** An SCO is awarded at the discretion of the CO. The maximum amount of a single SCO that can be awarded at Summary Hearing is £1000¹⁰⁷. Where 2 or more SCOs are awarded the combined total must still not exceed £1000¹⁰⁸. Only a CO may award¹⁰⁹ an SCO for personal injury as this cannot be delegated (see paragraph 171 below).

158. **Subordinate commander's powers.** A subordinate commander's power to award an SCO is limited according to his rank. A subordinate commander is also not permitted to award an SCO in respect to personal injury. This is set out at [Annex A](#).

159. **Awarding an SCO.** The SCO should be expressed as a specified sum of money (usually in whole pounds) and not in terms of a number of days' pay. It may be recovered by the following means:

- a. The offender may pay the SCO in full immediately.
- b. Payment may be made by instalments¹¹⁰.
- c. Deductions may be made from the offender's pay¹¹¹ to satisfy the SCO in full on one occasion or to satisfy the instalments.

160. The means of recovery is to be recorded on the RSH under orders made. An offender can apply to his CO for the variation of such an order¹¹² for example where his circumstances have changed such that he is no longer able to satisfy the SCO in full; a subordinate

¹⁰³ Section 175(1) of the Act.

¹⁰⁴ JSP 341 (Joint Service Road Transport Regulations).

¹⁰⁵ Section 175(3) of the Act.

¹⁰⁶ Section 250(1) of the Act.

¹⁰⁷ Section 137(1) of the Act.

¹⁰⁸ Section 137(2) of the Act.

¹⁰⁹ Schedule 1 to the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009.

¹¹⁰ Section 251(2) of the Act.

¹¹¹ Section 342(1)(d) of the Act.

¹¹² Section 251 of the Act.

commander may also vary any such order, see Part 6 of [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) and paragraph 168 below for the review of an SCOs.

161. Joint Service policy guidance sets out the maximum rate at which an SCOs may be recovered from pay¹¹³. However, with the application of a minimum drawing rate under JPA and the potential overpayment of (in particular separation) allowances, it may be necessary to extend this period in order to ensure fairness and that the regulations are not breached. If the offender wishes to pay the SCO in full immediately¹¹⁴ he may do so or he may make an application to his CO for an order to enable him to pay by instalments rather than by deductions from pay.

162. If authorised by order of the Defence Council, or an authorised officer, a deduction may be made from the pay of a person subject to Service law and be appropriated in or towards satisfaction of a payment that he is required to make in respect of a Service compensation order. Such an order may only authorise a deduction to be made on or after the date on which the payment is required to be made. This means that if an offender is given time to pay a Service compensation order or is allowed to pay a Service compensation order by instalments, deductions may only be made and be appropriated in or towards satisfaction of a payment (whether that be the Service compensation order in full or an instalment) that is actually required to be paid and on or after the date on which it is required to be made.

163. If an SCO is imposed in respect of more than one charge or article the amount which has to be made good in respect of each charge or article should be stated separately in the award.

164. An SCO may only be actioned once the CO is satisfied that, disregarding any power of the court to grant leave to appeal out of time, there is no further possibility of an appeal which could result in the order being varied or ceasing to have effect¹¹⁵. The appeal period is 14 days from the date the punishment was awarded at summary hearing or within such longer period as the SAC allows or the SAC may at any later time give leave for an appeal to be brought within such period as it may allow, see [Chapter 15](#) (Summary hearing review and appeal) for more detail on appeal periods.

165. The specified sum is to be paid to the person who has suffered the personal injury, loss or damage resulting from the offence, whether this be the Crown, a Service person or a private individual. If an SCO is awarded and money is to be paid to either a Service person or a civilian, the unit administration office must raise a manual iSupport on JPA and request that the JPAC take action. The iSupport to SPVA should include all relevant details, particularly where there is more than one victim. Payment to a civilian will be effected by SPVA. The iSupport to SPVA should include all relevant details, particularly where there is more than one victim. The Crown will not carry the debt of a SCO so compensation will not be paid until it has been recovered and, if the SCO is to be recovered by instalments, the compensation will also be paid out by instalments.

166. An SCO may not be made¹¹⁶ in respect of:

- a. Bereavement.
- b. Funeral Expenses.

¹¹³ JSP 754 (The tri-Service regulations for pay and charges) Chapter 2, Section 6 – Recovery of Items from Pay.

¹¹⁴ Section 251(2) of the Act.

¹¹⁵ Section 176(1) of the Act.

¹¹⁶ Section 175(4) of the Act.

- c. Loss of any other kind suffered by the dependants of a person in consequence of his death.

167. Where an SCO has been awarded and the offender ceases to be subject to Service law before the recovery of the amount due, there is a power to apply to the civil courts for recovery action under a financial penalty enforcement order¹¹⁷, see [Chapter 16](#) (Financial penalty enforcement orders).

168. **Review**¹¹⁸. When an SCO is imposed the CO should inform the offender of his right to apply for a review. The CO may carry out this review if he is satisfied that, disregarding any power of a court to grant leave to appeal out of time, there is no further possibility of an appeal¹¹⁹ which could result in the order being varied or ceasing to have effect¹²⁰.

169. The CO may discharge the SCO or he may reduce the amount payable if it appears to him that¹²¹:

- a. The injury, loss or damage in respect of which the SCO was made has been held in civil proceedings to be less than it was taken to be for the purposes of the order.
- b. In the case of an SCO in respect of the loss of any property, that the property has been recovered by the victim.
- c. The offender has suffered a substantial reduction in his means which was unexpected at the time when the SCO was made and that his means seem unlikely to increase for a considerable period.

170. The request to vary/review SCO form can be found at Annex P to [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

171. **Personal injury**. Where personal injury has been occasioned by an offence, COs should always consider the award of an SCO. This punishment not only compensates the victim but will also emphasise to the offender the full personal consequences of their actions. In addition, an award of an SCO may relieve the victim of the expense and inconvenience of resorting to civil litigation to recoup damages, particularly in cases where the injury is outside the scope of the Criminal Injuries Compensation Scheme, see JSP 839 (Codes of practice on services to be provided by the armed forces to victims of crime). A subordinate commander may not award an SCO where any part of the order would be related to personal injury.

172. A CO should use his judgment to fix an appropriate amount, based on information provided by the evidence put before him at the summary hearing. In determining an appropriate amount, COs should take into account the nature of the injury itself, any pain and suffering caused and any loss of amenity which results (e.g. loss of enjoyment of life - a broken leg is likely to have a more significant affect upon a Service sports representative). In addition the conduct of the victim will be a relevant factor; any responsibility on his part, either because of provocation or otherwise, may influence the decision as to whether to award compensation at all, or the size of the amount ordered. Further, there will be many injuries which are so trivial that an award of an SCO would be inappropriate.

¹¹⁷ Section 322 of the Act.

¹¹⁸ Section 177 of the Act.

¹¹⁹ The appeal period is 14 days from the date the punishment was awarded at summary hearing or within such longer period as the court may allow, see [Chapter 15](#) (Summary hearing review and appeal) for more detail on appeal periods.

¹²⁰ Section 177(2) of the Act.

¹²¹ Section 177(3) of the Act.

173. The guidelines in the table below¹²² relate to those injuries which most frequently arise in cases which are heard summarily. Other injuries should be assessed by comparison with the examples below (these guidelines are not intended to indicate that summary disposal is acceptable whenever particular levels of injury result; guidance on mode of trial following an offence of violence is at [Chapter 6](#) (Investigation, charging and mode of trial). Staff legal advice should be sought in any case where a CO is uncertain as to the amount which might be appropriate or as to the relevance of a particular factor or factors in the assessment.

INJURY	REMARK	GUIDELINE
Graze	Some pain for a few days and depending upon size	£50-75
Bruise	Likely to be painful for a fortnight and depending on size	£50-75
Black Eye		£100
Cut (without scarring)	Depending on size and whether stitched	£75-500
Minor Multiple Injuries	At least 3 types of injury and at least 1 of them having significant residual effects 6 weeks after incident. Injuries must have necessitated at least 2 visits to or by GP in that 6-week period. (note a)	£1000
Head or Facial Burns	Resulting in minor disfigurement	£2000 (CO's powers £1000)
Facial Scarring	Minor visible disfigurement (note b)	£1500 (CO's powers £1000)
Sprained Wrist / Ankle	If disabled 6-13 weeks	£1000
Fracture	Simple, small, uncomplicated & depending on which limb	£ 1000-3000 (CO's powers £1000)
Loss of Tooth (not front)	Depending on position of tooth and age of victim	£1250 (CO's powers £1000)
Loss of Tooth (front)		£1750 (CO's powers £1000)
Nasal	Undisplaced fracture of the nasal bone (see note c)	£1000
Nasal	Displaced fracture of the bone requiring manipulation under general anaesthetic (see note c)	£1500 (CO's powers £1000)

NOTES:

a. Minor multiple injuries: (a) grazing, cuts, laceration (no permanent scarring); (b) severe and widespread bruising; (c) severe soft tissue injury (no permanent disability); (d) black eye(s); (e) bloody nose; (f) hair pulled from scalp; (g) loss of fingernail.

b. This is a topic of unusual difficulty in view of the infinite variety of forms a scar may take. COs will usually see the relevant scar soon after its infliction, at a time when it is hard to foresee how it will develop and whether and how far it will fade. Some assistance will be gained in such circumstances from the nature of the treatment of the wound. A cut which needs stitches (sutures) will almost certainly

¹²² The Criminal Injuries Compensation Scheme 2001 (extant at May 2008).

leave a scar and the more sutures the more probable it is. Treatment by steristrip or 'butterflies' may or may not leave a permanent scar.

c. Assuming that after the appropriate treatment there is no visible deformity and no breathing problem.

174. **Loss or damage.** COs should use their judgment to fix an appropriate amount, based on information provided by the evidence put before him at the summary hearing. If it is alleged that damage has been caused, evidence must be given regarding the cost of repair or if that is not accurately known, the estimated cost must be given. If loss has occurred, there must have been evidence regarding the value of the lost items.

175. Administrative deductions from pay for loss or damage may only be made as an alternative to disciplinary action. If an SCO is awarded in respect of any loss or damage caused by an offence, an authorised officer may not make an administrative order for deduction from pay in respect of the same loss or damage. If no SCO is made during disciplinary proceedings then it is not open to the authorised officer to make a deduction for the same loss or damage. The issue of compensation should be dealt with as part of the sentencing procedure. See [Chapter 20](#) (Forfeitures and deductions).

176. Loss or damage to the property of persons not subject to the Act can be charged under section 42 and the Criminal Damage Act 1971; and, a Service compensation order may be awarded following a proven charge under these provisions. While it is generally undesirable that the Service should assume the function of awarding damages which may be claimed in an independent civil action, where the facts and the sum of money involved are straightforward an SCO may be used. Examples of where an SCO might be awarded are: to compensate a local authority for damage to municipal property; or to compensate a foreign national overseas for damage to property when the owner might otherwise have difficulty obtaining compensation and the good name of the Service is diplomatically at risk. Particular care should be taken following incidents in NATO countries where a separate claims procedure exists.

177. **Sentencing considerations.** When deciding whether to make an SCO and if so, for what amount, the CO is required to have regard to the offender's financial circumstances so far as they appear or are known to the CO¹²³. The CO should therefore satisfy himself that he is as far as possible aware of the offender's financial circumstances. If the offender cannot afford to pay both a fine and compensation, compensation must be given priority¹²⁴. This does not mean a fine cannot be awarded as well, but if a choice has to be made the CO should impose an SCO and may wish to consider an alternative accompanying punishment in place of the fine.

178. The CO must give reasons on passing sentence if he does not make an SCO in a case where he has the power to do so¹²⁵.

179. **After action.** If an SCO is awarded, the appropriate JPA action must be taken to recover the specified amount. The correct method of recovery, which will be directed by the CO, should be actioned. The Crown will not carry the debt of a SCO so compensation will not be paid until it has been recovered and, if the SCO is to be recovered by instalments, the compensation will also be paid out by instalments.

180. **Awarding fines and SCO.** In deciding whether to impose a fine in addition to an SCO, consideration is to be given as to whether any sum ordered to be paid is likely to be recovered

¹²³ Section 250(1) of the Act.

¹²⁴ Section 250(2) of the Act.

¹²⁵ Section 175(8) of the Act.

by deduction from the offender's pay and if so, how long the total period under a reduced rate of pay is likely to be.

Criminal injuries compensation

181. Civilian courts in England and Wales have similar powers to those under the Act to order compensation to be paid by those convicted of crimes of violence to their victims. For more information see JSP 839 (Codes of practice on services to be provided by the armed forces to the victims of crime).

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SUMMARY POWERS OF PUNISHMENT AND EXTENDED POWERS

	SUMMARY PUNISHMENT	Commanding officer (of any rank)	Extended Powers* needed?	Subordinate Commander OF 4 and above	Subordinate Commander OF 3	Subordinate Commander OF2	Punishments that may be combined
1	Detention	OR1 and OR2 - 28 days to 90 days OR4 (RN and RAF) - 90 days OR3 (Army/RM only) - 90 days	Yes – for 29 – 90 days Yes - for any period up to 90 days Yes - for any period up to 90 days	No powers	No powers	No powers	8
1A	Suspended detention	As above for detention	As above for detention	No powers	No powers	No powers	3, 8
2	Forfeiture of seniority	Officers only	Yes	Not Applicable	Not Applicable	Not Applicable	5, 5A, 8
3	Reduction in rank/disrating	Only available for OR3 to 9	Yes unless the offender being reduced in rank is an OR 3 in the Army/RM	No powers	No powers	No powers	1A, 8
4	Fine	OR1 – OR7 - 28 days OR8 - OF4 – up to 14 days	No No	OR1- OR7 - 14 days' pay	OR1- OR7 - 10 days' pay	OR1 - OR4 - 7days' pay	5, 5A, 7A, 7B, 8

		OR8 - OF4 – up to 15 to 28 days	Yes				
5	Severe reprimand	Officers and NCOs only OR3-9 and OF1-4	No	No powers	No powers	No powers	2, 4, 6, 7A, 8
5A	Reprimand	Officers and NCOs only OR3-9 and OF1-4	No	OR3 to OR7	OR3 to OR7	OR3 & 4	2, 4, 6, 7A, 8
6	SSPO	OR1 & 2 only - 30, 60 or 90 days	No	No powers	No powers	No powers	8
7A	Stoppage of leave	OR7 and below Up to 14 days	No	OR7 and below up to 14 days	OR7 and below up to 10 days	OR7 and below up to 7 days	4,5,5A,7B, 8
7B	Restriction of privileges	OR1 and OR2 – 14 days	No	OR1 and OR2 – 14 days	OR1 and OR2 – 10 days	OR1 and OR2 - 7 days	4, 7A, 8
7C	Admonition	Available for all ranks and rates	No	OR 7 and below	OR 7 and below	OR 7 and below	8
8	Service compensation order	Available for all ranks and rates Up to £1000.00	No	Up to £1000.00 ¹²⁶	Up to £750.00 ¹²⁷	Up to £500.00 ¹²⁸	1,1A,2,3,4,5,5A,6,7A, 7B, 7C

* Extended powers must be applied for unless the CO is of 2 star rank

¹²⁶ Not to be awarded for personal injury.

¹²⁷ Not to be awarded for personal injury.

¹²⁸ Not to be awarded for personal injury.

PUNISHMENTS WHICH MAY BE AWARDED TO EACH RANK OR RATE

May be awarded to:	Forfeiture of seniority	Fine	Severe reprimand	Reprimand	Admonition	Service compensation order	Reduction in rank/disrating	Stoppage of leave	Detention	SSPO	Restrictions of privileges
Officers	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No
Warrant officers	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No
Senior non-commissioned officers/senior rates	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Military corporal/military bombardier	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
Leading rate/lance corporal/lance bombardier/RAF corporal	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Able rates/marines/soldiers and airmen	No	Yes	No	No	Yes	Yes	No	Yes	Yes	Yes	Yes

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THE MILITARY CORRECTIVE TRAINING CENTRE - REHABILITATIVE TRAINING

1. The primary purpose of MCTC is as an establishment for Service personnel undergoing corrective training during sentences of military detention; it is not a prison. The MCTC also holds those Service personnel, or civilians subject to Service law, who are undergoing investigation or who, post sentence, are awaiting onward movement to civil prison. The punishment implicit in military sentences is the associated loss of liberty and pay. The aims of MCTC are to train and encourage Service personnel who are to return to their units on completion of sentence in such a way as to promote their efficiency, fortify their morale and establish in them the will to become better Service personnel. The purpose of D Company is to instruct and guide those personnel who are to be discharged from the Services on completion of their sentence, so that they develop their potential for self-sufficiency and responsible citizenship, by providing appropriate rehabilitation training.

2. MCTC has extensive military training facilities including a 25 metre outdoor range, a small arms trainer, a gymnasium, sports fields and an assault course. The Education Wing provides a range of courses which are central to the rehabilitative function of the Centre. The full details of the facilities and organisation at MCTC can be found in JSP 837 (Service code of practice for the management of personnel in Service custody and committal to Service custody premises and civil prisons).

Organisation

3. Personnel to be retained in the Services are held in A Company and undergo military training. Personnel to be dismissed from the Services are held in D Company and undergo rehabilitative and resettlement training. Women are housed separately within both Company's but train with their male counterparts. Detainees are required to wear Soldier 95 clothing for training.

Staging system

4. Central to the MCTC rehabilitative regime is the staging system through which all detainees are expected to progress. The three-stage system is based on weekly reports on training regarding the progress and performance of each detainee in his Company. Promotion from each stage to the next depends upon effort and attitude. On promotion to a higher stage, they gain increased privileges and are subject to fewer restrictions. Average time between stages is six weeks.

Training

5. The task of the training team is to ensure that all A Company detainees return to their units well-trained in basic military skills, very fit and keen to continue service.

The A Company training package consists of:

- a. **Garsia platoon.** A four-week programme consisting mainly of fitness training and weapon handling; detainees remain on this programme until they are released. Offenders sentenced to 42 days' detention or less will undertake only this stage

during their sentence at MCTC due to the amount of automatic remission they will receive.

b. **1 Platoon.** A twenty-week modular programme covering subjects such as personal weapons, NBC, field craft, aircraft recognition, map reading, health and hygiene and education.

c. **Special programmes.** A programme for those completing advanced training.

All A Company detainees attend a module designed to cover all Individual Training Directives (ITDs), including substance and alcohol abuse and equality and diversity.

Education

6. **Aims.** The aims of the MCTC Educational Wing are to:

a. Enhance detainees understanding of the roles of the armed forces at home and overseas.

b. Improve detainees' command of written and spoken communication in order to make them more receptive to training.

c. Provide programmes that will allow detainees to identify and consider ways of coping with some of the more common problems, pressures and demands of Service and everyday life.

d. Attend courses that include; trade training courses, including project work, which facilitates the attainment of nationally recognised qualifications. D Company detainees also carry out resettlement, education, vocational training, and fitness for life. Community projects and individual work attachments in the community, literacy and numeracy instruction as required. DUS in D Company do not undertake military training but are kept fit through PT and games.

7. **Programmes.** Attendance on the A Company education programme depends on the length of sentence, an individual's needs and the training programme on which they are placed. During evening association periods, basic skills are taught by locally employed college and Company instructors; these Basic Skills courses can have real time training benefits and help instil confidence in the detainees in themselves and their chain of command. Longer term detainees (up to one year) will normally only be placed on specific education detail once they have moved through the most part of an entire 25 week training cycle and therefore this will not be open to most 'soldier on' detainees. However, amongst a wide range of learning experiences and challenges, set mainly in a military context, each detainee is required to research, script and prepare visual aids for and present a lecture of at least fifteen minutes' duration. The aims of the longer term education courses are to improve individuals' command of written and spoken communication in order to make them more receptive to Service training.

Welfare

8. A retired officer and his assistant, usually a senior rate/SNCO, have specific responsibility for the welfare of all detainees, the safekeeping of their valuables and the co-ordination of visits to them by relatives and friends. The welfare officer interviews each detainee on arrival to assess his or her needs and will, where appropriate, liaise with Government agencies (e.g. the Department of Social Security), solicitors and banks, to

resolve problems. All members of staff are trained in sentence planning and those staff that work directly with detainees also assist with detainees' day-to-day welfare needs.

Conclusion

9. Detainees at MCTC can range from those accused of serious offences, to immature people who have had difficulty coping with Service life. Many need to learn self-discipline or require help to establish their self-confidence and to develop a positive approach to life. All are kept active and busy throughout their time at MCTC.

10. The detainees of A Company undergo a well-devised and continually reviewed programme of military training. The regime is based on reward for effort and privileges are only granted to those detainees who prove themselves worthy of them. Most detainees respond to corrective training in a positive manner and reports from COs of personnel returning from A Company suggest that the regime causes most detainees to become better Service personnel.

11. Detainees in D Company have access to the Education Centre which provides a variety of training courses in its practical skills workshops, which lead towards the attainment of nationally recognised qualifications. These include fork lift truck, plumbing, brickwork, welding and a number of City and Guilds qualifications in the garage skills workshop as well as a whole range of IT qualifications in the Army Learning Centre. The Centre also holds a number of 'core qualifications' weeks each year that provide certification in first aid, health and safety, food hygiene and manual handling.

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Save as

Print Form

ANNEX D TO
VOL1 CH 13
JSP 830 MSL
revised 08/09

SERVICE SUPERVISION AND PUNISHMENT ORDER (SSPO) REVIEW FORM

T-SL-SH08

To be completed for Reviews conducted in accordance with Regulation 5 of the Armed Forces (Service Supervision and Punishment Orders) Regulations 2009

1. Name & Initials of Offender

2. Rank/Rate

3. Service Number

4. Date SSPO awarded

5. Date of Review

6. Review Stage i.e. 1st, 2nd, 3rd etc

7. Review Decision

SSPO to continue in force

SSPO to cease

8. Reasons for Decision

Signed

First name

Surname

Rank/Rate

Date

Commanding officer (Insert ship/Unit/Establishment)

PROTECT - PERSONAL DATA (WHEN COMPLETE)

1-13-D-1

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TRANSITIONAL GUIDANCE

Sentencing where charge found proved before commencement

1. If a charge has been found proved at a summary dealing or trial before commencement, but punishment has not been awarded before commencement, punishment must be awarded under AA55, AFA55 or NDA57 (as the case may be), as if that Act and the summary discipline regulations made under it were still in force.¹²⁹ The punishments available are the SDA punishments, not their AFA06 counterparts, and the maxima are those applicable under the SDAs. If the charge was found proved at a summary dealing under AA55 or AFA55, the maximum period of detention that may be awarded is therefore 28 days if permission to award extended detention was not obtained, or 60 days if it was.
2. The case may be referred to a senior officer for punishment if this would have been permissible before commencement (i.e. not in the case of a finding under AA55).¹³⁰ If the case was referred for punishment before commencement, the officer to whom it was referred may award punishment. In either case, the punishments available are again the SDA punishments, and the maxima are those applicable under the SDAs.

Summary trial under NDA57

3. In the case of a finding at a summary trial under NDA57, warrant punishments must be approved in accordance with NSDR.¹³¹
4. A naval CO may award dismissal from HM Service, or disrating by more than one rate (or reduction by more than one rank), as under NDA57. A sentence of dismissal from HM Service or of detention carries automatic disrating or reduction to the ranks where appropriate, as under NDA57 section 43(4) and (5).¹³²
5. Where detention is awarded under NDA57 after commencement, the CO may suspend the sentence at the time when he awards it.¹³³ If he proposes to exercise this power, he must notify higher authority of that intention when he submits the punishment warrant. Alternatively, higher authority may require the sentence to be suspended under NSDR regulation 49. The sentence may not be suspended under NDA57 section 90 after it is awarded. The CO may not issue a committal order under NDA57 section 81(3), even if he does not suspend the sentence.¹³⁴
6. If the finding was recorded at a summary trial under NDA57 and the offender is subject to a suspended sentence of detention, the CO may activate the suspended sentence under NDA57 section 91B (having obtained approval under NSDR regulations 45A and 49A) at the same time as awarding sentence for the new offence.

Effect of SDA sentences

¹²⁹ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(3).

¹³⁰ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(9).

¹³¹ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 57.

¹³² Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 56.

¹³³ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(5).

¹³⁴ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(6).

7. A sentence awarded at a summary dealing or trial (including one awarded after commencement, under the rules above) has effect as if the relevant SDA were still in force.¹³⁵

Detention

8. The AFA06 provisions on the commencement of a sentence of detention awarded at a summary hearing (sections 290 and 291) apply equally to a sentence of detention awarded under the SDAs (including one awarded after commencement, under the rule explained at paragraph 1 above). An election by the offender under AA/AFA55 section 118ZA(2) or NDA57 section 85A(2) counts as an election under AFA06 section 290(2); the bringing of an appeal to the summary appeal court counts as the bringing of an appeal to the Summary Appeal Court; and so on.¹³⁶

9. Similarly, the AFA06 provisions on the commencement of a suspended sentence of detention activated by the offender's CO (section 292) apply equally to a suspended sentence passed under NDA57 and activated by the offender's CO (before or after commencement).¹³⁷

10. A committal order may not be issued under NDA57 section 81(3) after commencement, even if the sentence was passed before commencement.¹³⁸ Subject to the rules mentioned in paragraphs 8 and 9 above, a sentence passed under NDA57 takes effect without the need for a committal order (as under AA/AFA55 and AFA06).

2nd class for conduct

11. An award of 2nd class for conduct under NDA57 (including one awarded after commencement, under the rule explained at paragraph 1 above) is not converted into a service supervision and punishment order under AFA06: it remains an award of 2nd class for conduct, and NSDR regulation 55 continues to apply to it. However, regulation 55 is amended so as to align the daily routine with that prescribed by the SSPO regulations. In relation to any part of an award of 2nd class for conduct that is served after commencement, regulation 55 reads as: every rating who is reduced to the second class for conduct, shall:

- a. Forfeit one sixth of his gross pay for the period of reduction to the second class for conduct;
- b. Be deprived of leave for the first fourteen days, thereafter being allowed, when possible, up to one day's leave a week at the discretion of the Commanding Officer;
- 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):
 - (1) During the first 14 days of the punishment, for a period not exceeding 5½ hours each day;
 - (2) During the remainder of the punishment, for a period not exceeding 1 hour each day;

¹³⁵ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 135. But see paragraph 0 below, in relation to awards of 2nd class for conduct.

¹³⁶ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), articles 138 to 140 and 142.

¹³⁷ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), articles 141, 143 and 144.

¹³⁸ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 137.

- e. Be deprived of any good conduct badges he may hold, and of the Long Service and Good Conduct Medal, if held;
- f. Be debarred from advancement to leading rate or above.”¹³⁹

12. As in the case of an SSPO, the offender’s CO must decide in respect of each day of the punishment

- a. What extra duties the rating must perform,
- b. The period (not exceeding the permitted maximum) for which extra duties are to be performed, and
- c. The time or times for performing the extra duties,

The CO must inform the rating accordingly ¹⁴⁰ and may delegate any of these functions to a person of or above the rate of chief petty officer. ¹⁴¹

Sentencing under AFA06

13. Where punishment is awarded at a summary hearing under AFA06 (because the charge is not found proved until after commencement), the punishments available are those under AFA06 even if the offence was committed before commencement. If extended powers are obtained, ¹⁴² up to 90 days’ detention may be awarded, even if the CO could not have awarded more than 60 days at the time of the offence. The only restriction (in addition to those imposed by Part 6 of AFA06) is that no punishment may be awarded which is more severe than the maximum available *to a court-martial* at the time of the offence. ¹⁴³

14. The principles and procedure for awarding sentence under AFA06 are the same in the case of an SDA offence as in the case of an AFA06 offence for example where if the accused admits the offence, he will be given credit when sentenced see paragraph 16 above. Part 14 of the section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009) includes technical provisions to ensure that Part 9 of AFA06 works in these circumstances. For example:

- a. Whenever Part 9 refers to a “service offence”, this includes an SDA offence;¹⁴⁴
- b. Section 244, which ensures that an offender may not be made subject to sentences of detention for a total of more than two years, applies equally to an offender who is subject to one or more SDA sentences and is given a further sentence under AFA06;¹⁴⁵
- c. Section 246, which requires a CO who awards detention to direct that time spent in service custody after charge is to count towards the sentence, applies equally to time spent in military, air-force or naval custody after the accused was informed that a charge was to be reported to his CO.¹⁴⁶

¹³⁹ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 159(3).

¹⁴⁰ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 159(4).

¹⁴¹ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 159(5).

¹⁴² Extended powers may be applied for before commencement: see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention)

¹⁴³ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 7.

¹⁴⁴ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 102(a).

¹⁴⁵ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), articles 104 and 105.

¹⁴⁶ Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 106(1).

15. A sentence of detention awarded under AFA06 may be made consecutive to a sentence awarded under the SDAs (including one awarded after commencement).¹⁴⁷

¹⁴⁷ Armed Forces Act section 189; section 380 order, article 85(3).

Chapter 14

The summary hearing sentencing guide

Commanding officers guide to sentencing at summary hearing

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Chapter 14

The summary hearing sentencing guide

Introduction

1. The impartial administration of discipline is essential to the morale and cohesion of a Service unit, and therefore will influence that unit's operational effectiveness. Fairness at Summary Hearing generates confidence in other aspects of unit management. This chapter offers detailed and specific advice on how to approach sentencing for each offence. The guidance is designed to assist in arriving at an appropriate, safe, fair and proportionate sentence. Whilst this guidance is very detailed the actual sentence that is awarded is a matter solely for the **discretion** of the CO based on his judgement of all the circumstances in which the offence was committed and any personal mitigation relating to the offender. Guidance on how to sentence for specific offences must always be read in conjunction with guidance on sentencing principles in [Chapter 13](#) (Summary hearing sentencing and punishments). A CO must bear in mind that whilst the guide is merely that, he will be required to provide a mandatory explanation¹ as to the reasons why he has imposed a particular sentence and therefore it must be justifiable. Details of such an explanation (reasons for sentencing) are required on the Record of Summary Hearing (RSH). See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

2. As this guidance is relevant for the purposes of deciding upon the appropriate sentence the CO must understand the sentence he is awarding. Relevant guidance on each punishment can therefore be found in [Chapter 13](#) (Summary hearing sentencing and punishments).

¹ Section 252 of the Act

Commanding officers guide to sentencing at summary hearing

Quick guide

3. The following general instructions must also accompany guidance on each offence as it includes considerations applicable to every offence. The abbreviated sentencing guidance provided below does not excuse officers from consulting the full guidance in [Chapter 13](#) (Summary hearing sentencing and punishments);

4. The guide is structured as follows:

Quick guide AFA06 reference	Offence/type of offence
Charging reference	<ul style="list-style-type: none"> Reference to corresponding offences section of the MSL.
Mitigating factors	<ul style="list-style-type: none"> Mitigating factors affecting level of sentence – see table below at paragraph 5
Aggravating factors	<ul style="list-style-type: none"> Aggravating factors affecting level of sentence – see table below at paragraph 5
Range of punishments	<ul style="list-style-type: none"> An indication of typical sentence depending on severity by giving an entry point and low and high levels of seriousness. <i>With the exception of section 9 (AWOL) offences for which general guidance and a suggested tariff is provided, there are two entry points. The first is for use when the offence has been denied and subsequently found proved. No credit for admitting the offence has been given. The second entry point is on the basis of the offence being admitted by the offender at the earliest opportunity. This is calculated by the entry point above being reduced by the maximum 1/3rd discount. The 1/3rd discount will be appropriate if the offender admits the charge at the beginning of the summary hearing. This discount should be reduced on a sliding scale the later into the hearing he admits the charge.</i> It is stressed that this is guidance and merely that. Suggested sentences for the section 9 (AWOL) tariff and at Entry Points and according to level of seriousness are not fixed; however, they will assist the CO in arriving at a safe and fair sentence.
Sentencing guidance	<ul style="list-style-type: none"> Specific factors to take into account when deciding the severity of the offence and which punishment may be appropriate e.g. whether to consider impact on unit, level of responsibility the offender held at the time etc.

5. Aggravating and mitigating factors in the accompanying tables over the remainder of this chapter are specific to each offence, however the following is a quick guide to the factors that are appropriate for every offence and therefore must be taken into consideration when deciding upon appropriate punishment if applicable. The list below is not exhaustive and neither are the lists for every offence provided below. Should the CO consider any other factors to be mitigating or aggravating then he must also take those factors into consideration.

Mitigating factors	<ul style="list-style-type: none"> Admission of the offence. Substantial cooperation with investigators. Offender relatively young (usually under 21). Inexperienced Service person.
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	<ul style="list-style-type: none"> • Previous good character. • Good professional record. • Genuine remorse. • Serious illness. • Severe adverse effect of sentence on offender or family. • If the length of time since the commission of the offence has been significant and that time/delay has been of no fault of the offender.
Aggravating factors	<ul style="list-style-type: none"> • Previous Convictions • Unlawful prejudice (including race, ethnicity, religion, belief, sex, gender identity, sexual orientation, disability and age). • Common offence in unit. • Vulnerability of the victim. • Breach of trust. • Premeditation. • Operational environment. • Experienced Service person/offender in position of responsibility. • Alcohol (see full guidance above). • Group offence. • Gratuitous offending (especially violence). • Effect on Service discipline. • In public eye. • Repeat offence/relevant previous convictions. • In uniform

6. Where a CO records findings that two or more charges against a person have been proved, the award he must make is a single 'global' award (consisting of one or more of those punishments available to him) in respect of all the charges taken together². Care should be taken that the global total does not exceed the CO's maximum powers of punishment.

7. There will be occasions when it may be appropriate to award an offender a combination of punishments. In those circumstances the CO must ensure that only the permitted combination of punishments is awarded. See [Chapter 13](#) (Summary hearing sentencing and punishments);

8. **Co-accused from different units or sub-units.** Where a charge involves co-accused from different units, sub-units or the same charge is brought against two Servicemen in different units and it arises out of the same incident then COs should normally liaise and consult with each other in order that discipline is fairly and evenly administered and context is understood and taken into account. This spirit of cooperation is essential to ensure that any differences in the handling of discipline between units is minimised. See [Chapter 2](#) (Meaning of CO).

9. There are some offences which are unusual and not often dealt with. In those circumstances legal advice should normally be sought.

10. The CO passing sentence must explain in ordinary language the general terms of and the reasons for the sentence. For example, if the CO imposes a custodial sentence, he must

² Section 131 of the Act.

explain why the offence is sufficiently serious to warrant such a sentence³. He must include in his reasons, the following:

- a. Any reduction given for admitting the offence;
- b. Any aggravating or mitigating factors the CO regarded as being of particular importance;
- c. The effect of the sentence i.e. what punishments make up the sentence and what the consequences are (for example when the offender can expect to recover his rank/rate, impact on pay, pensions and bonuses, award of LS and GC medals etc). The detail on the effects of punishments are contained within [Chapter 13](#) (Summary hearing sentencing and punishments);
- d. Where the offender is required to comply with any order⁴ forming part of the sentence, the effects of any failure to comply with that order;
- e. Where the sentence consists of or includes a fine, the CO must explain the effects of failing to pay the fine (although fines will almost always be deducted direct from pay);
- f. Any power to vary or review any order forming part of the sentence on application⁵; and
- g. The amount of credit, if any, that has been given for any time spent in custody⁶.

³ Section 252 of the Act.

⁴ Eg a Service compensation order, order imposing a fine by deductions/installments, SSPO order, suspended sentence order etc.

⁵ Section 252 of the Act.

⁶ See [Chapter 13](#) (Summary hearing sentencing and punishments).

Offences

S.9 AFA 06	Absence without leave contrary to section 9 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-31
Mitigating factors	<ul style="list-style-type: none"> • Very short absence. • Attempted return. • Genuine reason e.g. domestic problems. • Returned voluntarily. • Whether offender asked for help in trying to resolve problems that led to absence. • Evidence of lack of support for offender's problems. • Low level of recklessness/negligence, for example a Service person who goes to sleep on a train when returning to duty and is carried past his station making him unable to return to his unit on time. • Made contact with unit. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Ship under sailing orders/unit on or about to be on operational deployment. • Wilful. • Long absence. • Absence in order to avoid other disciplinary action. • Intention to avoid arduous service. • Serious consequences for absentee's unit. • Failed to contact unit when plenty of opportunity. • Returned involuntarily as a result of arrest.
Range of punishments	<p>General guidance – for more detail see tariff below</p> <ul style="list-style-type: none"> • Low/1st offence – Admonishment for 1st offence. Restriction of privileges/stoppage of leave and/or fine (see below). • Entry point – Fine (see below) or disrating/reduction in rank. • High – Detention (see below)/SSPO
Sentencing guidance	<ul style="list-style-type: none"> • Absence without leave is one of the most commonly committed offences. Because of the importance of punctuality and attendance at place of duty, the deterrent element of the punishment should always be emphasised. • The impact of an offender's behaviour on his unit should always be considered, particularly if the ship/unit/establishment has been training for or conducting operations. • The table below is devised to ensure consistency across the Services. Although the table should be followed in most cases, it is not a rigid tariff, but a starting point for deliberation. It is not intended to imply a day's detention for a day's absence, and such an approach will rarely be appropriate. • For simple first offences of very short absence an admonition may be considered. • Stoppage of leave and restriction of privileges are available as an alternative to a financial penalty for the offender whose financial circumstances make a fine undesirable. Stoppage of leave is also appropriate for the persistent leave-breaker who needs an additional sanction to a fine and/or restriction of privileges combination. • Repetition of absence without leave should be treated more seriously. • For absences of over 7 days a sentence of detention should always be considered. As a guide this may range between 7 and 90 days

	<p>depending on all the facts of the case, including the actual length of absence.</p> <ul style="list-style-type: none"> • If the offender’s disciplinary record is poor, or there is absence in conjunction with some other offence, detention may be considered appropriate for absences of less than 7 days. This may also be the case if the offender’s motivation is to be absent long-term. A deterrent sentence may be appropriate even if he has been arrested and returned after only a short period of absence. • For details of suspension and forfeiture of pay as a result of absence see Chapter 10 (Absence and desertion) and Chapter 20 (Forfeiture and deductions). • Legal advice should always be sought in cases of absence over 120 days. • Where there are aggravating features and the offence is considered to be in the high category of seriousness then a sentence of detention would be appropriate in accordance with the tariff below.
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Guidance on the basis of an offence that has been denied and found proved (i.e. no credit given):

Period of Absence	Fine (days’ pay)	Number of days detention
Up to 24 hours	Up to 6 days’ pay	
Up to 2 days	Up to 9 days’ pay	
Up to 3 days	Up to 13 days’ pay	Consider short detention (up to 3 days)
Up to 7 days	Up to 16 days’ pay	Consider short detention (up to 7 days)
8 – 14 days	17 - 21 days’ pay	Consider medium term detention (up to 14 days)
15 – 21 days	22 - 28 days’ pay	Consider medium term detention (up to 21 days)
22 – 28 days		Medium term detention (up to 28 days)
29 – 100 days		Consider longer term detention with extended powers (29 – 49 days)
Over 100 days		Detention with extended powers (50 – 90 days)

Examples of absences and punishments:

1. Short absence of up to 24 hours caused by negligence/stupidity: range from admonition to fine of 6 days’ pay, no detention. (Alternatives stoppage of leave, restriction of privileges).
2. Short period of up to 3 days intentional absence which has not affected operational effectiveness: fine of more than 6 days’ pay or short period of detention (up to 3 days), depending on culpability.
3. Medium-term absentee, i.e. over 8 days but caught within a month: Detention will often be appropriate rather than a fine. (Alternative – SSPO)
4. Long-term absentee: 90 days (with permission of Higher Authority).

5. The point on the punishment scale will depend on the facts of the case, e.g.
 - (a) Offender going absent to sort out domestic problem – lower end;
 - (b) Offender deliberately absenting himself with no indication of intention to return in the short term – top end.

NB: The 'day for a day' correlation no longer applies; an assessment is made on the facts of each case.

s.15(1)(a) and s.15(1)(b) AFA 06	Failure to attend for a duty contrary to section 15(1)(a) and unauthorised leaving of duty contrary to section 15(1)(b) of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-46
Mitigating factors	<ul style="list-style-type: none"> • Genuine attempt by individual to inform superiors that he would be late for duty. • Simple forgetfulness. • Lack of supervision. • Lack of timely relief. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Previous offence(s) of a similar nature. • Avoiding arduous duty. • If degree of planning involved. • Operational environment or security implications. • If offender knew how serious the consequences of his failure would be.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave • Entry point - 5 – 10 days fine • High - 4 - 10 days detention <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave • Entry Point - 3 – 7 days fine • High - 1 - 7 days detention
Sentencing guidance	<ul style="list-style-type: none"> • The circumstances and consequences or likely consequences will determine the seriousness of the offence. • The wider deterrent effects on other members of the unit should be considered. • Leaving place of duty when on guard duty will always be more serious and, an offender should be punished accordingly. For this type of offence at its most serious, a short sentence of detention should be considered of up to 7 days. • For first offences of failure to attend the place of duty the entry point for the sentence should be 2 days' restriction of privileges and/or stoppage of leave or 1 day's fine. • For failing to attend a "special muster or parade" (eg; a muster or parade already required by restriction of privileges) the entry point should be 4 days' restriction of privileges and/or stoppage of leave or 2 days' fine.

s.15(1)(c) and s.15(2) AFA 06	Neglect of duty contrary to section 15(1)(c) and failure to perform duty contrary to section 15(2) of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-46
Mitigating factors	<ul style="list-style-type: none"> • Operational situation which reduces opportunity to exercise usual care and competence. • Good professional record. • One-off or momentary lapse. • Trivial consequences. • Poor training. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Deliberate act or omission. • Gross negligence — accused falls well below the level of a competent and careful person of his age, rate/rank, experience etc. • Negligence threatening to life and limb of others, i.e. safety implications. • Actual severe consequences, when foreseeable. • Poor professional record indicating general lack of professionalism.
Range of punishments	<p>Punishment after denial of offence</p> <ul style="list-style-type: none"> • Low – Restriction of privileges and/or stoppage of leave for able rate, marine, soldier or airman or small fine for offenders in position of responsibility. • Entry Point - Fine on sliding scale of seriousness or reprimand for those in position of responsibility. • High – Disrating/reduction in rank or 24 days + detention or 60 day SSPO. <p>Punishment after admission of offence</p> <ul style="list-style-type: none"> • Low – Restriction of privileges and/or stoppage of leave for able rate, marine, soldier or airman or small fine for offenders in position of responsibility. • Entry Point - Fine on sliding scale of seriousness or reprimand for those in position of responsibility. • High – Disrating/reduction in rank or 21 days + detention or 30 day SSPO.
Sentencing guidance	<ul style="list-style-type: none"> • The CO should focus on the negligence or failure itself. The consequences of the negligence or failure great or small clearly provide some indication of the seriousness of the offence as well as the foreseeability that harm would flow from that negligence or failure. It is possible however for gross negligence to result in minor harm by some stroke of luck and for minor negligence to result in great harm. The proper approach is to imagine an average Service person of the offender's age, rank/rate and experience in the same situation and to consider what he should have realised was likely to happen as a result of his act or omission.
Negligent discharge	<ul style="list-style-type: none"> • Care should be taken to distinguish cases involving accidental discharge due to a defect in the weapon (not an offence) and negligent discharge which involves human error (an offence). • Different standards of competence are expected depending on levels of experience and the first consideration is the stage of career the Service person is at. For the purposes of this guide a person is considered to be in a training environment prior to completion of phase 1 training. <p>Mitigating factors</p> <ul style="list-style-type: none"> • Offence committed in the training environment

- Momentary lapse
- No harm caused
- Lack of supervision
- Very inexperienced Service person
- Extreme fatigue
- Poor conditions
- Limited training on weapon concerned
- Genuine remorse.

Aggravating factors

- Ignoring proper procedures
- Horseplay
- Injury caused
- In close proximity to others
- Tampering with weapon belonging to another

Range of punishments

- Restriction of privileges in all very minor cases where mitigating factors are present. Otherwise:
 - In a training environment - fine of 2 days' pay.
 - Trained personnel whilst on range practice/phase 2 - Fine of 3 - 7 days' pay.
 - In operational environment/on duty - Up to 28 days' pay or 1 – 7 days detention.
- A Service compensation order, see [Chapter 13](#) (Summary hearing sentencing and punishments) may be appropriate where neglect of duty results in damage to property.

Sentencing guidance

- Notwithstanding punishment guidelines above, cases with strong mitigation might attract an admonition only, whilst extreme cases of negligence, e.g. when the discharge creates serious risk of injury, may well call into question the offender's fitness to hold his rank or rate.
- In the most serious of cases, where warnings as to appropriate procedures or behaviour have been ignored and serious risk of injury created, detention may also be appropriate.

s.13 AFA 06	Contravention of standing orders contrary to section 13 of the Armed Forces Act 2006 (General guidance)
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-41
Mitigating factors	<ul style="list-style-type: none"> • New to unit/theatre. • Genuine lack of appreciation of the consequences of the contravention. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Order related to security of ship or unit. • Premeditated. • Order was well promulgated and/or repeated. • Wilful.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low – Admonishment or restriction of privileges and/or stoppage of leave. • Entry Point – 5 – 10 days fine. • High – Reduction in rank/disrating or 4 – 10 days detention. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – Admonishment or restriction of privileges and/or stoppage of leave. • Entry Point – 3 – 7 days fine. • High – Reduction in rank/disrating or 1 – 7 days detention.
Sentencing guidance	<ul style="list-style-type: none"> • The key principles of sentencing this offence are to assess both the consequences of the contravention as well as the impact of the offender's actions and his appreciation of his actions • For offences involving contravention of orders in relation to road traffic matters see guidance below. Legal advice should always be sought in cases involving excess alcohol and driving/being in charge of a vehicle etc.
Loss of ID cards	<ul style="list-style-type: none"> • Disciplinary action is <i>only</i> applicable where <i>culpable negligence</i>/blame can be proved. Failure to report the loss may be an offence contrary to Standing Orders. • If an administrative charge (applicable to RN and Army only) is applied this must be taken into account in any punishment awarded, particularly as to the offender's ability to pay any fine. • Where the offence is prevalent in the unit or there is a significant degree of culpability attaching to the loss, a fine of 2 or more days pay may be an appropriate entry point. • Offences which impact on security (e.g. wilful surrender of an ID Card to a non-Service person resulting in a security breach) may attract more serious punishment.
Breach of no-touching rule (applicable to RN only)	<ul style="list-style-type: none"> • For a first time offence of a minor nature restriction of privileges and/or stoppage of leave or an admonition may be appropriate, otherwise a small fine or reprimand for those in positions of responsibility. For second time offences and offences of an intimate nature, a fine of 3 to 10 days pay would be appropriate depending on the overall seriousness. • Those in positions of trust, duty or seniority should be sentenced more severely and this may merit a larger fine or reduction in rank/disrating. In the case of the latter punishment extended powers would need to be applied for.

	<ul style="list-style-type: none"> • Offences committed in the training or operational environment may be considered to be more serious.
In improper place, eg male in female accommodation	<ul style="list-style-type: none"> • Offences committed in the training or operational environment may be considered to be more serious than those in other establishments. • First offence: a low sentence of restriction of privileges and/or Stoppage of Leave.
Abuse of toxic substances – e.g. glue sniffing	<ul style="list-style-type: none"> • Given the wide range of possible circumstances, COs should seek advice on individual cases.
Weapons offences	<ul style="list-style-type: none"> • See specific guidance below.

Road traffic and driving offences									
Charging reference s.3, s.5, s.25, s.28, s.29 RTA 88	MSL Chapter 8 - Criminal conduct offences pages 1-8-52 to 1-8-63								
Specific points to note about this offence	<ul style="list-style-type: none"> • Offences committed in UK. Where the offence is committed on a road to which the public has access primary jurisdiction falls to civil authorities who have powers to make orders a CO cannot, such as awarding penalty points and disqualifying from driving. In the unlikely event that jurisdiction is relinquished to COs, legal advice should be taken. Preferably a Service offence should be found to capture the offence, but Road Traffic offences with penalties are listed below in case they are needed. • Offences committed overseas. The starting point is that guidance for offences committed in the UK should be followed, however legal advice is essential at the sentencing stage. Different national rules on drink-related driving offences may require careful consideration for sentence. 								
Mitigating factors	<ul style="list-style-type: none"> • No harm or damage caused. • Impulsive behaviour in perceived emergency. • Level of training. • Lack of supervision. • Genuine remorse. 								
Aggravating factors	<ul style="list-style-type: none"> • On duty. • Consuming alcohol whilst driving. • Bad driving manner. • Intentional offence or careless regard of the law. • Harm or damage caused. • Previous offences of a similar type. • In uniform. 								
Sentencing guidance	<ul style="list-style-type: none"> • The duration of the offence, the speed driven and whether an accident was caused are all factors that should be taken into consideration when sentencing. • Because detention and/or disrating/reduction in rank may have a very significant financial impact, a CO may wish to take legal advice. As a guide to determining sentence once legal advice has been sought, if a civilian court would have imposed a custodial sentence, the CO should impose a sentence of detention. If a civilian court would have imposed a community order, a sentence of detention or a large fine are the options which will need careful consideration. • COs may wish to consider withdrawing car passes as accompanying administrative action. • If damage is caused a Service compensation order may be appropriate. 								
Range of punishments	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">Dangerous Driving</td> <td style="width: 50%;">Detention</td> </tr> <tr> <td>Drink driving</td> <td>Detention or disrating/reduction in rank for readings three and a half times over the limit (if alcohol level available): Otherwise max £1000 fine</td> </tr> <tr> <td>Driving without due care and attention</td> <td>Up to £800 fine</td> </tr> <tr> <td>Driving whilst disqualified by court</td> <td>Detention or disrating for high level offence, otherwise maximum of £800</td> </tr> </table>	Dangerous Driving	Detention	Drink driving	Detention or disrating/reduction in rank for readings three and a half times over the limit (if alcohol level available): Otherwise max £1000 fine	Driving without due care and attention	Up to £800 fine	Driving whilst disqualified by court	Detention or disrating for high level offence, otherwise maximum of £800
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		fine
	Failing to stop after accident	Up to £800 fine
	Failing to report incident	Up to £800 fine
	Driving without insurance	Up to £1000 fine
	Forgery, alteration, use, loan or allowing the use of motor vehicle documents, driving licence, insurance certificate, with intent to deceive	Up to £500 fine for low level offence
	Fraudulent alteration or use, or lending or allowing to be used by another, of vehicle licence or registration documents	Up to £500 fine for low level offence
	Defective brakes/tyres/steering	Up to £150 fine per item
	Failure to comply with traffic lights	Up to £200 fine
	Driving without current MOT	Up to £150 fine
	Failure to stop at a pedestrian crossing	Up to £100 fine
	Failure to comply with double white lines	Up to £100 fine
	Failure to comply with stop sign	Up to £100 fine
	Failure to comply with directions of Police officer or traffic warden	Up to £100 fine
	Failure to comply with other traffic signs	Up to £100 fine
	Driving without a licence	Up to £200 fine
	Probationary licence holder driving without plates/unsupervised/carrying unqualified passenger	Up to £50 fine
	Speeding	Up to £10 per mph over speed limit

s.11 AFA 06	Misconduct towards a superior officer contrary to section 11 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-36
Mitigating factors	<ul style="list-style-type: none"> • Provocation (not associated with professional duties). • Impulsive rather than pre-meditated. • Lack of appreciation of seriousness of actions. • Welfare difficulties leading to loss of self-discipline. • Absence of any other Service personnel. • Language not intended to be heard by superior. • Stress imposed by the situation/Service life. • Single blow or slap. • No injury caused. • No knowledge that victim was a superior, but should have known. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Aggression based on disagreement with lawful requirement of the Service. • Offence committed in front of colleagues/juniors. • Mode of attack (e.g. head butt or kicking). • Use of weapon. • Injury caused. • Warning to control situation not heeded. • Part of pattern of insubordination. • Flagrant contempt.
Range of punishments	<p>Punishment after denial of offence:</p> <p>For offences under s.11(1) (involving violence):</p> <ul style="list-style-type: none"> • Low - If detention is disproportionate in the circumstances an SSPO (if appropriate to rank/rate) or 10 - 24 days fine. • Entry Point - 28 days detention. • High - 36 – 72 days detention. <p>For offences under s.11(2) (no-violence):</p> <ul style="list-style-type: none"> • Low - 4 – 10 days fine. • Entry point – 10 - 16 days fine. • High – short period of detention/17 – 28 days fine. <p>Punishment after admission of offence:</p> <p>For offences under s.11(1) (involving violence):</p> <ul style="list-style-type: none"> • Low - If detention is disproportionate in the circumstances an SSPO (if appropriate to rank/rate) or 7 - 21 days fine. • Entry point - 21 days detention. • High - 28 – 60 days detention. <p>For offences under s.11(2) (no-violence):</p> <ul style="list-style-type: none"> • Low - 1 – 7 days fine. • Entry point – 7 - 14 days fine. • High – short period of detention/14 – 28 days fine.
Sentencing guidance	<ul style="list-style-type: none"> • Insubordinate language and contemptuous behaviour may not amount to serious misconduct depending on the full circumstances of the offence and language used however use of violence to a superior officer usually counts as serious misconduct and should therefore be dealt with by the CO rather than a subordinate commander. • Detention will be appropriate in most cases or an SSPO. • If detention is not awarded, a large fine will usually be appropriate.

s.12 AFA 06	Disobedience to lawful commands contrary to section 12 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-39
Mitigating factors	<ul style="list-style-type: none"> • Lack of appreciation of seriousness of actions/words. • Late compliance – where order is complied with later than the deadline given for obeying the order. • Genuine remorse. • Welfare difficulties leading to loss of self-discipline. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Premeditated. • On operational duty. • Disobedience may have actually or potentially caused a security risk or put the safety of individuals at risk. • Warnings and opportunity given to comply. • Offence committed in front of colleagues/juniors. • Flagrant or deliberate contempt.
Range of punishments	<p>Punishment after denial of offence:</p> <p>Reckless:</p> <ul style="list-style-type: none"> • Low - In exceptional or minor cases another punishment that does not require extended powers may be appropriate such as 7 – 10 days fine or restriction of privileges and/or stoppage of leave. • Entry point - 10 – 17 days fine • High – 17 – 28 days fine <p>Intentional:</p> <ul style="list-style-type: none"> • Low - 10 – 17 days detention • Entry point - 21 – 28 days detention. • High - 36 days detention. <p>If offender is in position of responsibility disrating or reduction in rank will usually be appropriate.</p> <p>Punishment after admission of offence:</p> <p>Reckless:</p> <ul style="list-style-type: none"> • Low - In exceptional or minor cases another punishment that does not require extended powers may be appropriate such as 3 – 5 days fine or restriction of privileges and/or stoppage of leave. • Entry point - 7 – 14 days fine • High – 14 – 28 days fine <p>Intentional:</p> <ul style="list-style-type: none"> • Low - 7 – 14 days detention • Entry point - 14 – 24 days detention. • High - 28 days detention. <p>If offender is in position of responsibility disrating or reduction in rank will usually be appropriate.</p>
Sentencing guidance	<ul style="list-style-type: none"> • The authority of superior officers and those authorised to give lawful orders must be upheld and therefore there should always be a deterrent element to any sentence awarded. • Generally intentional ('wilful') disobedience counts as serious insubordination and should be treated as such; reckless disobedience may be treated as slightly less serious depending on the circumstances. It is important to examine the effect of the insubordinate behaviour. • For the sake of consistency all accused charged with disobedience should be dealt with by the CO.

s.10 AFA 06	Failure to cause apprehension of deserters and absentees contrary to section 10 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-34
Mitigating factors	<ul style="list-style-type: none"> • Accused finally confesses or acts. • Reported as soon as possible. • Lack of appreciation of seriousness of actions. • Limited opportunity to apprehend. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Knowledge that deserter or absentee's absence compromises operational effectiveness of unit. • Continued opportunity to apprehend.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave. • Entry point - 5 – 10 days fine. • High - 10 – 21 days detention (AWOL)/28 days detention (Deserter) <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave. • Entry point - 3 – 7 days fine. • High - 7 – 14 days detention (AWOL)/28 days detention (Deserter)
Sentencing guidance	<ul style="list-style-type: none"> • As this is an offence that is little used it is advisable to seek advice prior to awarding punishment. • An offence of failing to apprehend a deserter will always be more serious than any offence of failing to apprehend an absentee. • The length of period of knowledge that the offender had regarding the absentee or deserter will be a factor to consider when determining the seriousness of the offence. • This offence is akin to being an accessory therefore there must be a deterrent element in the punishment.

s16(1)(a) and s16(1)(c) AFA 06	Malingering contrary to section 16(1)(a) or 16(1)(c) of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-49
Mitigating factors	<ul style="list-style-type: none"> • If offender relatively inexperienced and little appreciation of consequences of actions • If offence occurs after period of heavy commitment such as a lengthy operational tour. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • In operational environment • Intention to avoid Service on operations/deployment • Intention to avoid arduous duty or military training assessments • Repeat or long term malingering
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave • Entry point - 5 – 10 days fine • High - 21 – 28 days detention <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave • Entry point - 3 – 7 days fine • High - 14 – 28 days detention
Sentencing guidance	<ul style="list-style-type: none"> • The following factors should determine the seriousness of the offending: <ul style="list-style-type: none"> ○ The extent of the waste of medical and administrative resources used in treating the pretended illness or injury; ○ The operational consequences of that person's actions; and ○ The importance of the duty being avoided.

s.17 AFA 06	Disclosure of information useful to an enemy contrary to section 17 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-52
Mitigating factors	<ul style="list-style-type: none"> • Accidental. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • If information actually reached enemy or certainty that information could reach an enemy. • Operational environment where security may be compromised. • Premeditated.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - 9 – 17 day fine • Entry point - 17 – 24 day fine • High - 36 days detention <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - 7 – 14 day fine • Entry point - 15 – 19 days' fine • High - 28 days detention
Sentencing guidance	<ul style="list-style-type: none"> • When assessing the seriousness of the offence the degree of usefulness of the information to the enemy and the extent of the disclosure should be considered. • As this is an offence that is little used it is advisable to seek advice prior to awarding punishment. • It will be usual for the CO to hear this offence rather than a sub-ordinate commander.

s.19 AFA 06	Conduct prejudicial to good order and discipline contrary to section 19 of the Armed Forces Act 2006 (General guidance)
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-58
Mitigating factors	<ul style="list-style-type: none"> • Genuine misunderstanding. • Relative youth/inexperience. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Threat of injury. • Operational effectiveness compromised.
Range of punishments	<ul style="list-style-type: none"> • Minor offences – Entry point - 3-7 days' restriction of privileges and/or stoppage of leave.
Sentencing guidance	<ul style="list-style-type: none"> • Most s.19 offences are low level, however it is possible to deal with serious offences under s.19 and for there to be a correspondingly serious sentence, e.g. lying for financial gain not charged under the Theft Act. • The degree to which the Service was brought into disrepute must be taken into consideration when sentencing.
	(Sample offences – not exhaustive)
Possession of property belonging to another without authority where a charge of theft is inappropriate	<p>Mitigating factors</p> <ul style="list-style-type: none"> • Condition of the property on return to the owner. • Temporary borrowing of another person's property a common practice in the unit. • Genuine remorse. <p>Aggravating factors</p> <ul style="list-style-type: none"> • Previous offences of the same nature. • In uniform. <p>Range of punishments</p> <ul style="list-style-type: none"> • 1 – 7 days fine or restriction of privileges and/or stoppage of leave. <p>Sentencing guidance</p> <ul style="list-style-type: none"> • Consideration should be given to the value of the property as well as how long the property was in the offender's possession.
Use of a vehicle without authority where a charge of TWOC is inappropriate	<p>Mitigating factors</p> <ul style="list-style-type: none"> • Genuine misunderstanding of orders or instructions. • Compassionate circumstances. • Genuine remorse. <p>Aggravating factors</p> <ul style="list-style-type: none"> • Encouraging others to take part in the offence. • In uniform. <p>Range of punishments</p> <ul style="list-style-type: none"> • A minor punishment would be appropriate for a low level offence otherwise a fine or reprimand. <p>Sentencing guidance</p> <ul style="list-style-type: none"> • The extent to which the vehicle has been used over and above that which was authorised will be a consideration. • An assessment of any costs incurred to represent the loss to the Service or damage done will need to be made and the appropriate amount claimed through a Service Compensation Order.
Failure to clean Service kit	<p>Mitigating factors</p> <ul style="list-style-type: none"> • Relatively young/inexperienced/welfare. • Genuine remorse.

	<p>Aggravating factors</p> <ul style="list-style-type: none"> Operational consequences of the failure. <p>Range of punishments</p> <ul style="list-style-type: none"> A wide range of punishments may be appropriate from an admonishment to detention/SSPO depending on what the failure relates to and how many times the offender has committed this offence. <p>Sentencing guidance</p> <ul style="list-style-type: none"> The consequences of an offender's actions and any actual or potential risk to others must be examined to determine the seriousness of the offending.
<p>Misbehaviour in ship/base/camp</p>	<p>Mitigating factors</p> <ul style="list-style-type: none"> Uncharacteristic lapse. Genuine remorse. <p>Aggravating factors</p> <ul style="list-style-type: none"> Offence committed in front of subordinates. Effect on the local community. In uniform. <p>Range of punishments</p> <ul style="list-style-type: none"> A wide range of punishments may be appropriate from an admonishment to a short period in detention depending on the circumstances of the offence. <p>Sentencing guidance</p> <ul style="list-style-type: none"> To determine the seriousness the level of thoughtlessness involved in committing the offence must be considered

s.20 AFA 06	Unfitness through alcohol or drugs contrary to section 20 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-61
Mitigating factors	<ul style="list-style-type: none"> • Off duty. • No other offence committed. • Lack of supervision. • Led astray by more senior ranks/rates. • 1st offence of drunkenness in a training environment. • No disturbance/placid behaviour. • No intention to reach actual level of drunkenness. • Welfare problems behind drinking. • Effort made to return on board from ashore/back to base or camp. • Drunkenness in Service club or in single living accommodation. • Illness – where offender has alcohol dependency/alcoholism. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • On duty/unable to perform a planned duty. • On board a ship at sea/on exercise/in operational environment. • Official function. • Activity involving loaded weapons. • Aggressive behaviour/rowdiness. • Failure to heed warnings. • Offence committed under stoppage of beer/alcohol restriction rule. • Intention to get drunk/wilful disregard of worsening condition. • In uniform.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - 5 days fine or 5 – 10 days restriction of privileges and/or stoppage of leave. • Entry point - 7 – 10 days fine or 10 days restriction of privileges and/or stoppage of leave. • High - 10 – 14 days fine or 14 days restriction of privileges and/or stoppage of leave. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - 3 days fine or 3 – 5 days restriction of privileges and/or stoppage of leave. • Entry point - 5 – 7 days fine or 7 days restriction of privileges and/or stoppage of leave. • High - 8 – 10 days fine or 10 days restriction of privileges and/or stoppage of leave.
Sentencing guidance	<ul style="list-style-type: none"> • For offences by senior rates/SNCOs their status may be an additional aggravating feature. • In very serious cases, e.g. drunk on duty or when safety or operations are imperilled, an SSPO, disrating/reduction in rank or 14 – 28 days detention should be considered. Legal advice should be sought in these circumstances. • Whilst the guidance above should generally be followed for the sake of consistency, the CO's powers (up to his maximum permitted) to award stoppage of leave and/or restrictions of privileges are not fettered. • It will usually be the case that an offence under s.20(1)(a) will be more serious than one under s.20(1)(b) therefore someone unable to do his duty will usually be sentenced more severely than someone who behaves in a disorderly manner.

s.21 AFA 06	Fighting or threatening behaviour contrary to section 21 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-65
Mitigating factors	<ul style="list-style-type: none"> • Incident overall not serious. • Provocation. • Started by acting in self defence (see Chapter 12 – Defences, mitigation and criminal responsibility) but then went on beyond self defensive actions. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • High degree of force used. • Injuries caused. • Protracted fight. • In front of subordinates. • Many parties involved. • In uniform.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - 5 – 10 days fine or restriction of privileges and/or stoppage of leave. • Entry point - 10 – 14 days fine. • High - 14 – 28 days detention/60 day SSPO. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - 3 – 7 days fine or restriction of privileges and/or stoppage of leave. • Entry point - 7 – 10 days fine. • High - 7 – 28 days detention/30 day SSPO.
Sentencing guidance	<ul style="list-style-type: none"> • The punishment should reflect the degree of the accused's involvement as well as his position, level of responsibility and amount of Service experience. • For those of the lowest rank or rate a punishment of 7 days' restriction of privileges and/or stoppage of leave (or equivalent Fine or combination of punishments) would be appropriate for a first offence. Those holding rank/rate above should be punished more severely. • If fighting parties are from different units then there should be consultation between units to ensure a consistent punishment is awarded. • The effect of the threatening behaviour on the victim must be taken into consideration when considering the seriousness of the offence.

s.22 AFA 06	Ill treatment of subordinates contrary to section 22 of The Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-68
Mitigating factors	<ul style="list-style-type: none"> • Inexperience. • Absence of malice. • Horseplay. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Initiation rights. • Course of conduct/systematic. • In front of others. • Serious injury caused: psychological or physical. • Abuse of position. • Motivated by prejudice (race, ethnicity, religion, belief, sex, gender identity, sexual orientation, disability or age). • Accompanied by an assault. • In uniform.
Range of punishments	<p>Punishment after denial of offence:</p> <p>For offence committed intentionally:</p> <ul style="list-style-type: none"> • Low - If detention is disproportionate in the circumstances an SSPO (if appropriate to rank/rate) or 10 - 24 days fine. • Entry point - 28 days detention. • High - 36 – 72 days detention. <p>For offence committed recklessly:</p> <ul style="list-style-type: none"> • Low - 4 – 10 days fine. • Entry Point – 10 - 16 days fine. • High – short period of detention/ 17 – 28 days fine. <p>Punishment after admission of offence:</p> <p>For offence committed intentionally:</p> <ul style="list-style-type: none"> • Low - If detention is disproportionate in the circumstances an SSPO (if appropriate to rank/rate) or 7 - 21 days fine. • Entry point - 24 days detention. • High - 28 – 60 days detention. <p>For offences committed recklessly:</p> <ul style="list-style-type: none"> • Low - 1 – 7 days fine. • Entry point – 7 - 14 days fine. • High – short period of detention/14 – 28 days fine.
Sentencing guidance	<ul style="list-style-type: none"> • This offence will almost always have arisen out of prescribed circumstances therefore will usually be dealt with at CM, however a CO may still deal with this offence if the circumstances dictate or the DSP refers the charge to the CO. • This offence should not be dealt with by a subordinate commander and advice as to punishment should always be sought. • The effect of the ill treatment on the victim must be taken into consideration when considering the seriousness of the offence. • Any element of bullying, intimidation or harassment will always make an offence more serious therefore, if any of these elements are present, a more severe punishment will be appropriate

s.23 AFA 06	Disgraceful conduct of a cruel or indecent kind contrary to section 23 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-71
Mitigating factors	<ul style="list-style-type: none"> • Consensual activities not intended to be made public. • Single incident. • Genuine ignorance of proper animal care. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Deliberately cruel. • Two or more persons acting together. • Service personnel whose duty it is to care for animals. • Initiation rites. • Abuse of rank or position. • Violence. • Bullying or intimidation. • Coercion. • In uniform.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave. • Entry point - 5 – 10 days fine. • High - 36 days detention or disrating/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Restriction of privileges and/or stoppage of leave. • Entry point - 3 – 7 days fine. • High - 28 days detention or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • The effect of the disgraceful conduct on the victim must be taken into consideration when considering the seriousness of the offence. • If the behaviour led to a lowering of moral standards in a Service unit it must be taken into consideration when determining the seriousness of the offence. This will particularly be the case in an operational environment. If the offender holds rank or rate consideration must be given to determining whether an offender is fit to be in a position of responsibility. • This offence will be used rarely therefore it will almost always be appropriate for a CO to hear this offence to seek advice when considering appropriate sentence.

s.18 AFA 06	Making false records contrary to section 18 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-54
Mitigating factors	<ul style="list-style-type: none"> • Misguided motive to disguise another's negligence/wrongdoing. • Coercion by others. • Lack of supervision. • One-off offence. • Consequence of falsification slight. • No personal gain. • False entry due to poor record keeping. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Intent to deceive. • Motive to disguise offender's own negligence/wrongdoing. • Repeat offences or evidence of system. • Premeditation. • Abuse of position of trust. • Safety or operational implications. • Other serious consequences of falsification.
Range of punishments	<p>Punishment after denial of offence :</p> <ul style="list-style-type: none"> • Low - Admonishment or restriction of privileges and/or stoppage of leave. • Entry point - 10 – 28 days fine. • High - SSPO or disrating/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Admonishment or restriction of privileges and/or stoppage of leave. • Entry point - 7 – 21 days fine. • High - SSPO or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • Any offence where the accused is proved to have intended to deceive will always be more serious. • The extent to which the falsification covers up a failure or neglect of duty should be considered when sentencing. • Serious cases will often cast doubt on the suitability of those in a position of responsibility to hold their current rank or rate. • Very serious cases may attract a sentence of detention.

s.25 AFA 06	Misapplying or wasting service property contrary to section 25 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-77
Mitigating factors	<ul style="list-style-type: none"> • Low/inconsequential value. • No advantage to the accused. • Consequence of misapplication slight. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Premeditated. • Planned to gain advantage. • Evidence of system over time. • Concealment of actions. • Abuse of trust. • High value (operational or financial) of property.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - Admonishment or restriction of privileges and / or stoppage of leave. • Entry point - 10 – 28 days fine. • High - SSPO or disrating/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Admonishment or restriction of privileges and/or stoppage of leave. • Entry point - 7 – 21 days fine. • High - SSPO or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • Despite it not being necessary to prove there was any dishonesty misapplying or wasting Service property should be considered a serious offence as it is the duty of Service personnel to protect Service property and not display a careless attitude towards it. • Dependent on the value of Service property misapplied or wasted, a financial penalty will generally suffice.

s.28 AFA 06	Resistance to arrest contrary to section 28 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-84
Mitigating factors	<ul style="list-style-type: none"> • Provocation (not associated with professional duties). • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Offence committed in front of colleagues/juniors. • Mode of attack (e.g. head butt or kicking). • Use of weapon. • Injury caused. • If arrest is for serious act/s of violence. • Warning to control offender not heeded. • In uniform.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low – Short period of detention or 10 – 28 days fine. • Entry point - 10 – 28 days detention. • High - 28 – 90 days detention. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – Short period of detention or 7 – 21 days fine. • Entry point - 7 – 28 days detention. • High - 21 – 60 days detention.
Sentencing guidance	<ul style="list-style-type: none"> • The CO should place appropriate weight on any violence aimed at an arresting officer. Such violence should not be considered an occupational hazard and should be treated with the seriousness that it deserves.

s.42 AFA 06 AND s1(1) TA 68	Theft contrary to section 42 of the Armed Forces Act 2006 namely 1(1) of the Theft Act 1968
Charging reference	MSL Chapter 8 - Criminal conduct offences pages 1-8-19 This offence is complicated therefore close consultation with the corresponding offences section in the MSL is essential.
Mitigating factors	<ul style="list-style-type: none"> • Low/inconsequential value. • Special personal or domestic circumstances lying behind theft. • Opportunistic theft not premeditated. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • If theft involves breach of trust, theft from employer or theft in Service accommodation (see below for specific guidance). • Premeditated. • High value. • Victim shares single-Service accommodation with offender. • Consequential damage to property as a result of an offence. • Adverse effect on morale and discipline in unit. • Acting in concert with another.
Range of punishments	<ul style="list-style-type: none"> • The appropriate punishment for a theft can vary significantly. Where the value of the theft is low (under £300) and the overall level of dishonesty is not high (e.g. single instance, opportunistic, unpremeditated and no subsequent deceit) the CO may consider his powers of punishment sufficient. • Where there has been a breach of trust, detention will be virtually inevitable, the length of which will be dependent on the level of trust reposed. • In those very minor cases where detention is not considered appropriate, a fine or restriction or privileges/stoppage of leave will usually be appropriate or disrating/reduction of rank where the offender is in a position of responsibility. • Consideration should be given to Service compensation orders. • Advice must be sought in all but the most simple cases.
Sentencing guidance	<ul style="list-style-type: none"> • Theft in the Service community is a serious offence. It undermines mutual trust and respect in a close-knit team and therefore impacts on operational effectiveness. The financial value of an item stolen will always be an important factor in sentencing however, in some circumstances, it may be of little consequence in comparison to the effect of a breach of trust between comrades. • The seriousness of the offence should be gauged by assessing the value of the item stolen, the extent of the dishonesty and the breach of trust, if any, between Service personnel. • The impact on the Service person's unit must always be considered. • A deterrent sentence should always be considered bearing in mind the close-knit Service community. • Theft from employer. This is a very serious offence, which, in a civilian context, would usually lead to dismissal for gross misconduct. As a direct parallel, a presumption of dismissal as a means of dealing with such misconduct is similarly created in the Services therefore most cases will be referred to the DSP for trial by CM. Where the amount stolen from the employer is small and the Service interest merits it, an offender's behaviour may not necessarily warrant dismissal from the Service and a CO may hear the charge. However, any punishment is likely to be severe and involve a sentence of detention. The same

	<p>approach should be adopted for all forms of dishonesty for personal gain practised against an employer including travel claim fraud and Service telephone misuse.</p> <ul style="list-style-type: none">• Breach of trust. Where an individual has used his position in order to defraud or steal then there is a presumption that such behaviour will be met with a sentence of detention in addition to any other sentence that might be considered necessary.• Theft in Service accommodation. Theft from colleagues who share Service accommodation undermines the mutual respect and comradeship that form the ethos of Service life. It may also represent a breach of a position of trust, which will invariably mean that a sentence of detention is merited.
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s.42 AFA 06	Dishonesty offences other than theft
Charging reference	For a dishonesty offence other than theft see each offence for civil legislation reference MSL Chapter 8 - Criminal conduct offences pages 1-8-24 to 1-8-42 Note: Some offences outlined below are to be charged under the Fraud Act 2006 which substitutes many offences previously charged under the Theft Acts.
Mitigating factors	Apply relevant theft criteria.
Aggravating factors	Apply relevant theft criteria.
Sentencing guidance	<ul style="list-style-type: none"> • See guidance for theft and specific guidance below:
Fraud by false representation or failing to disclose information	<ul style="list-style-type: none"> • Such cases are often distinguishable as more serious than mere opportunistic theft as they reveal clear premeditation and a dishonest course of conduct.
Fraud by abuse of position	<ul style="list-style-type: none"> • The level of seriousness is aggravated by the deceit, premeditation and dishonest course of conduct by someone in a position of trust.
Making off without payment	<ul style="list-style-type: none"> • Making off without payment from a restaurant or taxi is akin to theft in that it involves dishonesty and an intention to avoid payment. • Owners of businesses vulnerable to this form of dishonesty deserve protection. Furthermore, it brings the Service into disrepute. Therefore the sentencing criteria for ‘theft’ outlined above should be applied robustly. • This offence, however, involves neither ‘theft from employer’ nor ‘abuse of trust’. Where the payment avoided was not high a large fine or short period of detention would be appropriate.
Taking a vehicle or pedal cycle without consent of owner	<ul style="list-style-type: none"> • The circumstances surrounding the taking; who owned the vehicle (Service or private); and anticipated method of recovering loss for damage (Service compensation order) are all factors to be taken into consideration when sentencing these offences. • Whilst the specific element of ‘dishonesty’ is not included in this offence, it is an aggravating feature if a Service vehicle is taken without consent or if the driver of that Service vehicle has wilfully exceeded the authority granted, by using it for private purposes. This is because he has benefited at his employer’s expense. As such, dependent on the level of culpability proved and any detriment to the Crown, the sentencing guidelines outlined for ‘theft from employer’ should be consulted. • In very minor cases, a large fine may suffice otherwise a short sentence of detention would be appropriate. • Where damage is caused a Service compensation order may be appropriate.

s.42 AFA 06 AND s.39 CJA1988 or s.47 OAPA 1861	Common assault or battery contrary to section 42 of the Armed Forces Act 2006 namely section 39 of the Criminal Justice Act 1988 and assault occasioning ABH contrary to section 42 of the Armed Forces Act 2006 namely section 47 of the Offences Against The Person Act 1861
Charging reference	MSL Chapter 8 - Criminal conduct offences pages 1-8-5 to 1-8-13
Charging standards	In order to assess the seriousness of the offence it is beneficial to understand the charging standards which are as follows: <ul style="list-style-type: none"> • Common assault. The statutory offence of assault covers both common assault, i.e. causing another to apprehend immediate unlawful violence, and battery, i.e. the application of unlawful force. Common assault does not require any physical harm. However battery is charged for: grazes; scratches; abrasions; minor bruising; swellings; reddening of the skin; superficial cuts; a black eye. • Assault occasioning actual bodily harm. Actual bodily harm need not be permanent, but must be more than merely transient or trifling. ABH should generally be charged to cover: • Loss or breaking of a tooth, temporary loss of a sensory function (e.g. loss of consciousness); extensive or multiple bruising; minor fractures; minor, but more than superficial, cuts requiring medical treatment.
Mitigating factors	<ul style="list-style-type: none"> • Impulsive action. • Provocation. • Stress imposed by situation. • Single blow. • Minor or no injury. • Recklessness rather than intention. • Suffering from welfare/medical difficulties. • No intent to cause harm. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Hospital/medical premises. • Group action. • Premeditated. • Unprovoked. • Offence committed in front of others. • Civilian victim. • Degree of injury. • Use of weapon, e.g. glass. • Mode of attack, e.g. head butt or kicking. • Motivated by prejudice (race, ethnicity, religion, belief, sex, gender identity, sexual orientation, disability or age) • Victim vulnerable. • Any element of bullying. • Victim superior officer, duty man or provost staff. • Victim performing a public Service. • Intention to cause harm. • In uniform.
Range of punishments	Assault: Punishment after denial of offence: <ul style="list-style-type: none"> • Low - Fine and or restriction of privileges/stoppage or leave.

	<ul style="list-style-type: none"> • Entry point – 21 – 28 days detention or disrating/reduction in rank, SSPO. • High – 36 – 60 days or detention/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Fine and or restriction of privileges/stoppage or leave. • Entry point – 14 – 28 days detention or disrating/reduction in rank, SSPO. • High – 28 – 36 days or detention/reduction in rank. <p>ABH:</p> <p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low – 36 days detention or detention/reduction in rank. • Entry point – 42 – 56 days detention or detention/reduction in rank. • High - 72 – 90 days detention or detention/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – 28 days detention or detention/reduction in rank. • Entry point – 36 – 42 days detention or detention/reduction in rank. • High - 60 – 72 days detention or detention/reduction in rank.
<p>Sentencing guidance</p>	<ul style="list-style-type: none"> • Other offences involving violence may benefit from this guidance including: Misconduct towards a superior officer, fighting and certain public order offences (e.g. affray) see page 1-13-31. • Sentencing in all cases of violence must contain a strong element of deterrence, particularly when the victim is a superior officer or a vulnerable victim. • The persistence and duration of the assault must be taken into account when sentencing. • A sentence of detention is appropriate for all but low seriousness offences of violence. Low level offences are those with a preponderance of mitigating features and no serious aggravating features present. • As the circumstances of assaults and ABH offences are diverse, the length of detention will be governed by weighing the seriousness of the offence as well as any aggravating and mitigating factors. • Consideration must be given to the award of a Service compensation order for personal injury to the victim if appropriate see Chapter 13 (Summary hearing sentencing and punishments) for further detail.

s.42 AFA 06 AND s.1(1) CDA 1971	Criminal damage contrary to section 42 of the Armed Forces Act namely section 1(1) of the Criminal Damage Act 1971
Charging reference	MSL Chapter 8 - Criminal conduct offences page 1-8-46
Mitigating factors	<ul style="list-style-type: none"> • Impulsive action. • Minor damage. • Provocation. • Voluntary compensation. • Committed recklessly. • Genuine lack of understanding of the consequences of the action which caused damage. • Genuine remorse.
Aggravating Factors	<ul style="list-style-type: none"> • Deliberate. • Serious damage. • Damage or loss caused danger to others. • In uniform. • Encouragement of others to engage in activity causing damage.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - 5 – 18 days fine. • Entry point - 18 – 28 days fine. • High - 10 – 36 days detention or disrating/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - 3 – 7 days fine. • Entry point – 7 - 14 days fine. • High - 7 – 28 days detention or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • In assessing the seriousness of the offence the value of the property, the extent of the damage, the reason for the damage and any effect on a victim (owner of the property) should be considered. • A Service compensation order should always be considered. • Any voluntary payment of compensation can be taken into account as mitigation in subsequent disciplinary action.

s.24 AFA 06	Damage to or loss of Service property contrary to section 24 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-73
Mitigating factors	<ul style="list-style-type: none"> • Impulsive action. • Minor damage. • Provocation. • Committed recklessly. • Genuine lack of anticipation of the potential consequences of the action which caused damage. • Level of professional competency. • Operational situation which reduces opportunity to exercise usual care. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Deliberate. • Serious damage. • Operational efficiency affected. • Damage or loss caused endangered others. • In uniform. • Encouragement of others to engage in activity causing damage.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - 5 – 18 days fine. • Entry point - 18 – 28 days fine. • High - 10 – 36 days detention or disrating/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - 3 – 13 days fine. • Entry point - 14 – 24 days fine. • High - 7 – 28 days detention or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • In cases of Service property both the monetary and operational values of the items must be considered. • A Service Compensation Order should always be considered. • Any voluntary payment of compensation can be taken into account as mitigation in subsequent disciplinary action.

<p>s.13 AFA 06 OR s.42 AFA 06 AND s.139 CJA 88 or s.1 PCA 53</p>	<p>Contravention of standing orders (weapon offence) contrary to section 13 of the Armed Forces Act 2006 or having offensive weapon in public place contrary to section 42 of the Armed Forces Act 2006 namely section 1 Prevention Of Crime Act 1953 or having article with blade or point in public place contrary to section 42 of the Armed Forces Act 2006 namely section 139 Criminal Justice Act 1988</p>
<p>Charging reference</p>	<p>MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-41 MSL Chapter 8 - Criminal conduct offences pages 1-8-14 to 1-8-18</p>
<p>Mitigating factors</p>	<ul style="list-style-type: none"> • Not premeditated. • Genuine remorse.
<p>Aggravating factors</p>	<ul style="list-style-type: none"> • Group action or joint possession. • Weapon actually produced. • People put in fear. • Premeditated.
<p>Range of punishments</p>	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low – 21 – 28 day fine. • Entry point – 21 – 60 days detention. • High – 60+ days detention. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – 14 – 21 day fine. • Entry point – 14 – 42 days detention. • High – 42+ days detention.
<p>Sentencing guidance</p>	<ul style="list-style-type: none"> • If a weapon is actually used in a public place the charge will usually be serious enough to warrant CM. However this will not always be the case and this offence may be heard by the CO. In these circumstances a sentence of detention will usually be appropriate unless there are substantial mitigating circumstances. • Offences against Standing Orders may attract a fine if there are no aggravating features, for example a flick knife in a locked personal locker.

s.27 AFA 06	Obstructing or failing to assist a Service policeman contrary to section 27 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-81
Mitigating factors	<ul style="list-style-type: none"> • Temporary or momentary obstruction or failure to assist. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Serious consequences from offender's action. • Offence committed in public. • Operational environment. • Group offence.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - 5 - 10 days fine and/or restriction of privileges/stoppage of leave. • Entry point - 14 – 24 days fine. • High - 24 – 28 days fine or disrating/reduction in rank. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - 3 - 7 days fine and/or restriction of privileges/stoppage of leave. • Entry point - 8 – 21 days fine. • High - 22 – 28 days fine or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • The consequences of the intentional act should always be considered as well as how much appreciation of those consequences the offender had. • Consider whether those in a position of responsibility are fit to hold their rate or rank.

s.29 AFA 06	Escaping from lawful custody or using violence or threatening behaviour against a person in whose custody an offender is contrary to section 29 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-88
Mitigating factors	<ul style="list-style-type: none"> • Opportunist. • Poor supervision of detainee. • Poor treatment of detainee. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Planned. • Operational environment. • Injury caused. • Damage caused. • Use of weapon. • Use of force.
Range of punishments	<p>Punishment after denial of offence: Entry point is detention due to the offender being in custody.</p> <ul style="list-style-type: none"> • Low/Medium – 21 days detention. • High – 36 days detention. <p>Punishment after admission of offence: Entry point is detention due to the offender being in custody.</p> <ul style="list-style-type: none"> • Low/Medium – 14 days detention. • High – 28 days detention.
Sentencing guidance	<ul style="list-style-type: none"> • Any violence used whilst in custody will always be considered more serious than if it had been used when not in custody. • Legal advice must always be sought when a weapon is involved.

s.30 AFA 06	Allowing escape of prisoners contrary to section 30 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-91
Mitigating factors	<ul style="list-style-type: none"> • Lack of Service experience. • Force or threat of force by prisoner. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Experienced Serviceperson. • Operational environment. • Severe consequences of allowing escape. • Multiple escapees. • Gross negligence.
Range of punishments	<p>Offence committed deliberately:</p> <p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low - Fine and/or restriction of privileges and/or stoppage or leave. • Entry point – 14 – 28 days detention or disrating/reduction in rank, SSPO. • High – 28 days + days or detention or disrating/reduction in rank, SSPO. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low - Fine and/or restriction of privileges and/or stoppage or leave. • Entry point – 7 - 14 days detention or disrating/reduction in rank, SSPO. • High – 14 - 28 days or detention/reduction in rank. <p>Offence committed negligently:</p> <p>Punishment after denial of offence</p> <ul style="list-style-type: none"> • Low – Restriction of privileges and/or stoppage of leave for able rate, marine, soldier or airman or small fine for offenders in position of responsibility. • Entry point - Fine on sliding scale of seriousness or reprimand for those in position of responsibility. • High – Disrating/reduction in rank or 24 days + detention, SSPO. <p>Punishment after admission of offence</p> <ul style="list-style-type: none"> • Low – Restriction of privileges and/or stoppage of leave for able rate, marine, soldier or airman or small fine for offenders in position of responsibility. • Entry point - Fine on sliding scale of seriousness or reprimand for those in position of responsibility. • High – Disrating/reduction in rank or 14 days + detention, SSPO.
Sentencing guidance	<ul style="list-style-type: none"> • The level of training and experience of the accused should be taken into consideration. • This is a very serious offence because it requires an offender to release or allow escape of a prisoner whilst the offender is in a position of authority therefore it will always be the case that the offender's position should be reviewed. • Any punishment awarded must include a deterrent element.

s.34 AFA 06	Low flying contrary to section 34 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-104
Mitigating factors	<ul style="list-style-type: none"> • Distraction. • Impulsive action. • No damage or distress caused. • No Intent. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Very low height. • Serious deviation from authorised height. • Pilot in executive position. • Damage or injury caused. • Carrying Ordnance.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low – Reprimand/fine. • Entry point – Severe reprimand and up to 14 days fine. • High – Forfeiture of seniority and Severe reprimand, Reduction in rank for NCO Aircrew or up to 28 days fine. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – Admonition, Reprimand. • Entry point – Up to 10 days fine, Severe reprimand. • High – Up to 14 days fine or Forfeiture of seniority, reduction in rank for NCO Aircrew.
Sentencing guidance	<ul style="list-style-type: none"> • Sentencing must contain a large element of deterrence for such a risky activity particularly if the offender was in a position of authority.

s.35 AFA 06	Annoyance by flying contrary to section 35 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-107
Mitigating factors	<ul style="list-style-type: none"> • Impulsive action. • Not prolonged annoyance. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Actual distress caused. • Offence took place over a prolonged period. • Offence too place in front of large number of people/in public eye. • Intentional.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low –Reprimand or fine. • Entry point – Severe reprimand and up to 14 days fine. • High – Up to 28 days fine or Forfeiture of seniority. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – Reprimand. • Entry point – up to 10 days fine or Severe reprimand. • High - up to 14 days fine or forfeiture of seniority, reduction in rank for NCO aircrew.
Sentencing guidance	<ul style="list-style-type: none"> • The seriousness will be determined by the level of compromise to public safety or the exposure of this offence to the general public. This includes any noise nuisance that may affect those who are vulnerable such as children, elderly people or animals. • The sentence must contain a large element of deterrence for such a risky activity – particularly if the offender was in a position of authority.

s.36 AFA 06	Inaccurate certification contrary to section 36 of the Armed Forces Act 2006
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-109
Mitigating factors	<ul style="list-style-type: none"> • One-off offence. • Consequence of inaccurate certification slight. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Intentional. • Motive to disguise offender's own negligence/wrongdoing. • Multiple offences. • Abuse of position of trust. • Safety or operational implications. • Serious consequences of falsification.
Range of punishments	<p>Punishment after denial/admission of offence:</p> <ul style="list-style-type: none"> • Low - 5 – 28 days fine and/or restriction of privileges/stoppage of leave. • Entry point – 24 – 28 days fine or disrating/reduction in rank. • High – 21 – 28 days detention or disrating/reduction in rank. <p>Punishment after denial/admission of offence:</p> <ul style="list-style-type: none"> • Low - 3 – 21 days fine and/or restriction of privileges/stoppage of leave. • Entry point – 18 – 24 days fine or disrating/reduction in rank. • High – 14 – 24 days detention or disrating/reduction in rank.
Sentencing guidance	<ul style="list-style-type: none"> • If consequences could be potentially catastrophic or safety has been compromised all options should be considered. • The level of training and experience of the accused should be taken into consideration.

s.42 AFA 06 AND s.5(2) MDA 71	Possession of a controlled drug contrary to section 42 of the Armed Forces Act 2006 namely section 5(2) of the Misuse of Drugs Act 1971
Charging reference	MSL Chapter 8 - Criminal conduct offences page 1-8-46 JSP 853 – Alcohol and substance misuse and testing
Mitigating factors	<ul style="list-style-type: none"> • Very small quantity. • Youthful experimentation. • Absence of knowledge as to the true nature of the substance possessed. • Possession away from Service environment. • Young age of offender. • Genuine remorse.
Aggravating factors	<ul style="list-style-type: none"> • Amount other than very small. • In a Service environment. • Corruption of others. • Operational environment. • Class A drug.
Range of punishments	<p>Punishment after denial of offence:</p> <ul style="list-style-type: none"> • Low – 36 days detention. • Entry point – 48 days detention. • High – 72+ days detention. <p>Punishment after admission of offence:</p> <ul style="list-style-type: none"> • Low – 28 days detention. • Entry point – 42 days detention. • High – 60+ days detention.
Sentencing guidance	<ul style="list-style-type: none"> • The tri-Service policy on drug misuse should always be followed and all Service personnel who misuse drugs should expect to be removed from the Service by disciplinary or administrative means. • There may however be exceptional circumstances in which a CO could determine that the retention of an offender is desirable. In those circumstances a sentence of detention will be inevitable. • A suspended sentence of detention should be reserved for the most exceptional cases. • The possible consequences for others in the unit should always be considered.

Chapter 15

Summary hearing review and appeal

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Chapter 15

Summary hearing review and appeal

Introduction

1. This chapter provides guidance for those required to administer discipline at unit and higher authority (HA) level. Part 1 provides guidance in relation to: the review of summary hearings; where a finding that a charge is proved has been recorded; and the review of an order to activate a suspended sentence of detention. Part 2 focuses on unit actions relating to the Summary Appeal Court (SAC) following the award of a finding and sentence at summary hearing, including an appeal following the activation of a suspended sentence of detention. Part 2 does not explain how the SAC (or the judge advocates sitting alone) will conduct itself or what will occur in any hearing conducted by the SAC or the judge advocate. Guidance on these issues is contained in [Chapter 27](#) (Summary Appeal Court). Part 3 covers transitional guidance. This Chapter should be read in conjunction with [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

Part 1 – Summary hearing review

Review of summary hearing findings and sentence

2. **Purpose of review.** The finding or punishment awarded may be reviewed following a summary hearing or an activation hearing where either a finding that a charge is proved has been recorded or a decision has been made to activate a suspended sentence of detention. The purpose of review is to identify if there are any reasons for referring the summary finding, sentence or activation order to the SAC. From a policy perspective, the review of summary and activation hearings identifies disciplinary trends and issues as well as helping to achieve a common approach to summary findings and punishments (including the making of activation orders) within the Services as a whole.

3. **Time limits.** There is no time limit as to when the review might take place and review is not precluded by any appeal to the SAC, but see paragraph 10 below.

4. **Reviewing officer.** A review may be carried out at any time after a summary hearing by the Defence Council or by an officer appointed by the Defence Council¹. An officer appointed for this purpose is known as a reviewing officer (RO). In practice, the Defence Council will appoint ROs in each of the Services to conduct the review function.

5. **Role of a RO.** A RO may refer a case to the SAC, but this does not affect the offender's right to appeal, see paragraph 61a below. A RO can assess matters such as whether he considers the correct procedure was followed at the summary hearing or whether the punishment awarded was reasonable. However, a RO is not legally qualified and has no judicial function; therefore, he cannot determine that errors of law may have occurred at the summary hearing and this is a matter for the SAC.

6. **Appointment of a RO.** The officers appointed by the Defence Council to act as ROs are:

- a. **RN¹.** Lawyers on the staff of DNLS of the rank of not less than SO1, on reference from the Summary Hearing Review Cell.
- b. **Army.** DPS(A) and staff.
- c. **RAF.** ACOS A1 and staff, HQ Air Command.

Reviews involving activation of a suspended sentence of detention

7. A review of a summary hearing findings and sentence may include the review of any order that is made (in the summary hearing) to activate a suspended sentence of detention, see paragraphs 8 and 9 below. A review may also be carried out where a commanding officer (CO) has activated a suspended sentence of detention in a separate hearing, which for the purposes of this chapter will be described as an activation hearing.

8. A RO may review the activation of a suspended sentence of detention regardless of whether the order to activate was made in a summary hearing or an activation hearing, see [Chapter 13](#) (Summary hearing sentencing and punishments). Where a RO reviews an order

¹ Section 152 of the Act.

that is made to activate a suspended sentence of detention, he will treat the order as a punishment for the original offence for which the accused received the suspended sentence².

Case Study

1. If, in a summary hearing, a Service person receives a suspended sentence of detention for offence X, the RO may review the finding or punishment. If the Service person commits a second offence (which is proved in a subsequent summary hearing and is within the operational period of offence X) the officer conducting the summary hearing may award a punishment for the 2nd offence and activate the suspended sentence of detention by making an activation order. The RO may then review the finding and punishment for the 2nd offence and the activation order. The activation order for these purposes is treated as the punishment for offence X.
2. Similarly, if the Service person commits a second offence (for which he was convicted by the civilian court in the British Islands) his CO may activate the suspended sentence of detention. The RO may then review the activation order. The activation order for these purposes is treated as the punishment for offence X.

9. In both cases 1 and 2 in the case study above, where an activation order is reviewed, the RO will need to consider the factors that were relevant in hearing the charge in the original summary hearing (i.e. the hearing in respect of offence X) and the factors that were considered by the CO who activated the order. The RO will therefore need the written records from any relevant hearings, the Record of Summary Hearing (RSH), see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) from the original summary hearing related to offence X and the subsequent hearing at which the activation order was made.

Procedures for review of summary hearings and activation orders

10. **Time limits.** Although there are no time limits within which a review must be conducted, the utility of the review will be reduced if there is a substantial delay between the summary hearing and the review. Therefore, in order to be effective, the RO should conduct a preliminary screening within 48 hours³ of the award of the punishment at the summary hearing or activation hearing, as appropriate. Where detention⁴ has been awarded and the offender has chosen to start his sentence, the review should take place as a matter of the highest priority.

11. **Initial action by unit.** As soon as reasonably practicable after the hearing of a charge (normally within 24 hours), which may or may not include a decision to activate a suspended sentence of detention, the unit should ensure that a JPA 'SL Progress to SH Review' task is created and assigned to the relevant Service RO. The JPA 'SL Suspect Service Request' should contain all the information detailed in form T-SL-SHR01 at [Annex A](#), which may be used and faxed or emailed as a fallback if JPA is unavailable. Likewise, following an activation hearing as a result of a conviction by a civilian court in the British

² Section 195(1) of the Act.

³ Other than for detention, this should be considered to be 2 working days.

⁴ This is particularly important where the accused is already serving the sentence of detention which may occur because he has elected to start it on the day the punishment was awarded – see section 290(2) of the Act.

Islands⁵, where a suspended sentence has been activated, unit staffs should complete an Activation hearing review form (T-SL-AHR01) at [Annex B](#) and forward it to the RO within the same timelines (normally not later than 24 hours).

Procedures for review by the RO of summary hearing

12. **Initial actions by the RO.** The RO will use the JPA 'SL Suspect SR' (or the Summary hearing review form T-SL-SHR01 at [Annex A](#)) to review both finding and punishment by checking the following:

- a. The offence was capable of being heard summarily⁶;
- b. The legality of the punishment, i.e. that the punishment is within the powers of the CO or subordinate commander who awarded it;
- c. The officer who heard the charge was empowered to do so⁷ (for example, a subordinate commander must be at least of the rank of naval lieutenant, military or marine captain or flight lieutenant);
- d. Where the CO is below the rank of rear admiral, major general, or air vice-marshal and extended powers of punishment have been used, that permission had been granted by HA;
- e. Where the offence is one that requires the permission⁸ of HA to hear summarily, that permission had been granted;
- f. The punishment is appropriate to the rank of the accused⁹;
- g. Where punishments are conjoined, that the resulting punishment is legal¹⁰; and
- h. The severity of the punishment is commensurate with the offence proven¹¹ (Note: a manifestly excessive punishment may be deemed unlawful).

Where the summary hearing includes the activation of a suspended sentence of detention the RO will also check:

- i. Whether the suspended sentence had previously been awarded by a CO or the SAC¹² (a CO may not consider the activation of a suspended sentence of detention awarded by the CM); and
- j. Whether the subsequent offence, which triggered the requirement to consider activating the suspended sentence, was committed within the operational period¹³ of that sentence.

⁵ For definition of British Islands see Schedule 1 section 5 of the Interpretation Act 1978. It means the UK, the Channel Islands and the Isle of Man.

⁶ See section 52 of the Act

⁷ See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

⁸ Section 54(2), of the Act.

⁹ See [Chapter 13](#) (Summary hearing sentencing and punishments).

¹⁰ See [Chapter 13](#) (Summary hearing sentencing and punishments).

¹¹ See [Chapter 13](#) (Summary hearing sentencing and punishment) and [Chapter 14](#) (The summary hearing sentencing guide).

¹² If awarded by the Court Martial (CM) then any suspended sentence can not be activated by the CO.

¹³ This can be anywhere between 3 and 12 month from the date the suspended sentence came into effect.

13. **Action by unit.** The unit will be requested to provide the following only where the RO discovers any matter that may require further examination and where there is a possibility of grounds for an appeal to the SAC¹⁴:

- a. A copy of the RSH;
- b. A copy of the charge sheet;
- c. A copy of the case summary;
- d. A copy of the disciplinary record of the offender;
- e. A copy of the written evidence relevant to the charge;
- f. A copy of the unused written evidence gathered as part of the investigation;
- g. Details of all exhibits that form part of the evidence and where and when they can be inspected;
- h. Details of unused exhibits gathered as part of the investigation of the charge and where and when they can be inspected; and
- i. A copy of any notification from HA that permission to hear a charge summarily¹⁵ and/or permission to use extended powers of punishment had been granted¹⁶.

Where the summary hearing also involves the activation of a suspended sentence of detention, the unit will be required to provide a copy of the RSH during which the suspended sentence was awarded and the associated papers which relate to that summary hearing, see sub-paragraphs 13b – i above.

14. **Subsequent action by the RO.** The RO is to inquire into those matters he judges require further examination (see paragraph 12 above) with a view to seeking leave to refer a case to the SAC or by notifying the SAC of matters arising at or from the summary hearing/activation hearing, bearing in mind his powers as outlined at paragraphs 21 and 22 below. Such action should be taken as soon as reasonably practicable and the unit of the individual concerned should be notified of any action taken on review and should be provided with feedback where remedial action is required by the unit.

Procedures for review by the RO of activation orders

15. **Initial actions by the RO following an activation hearing after a civil court conviction.** The RO will use the Activation hearing review form (T SL-AHR01) at [Annex B](#) to review the activation of the suspended sentence by checking the following:

- a. The accused was subject to Service law, see [Chapter 3](#) (Jurisdiction and time limits) at the time of the activation hearing and the offence was committed in the operational period of the suspended sentence;

¹⁴ Protocols within the Services for the provision of documentation to the RO may differ in this respect.

¹⁵ See section 54 of the Act - If an officer has summarily heard a charge that requires HA's permission to be dealt with summarily and that permission has not been given, the summary hearing will be a nullity. The RO should therefore seek the advice of a staff legal adviser and should not refer the case to the SAC.

¹⁶ This function can only be undertaken by a CO, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

b. The officer who was carrying out the activation hearing was empowered to do so¹⁷; and

c. The sentence activated was warranted in the circumstances as a whole (i.e. by reference to the original Service offence, the subsequent civil offence and how far into the operational period of the suspended sentence the subsequent civil offence was committed).

16. **Action by unit.** The unit will be requested to provide the following only where the RO discovers any matter that may require further examination and where there is a possibility of grounds for an appeal to the SAC¹⁸:

a. A copy of the RSH or written record of any proceedings before the SAC at which the suspended sentence was awarded;

b. Details known to the CO of all offences proven to have been committed by the offender during the operational period of the suspended sentence of detention. This includes the report of the officer who attended the civil court on behalf of the unit;

c. Copies of the written records of all summary hearings, the written records of any other hearings, any records of proceedings before the SAC at which power to activate the suspended sentence arose but was not exercised and where reasons were given for that decision;

d. A copy of the offender's disciplinary record; and

e. A copy of any notification from HA that permission to hear a charge summarily¹⁹ and/or permission to use extended powers of punishment had been granted²⁰.

17. **Subsequent action by the RO.** The RO is to inquire into those matters he judges require further examination (see paragraph 15 above) with a view to seeking leave to refer a case to the SAC or by notifying the SAC of matters arising at or from the summary hearing/activation hearing, bearing in mind his powers as outlined at paragraphs 21 and 22 below. Such action should be taken as soon as reasonably practicable and the unit of the individual concerned notified of any action taken on review and should be provided with feedback where remedial action is required by the unit.

Procedure for review by the RO of multiple charges

18. In cases where a summary hearing was conducted involving more than one charge and the hearing in respect of at least one of these charges is clearly a nullity (see paragraph 23 below) while another is not, the RO should seek staff legal advice on how best to proceed. For example, a CO holds a summary hearing in respect of two charges. One of these charges is a charge the CO does not have the power under the Act to hear summarily, while the other is a charge the CO is empowered to hear. Having found both charges 'proved' he then gives a global award of punishment; it is likely that the appropriate course of

¹⁷ See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

¹⁸ Protocols within the Services for the provision of documentation to the RO may differ in this respect.

¹⁹ See section 54 of the Act - If an officer has summarily heard a charge that requires HA's permission to be dealt with summarily and that permission has not been given, the summary hearing will be a nullity. The RO should therefore seek the advice of a staff legal adviser and should not refer the case to the SAC.

²⁰ This function can only be undertaken by a CO, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

action is to bring an appeal against the punishment to the SAC, but this is a matter upon which the staff legal adviser will be able to advise.

Review by the RO in relation to a Service person from another Service

19. Where a RO undertakes a review in relation to a Service person from another Service and decides that no further action is necessary, he is to send a copy of the Summary hearing review form (T-SL-SHR01) at [Annex A](#) to his counterpart in the appropriate Service. This will ensure that the parent Service takes the administrative action that it considers appropriate and takes action to notify the relevant personnel agency to ensure the individual's record is annotated appropriately. Where the RO refers the case to the SAC or notifies the SAC of any matters arising at or from the summary hearing/activation hearing of which the court was not aware and which should have been brought to the attention of the SAC, he is to inform his counterpart in the parent Service of the outcome of the review.

Feedback by the RO

20. The RO will provide feedback to units as soon as reasonably practicable following review to ensure that common errors are corrected expeditiously and lessons are learnt from mistakes identified. This is especially the case when matters are referred to the SAC for resolution.

Powers of the RO

21. **Rectification of minor errors post summary hearing/activation hearing.** The RO may, after²¹ the summary hearing, order the unit to correct minor typographical errors, which can have no disadvantageous effect for the accused. The RO may not, however, order the unit to correct errors of law or procedure. Where there is any doubt, where the error is substantial²² or where there has been disadvantage to the accused, the RO should refer the case or notify the matter to the SAC.

22. **Referral or notification to the SAC.** When the RO refers a matter to the SAC, it is treated as if it were an appeal brought by the person to whom the finding or sentence relates, see paragraphs 53 to 61 below. In other words, the appeal is treated as if the individual himself had appealed and he is the appellant; but see paragraphs 57 and 61. Although there is no time limit as to when a review might be undertaken, the powers of a RO will vary depending on whether the person to whom the review relates has brought an appeal to the SAC and whether the appeal has been completed.

a. Where the person to whom the review relates has not brought an appeal²³ within the 14 day appeal period (or any extension to that period that has been authorised²⁴) the RO may refer the finding or punishment (or both) to be considered by the SAC as if on appeal.

b. Where the person has appealed to the SAC and the SAC has not completed the hearing of the appeal and a RO considers that the SAC should be aware of any matter arising at or from the summary hearing/activation hearing, the RO may notify the SAC of the matter. The SAC may take such matters into consideration.

²¹ A CO has some power to correct errors during the summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention)

²² Where the mistake nullifies the entire proceedings see paragraph 23 below.

²³ Section 141(2) of the Act.

²⁴ Section 141(1) of the Act.

c. Where the person has appealed to the SAC and that appeal has been completed, the RO may refer a finding or punishment to the SAC to be considered by it as an appeal, if he is of the opinion that:

(1) There are matters arising at/or from the summary hearing/activation hearing of which the SAC was not aware; or

(2) Such matters should have been brought to the attention of the SAC.

For this purpose the finding or punishment includes any finding or punishment previously substituted or awarded by the SAC.

23. **Nullity.** There are some cases where the errors are so serious that the law regards the proceedings as not having taken place, i.e. a nullity; for example, where an officer purports to hear a case which it is not within his powers to consider. In such circumstances, the RO should consult the Office of the Judge Advocate General immediately.

24. **Procedure.** The procedure to be followed when the RO decides to apply for leave to appeal or considers that the SAC should be notified of any matter arising at or from the summary hearing/activation hearing is at paragraphs 53 to 61 below.

Part 2 - Appeals made from summary hearings

Introduction

25. The person who brings the appeal is the appellant, however, in those cases where the RO has referred a matter to the SAC, it is still the person in relation to whom the finding and punishment was awarded who is the appellant. The respondent to the appeal (the person contesting the appeal) will, in all cases, be the Director of Service Prosecutions (DSP).

26. Servicemen who have been dealt with at a summary hearing/activation hearing have an automatic right of appeal to the SAC, a court which is compliant with the European Convention on Human Rights (ECHR). The automatic right of appeal to the SAC assists in making the overall summary process compliant with the ECHR. Although there is an automatic right of appeal to the SAC, the leave (permission) of the SAC must be obtained in some circumstances before an appeal may be brought. This is the case where the person who is seeking to bring the appeal, wishes to do so outside the ordinary time limits and where a RO is seeking to refer a finding or a sentence to the SAC.

27. Any person who is unable to bring an appeal (or is unsure as to whether he wants to appeal) within the first 14 days following the summary hearing, may within the 14-day period, apply for the SAC's leave to bring an appeal after the 14 day period. If the SAC grants such leave, the prospective appellant does not need to ask for further permission of the SAC to bring the appeal as long as the appeal is brought within the extended time limit authorised by the SAC.

Hearing of appeals²⁵ and powers of the court

28. **Contested appeal against finding.** Where the DSP opposes an appeal against finding, the proceedings take the form of a rehearing of the charge. The SAC may confirm a finding, quash it or substitute it with a finding that another charge has been proved. Where the SAC quashes a finding it must also quash any accompanying punishment. After rehearing the evidence in respect of punishment, the SAC may confirm the punishment or quash it and substitute another punishment. The SAC cannot substitute a punishment unless the substituted punishment was capable of being awarded by the hearing officer who awarded the original punishment at the summary hearing²⁶ and it is a punishment that the SAC considers is no more severe than the original punishment. Where the appellant was convicted of multiple charges and decides to appeal against finding and/or punishment on one of the charges, the SAC, should it allow the appeal, will adjust accordingly the global sentence that the appellant originally received²⁷.

29. **Uncontested appeal against finding.** If the appeal is uncontested, where the DSP as respondent does not oppose the appeal, the finding being appealed against will be quashed²⁸ by the SAC. Where the appeal is uncontested the powers of the SAC may be exercised by the Judge Advocate General without a hearing and the Court Administration Officer (CAO) is responsible for informing the appellant, the appellant's CO and the DSP of the outcome.

²⁵ Section 146 of the Act.

²⁶ See section 147(3)(b)(i) of the Act.

²⁷ [Chapter 13](#) (Summary hearing sentencing and punishment) provides guidance on global sentences.

²⁸ Rule 20(1) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

30. **Appeal against punishment.** The powers of the court on an appeal against punishment are:

- a. To confirm the punishment awarded; or
- b. To quash the punishment and award in substitution for it any punishment that it would have been in the powers of the officer who held the summary hearing to award and in the opinion of the court is no more severe than the punishment originally awarded.

Bringing of appeals

31. When an individual wishes to appeal²⁹ against a finding and/or punishment awarded at summary hearing, including an appeal following the activation of a suspended sentence of detention, he is to complete the Notice of appeal form (T-SL-SAC01) at [Annex C](#). A person who has been dealt with summarily need only submit one Notice of appeal form in relation to two or more charges where those charges were dealt with together at a summary hearing. He is to submit the Notice of appeal form to his CO within one of the following periods:

- a. Fourteen days (the initial period) of:
 - (1) The date on which the finding and punishment were awarded (day one is the day on which the punishment was awarded); or
 - (2) The date on which the activation order was made³⁰, where a suspended sentence of detention has been activated by an order.
- b. Any extended period that the SAC has authorised, see paragraph 49 below.

32. Arrangements do not differ even if a suspended sentence is activated and the CO orders that the activated sentence be served at the end of (i.e. consecutive to) another sentence of detention. The crucial date is the date on which the punishment was awarded or the date on which the activation order was made, not the date on which the sentences were to be carried out.

Legal aid

33. Legal aid is available for the hearing of the appeal before the SAC. At the point of bringing an appeal, the appellant may apply for legal aid by completing the appropriate form within JSP 838 (The Armed Forces Legal Aid Scheme). Unit staff and/or the appellant's assisting officer (see paragraphs 38 and 39) should provide assistance in this regard.

Action by CO

34. On receipt of a notice of appeal the CO should, as soon as reasonably practicable (normally within 2 working days), forward the notice of appeal to the CAO. At the same time the CO is to send a copy of the notice of appeal to the respondent (the DSP) with the material outlined in a to k below:

- a. A copy of the RSH;
- b. A copy of the charge sheet;

²⁹ Section 141 of the Act.

³⁰ Rule 15 of the Armed Forces (Summary Appeal Court) Rules 2009/1211 and section 195 of the Act.

- c. A copy of the case summary;
- d. A copy of the formal discipline record of the appellant;
- e. A copy of the written evidence relevant to the charge;
- f. A copy of the unused written evidence gathered as part of the investigation;
- g. Details of all exhibits that form part of the evidence and where and when they can be inspected;
- h. Details of unused exhibits gathered as part of the investigation of the charge and where and when they can be inspected;
- i. Any material in the CO's possession that is not referred to in the RSH but, which in his opinion, may be relevant to the proceedings before the SAC, e.g. any new evidence that comes into the possession of the CO subsequent to the summary hearing;
- j. A copy of any notification from HA that permission to hear a charge summarily³¹ and/or permission to use extended powers of punishment had been granted³²; and
- k. A document specifying the appellant's age, rank or rate, Service record and any acts of gallantry.

If the information at g. above is not available within this timeframe, every effort should be made to acquire it; however, this must not delay submission of the remainder of the material³³.

Action by respondent

35. The respondent to the appeal (the DSP) will decide whether to contest the appeal. He must inform the CAO of his decision within 28 days³⁴ and notify the CO of the appellant. Where the respondent decides to contest an appeal against finding, he is to give notice to the CAO and serve on the CAO³⁵, the appellant and his/her legal representative (if any) the following (known as 'advance information'):

- a. Copies of the statements of those witnesses on whom the DSP intends to rely;
- b. A list of all exhibits which the DSP intends to adduce in evidence and a statement of where any non-documentary exhibits are held;
- c. A transcript of any sound recording of an interview with the appellant.

³¹ See section 54 of the Act. If an officer has summarily heard a charge that requires HA's permission to be dealt with summarily and that permission has not been given, the summary hearing will be a nullity. The RO should therefore seek the advice of a staff legal adviser and should not refer the case to the SAC.

³² This function can only be undertaken by a CO, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

³³ Rule 15(1) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

³⁴ If this is not achievable the DSP may request an extension from the Judge Advocate General— see rule 19(4) Armed Forces (Summary Appeal Court) Rules 2009/1211.

³⁵ Rule 42, Armed Forces (Summary Appeal Court) Rules 2009/1211.

Where an appeal relates only to the award of punishment and there are disputed facts in the case, the respondent may call any witness to give evidence that the judge advocate directs³⁶.

36. If at any time before the commencement of the hearing of an appeal, the respondent wishes to produce any additional evidence to that referred to above, he is to copy it to the CAO and the appellant's CO. Where this is not practical for any reason, the respondent is to notify the CAO and the appellant's CO of the nature of the evidence and details of its location including the name and address of the person who has custody of it. The CO is to serve this additional evidence on the appellant as soon as reasonably practicable.

37. The respondent may at any time prior to the hearing of the appeal, give notice that he no longer intends to contest it. The DSP must inform the CAO and the appellant's CO to ensure that the appellant is notified and that the record of the appellant's conviction to which the appeal relates is removed from his record as appropriate.

Appellant's assisting officer

38. The appellant may nominate an assisting officer³⁷ to assist him with the preparations for the appeal hearing and during the appeal hearing (although he may not represent the appellant). For example, the assisting officer may assist with the completion of the various applications that may be appropriate in the case, including that for legal aid and the abandonment of appeals by the appellant (see paragraph 61 below). The assisting officer's primary duty is to assist the appellant; however, he may also liaise between the appellant's legal representative and the Service. The appellant may nominate any officer who falls within the criteria set out in sub-paragraphs 38 a – c below. This could usually include the officer who acted as his accused assisting officer (AAO) in the summary hearing (which is the subject of the appeal). There is no necessity for the appellant to nominate this officer but he may wish to do so, particularly as this officer will be familiar with the case. An individual may only be nominated as an assisting officer if that person:

- a. Is subject to Service law and continues to be so subject while carrying out this function;
- b. Is of at least the rank or rate of petty officer, military, marine or air force sergeant; and
- c. Agrees to assist the appellant.

39. The appellant may select another assisting officer if the original person selected has to relinquish the function. If the appellant cannot find an officer who consents to assist him, he may ask his CO for assistance in finding a suitable nominee. The CO should provide a list of at least two suitable officers who are available to act. The appellant may then nominate a person from the list. If, however, the appellant is unwilling to nominate anyone from the list, he will be free to try and find another who can assist him. Ultimately, the appellant may be required to proceed without the assistance of an assisting officer because he cannot be allowed to frustrate the process by refusing to nominate an assistant.

Legal representation of appellant on appeal

³⁶ Rule 84(1), Armed Forces (Summary Appeal Court) Rules 2009/1211.

³⁷ See 'Your rights if you are accused of an offence under the Service Justice System' booklet, Annex G to [Chapter 6](#) (Investigation, charging and mode of trial).

40. An appellant³⁸ has the right to be legally represented³⁹ at a hearing before the SAC (including a preliminary hearing and an appeal brought following a referral by the RO) and may instruct a qualified legal representative⁴⁰ for that purpose. The appellant's CO is to ensure that the appellant is afforded reasonable opportunity of communicating with his legal representative for the purposes of preparing his case for appeal. The legal representative will be required to provide the following information to the CAO:

- a. His name and address;
- b. The name, rank or rate, Service number, Service and unit or establishment of the person for whom he is acting; and
- c. The proceedings before the SAC in connection with which he has been instructed.

41. The appellant is to notify the CO or the CAO in writing when he has either transferred his instructions to a different legal representative or dispensed with the services of a legal representative. Where the appellant has dispensed with legal representation, the CO should ensure that the appellant is content to proceed without legal representation.

Applications for leave to extend time to appeal and for leave to appeal out of time

42. Action by the appellant.

a. Where a potential appellant, before the expiry of the 14-day appeal period (the initial period)⁴¹, considers that this period is insufficient⁴² and that he needs more time than 14 days to decide whether to appeal, he may apply to the SAC (via his CO) for permission for more time⁴³. In all cases, he is to complete the Notice of application to extend the period of time for bringing an appeal form (T-SL-SAC02A) at [Annex D](#), which among other things, will require him to state the reasons for the application. The individual is, at the same time, to include with his application any documents he considers relevant to the application. This additional material is described below as the supporting documentation.

b. Where the initial period (or any extended period that the SAC has granted) has expired and a person decides that he wishes to appeal⁴⁴, he may apply to the SAC via his CO for leave to do so. He is to complete the Notice of application for leave to appeal out of time form (T-SL-SAC02B) at [Annex E](#), which will require him to provide the grounds for the application⁴⁵. The individual is to, at the same time, include with his application any documents he considers relevant to the application. This additional material is described as the supporting documentation. Where the individual is in detention when he decides to apply for leave to appeal out of time, he is not released from detention unless and until a judge advocate decides that the case has merit and grants leave to appeal.

³⁸ Under section 141 of the Act.

³⁹ See 'Your rights if you are accused of an offence under the Service Justice System' booklet, Annex G to [Chapter 6](#) (Investigation, charging and mode of trial).

⁴⁰ Subject to rule 41, Armed Forces (Summary Appeal Court) Rules 2009/1211.

⁴¹ This is the 14 day period that begins on the day the punishment is awarded or, in the case of an order to activate a suspended sentence of detention, the date the order is made.

⁴² Under section 141(2)(b) of the Act.

⁴³ Under section 141(2)(b) of the Act.

⁴⁴ Under section 141(3) of the Act.

⁴⁵ Rule 16(1) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

43. **Action by CO.** On receipt of a Notice of application to extend the period of time for bringing an appeal form or a Notice of application for leave to appeal out of time form, the CO is to, as soon as is reasonably practicable (but normally within 2 working days), forward it and any supporting documentation to the CAO. The CO is also to send a copy of the application and supporting documentation to the DSP, as respondent, along with the documentation as listed at paragraph 34 above. If any of this information is not available within this timeframe, every effort should be made to acquire it; however, this must not delay submission of the remainder of the material.

44. **Withdrawal of application to appeal.** Where the person has applied for leave in accordance with paragraphs 42 and 43 above, he may at any time before the determination of the application, apply to his CO in writing to withdraw his application using the Notice of withdrawal of application for leave to extend time to appeal or leave to appeal out of time form (T-SL-SAC02C) at [Annex F](#). The CO is to forward the application for withdrawal to the CAO.

45. **Determination of applications for leave to extend time to appeal and leave to appeal out of time.** Applications for leave to extend time to appeal and for leave to appeal out of time will be decided by a judge advocate sitting alone. A judge advocate will make a decision based on the papers alone, unless he directs that a hearing should take place.

a. Where a judge advocate intends to refuse an application on the papers alone, the CAO is to give notice in writing to the applicant and his CO of the judge advocate's intentions. The applicant is to be made aware by his CO of the significance of this decision as soon as possible so that he can take advice and decide whether he wishes to apply for a hearing. To apply for a hearing, the applicant must submit a notice in writing to the CAO (through his CO) using the Request for a hearing by an applicant requesting leave to extend time to appeal or leave to appeal out of time form (T-SL-SAC02D) at [Annex G](#). The request must be submitted before the end of a period of 14 days beginning with the date that the notice from the CAO was received.

b. Where the judge advocate receives a specific request from an appellant for a hearing, he must make a direction that a hearing will take place to determine the application.

46. **Arranging a hearing to determine the application.** Where an applicant requests a hearing, the CAO will at the judge advocate's direction, decide when and where the hearing is to take place and will advise the applicant (through his CO) and the DSP, of the arrangements made for the hearing. The CO should notify the applicant of the details of the hearing as soon as is reasonably practicable.

47. **Notice of decision of the judge advocate on an application for leave to extend time to appeal and for leave to appeal out of time.** The judge advocate will give notice in writing to the CAO of his decision on an application for leave to extend time to appeal and for leave to appeal out of time, setting out the period of time that the applicant has to bring an appeal or his reasons for refusing the application. The CAO will serve it on:

- a. The applicant;
- b. The applicant's CO; and
- c. The DSP as respondent.

48. **Implications of refusal of request to extend time to appeal.** If the application to extend time to appeal beyond the initial 14 day period is unsuccessful, the applicant should be advised by the CAO (through his CO) that this does not affect his right to apply for leave to appeal out of time.

Abandonment of appeal

49. **When an appeal is abandoned.** An appeal will be abandoned when the CO receives a notice of an abandonment of the appeal from the appellant. In some cases an offender may be deemed to have abandoned an appeal, see paragraph 51 below.

50. **Abandonment of appeal prior to determination.** An appellant may abandon an appeal whether wholly or in part at any time prior to its determination; however, while the appellant has the absolute right to abandon an appeal it would be in his interests to discuss this matter with his legal representative and/or his assisting officer before doing so. It may be advisable for the appellant to await the outcome of the DSP's consideration of whether to contest the case, before abandoning an appeal. An appellant may give notice to abandon an appeal by serving on the CAO the Notice of abandonment of appeal form (T-SL-SAC04) at [Annex H](#). The CAO is responsible for serving a copy of the notice on:

- a. The DSP;
- b. The appellant's CO;
- c. The Judge Advocate General; and
- d. The RO⁴⁶, where the appeal has been referred by that officer.

51. **Abandonment of appeal by failure to attend an appeal hearing.** The judge advocate in relation to the proceedings may direct that the appeal be treated as abandoned⁴⁷ where:

- a. an appellant fails to appear before the court at the time appointed for the commencement or resumption of the appellate proceedings, and
- b. the judge advocate considers that there is no reasonable explanation for the failure to appear.

The form at [Annex I](#) (Notice to offender that appeal has been treated as abandoned) may be used by the judge advocate (T-SL-SAC06).

52. **Effect on sentences of detention when appeal is abandoned.** Where notice of abandonment relates to the whole of any appeal and the punishment which would have been the subject of the appeal was detention, the offender will start or resume his sentence of detention on the date on which the copy of the notice is received by the appellant's CO⁴⁸ (see also paragraph 64). Abandonment will not affect other types of punishments because all other punishments except detention and Service compensation orders⁴⁹ have effect from the day that they are awarded in the summary hearing.

Application for leave to refer a case to the SAC by a RO⁵⁰

⁴⁶ Under section 152(4) of the Act.

⁴⁷ Rule 24 of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

⁴⁸ Section 290(3)(b) of the Act.

⁴⁹ Section 176(1) of the Act.

⁵⁰ Rule 17, Armed Forces (Summary Appeal Court) Rules 2009/1211 & sections 152(4) & (7) of the Act.

53. A RO may apply to the SAC to refer a finding or a punishment of a summary hearing or activation hearing for it to be considered as an appeal, even where the person to whom the review relates has not brought an appeal⁵¹ within the 14-day appeal period (or any extension to that period that has been authorised⁵²). The RO does this by submitting to the CAO the Application from a RO for leave to refer a finding and/or punishment to be considered by the SAC as on appeal form (T-SL-SAC03) at [Annex J](#), attaching any documents he considers relevant to the application⁵³ (see paragraph 22 above).

54. The CAO having received the Application from a RO for leave to refer a finding and/or punishment to be considered by the SAC as on appeal is to, as soon as is reasonably practicable, notify:

- a. The Judge Advocate General;
- b. The offender;
- c. The offender's CO; and
- d. The DSP (as respondent).

55. The CO will ensure that the offender is advised of the application made by the RO and the implications of such an application, see paragraph 61. The RO is to send to the CAO (copied to the DSP) the following⁵⁴ in respect of a referral following a review of a summary hearing:

- a. The application;
- b. Any other documents he considers relevant to determining the application, including: the documents previously forwarded under paragraph 13 and The Information for the Service courts (T-SL-SC01) (Annex R) to [Chapter 29](#) (Court Martial proceedings)⁵⁵ form.

56. The RO is to send to the CAO (copied to the DSP) the following in respect of a referral following a review of an activation hearing (following civil conviction):

- a. The application;
- b. Any other documents he considers relevant to determining the application, including the documents previously forwarded under paragraph 16 and The Information for the Service courts (T-SL-SC01) (Annex R) to [Chapter 29](#) (Court Martial proceedings)⁵⁶ form.

57. The RO may withdraw an application made in accordance with paragraphs 53 - 56 above at any time before the determination of the application, by notifying the CAO in

⁵¹ Under section 141(2) of the Act.

⁵² Under section 141(1) of the Act.

⁵³ Rule 17(2) Armed Forces (Summary Appeal Court) Rules 2009/1211.

⁵⁴ See rule 17 Armed Forces (Summary Appeal Court) Rules 2009/1211.

⁵⁵ To be provided by the unit.

⁵⁶ To be provided by the unit.

writing⁵⁷ using the Notice of withdrawal of an application for leave to refer a case by a RO form (T-SL-SAC03A) at [Annex K](#).

58. Determination of application for leave to refer a case by the RO. The Judge Advocate General sitting alone with or without a hearing will consider an application for leave⁵⁸ made by a RO. Where the Judge Advocate General is minded to dismiss the application without a hearing the CAO shall notify the RO, the offender and his CO in writing. The application shall be considered as dismissed unless the RO gives notice in writing to the CAO or the offender gives notice in writing to his commanding officer, as the case may be, within 14 days that he requires a hearing of the application⁵⁹. The CO must forward any such notice from the offender to the CAO and the DSP⁶⁰.

59. Where the Judge Advocate General directs the CAO to convene a hearing for the purposes of determining the application, or if either the RO or then offender requires one, the CAO in consultation with the JAG will decide on when and where the hearing is to take place. The CAO will notify the following of the arrangements for the hearing:

- a. The RO;
- b. The offender;
- c. The CO of the offender; and
- d. The DSP (as respondent).

60. Status of appeal. When the RO refers a matter to the SAC in the circumstances above, the appeal against the finding or punishment or both, is treated as if it were an appeal brought by the person to whom the finding or sentence relates.

61. Guidance to the offender. Where a RO has asked for leave to refer a case to the SAC, the CO of the offender should advise him that:

- a. The application made by the RO does not affect his right to appeal or abandon the appeal;
- b. There will be no difference in the way the appeal is dealt with;
- c. He has a right to legal representation and he may be eligible for legal aid, see paragraph 40 above;
- d. He is entitled to an assisting officer, see paragraph 38 above;
- e. He should seek assistance from his assisting officer and/or his legal representative if he is at all unsure of any part of the process, but especially if he is thinking of abandoning the appeal; and

⁵⁷ Rule 17(4) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

⁵⁸ Under sections 152(4) or (7) of the Act.

⁵⁹ Rule 17(7) Armed Forces (Summary Appeal Court) Rules 2009/1211.

⁶⁰ Rule 17(8) Armed Forces (Summary Appeal Court) Rules 2009/1211.

- f. He may abandon an appeal, wholly or in part, at any time prior to the appeal's determination using the Notice of abandonment of appeal form (T-SL-SAC04) at [Annex H](#).

Notification to the SAC

62. Where a RO considered that the SAC should be aware of any matter arising at/or from a summary/activation hearing and the SAC has not completed its hearing of the appeal, he may notify the SAC thereof. Form T-SL-SAC05 ([Annex L](#)) Notification from a RO of a matter relating to a finding and/or punishment to be considered by the SAC, is to be used for his purpose.

Effect of appeal on summary punishments

63. Where a punishment is awarded at a summary hearing, in most cases it will take effect immediately⁶¹. A sentence of detention, however, cannot take effect immediately unless the offender indicates that he wants this to occur at the time the punishment is awarded. A sentence of detention that is suspended will not take effect unless or until an order that is made to activate the suspended sentence takes effect. An order made by a CO to activate a suspended sentence of detention will not have effect immediately unless the person against whom the order is made elects (when the order is made) for it to become effective immediately. The practical effect is that an offender cannot be put into detention immediately after a summary hearing unless he elects to do so or unless the accused is already serving a sentence of detention imposed for another offence when the punishment or order is imposed. Where COs are in any doubt, they should seek staff legal advice before placing an offender into any form of Service custody.

Offender's choice as to when to start a sentence of detention

64. The offender has the right to elect to begin his sentence of detention immediately when the punishment is awarded. If he does not do so, his detention will start:
- a. After the 'initial period' for bringing an appeal to the SAC (i.e. after 14 days starting with the day on which the punishment was awarded by the CO) if the offender does not bring an appeal within that appeal period. Thus if an award of detention is made on 1st Feb, the punishment would take effect and the offender would start his sentence on the 15th Feb;
 - b. If the offender brings an appeal within the initial period, on the beginning of the day when the appeal is either abandoned or determined; or
 - c. If an offender brings an appeal within any extended appeal period (i.e. where the appellant has successfully applied for permission to bring an appeal outside the initial 14-day period), on the beginning of the day when the appeal is either abandoned or determined.

Where the offender elects to begin a sentence of detention immediately, and brings an appeal outside the initial appeal period (or any extended appeal period), his sentence of detention will immediately cease to have effect and he must be released from detention. The sentence will not resume again until the appeal has been abandoned or determined.

⁶¹ A CO may delay the date on which some punishments will take effect, see [Chapter 13](#) (Summary hearing sentencing and punishments). See also paragraph 71 below.

Activation of suspended sentences

65. The appeal arrangements vary slightly where a charge has been proved in a summary hearing and the accused was subject to an operational period⁶² of a suspended sentence when he committed the further offence (for these purposes this latter offence will be described as the trigger offence).

a. Where the CO has made an order to activate the suspended sentence, the offender may:

(1) Bring an appeal against the finding and punishment of the trigger offence in which case the SAC will automatically treat this as an appeal against the order. This is so even if the appellant is not appealing the order to activate the suspended sentence of detention; or

(2) Bring an appeal against the order in which case the SAC will automatically treat this as an appeal against the punishment for the trigger offence. Again this is so even if the appellant is not appealing the punishment for the trigger offence.

b. Where the CO decided not to make any order (and therefore did not activate the suspended sentence in the summary hearing) the offender may bring an appeal against the finding and or punishment of the trigger offence. If this occurs, the SAC may⁶³ have the power to activate the suspended sentence if the appeal is against punishment or where it is against finding and the SAC confirms the original finding or substitutes an alternative finding. Where it does so the SAC cannot impose a punishment which is more severe than that originally awarded.

66. A Service person will also be able to bring an appeal to the SAC where an activation order has been awarded by a CO in an activation hearing⁶⁴ (i.e. following a civilian conviction). In such cases, the activation order will be treated as a punishment awarded for the offence for which the suspended sentence was originally awarded.

67. Commencement of sentence where a suspended sentence has been activated. Where a suspended sentence has been activated the arrangements for commencing the sentence are the same as those that apply where a sentence of detention has been awarded in a summary hearing, see paragraph 64 above. Therefore, where a CO makes an order activating a suspended sentence of detention, the order cannot take effect immediately unless the person against whom the order is made elects for it to do so. The person, however, can only make this election at the time the order is made. The sentence will commence or resume in the same circumstances as are set out in paragraph 64 above. Thus, for example, if the offender has not brought an appeal within 14 days of the order being awarded (the initial period for bringing an appeal), the offender will begin to serve his sentence on the 15th day.

68. In cases of doubt and in more complicated cases (for example when concurrent sentences of detention are imposed by the CO at the same time and the offender elects to start one sentence but not the other) staff legal advice should be sought before the offender is placed into detention.

⁶² This can be anywhere between 3 and 12 months from the date the suspended sentence came into effect.

⁶³ Subject to section 195(6) - (8) of the Act.

⁶⁴ See section 193(2)(b) of the Act.

Service of documents by the CO on the applicant or appellant

69. Where a document or notice has been sent to the CO, he must serve it on the applicant or appellant as soon as reasonably practicable and notify the person on whose behalf the document has been served of the time and date of service⁶⁵. The CO or the person acting on his behalf will usually be required to return a proof of service slip.

Post appeal action by unit staff

70. Where the SAC has considered an appeal it may confirm a finding, quash it or substitute it with a finding that another charge has been proved. Where the SAC quashes a finding it must also quash any accompanying punishment. For an appeal against punishment, the SAC may confirm the punishment or quash it and/or substitute another punishment. The outcome of an appeal will be notified (for result notification, see [Chapter 27](#) Summary Appeal Court) to unit staffs in accordance with single-Service arrangements⁶⁶. Where the SAC has decided, in effect, to alter the outcome of a summary hearing by upholding an appeal in whole or in part, action must be taken by unit staff to reflect such changes on the appellant's records and pay account. The JPA Business Process Guide, Service Law – Administration of Appeals Process, should be followed. A copy of the Result notification should be retained with the unit copy of the RSH to which the appeal relates.

71. **Action where sentence of detention is confirmed or awarded (Army and RAF only).** Where the SAC has decided to confirm or vary an original award of detention (including the activation of a suspended sentence of detention), that sentence is to take effect immediately and the necessary arrangements made with MCTC Colchester (or other relevant custody facility, if appropriate); the Committal order for use at the Court Martial, summary hearings and the Summary Appeal Court form (T-SL-CUSO5), see Annex K to [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention), is to be completed. The date of committal is the date on which the appeal is concluded.

72. **Action in relation to a Service compensation order (SCO).** A SCO awarded at a summary hearing may only be actioned once the CO is satisfied that, disregarding any power of the court to grant leave to appeal out of time, there is no further possibility of an appeal that could result in the order being varied or quashed (see [Chapter 13](#) (Summary hearing sentencing and punishments)). Therefore, where an appeal brought within the 14-day appeal period relates to a SCO and the award has been confirmed or varied, action is to be taken to effect the award. Where an appeal is brought out of time (after the 14-day appeal period and thus the award has already been effected) and the SCO is varied, quashed or substituted by the court for another punishment, action must be taken to recover the SCO in whole or in part. See the JPA Business Process Guide, Service law – Administration of Appeals Process.

⁶⁵ For further guidance on service of documents see part 2 of the Armed Forces (Summary Appeal Court) Rules 2009/1211 and [Chapter 27](#) (Summary Appeal Court).

⁶⁶ For RN – SAC – Result Notification is sent by the NCAO to the relevant Ship/Unit and the Central Criminal Records Intelligence Office (CCRIO).

For Army - SAC – Result Notification is sent to by PS2(A) PTS to the relevant Bde/Garrison HQ, APC Glasgow, Unit staffs and CCRIO RMP.

For RAF – SAC - Result Notification is sent by the RAF CAU to ACOS A1 Casework Staffs, Unit staffs and the CCRIO.

Part 3 – Transitional guidance

Appeals

73. A transitional situation could arise at commencement in the following situations:
- (a) Where a charge under the AA 1955, AFA 1955 or the NDA 1957 (the SDAs) has been heard summarily and a finding that the charge has been proved has been recorded but no appeal has yet been brought.
 - (b) Where an appeal to a summary appeal court was brought pre-commencement (before 31 October 2009), and by commencement the court has not begun to hear the appeal and the appeal has not been abandoned.
74. Staff legal advice should be sought in either of these situations

Review

75. Where a charge was heard summarily and a finding that the charge has been proved was recorded under the SDAs, post commencement review powers apply. For example, the power to quash a finding and punishment will not be available.

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX A TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

SUMMARY HEARING REVIEW

T-SL-SHR01

Serial Number: [e.g. /09]

Part 1

From:

Ship/unit/establishment

UIN

First name and initials

Family name

Rank/rate

Telephone number

Details of offender:

Service number

Rank

First name and initials

Family name

Ship/unit/establishment

UIN

Details of officer who heard the charge:

Service number

Rank

First name

Family name

Ship/unit/establishment

In the capacity of subordinate commander commanding officer

Details of charge:

AFA 06 Section

Offence

Date of the offence

Date charge brought

Date charge heard

Individual admitted the charge(s)

Individual denied the charge(s)

Charge involved:

- Age under 18
- Alcohol related
- Bullying
- Drugs
- Dishonesty
- Racial harassment
- Sexual harassment
- Violence

Brief description of offence

Punishment

Where detention awarded whether the offender elected to start sentence of detention immediately:

Yes No

Intention to appeal:

Yes No Not yet known

Extended powers/permission to hear the charge:

An application for extended powers was was not made for this hearing and was was not granted.

An application for permission to hear a charge summarily was was not made for this hearing and was was not granted.

Part 2

To be completed when the CO has considered the activation of a suspended sentence of detention.

Original suspended sentence of detention was imposed on

Date

Details of offence(s) for which the suspended sentence was imposed

Operational period of original suspended sentence

Length of original suspended sentence

An application for extended powers was was not made for the purposes of activating the suspended sentence and was was not granted.

The suspended sentence of detention in respect of the above named offender was:

Not activated

Activated in full

Activated in part by the substitution of the following number of days' detention:

Days of detention

The period of detention is to run:

Concurrently

Consecutively

Parts 1 and 2 of this form should be completed within 24 hours of the conclusion of the summary hearing and sent by email, fax or any other method available to the relevant reviewing officer.

Part 3 (completed by RO)

To be completed by the RO when the offender is a member of a different Service to that of the CO.

I have reviewed the summary hearing in respect of the above named member of your Service and I have taken the following action:

Action taken

Service number

Rank

First name

Family name

Appointment

Signature

Date



MINISTRY OF DEFENCE

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ANNEX B TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

**ACTIVATION HEARING REVIEW
(FOLLOWING A CIVIL CONVICTION IN THE
BRITISH ISLANDS)**

T-SL-AHR01

Serial Number: [e.g. /09]

Part1

From:

Ship/unit/establishment

UIN

First name and initials

Family name

Rank

Telephone number

Details of offender:

Service number

Rank/Rate

First name and initials

Family name

Ship/unit/establishment

UIN

Details of CO conducting the activation hearing:

Rank

Ship/unit/establishment

First name

Family name

Date when original suspended sentence of detention was imposed

Details of offence(s) for which the suspended sentence was imposed

Operational period of original suspended sentence

Length of original suspended sentence

Details of civil conviction

Conviction involved:

- Age under 18
- Alcohol related
- Bullying
- Drugs
- Dishonesty
- Racial harassment
- Sexual harassment
- Violence

Sentence for civil conviction

Intention to appeal:

- Yes No Not yet known

Extended powers:

An application for extended powers was was not made for this hearing and was was not granted.

The suspended sentence of detention in respect of the above named offender was:

- Not activated
- Activated in full

Activated in part by the substitution of the following number of days' detention:

Days of detention

Parts 1 of this form should be completed within 24 hours of the conclusion of the activation hearing and sent by email, fax or any other method available to the relevant reviewing officer.

Part 2 (completed by RO)

To be completed by the RO when the offender is a member of a different Service to that of the CO.

I have reviewed the activation hearing in respect of the above named member of your Service and I have taken the following action:

Action taken

Service number

Rank

First name

Family name

Signature

Date

Intentionally left blank



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ANNEX C TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

NOTICE OF APPEAL

T-SL-SAC01

To: COMMANDING OFFICER (for onward transmission to the CAO)

I

First name <input type="text"/>	Family name <input type="text"/>
Rank/rate <input type="text"/>	Service number <input type="text"/>
Ship/unit/establishment/civilian address* <input type="text"/>	

* For ex-service personnel only

Do HEREBY GIVE NOTICE that in respect of:

Charge

I appeal against both finding and punishment / punishment only;

Charge

I appeal against both finding and punishment / punishment only;

Charge

I appeal against both finding and punishment / punishment only;

Charge

I appeal against both finding and punishment / punishment only;

The above mentioned finding(s) and punishment were imposed by way of summary hearing/activation hearing

on date

at

Officer who conducted the summary hearing/activation hearing, and the capacity in which he conducted it :

First name

Family name

Rank

Commanding Officer

Subordinate Commander

Appellant's Signature

Date



MINISTRY OF DEFENCE

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ANNEX D TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

NOTICE OF APPLICATION TO EXTEND THE PERIOD OF TIME FOR BRINGING AN APPEAL

T-SL-SAC02A

To: COMMANDING OFFICER (for onward transmission to the CAO)

<p>I</p> <p>First name</p> <input type="text"/>	<p>Family name</p> <input type="text"/>
<p>Rank/rate</p> <input type="text"/>	<p>Service number</p> <input type="text"/>
<p>Ship/unit/establishment/civilian address*</p> <input type="text"/>	

* For ex-service personnel only

Do HEREBY GIVE NOTICE of an application under Section 141(2)(b) of the Armed Forces Act 2006 and Rule 16(1)(a) of Armed Forces (Summary Appeal Court) Rules 2009 to extend the period of time for bringing an appeal.

Part 1

This application relates to either:

a summary hearing that occurred on:

Date

The officer conducting the summary hearing was:
(Insert the rank and name of the officer who heard the charge) who was/is my :

- Commanding Officer
- Subordinate Commander

Rank

First name

Family name

The summary hearing took place at

[insert the name of the Ship/Unit/Establishment where the charge was heard]

The following charges were proved against me

[insert charges proved]

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Date punishment awarded

I was awarded the following punishment

Punishment

(If detention was awarded, indicate whether you are currently in detention)

A suspended sentence of detention was activated in the summary hearing for the following period of days.

A suspended sentence of detention was not activated in the summary hearing for the following period of days.

Days

OR

An activation hearing that occurred on

Date

The officer conducting the activation hearing was my CO

Rank

First name

Family name

The hearing took place at

[insert the name of the Ship/Unit/Establishment that the charge was heard]

A suspended sentence of detention was activated in the summary hearing for the following period of days

A suspended sentence of detention was not activated in the summary hearing for the following period of days

follow period of days

Days

I am / am not currently serving this sentence of detention.

Part 2

The reasons why I wish the period to be extended are:

(insert here the matters on which you wish to rely on in support of your application)

I am including the following documents which I consider relevant to this application:

Signature

Date

Intentionally left blank



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ANNEX E TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

NOTICE OF APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

T-SL-SAC02B

To: COMMANDING OFFICER (for onward transmission to the CAO)

<p>I</p> <p>First name</p> <input type="text"/>	<p>Family name</p> <input type="text"/>
<p>Rank/rate</p> <input type="text"/>	<p>Service number</p> <input type="text"/>
<p>Ship/unit/establishment/civilian address*</p> <input type="text"/>	

* For ex-service personnel only

Do HEREBY GIVE NOTICE of an application under Section 141(3) of the Armed Forces Act 2006 for leave to appeal out of time.

This application relates to the following finding(s) and or punishment.

Finding or punishment awarded

[insert here details of any finding or punishment awarded, against which an appeal is brought]

Imposed by way of summary hearing/activation hearing on

<p>Date</p> <input type="text"/>	<p>Held at</p> <input type="text"/>
----------------------------------	-------------------------------------

Name and rank of the officer who conducted the summary hearing/activation hearing, and the capacity in which he conducted it

<input type="checkbox"/> Commanding Officer <input type="checkbox"/> Subordinate Commander	<p>Rank</p> <input type="text"/>
---	----------------------------------

<p>First name</p> <input type="text"/>	<p>Family name</p> <input type="text"/>
--	---

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Date punishment awarded

The reasons why I did not bring the appeal within the appeal period are:

(insert here the matters on which you wish to rely within the appeal period in support of your application)

I am including the following documents which I consider relevant to this application:

Signature

Date



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ANNEX F TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

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NOTICE OF WITHDRAWAL OF AN APPLICATION FOR LEAVE TO EXTEND TIME TO APPEAL OR LEAVE TO APPEAL OUT OF TIME

T-SL-SAC02C

To: COMMANDING OFFICER (for onward transmission to the CAO of the Summary Appeal Court)

I

First name <input type="text"/>	Family name <input type="text"/>
Rank/rate <input type="text"/>	Service number <input type="text"/>
Ship/unit/establishment/civilian address* <input type="text"/>	

* For ex-Service Personnel only

DO HEREBY GIVE NOTICE that I wish to withdraw my application for leave to extend the time to appeal.
 my application for leave to appeal out of time.

This application relates to the following finding(s) and or punishment.

Against

insert here details of any finding or punishment awarded against which an application relates

Imposed by way of summary hearing/activation hearing on

Date <input type="text"/>	Held at <input type="text"/>
------------------------------	---------------------------------

Signature <input type="text"/>	Date <input type="text"/>
-----------------------------------	------------------------------

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MINISTRY OF DEFENCE

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ANNEX G TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

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REQUEST FOR A HEARING BY APPLICANT REQUESTING LEAVE TO EXTEND TIME TO APPEAL OR LEAVE TO APPEAL OUT OF TIME T-SL-SAC02D

To: COMMANDING OFFICER (for onward transmission to the CAO of the Summary Appeal Court)

I
First name

Family name

Rank/rate

Service number

Ship/unit/establishment/civilian address*

* For ex-Service personnel only

Date appellant received the notice

Having received notice on (date in box above) that the judge advocate considering my application for leave to extend the time to appeal / or for leave to appeal out of time, is minded to refuse my application, I do hereby give notice under Rule 16(5) Armed Forces (Summary Appeal Court) Rules 2009 that I wish a hearing to take place before the judge advocate.

Signature

Date

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ANNEX H TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

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NOTICE OF ABANDONMENT OF APPEAL

T-SL-SAC04

To: COMMANDING OFFICER (for onward transmission to the CAO of the Summary Appeal Court)

I
First name

Family name

Rank/Rate

Service number

Ship/unit/establishment/civilian address*

* For ex-Service personnel only

DO HEREBY GIVE NOTICE in accordance with rule 23(2) Armed Forces (Summary Appeal Court) Rules 2009 that it is my wish to abandon my appeal against

Insert here details of any finding, or punishment awarded, to which the notice relates. Also include here, where appropriate, the date fixed for the hearing of the appeal and your reasons for abandoning the appeal

Imposed by way of summary hearing/activation hearing on

held at

Date punishment awarded

Signature

Date

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This is to certify that I, as the assisting officer, have explained to the aforementioned appellant, the implications of abandoning his appeal.

First name

Family name

Rank

Service number

Signature

Date



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ANNEX I TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

**NOTICE TO OFFENDER THAT APPEAL
HAS BEEN TREATED AS ABANDONED**

T-SL-SAC06

Details of offender:

First name

Family name

Rank/rate

Service number

Ship/unit/establishment

Due to your failure to attend the hearing your appeal
has been treated as abandoned on:

Date

Signature

Date

Judge advocate/CAO

Intentionally left blank



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ANNEX J TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

**APPLICATION FROM A REVIEWING OFFICER FOR
LEAVE TO REFER A FINDING AND/OR PUNISHMENT
TO BE CONSIDERED BY THE SUMMARY APPEAL
COURT AS AN APPEAL**

T-SL-SAC03

To: CAO of the Summary Appeal Court

I HEREBY APPLY FOR LEAVE TO REFER the following finding and or punishment to the Summary Appeal Court to be considered by it as if on an appeal in accordance with s152(4) AFA 06 and Rule 17 (1) Armed Forces (Summary Appeal Court) Rules 2009.

1. Details of the offender:

First name

Family name

Rank/rate

Service number

Ship/unit/establishment/civilian address

2. Details of summary hearing/activation hearing:

Where held

Date

Particulars of the charges heard summarily or the civil conviction and the findings recorded in respect of each charge.

Charge(s) and findings

Particulars of the punishment awarded

Date punishment awarded

If the punishment includes the activation of a suspended sentence the particulars of the original punishment awarded, i.e. the length of the original sentence, the operational period of the original sentence and the charge(s). In addition if a suspended sentence has been activated after a civilian conviction the details of that conviction and any sentence imposed by the civilian court.

1-15-J-1

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3. Matters to which the application relates:

Insert here any finding or punishment to which the application relates

4. Grounds for the application:

Reviewing officer's details

First name

Family name

Rank

Service number

Ship/unit/establishment

Signature

Date



MINISTRY OF DEFENCE

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Print Form

ANNEX K TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

**NOTICE OF WITHDRAWAL OF AN APPLICATION
FOR LEAVE TO REFER A CASE BY A RO**

T-SL-SAC03A

To: COMMANDING OFFICER (for onward transmission to the CAO of the Summary Appeal Court)

I

First name <input type="text"/>	Family name <input type="text"/>
Rank/rate <input type="text"/>	Service number <input type="text"/>
Ship/unit/establishment/civilian address* <input type="text"/>	

* Ex-service personnel only

DO HEREBY GIVE NOTICE that I wish to withdraw my application for leave to extend the time to appeal.
 my application for leave to appeal out of time.

This application relates to the following finding(s) and or punishment.

Against

insert here details of any finding or punishment awarded against which an application relates

Imposed by way of summary hearing/activation hearing on

Date <input type="text"/>	Held at <input type="text"/>
------------------------------	---------------------------------

Signature <input type="text"/>	Date <input type="text"/>
-----------------------------------	------------------------------

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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MINISTRY OF DEFENCE

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ANNEX L TO
VOL1 CH 15
JSP 830 MSL
revised 08/09

**NOTIFICATION FROM A REVIEWING OFFICER
OF A MATTER RELATING TO A FINDING AND/
OR PUNISHMENT TO BE CONSIDERED BY
THE SUMMARY APPEAL COURT**

T-SL-SAC05

To: CAO of the Summary Appeal Court

I HEREBY NOTIFY YOU OF A MATTER following finding and or punishment to be put before the Summary Appeal Court in relation to an existing appeal.

1. Details of the offender

Name

Rank/Rate

Service number

Ship/unit/establishment

2. Details of summary hearing/activation hearing

Location

Date held

Particulars of the charges heard summarily or the civil conviction and the findings recorded in respect of each charge

Particulars of the punishment* awarded

Date punishment awarded

* If the punishment includes the activation of a suspended sentence the particulars of the original punishment awarded, i.e the length of the original sentence, the operational period of the original sentence and the charge(s). In addition if a suspended sentence has been activated after a civilian conviction the details of that conviction and any sentence imposed by the civilian court.

1-15-L-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

3. Matters to which the application relates

Insert here any finding or punishment to which the application relates

4. Matter(s) to be notified

Signature

Date

Appointment

Family name

First name

Ship/unit/establishment

Chapter 16

Financial penalty enforcement orders

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Chapter 16

Financial penalty enforcement orders

Introduction

1. Financial penalty enforcement orders (FPEOs) enable unpaid (or partially unpaid) fines and other financial penalties to be enforced by certain civilian courts¹. FPEOs are made where Service enforcement procedures² cannot be used to recover the amount outstanding under a financial penalty because the person against whom the financial penalty was awarded is neither a Service person (and is therefore not subject to Service law)³ nor a relevant civilian (a civilian subject to Service discipline). FPEOs are usually made when Service personnel leave the Services without having paid all of a financial penalty which has been awarded against them, or when a relevant civilian, against whom a financial penalty has been awarded, returns to the UK. Special arrangements apply where the person against whom the financial penalty was awarded is a reservist. [Annex A](#) provides specific guidance on making FPEOs against members of the Reserve Forces. The relevant legislative provisions relating to FPEOs are section 322 of the Armed Forces Act 2006 (the Act) and the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009 (the Regulations).

Making the FPEO

2. **Who can make the FPEO.** An FPEO may be made by the Defence Council or any person authorised by the Defence Council (an authorised person). The FPEO must include a certificate providing specified information about the financial penalty (see paragraph 10 of this chapter for the matters which must be set out in the certificate). The person authorised by the Defence Council to make an FPEO and its accompanying certificate for all three services is AD Mil SVCS, SPVA.

3. A form 'Order made by a person authorised by the Defence Council in respect of an FPEO' (T-SL-FP01) is shown at [Annex B](#). The FPEO should be sent to the relevant court (see paragraph 10 below) and should be marked for the attention of the Court Manager.

4. It is likely FPEOs will need to be made in the following circumstances;

a. Where a member of the regular forces has left the Service and it becomes apparent that he or she has an unpaid or un-recovered financial penalty⁴, or

b. A member of the regular forces is about to leave the Service⁵ and it appears that the person has an unpaid or un-recovered financial penalty and it will not be possible to obtain the sum owed by way of Service enforcement procedures, or

c. A relevant civilian, such as a dependant in Germany, is about to return to the UK⁶, or has returned to the UK, and has an unpaid or unrecovered financial penalty.

¹ The civilian court must be a 'relevant court' see paragraph 11 of this chapter.

² The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 2(1) – i.e. any procedure provided for in sections 341 and 342 of the Act.

³ Unless the person who has not paid the financial penalty is a special member of a reserve force with the meaning of the Reserve Forces Act 1996 (see paragraph 6 of this chapter).

⁴ See paragraph 7 of this chapter.

⁵ Although consideration should be given to making an FPEO in such cases, the FPEO cannot be made until the individual in question has either left the Service, or is no longer a relevant civilian (and is therefore not subject to Service discipline): see paragraph 5(c).

⁶ See footnote 5 above.

In these circumstances, the individual's commanding officer (CO) should notify Head of Debt Management (Recoveries and Write-Off), SPVA, Glasgow of the matter. All related documentation should be forwarded to him at Mail Point 600, Kentigern House, 65 Brown Street, Glasgow, G2 8EX. Further action should then be taken in accordance with paragraphs 10 - 12 below.

5. **Circumstances when an FPEO may be made.** The Defence Council (or AD Mil SVCS, SPVA) may only make an FPEO when each of the following conditions is met:⁷

- a. A financial penalty (see paragraph 6) has been awarded against a person⁸; and
- b. There is no appeal outstanding against the award and any time limit for giving notice of an appeal has expired⁹; and
- c. The whole, or any part, of the penalty awarded remains unpaid or unrecovered¹⁰; and
- d. either:
 - (1) At the time the FPEO is made, the person is not a member of the Services nor a relevant civilian¹¹; or,
 - (2) The person is subject to Service law only because he or she is a *special member of a reserve force*¹² within the meaning of the Reserve Forces Act 1996¹³.

In cases of doubt and where the offender is believed to be a special member of a reserve force, legal advice from a staff lawyer should be sought before an FPEO is made. (See also paragraph 7 of this chapter).

6. **Financial penalties.** A financial penalty can be any of the following:

- a. Fines and Service compensation orders (SCO) imposed under the Act. These include:
 - (1) Any fine or SCO imposed on an offender by his CO in a summary hearing, or by the Summary Appeal Court (SAC), Court Martial (CM) or Service Civilian Court (SCC);
 - (2) Any fine which the Service parent/guardian¹⁴ is ordered to pay under section 233(2)(b) of the Act. (A fine will be imposed where a Service parent/guardian of an offender unreasonably refuses to give an undertaking (known as a recognizance) to the CM or SCC to pay a specified sum if the offender re-offends within a specified period); and

⁷ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulations 3(1) and 3(2).

⁸ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(1)(a). This includes a sum adjudged to be paid under section 236(3) of the Act (forfeiture of recognizance): see regulation 2(2).

⁹ The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(1)(b).

¹⁰ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(1)(c).

¹¹ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(2)(a).

¹² See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(2)(b).

¹³ See Part V of that Act (sections 38 to 49).

¹⁴ i.e. A person who is, themselves, subject to Service law or Service discipline see section 268(8) of the Act.

(3) Any fine or SCO which a Service parent/guardian is ordered by the CM or SCC, under section 268 of the Act¹⁵, to pay instead of the offender.

b. Any sum which is adjudged to be paid as a result of a declaration by the CM or SCC under section 236(3) of the Act¹⁶. This applies where a Service parent/guardian of an offender gives an undertaking to the court to pay a specified sum if the offender commits an offence within a specified period (a recognizance) and the offender commits another offence which results in the court requiring that parent/guardian to pay the specified sum (or part of the specified sum). Once the court imposes this requirement, the sum to be paid (the recognizance) becomes a financial penalty.

c. Any order as to the payment of costs made under regulations under section 26 or 27¹⁷ of the Armed Forces Act 2001. The former provision concerns circumstances where a court¹⁸ is satisfied that one party to the proceedings has incurred costs because of some unnecessary or improper conduct by the other party and, accordingly, makes an order as to payment of those costs. Section 27 is concerned with costs against legal representatives¹⁹.

7. **Service personnel and relevant civilians.** As a rule, an FPEO cannot be made whilst a person is a member of the Services (and is therefore subject to Service law). The only exception is where the person is a special member of a Reserve Force²⁰. This is because the payment of a financial penalty (imposed by a CO or a Service court) may usually be secured by deducting it from an offender's pay, bounty or allowance²¹. The pay of a special member of a reserve force cannot be deducted in this way because such persons are not, in all cases, paid by the MOD. For further guidance, see [Chapter 20](#) (Forfeitures and deductions).

8. An FPEO cannot be made where the person against whom the financial penalty was awarded is a relevant civilian²². In contrast with Service personnel, there are no Service enforcement procedures available in respect of relevant civilians. In many cases, a relevant civilian will be a dependant spouse or child of a member of the armed forces. Where, for example, the person is a relevant civilian because he or she resides in Germany with his or her spouse, the FPEO cannot be made until the Service person is posted to an area where his or her spouse ceases to be a relevant civilian. In the example given, an FPEO may be made when the spouse of the Service person returns to the UK.

Information to be provided to the relevant court

9. All FPEOs must contain a certificate issued on behalf of the Defence Council or AD Mil SVCS, SPVA which certifies the following matters²³:

a. A financial penalty has been awarded against the person named in the order.

¹⁵ More information on the sentencing powers of Service Courts can be found in [Chapter 31](#) (Sentencing principles, powers and effect).

¹⁶ Section 322(4)(b) of the Act.

¹⁷ Section 342(4)(c) of the Act.

¹⁸ 'Court' in this context means the Court Martial, the Summary Appeal Court, the Court Martial Appeal Court and the Service Civilian Court (see section 26(1) of the Act).

¹⁹ The Armed Forces Proceedings (Costs) Regulations 2005 (as amended by Schedule 16, paragraphs 192 and 193 of the Act).

²⁰ See Part V of that Act (sections 38 to 49).

²¹ See sections 341 and 342 of the Act and the Armed Forces (Forfeitures and Deductions) Regulations 2009/1109.

²² There are a variety of circumstances when a civilian will be a relevant civilian (subject to service discipline). If there is any doubt, legal advice should be obtained from a staff legal adviser before an FPEO is made.

²³ The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(3).

- b. No appeal is outstanding and any time limit for giving notice of an appeal has expired.
- c. The whole or any part of the penalty remains unpaid or unrecovered.
- d. The person against whom the award was made is a person to whom the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009 apply.
- e. The nature and amount of the penalty awarded.
- f. The date on which the penalty was awarded and the Service offence(s) in respect of which it was awarded.
- g. If the penalty was awarded against the person named in the order because that person is the parent or guardian of offender, the fact that it was so awarded and the name of the offender²⁴.
- h. Sufficient particulars of the case in respect of which the financial penalty was awarded (including particulars of any offences “taken into consideration” at the trial).
- i. The date of any payment or recovery of a sum relating to the penalty in question.
- j. The amount of the penalty which is still outstanding.
- k. The person to whom any SCO²⁵ or costs included in the awarded penalty will, upon recovery, fall to be remitted (see paragraph 12 below).

Where an FPEO is made a copy of the form at [Annex A](#) should be completed and sent to the relevant court (see paragraph 11 below). Only one FPEO (including one certificate) should be made where more than one financial penalty has been awarded against an individual.

Sending the FPEO to the relevant court

10. **Relevant Court.** An FPEO may only be enforced by a relevant court. Relevant courts are²⁶:

- a. The magistrates’ court in England or Wales;
- b. The sheriff court in Scotland;
- c. The court of summary jurisdiction in Northern Ireland; and
- d. A court of summary jurisdiction in the Isle of Man

within whose jurisdiction the person against whom an FPEO is made appears to the Defence Council (or AD Mil SVCS, SPVA) to reside or to be likely to reside.

²⁴ This relates to situations where a service parent or guardian has been ordered to pay a fine or Service compensation order under section 268 of the Armed Forces Act 2006, on behalf of the offender. It also covers situations where any sum is ordered to be paid as a result of a declaration by the court-martial or service civilian court that a recognizance is to be forfeited under section 236 of the Act. See [Chapter 20](#) (Forfeitures and deductions) for full details.

²⁵ Defined in section 175 of the Act. The stipulation under sub-paragraph 7 is important since the regulations specifically provide that any compensation recovered shall be remitted to the authority at the address as specified in that sub-paragraph.

²⁶ The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 2(1).

11. Enquiries will need to be carried out before an FPEO is made to ascertain where the individual in question intends to reside. It should not be assumed they will be residing at their last known address in the UK. If no information can be obtained as to where the individual in question intends to reside, those authorised to make an FPEO must satisfy themselves that there are reasonable grounds to believe that the individual does or is likely to reside at an address in the UK: this might be their last known address or the address of a spouse or relative. It should be noted that if a person who has failed to pay a financial penalty emigrates or is residing on a permanent basis outside the UK, an FPEO cannot be enforced. For example, an FPEO cannot be enforced against a civilian who decides to reside in Germany after their spouse has left the Service.

Effect of registration

12. On receipt of an FPEO, the relevant court will register²⁷ the order and proceed to enforce payment of the sum due as if it were a fine imposed by that court.²⁸ The court will then deal with the recovery and payment of outstanding sums into central funds without the involvement of the MOD. Where, however, the sum outstanding is owed under a Service compensation order (SCO) or an order as to the payment of costs, the sum will be remitted to the AD Mil SVCS, SPVA for onward transmission to the person to be compensated or to whom the payment of costs is due. As a rule, upon registration of an FPEO, and while it remains registered with a relevant court, service enforcement procedures cannot be used as a means of recovery of the sum which is certified as being outstanding²⁹. However, if the person against whom the order has been made rejoins the Services and the financial penalty (whether partly paid or not) is still outstanding, Service enforcement procedures *can* be used to recover the outstanding sum³⁰. In this instance, the Service authorities can recover the sum as if it were a fine imposed by a civil court³¹ see [Chapter 20](#) (Forfeitures and deductions) for further guidance.

13. If it appears from the FPEO that the penalty imposed is in respect of more than one offence, then for the purposes of enforcement it must be treated as a single penalty³².

14. A document purporting to be an FPEO which is signed on behalf of the Defence Council (or by an authorised person) is to be regarded as being a valid order, unless the contrary is proved³³. The relevant court may accept what is certified in such an Order without requiring any further evidence of the matters stated.

²⁷ See rule 47 of the Magistrates' Courts Rules 1981 for registration and notification of FPEO.

²⁸ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(5)(b).

²⁹ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(5)(a).

³⁰ See [Chapter 20](#) (Forfeitures and deductions).

³¹ See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(8). Once again this will enable the sum to be recovered by way of a deduction.

³² See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(7).

³³ The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(4).

FPEOs and reserve forces

1 Special arrangements are required in relation to members of the Reserve because of the varying nature of reserve service. This Annex sets out the arrangements where the financial penalty is imposed on a member of the Reserve Forces³⁴. It should be noted, however, that the Annex does not apply to individuals who are recalled to permanent service under section 68 Reserve Forces Act 1996 (RFA 96) or an equivalent power in the Reserve Forces Act 1980 (RFA 80); when recalled into permanent service, such individuals are treated in the same way as members of the regular forces.

Consideration as to whether an FPEO may be required

2. Paragraph 5 of this chapter provides general advice as to when an FPEO may be required. In the case of reservists, the nature and length of a reserve commitment varies according to the type of reserve service undertaken. Where the reservist is in Full Time Reserve Service (FTRS) under section 24 RFA 96 or is called out for permanent service, or is a member of the Non Regular Permanent Staff (NRPS) of the Territorial Army, consideration as to whether an FPEO will be required should be made when the reservist's FTRS commitment or period of permanent service or NRPS engagement is about to end. This is the most appropriate time because this is the time when the reservist will cease to be subject to Service law. At this time, the reservist's Commanding Officer should notify Head of Debt Management (Recoveries and Write-Off), SPVA, Glasgow of the matter.

3. In the case of special members of a reserve force, commonly known as the Sponsored Reserve, an FPEO may be made whilst they remain subject to Service law, see paragraph 6 of this chapter.

4. Where the person's reserve liability arises as a result of a requirement to attend for Manned Training Days (MTD)³⁵ or as a result of an Additional Duties Commitment (ADC), an FPEO may be required where the reservist has:

- a. Incurred a financial penalty whilst undertaking his MTD or ADC,
- b. Failed to pay the penalty in whole or in part during the period that he or she undertook his or her MTD or ADC, and
- c. An order authorising a deduction from his pay or bounty or allowance (equivalent to the amount of the financial penalty still outstanding) was not made during this period.

5. In such cases the reservist's CO should notify Head of Debt Management (Recoveries and Write-Off), SPVA, Glasgow as follows;

- a. In the case of a reservist who has attended for an MTD, as soon as reasonably practicable after the reservist has been discharged.

³⁴ See section 1(2) Reserve Forces Act 1996 for meaning of Reserve Forces

³⁵ Arising under sections 22 and 27 of the Reserve Forces Act 1996

- b. In the case of a reservist attending for an ADC, as soon as reasonably practicable after his commitment has ended.

All related documentation should be forwarded to Head of Debt Management (Recoveries and Write-Off), SPVA at Mail Point 600, Kentigern House, 65 Brown Street, Glasgow, G2 8EX. Where necessary, AD Mil SVCS, SPVA will make an FPEO as outlined at paragraphs 6 and 10 of this chapter.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Save as

Print Form

ANNEX B TO
VOL1 CH 16
JSP 830 MSL
revised 08/09

**ORDER MADE BY A PERSON AUTHORISED BY
THE DEFENCE COUNCIL IN RESPECT OF A
FINANCIAL PENALTY ENFORCEMENT ORDER**

T-SL-FP01

Financial Penalty Enforcement Order (Section 322 of the Armed Forces Act 2006: the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009)

From;

Rank/Rate <input type="text"/>	First name <input type="text"/>
Family name <input type="text"/>	Service number <input type="text"/>

1. I am a person authorised by the Defence Council to make Financial Penalty Enforcement Orders pursuant to section 322 of the Armed Forces Act 2006 and the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009.

2. In accordance with Regulation 3(3) of the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009 - I certify that:

a. A financial penalty has been awarded against

Name of the offender/parent /guardian of the offender

b. No appeal in respect of the award of the financial penalty is outstanding and the time provided for the giving of the notice of appeal against the award has expired;

c. The whole Part of the financial penalty remains unpaid or unrecovered;

d. The person against whom the financial penalty was awarded is a person to whom the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2008 apply;

e. The financial penalty awarded

Type of penalty

Amount awarded

i.e fine, SCO, forfeiture of recognizance or payment of costs

f. The penalty was awarded

Date

in respect of the following Service offence(s)

g. The penalty was awarded against

name of the person named in the order

as the parent or guardian of

the name of the accused

h. The particulars of the case in respect of which the financial penalty was awarded are

set out details of the court and judge advocate who awarded the financial penalty, or the CO if awarded at a summary hearing, details of the charges in respect of which the financial penalty was awarded and where appropriate any offences that were taken into consideration by the court or CO. When a recognizance is ordered to be forfeited or an order is made as to the payment of costs details should be given of the court's grounds for making the order

i. Payment/Recovery

No payment or recovery of a sum relating to the penalty in question has been made

Payment/Recovery of a sum was made on

insert dates and amounts if payments/recoveries made

j. The sum outstanding in respect of the financial penalty

amount

3. Any SCO or costs included in the penalty should, on recovery, be remitted to;

First name

Family name

Contact address

4. Declaration

Signed

Date

Name

Rank/Rate

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Transitional arrangements regarding financial penalty enforcement orders

1. The previous parts of this chapter have described the arrangements that are to be followed to make an FPEO where:
 - a. A financial penalty within the meaning of section 322(4) of the Act (see paragraph 6 of this chapter) has been imposed; and
 - b. That financial penalty was imposed following a conviction for a Service offence or offences.
2. This Annex explains the other circumstances when a FPEO might be made. It should be read in conjunction with the flow chart at Appendix 1.
3. For the purposes of this Annex and the flow chart, a financial penalty within the meaning of section 322(4) of the Act will be described as an 'AFA 06 financial penalty'. For the purpose of this Annex and the flowchart a 'SDA Financial Penalty' means:
 - a. A fine awarded under the Army Act 1955 (AA 55), including a fine imposed by virtue of paragraph 13 of schedule 5A of AA 55;
 - b. A fine awarded under the Air Force Act 1955 (AFA 55), including a fine imposed by virtue of paragraph 13 of schedule 5A of AFA55;
 - c. A fine awarded under the Naval Discipline Act 1957 (NDA 57), including a fine imposed by virtue of paragraph 13 of schedule 4A of NDA 57;
 - d. Stoppages awarded under AA55, AFA55 and NDA 57³⁶;
 - e. A compensation order imposed by virtue of paragraph 11 or 13 of schedule 5A of AA 55;
 - f. A compensation order awarded by virtue of paragraph 11 or 13 of schedule 5A of AFA 55; and
 - g. A compensation order awarded by virtue of paragraph 11 or 13 of schedule 4A of NDA 57.

Additionally, for the purposes of this Annex and the flow chart, a 'SDA offence' means an offence that was committed under NDA 57, AA 55 or AFA 55.

4. The other circumstances when a FPEO can be made are where:
 - a. An AFA 06 financial penalty has been awarded in respect of a SDA offence³⁷. For example, where a Service court or a CO convicts an offender of an offence under the AA 1955 on or after the 31 October 2009 and awards an AFA 06 financial penalty.

³⁶ This however does not include stoppages imposed under section 128C of NDA 57, section 147 or 148 of AA 55 or section 147 or 148 of AFA 55.

³⁷ This will not include an offence under the Armed Forces Act 1991 or the Reserve Forces Act 1996.

b. On or after 31 October 2009 either:

(1) A CO (in a summary dealing or summary trial) imposes a SDA financial penalty³⁸; or

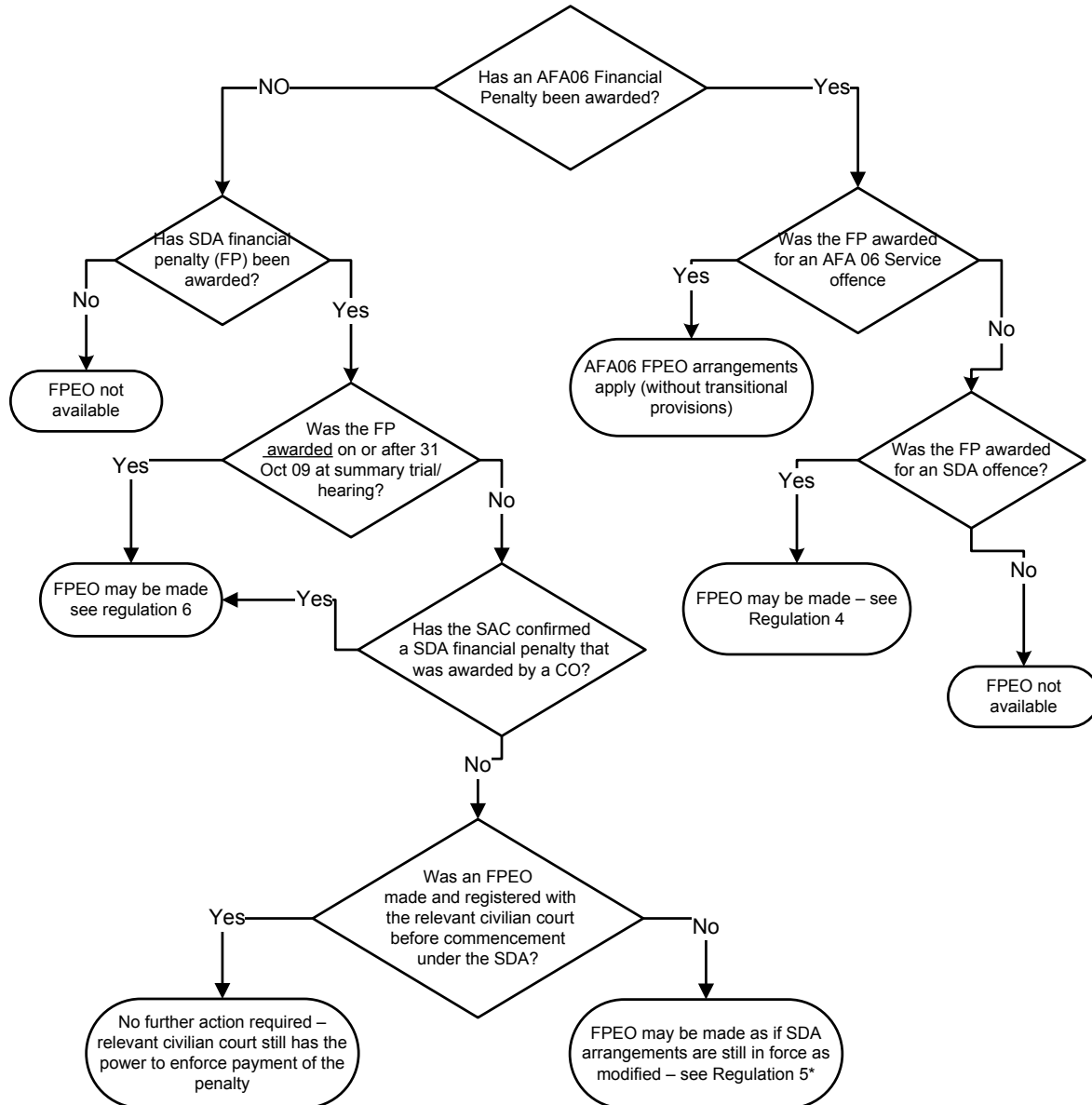
(2) The SAC confirms a SDA punishment that was awarded by a commanding officer and where that punishment, originally awarded by commanding officer, was a SDA financial penalty.

c. Prior to 31 October 2009, a SDA Financial Penalty has been awarded. This may have been awarded by a commanding officer in a summary dealing or summary trial. It might also have been imposed by a court-martial, standing civilian court or a summary appeal court.

5. Before an FPEO is made by the Defence Council or a person authorised by the Defence Council in any of the above cases (or in any cases which do not appear to be covered in the chapter) staff legal advice should be sought.

³⁸ The will only occur if the summary dealing (for Army and RAF) or summary trial (for the RN) began before 31 October 2009 but the CO hearing the case did not find the case proven until 31 October 2009 or a later date.

FPEO – Transitional arrangement flowchart



Note:

* Where regulation 5 applies – the FPEO is enforced as if the SDA were still in force. Therefore a FPEO may only be made if the FPEO was awarded for a ‘qualifying offence’ – this includes all SDA civil offences and a limited number of other ‘SDA offences’ – see AA55 section133A(3), AFA section 133A(3) and NDA section 128F(3).

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Chapter 17

Naval chaplains

1. The Armed Forces (Naval Chaplains) Regulations 2008 make provisions for the Armed Forces Act 2006 (the Act) to apply to naval chaplains¹. As naval chaplains are commissioned as chaplains, but have no equivalent Service rank, they would otherwise fall outside some of the provisions of the Act relating to officers.
2. Naval chaplains are to be treated as officers for the purposes of Service law, except that they are exempted from sitting as members of the Court Martial or the Summary Appeal Court; this exemption places naval chaplains in the same position as Army and RAF chaplains.
3. For the purposes of offences of misconduct towards a superior officer, under section 11 of the Act, see [Chapter 7](#) (Non-criminal conduct (discipline) offences), the superior officer² for a naval chaplain is defined as the commanding officer (CO) or an officer not below the rank of captain RN, colonel or group captain. For principal chaplains the superior officer is the CO or an officer not below the rank of rear admiral, major general or air vice marshal.
4. For the purposes of offences of disobedience to lawful commands, under section 12 of the Act, see [Chapter 7](#) (Non-criminal conduct (discipline) offences), a lawful command³ may also be given by an officer in exercise of the functions delegated to him by the CO, such as the officer of the day or the orderly officer, as well as those listed at paragraph 3.
5. The regulations also provide that powers of arrest under section 67 of the Act may be exercised by those people mentioned in paragraphs 3 and 4⁴.
6. For summary discipline⁵ purposes naval chaplains are subject to the Act in the same way as a commander RN or equivalent.

¹ Section 371 of the Act.

² The Armed Forces (Naval Chaplains) Regulations 2009 regulation 4.

³ The Armed Forces (Naval Chaplains) Regulations 2009 regulation 5.

⁴ The Armed Forces (Naval Chaplains) Regulations 2009 regulation 4(3).

⁵ Section 52 of the Act.

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Chapter 18

Terms and conditions of enlistment and service

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Chapter 18

Terms and conditions of enlistment and service

Introduction

1. **General.** This chapter covers: enlistment; restrictions on aliens; terms and conditions of service; forfeiture of service for desertion and absence without leave¹; discharge from the regular forces and transfer to the reserve forces. The primary statutory provisions relating to these areas are in the Armed Forces Act 2006 (the Act), sections 328 to 331 and 340². The applicable secondary legislation³ is contained in the Armed Forces (Enlistment) Regulations 2009 and the Armed Forces (Forfeiture of Service) (No.2) Regulations 2009, the Armed Forces (Aliens) Regulations 2009, the Armed Forces (Terms of Service) (Amendment) (No.2) Regulations 2009, the Army Terms of Service Regulations 2007, the Royal Air Force Terms of Service Regulations 2007, the Royal Navy Terms of Service (Ratings) Regulations 2006 and the Royal Marines Terms of Service Regulations 2006.

2. **Reserves.** The primary statutory provisions relating to the Reserve Forces are contained in Schedule 1 to the Reserve Forces Act 1996 and in regulations and orders made under section 4 to that Act. Although the recruiting and selection procedures for enlistment into the Reserve Forces are similar to those for regular Service personnel, those involved in recruiting and enlisting reservists should follow the appropriate single-Service procedures⁴. The terms and conditions of enlistment and service for the Reserve Forces are published in: BR 64 for the RN and RM Reserves; The Regular Reserve Regulations 1997 for the TA; and APs 3391 Volume 3 (RAF Manual of Recruiting) and 3392 Volume 7 (Regulations for the Reserve Air Forces) for the RAF Reserve and the RAuxAF.

Enlistment

3. Although the fundamental procedures for enlistment under the Act do not differ markedly from previous procedures, the Act has introduced a number of important changes to the system and produced a common, tri-Service process.

4. **Recruiting.** Recruiting is the process through which recruiting and selection staffs enable a member of the public to progress from an initial enquiry to enlistment as a member of the armed forces. Following initial enquiry (where the candidate is uncommitted), an information seeker will be advised to contact an armed forces careers office for an armed forces careers enquiry interview, following which an application form is completed⁵. Applicants must be informed before the application form is completed that if accepted for service in the armed forces, they will be required to swear an oath of allegiance to Her Majesty the Queen, see paragraph 8 below, and will become subject to Service law. The Applicant undergoes various recruiting tests and a selection interview; each Service has different procedures⁶, all are lengthy and involve many stages. At the culmination of the recruiting process, the candidate will be issued with an enlistment notice and paper and asked to provide written answers to the questions in the enlistment paper, having been warned by the recruiting officer that it is an offence to provide false answers.

¹ See sections 8 and 9 of the Act and [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) for offences of desertion and absence without leave.

² MSL Volume 3.

³ MSL Volume 3.

⁴ RN BR689, Army TA Regulation 1978 chapter 5, RAF AP3391

⁵ AFCO Form 4.

⁶ RN BR689, Army Recruiting Group Instructions 1978 chapter 5, RAF AP3391.

5. **Recruiting officer.** 'Recruiting officer' means a person who is appointed in accordance with regulations⁷ for the purpose of enlisting persons in the regular forces. A recruiting officer enlists a recruit into the armed forces by conducting the procedure leading to his attestation⁸ as to the validity of the enlistment. Recruiting officers are appointed by the Naval Secretary, Military Secretary and Air Secretary or any officer on their staffs not below the rank of naval captain, colonel or group captain⁹. Recruiting officers will be appointed by the appropriate Service secretary. Recruiting officers will relinquish their status as recruiting officers on being appointed to another post or on leaving the Service, which ever is applicable. No Service person other than a recruiting officer as defined in the regulations may enlist an individual in the armed forces.

6. **Enlistment procedure.** On successful completion of the recruitment process, a candidate undergoes the enlistment¹⁰ procedure. The point of enlistment alters the legal status of the recruit, making the person subject to Service law and is therefore a significant step in a person's life. A recruiting officer will conduct this procedure and attest¹¹ to its validity. The candidate will have been issued with the enlistment notice and paper during the recruiting process and asked to provide written answers to the questions in the enlistment paper, having been warned by the recruiting officer that it is an offence to provide false answers. The enlistment notice sets down the general terms and conditions of enlistment and service and the enlistment paper contains the questions to be answered, the declaration by the person offering to enlist, and the attestation by the recruiting officer. As terms of engagement vary within and between the Services, the enlistment notice and paper provide for additional details to be added, particular to the recruit and to the engagement for which he is offering to enlist. At enlistment, the following procedure is to be followed:

- a. The recruiting officer must warn the person who is to be enlisted that if any false answer is made to the questions put to him during the enlistment procedure, the person will be liable to proceedings for an offence (see paragraph 7 below).
- b. The recruiting officer must read (or cause to be read) to the person wishing to be enlisted, the questions that are set out in the enlistment paper. Recruiting officers must satisfy themselves that the person understands each question and ensure that the person's answer to each question is recorded¹².
- c. The recruiting officer must then ask the person to make and sign the declaration in the enlistment paper that the answers given are true.
- d. The person will be enlisted into the relevant Service once he has signed the declaration.
- e. The recruiting officer must then attest to the validity of the enlistment of the person and confirm that all required procedures have been complied with, by signing the attestation in the enlistment paper. The recruiting officer must then deliver the duly completed enlistment paper to the approving officer, who is a recruiting officer

⁷ The Armed Forces (Enlistment) Regulations 2009, Regulations 2 and 3.

⁸ 'Attestation' is the evidencing of the validity of the process leading to the recruit's enlistment by the recruiting officer, and in particular, the genuineness of the recruit's answers on the form.

⁹ The Defence Council may also appoint any British consul-general, consul or vice-consul and any person duly exercising the authority of a British consul, in a country or territory of which Her Majesty is not head of state, to be a recruiting officer.

¹⁰ "Enlistment" denotes the point at which a recruit becomes a member of the armed forces; that is, when the declaration is made and signed on the enlistment paper.

¹¹ "Attestation" is the evidencing of the validity of the process leading to the recruit's enlistment by the recruiting officer, and in particular, the genuineness of the recruit's answers on the form.

¹² The enlistment notice and paper having been issued and completed at the AFCO, with appropriate caution about making false answers, the policy at enlistment is that the person offering to enlist will be asked to review the answers provided and reminded of the previous caution before being asked to sign the declaration.

within the regulations¹³, but not the same recruiting officer who enlisted the person in the regular forces.

f. When the person is finally approved for service, the approving officer must provide the person with a certified copy of the enlistment paper, if the person requests it.

7. **False answers on enlistment.** It is an offence punishable by the civil or Service justice system if an individual knowingly makes a false statement to a question put to him by a recruiting officer during the enlistment procedure. This provision applies whether or not the individual has become subject to Service law. The maximum punishment in a civil court is a fine not exceeding level 1 on the standard scale¹⁴. At a Court Martial (CM) trial, any of the punishments may be awarded that are listed in rows 2 to 12 of the table at section 164 of the Act. This dual provision enables an individual to be dealt with by the more appropriate justice system depending on whether the individual is enlisted for service or whether he remains in service at the time of any proceedings.

8. **Oath of allegiance.** Whilst the signed declaration made at enlistment is a legal matter, the oath of allegiance¹⁵ has an educational, symbolic and solemn purpose. The swearing may be conducted during the first day of training or if considered more appropriate, at another suitable point, at the convenience of the single-Service. Swearing the oath of allegiance is a requirement of the Services for service in Her Majesty's forces (this is a new provision for the RN because people offering to enter RN service have historically not sworn an oath of allegiance). Swearing the oath of allegiance is viewed as a mark of the individual's loyalty to the Crown and therefore, their willingness faithfully to serve as a member of the armed forces.

9. **Minimum age for enlistment.** The minimum age for enlistment into the armed forces is 16 years. A recruit will be deemed to have (or have not) attained the minimum age when the recruiting officer is so satisfied by the production of a certified copy of an entry in the register of births (birth certificate) or such other evidence as appears to him to be sufficient for these purposes¹⁶. Additionally, a person under the age of 18 years can only be enlisted for regular service if written consent¹⁷ is obtained from all appropriate persons (i.e. people with parental responsibility for him¹⁸), with whom he is living, or if he is not living with an appropriate person, by any appropriate person. Finally, a recruit over the age of 16 years and under the age of 18 years may be enlisted without anyone's consent if no appropriate person exists.

10. **Enlistment for general or corps service (Army).** Although recruits entering service with the RN, RM and the RAF are enlisted into general service, those entering service in the Army will be enlisted into a specific Corps¹⁹. In the event that a soldier is recruited into general service he should be appointed to a corps as soon as reasonably practicable. Soldiers may also be transferred between corps, at their own request, to meet the Army's manning requirements or when a call-out order under sections 52 and 54 of RFA 96 (call out for national danger, etc; call out for warlike operations) is in force²⁰. A variation in the

¹³ The Armed Forces (Enlistment) Regulations 2009.

¹⁴ Section 328(4)(b) of the Act.

¹⁵ Those who, for whatever reason, are unable to swear an oath of allegiance may make a solemn affirmation to the same effect.

¹⁶ This provision allows for the enlistment of UK citizens and other persons born outside the UK from whose country of birth such documentary evidence may not be available.

¹⁷ MOD Form 486, Consent of Parent(s) or Guardian to Enlistment Under the Age of 18 is used for this purpose during the recruiting process.

¹⁸ Within the meaning of the Children Act 1989, the Children (Northern Ireland) Order 1995 or the Children (Scotland) Act 1995.

¹⁹ For the Brigade of Gurkhas, a military recruiting team is permanently stationed overseas and enlistment is carried out by an authorised officer in Nepal.

²⁰ In peace time, a soldier can be transferred compulsorily from one corps to another only by order of a member of the Army Board.

conditions of service of the individual may be made to correspond with the corps to which the individual is transferred. Details of the corps are included in the enlistment paper and this provides protection for the recruit in that he knows in what area he will be employed. The recruit is to be advised that remaining in the corps/trade/branch is subject to certain conditions.

11. **Validity of enlistment.** Where an individual offering to enlist in one of the Services has signed the declaration on the enlistment paper:

- a. Enlistment will not be questioned on the grounds of any error or omission in the enlistment paper.
- b. If the individual shows within 3 months of enlistment that there was an error in the enlistment paper that should deny entry under the Act or on any other grounds except a. above, the individual will be discharged without reserve service liability.
- c. If an error or omission is discovered after that 3-month period the enlistment will be valid, regardless of any non-compliance with enlistment requirements in the Act or on any other grounds.
- d. The individual will be deemed to be a rating, marine, soldier or airman until discharge is effected.
- e. Where an individual has not attained the age of 18 years and he or persons who would have been required to consent to enlistment show that enlistment is invalid, the individual will be discharged on application to the Defence Council, without reserve service liability. This provision is limited to within 3 months of enlistment.
- f. Where an individual has not attained the age of 16 years and he, or persons with parental responsibility, or in whose care he is, show that the enlistment is therefore invalid, the individual will be discharged on application to the Defence Council, without reserve service liability. This provision is limited to within 3 months of enlistment or the day before the individual's 16th birthday, whichever is the later.

An individual who has received pay yet has failed to sign the declaration on the enlistment paper is deemed to be a rating, marine, soldier, or airman until discharged. Discharge on this ground may be claimed at any time.

Restrictions on aliens

12. **Legal provision.** Section 340 of the Act provides that an alien (see paragraph 13 below) may not be a member of the regular forces²¹ nor a member of any of HM forces raised under the law of a British overseas territory, unless he/she satisfies certain prescribed conditions (see paragraph 14 below)²².

13. **Definition of an alien.** An alien is defined, in the British Nationality Act 1981, as a person who is not within one of the following categories:

- a. A British citizen.

²¹ That is to say the Royal Navy, the Royal Marines, the regular army or the Royal Air Force (see section 374 of the Act).

²² An alien is also not permitted to become a member of the reserve forces because an alien is not a British citizen residing in the UK – see s.10 Reserve Forces Act 1996 – although Regulations made under s.4 of that Act can make exceptions to this (e.g. Territorial Army Regulations 1978).

- b. A Commonwealth citizen.
- c. A British protected person.
- d. A citizen of the Republic of Ireland.

14. **Prescribed conditions.** Enlistment to the regular forces is carried out overseas only in restricted circumstances. In such circumstances governors, consul-generals, consuls, vice-consuls or those authorised to act on behalf of a British consul may carry out the enlistment process for individuals from countries outside the dominions. The prescribed conditions by which aliens²³ may be enlisted into the regular forces or a British overseas territory force are laid down in the Armed Forces (Aliens) Regulations 2008, which are made pursuant to section 340 of the Act²⁴. The regulations provide that the exclusion in section 340(1) of the Act do not apply to citizens or nationals of Nepal who:

- a. Serve in the Brigade of Gurkhas; or
- b. having served five or more years in the Brigade of Gurkhas, subsequently transfer to serve in another unit of the regular forces or the forces of a British overseas territory²⁵.

Terms and conditions of service

15. Although pre-existing primary legislation²⁶ has been repealed because the provisions in the Act that replace it are almost identical in scope, the existing single-Service secondary legislation²⁷ has been deemed to have been made under the Act. However, aspects of the existing secondary legislation required updating in light of provisions and policy under the Act; therefore, a further statutory instrument, the Armed Forces Terms of Service (Amendment) Regulations 2008, has been made to make the necessary amendments.

Discharge and transfer to the reserve forces

16. **Discharge.** Members of the regular forces entitled to discharge are to be discharged with all convenient speed, but will remain subject to Service law until such time as the discharge is effected. Discharge must be authorised by the competent Service authority (see [Annex A](#)). Those discharged in the UK are entitled to free travel to the place of residence within the UK. Those serving outside the UK may request free return to the UK for discharge. If a Service person serving outside the UK consents to a delayed discharge, this must be effected within 6 months after arrival in the UK. The 6-month clause provides flexibility for the Services and the individual where it is convenient for the individual to remain in the Service for a short period. Service personnel serving overseas can request to be discharged at the place where they are serving, but no claim can be made thereafter to be returned to the UK or elsewhere.

17. **Right of warrant officers to discharge after reduction in rank.** A warrant officer who has been reduced to the lowest rank or rate²⁸ as a result of a sentence in Service proceedings, has a right to claim discharge unless warlike operations exist or a call-out order

²⁴ See Section 340(2), (3) and (5) of the Act.

²⁵ Gurkha Terms and Conditions of Service (TACOS) are by and large the same TACOS as those of their counterparts in the wider Army. Upon transferring outside the Brigade of Gurkhas, their TACOS are identical to those of their British counterparts.

²⁶ AA and AFA 55 and AFA 66.

²⁷ Royal Navy (Ratings) Terms of Service Regulations 2006, Royal Marines Terms of Service Regulations 2006, Army Terms of Service Regulations 2007, Royal Air Force Terms of Service Regulations 2007.

²⁸ See the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009/1215; certain trades and branches have a minimum rank imposed that is higher than the minimum rank for the Service.

is in force under RFA 96, sections 52, 54 or 56. A claim for discharge should be made within one month of the reduction in rank and discharge must be effected as soon as reasonably practicable. This allows former warrant officers to leave the Service promptly following conviction or administrative reduction in rank or rate if he does not wish to remain in the Service. Details are at [Annex B](#).

18. **Discharge certificate.** All Service personnel of or below the rank of warrant officer are to be given a discharge certificate²⁹ to show prospective employers that they have been legally discharged. The discharge certificate must contain the following information³⁰:

- a. Full name, rank or rate and Service number.
- b. Date and place of enlistment or of commencement of service.
- c. If being discharged having performed duties as a member of the regular forces, a signed assessment by an officer as to conduct and character.
- d. The date of discharge and the Service or corps from which discharged.
- e. Liability, if any, to service in the reserve forces.
- f. The signature of the officer authorising the discharge or of another officer acting on his behalf.

19. **Transfer to the reserve.** Members of the regular forces who are due to be transferred to the reserve remain subject to Service law until that transfer is effected. Transfer to the reserve must be authorised by the competent Service authority (see [Annex A](#)). Those transferred to the reserve in the UK are entitled to free travel to the place of residence in the UK. Personnel serving outside the UK will be returned free of cost and at all convenient speed to the UK for transfer to the reserve; or if an individual consents to a delayed transfer, within 6 months of arrival in the UK. Alternatively, an individual may be transferred to the reserve without being required to return to the UK. The 6-month clause provides the same flexibility as outlined at paragraph 16 above.

20. **Postponement of discharge and transfer to the reserve.** Members of the regular forces may be retained beyond their discharge date or transfer to the reserve date. The maximum extension period that can be authorised for an individual who would have transferred to the reserve is the same as he could have been required to serve if called out as part of his regular reserve liability³¹. For those who would have been discharged, the period for retention is a maximum of 12 months. This period accords with the time that a member of the reserve forces could be retained beyond the end of his current term if call out was authorised under RFA 96, section 52³². Individuals retained may be transferred to the reserve or discharged by the competent authority when services are no longer required. A person entitled to be transferred to the reserve or discharged may by declaration to his CO³³, (see Annexes [C](#) and [D](#)), remain in the Service if warlike operations exist and a call-out order is in force under RFA 96, section 54. He is entitled to give 3 months' notice of this extension to his CO. Periods of extended service count towards reserve service. Individuals on extended service outside the UK are entitled to be discharged or transferred to the reserve in

²⁹ The JPA-generated discharge certificate may be accompanied by a number of separate documents containing the salient information. This information and any valedictory letter that may be provided may vary in format between the Services.

³⁰ The Armed Forces (Discharge and Transfer to the Reserve Forces) (No.2) Regulations 2009, regulation 6.

³¹ Under RFA 96: s.53(6), national danger etc – 3 years; s.55(6), warlike operations – 12 months; s.57(6), certain operations - 9 months.

³² In accordance with the powers under RFA 96, section 17(2).

³³ The Armed Forces (Discharge and Transfer to the Reserve Forces) (No.2) Regulations 2009/1091, regulation 8.

the UK, according with the provisions for individuals serving overseas under normal conditions of engagement.

Forfeiture of service for desertion and absence without leave

21. **Certificate of absence.** The CO of a Service person who is absent without leave is to issue a certificate of absence³⁴ by the eighth day of absence, see [Chapter 10](#) (Absence and desertion). The certificate of absence will remain in force until the Service person who is the subject of the certificate surrenders, is arrested or the certificate is cancelled. The issue of a certificate of absence has the effect on the person in respect of whom it is issued of cessation of entitlement to pay and allowances from the first day of absence until the day of surrender, arrest or cancellation.

22. **Confession of desertion.** If a Service person makes a confession of desertion³⁵, the CO may decide with the consent of the Director Service Prosecutions to dispense with Service proceedings, having taken into account the circumstances of the case and of the person who made the confession. In such cases, the CO must inform the person who made the confession of his decision and of the period of service to be forfeited. Confessions of desertion must be made in writing, to a Service policeman³⁶ during an interview conducted in accordance with the Service Police Code of Practice for the Treatment and Questioning of Persons by the Service Police³⁷. The confession must be written, signed and dated and must include:

- a. The date on which the person deserted.
- b. The place from which desertion occurred.
- c. The date on which and the place at which the person surrendered or was arrested.

23. **Forfeiture of service following conviction for desertion³⁸.** If a Service person is convicted of desertion, the period of service for which he was convicted as a deserter will be forfeited. If service is forfeited, the following rules apply:

- a. The date of enlistment will be deemed to have been the date which precedes the date of conviction by the period of service that has not been forfeited. (i.e. the enlistment date will effectively be moved forward by a period equal to the amount of service forfeited.)
- b. The Service person convicted will be liable to serve for an additional period that is equal to the period in respect of which he was convicted of desertion.
- c. The date on which the Service person convicted will be entitled to be discharged from the regular forces, to end service with the regular forces or to be transferred to a reserve force, will be postponed by an equal period.
- d. If the Service person convicted had previously extended the term of service so as to end at a specified time, the forfeiture will not have the effect of requiring the

³⁴ Section 330(4) of the Act and The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108, regulation 3.

³⁵ A confession to being guilty of an offence of desertion under Section 8 of the Act.

³⁶ Where a reservist fails to report under a call-out notice, the civil police will normally be requested to make an arrest and bring the accused before the local magistrates' court. The confession may therefore be made to a constable and would be admissible in both civil and Service courts.

³⁷ Code C made under section 113(3) and (4) of the Police and Criminal Evidence Act 1984, 1984 c.60. See JSP 397.

³⁸ The Armed Forces (Forfeiture of Service) (No.2) Regulations 2009/1090, regulation 4(2).

person to serve for any period after that time provided that the original term of service for which a person enlisted has been completed before the desertion occurred.

In effect, the Service person's date of enlistment and the date on which he is entitled to be discharged will be deemed to be postponed by a period of additional service equal to the period of desertion.

24. **Forfeiture of service following confession of desertion**³⁹. If a Service person makes a confession of desertion and the CO decides to dispense with Service proceedings, service is forfeited according to the following rules:

- a. The date of enlistment will be deemed to have been the date which precedes the date of the CO's decision by the period of service that has not been forfeited. (i.e. the enlistment date will effectively be moved forward by a period equal to the amount of service forfeited.)
- b. The Service person who confessed will be liable to serve for an additional period equal to the period admitted as desertion.
- c. The date of entitlement to discharge from the regular forces, to end service with the regular forces or to be transferred to a reserve force, will be postponed by an equal period.
- d. The CO may decide that the person who confessed is not required to serve for an additional period under sub-paragraph b or that only a specified part of the period on absence is to be forfeited.

In effect, service is forfeited in the same way as after a conviction for desertion, although at the CO's discretion, the requirement to forfeit all or part of the period of absence may be waived.

25. **Restoration of forfeited service.** Where service has been forfeited for desertion, the Defence Council may restore the whole or part of the forfeited service if they consider it expedient or desirable to do so because of any circumstances which they consider to be relevant, for example, the person's distinguished, gallant or other conspicuous conduct during the period since the desertion ended. If the forfeited service is restored by the Defence Council, the following rules apply:

- a. The additional period of service equal to the period of desertion will be reduced by the period of restored service.
- b. The date of entitlement to discharge from the regular forces or transferred to the reserve will be adjusted accordingly.
- c. The date on which regular service ends or of transfer to the reserve force in accordance with the person's engagement will not be affected by the restoration of service.

In effect, the period of forfeited service will be reduced by the period of service deemed to have been restored by the Defence Council. The date on which regular service ends or of transfer to the reserve forces in accordance with the Service person's engagement will not be affected by the restoration of service.

³⁹ The Armed Forces (Forfeiture of Service) (No.2) Regulations 2009/1090, regulation 4(3).

Transitional guidance

26. Although the primary and secondary legislation concerning terms and conditions of enlistment and service largely replicate the provisions under the single Service Discipline Acts, there are some important changes made under the Armed Forces Act 2006. Regulations and therefore procedures have been harmonised in some areas, as well as having been updated. Transitional provisions will exist in some areas. For example, attestation or entry papers completed before implementation of the 2006 Act (ie before 31 October 2009) will be deemed to have been completed after implementation where the papers were completed before implementation, but the act of enlistment took place after implementation. Recruiting officers who were in post as authorised recruiting officers before implementation will be recruiting officers under the 2006 Act, if they remain in post after implementation. These are simple examples of where transitional provisions occur; there are others in the areas of enlistment, terms and conditions of service, discharge and transfer to the reserve, and forfeiture of service. Staff legal advice should be sought where an action or event occurs immediately before or after implementation, or spans the period immediately before and after implementation.

COMPETENT SERVICE AUTHORITIES

1. RN and RM competent authorities.

RN AND RM COMPETENT AUTHORITIES FOR TCOES (RN RATINGS AND RM OTHER RANKS)		
Item No	Column 1	Column 2
	Reason	Competent Naval Authority (as delegated by the Naval Secretary)
1	Determining the length of service in the reserve	NPT(Res) Team Leader (TL)
2	Approving the continuance in service in the Naval Service	DNPS, NPT TLs, NPT Career Managers, NPT Requirement Managers
3	Approving the re-entry of personnel to the Naval Service	CNR
4	Publishing and providing forms of consent and notices under TCOES regulations	DNPers, DNPS, NPT TLs

DISCHARGE AND TRANSFER TO THE RESERVE (RN RATINGS AND RM OTHER RANKS)		
Item No	Column 1	Column 2
	Reason	Competent Naval Authority (as delegated by the Naval Secretary)
1	Discharge Service No Longer Required (SNLR) - Unruly Behaviour, CDT, Drug Abuse	DNPers, DDNPers
2	Discharge Shore – Medical	DNPers, DDNPers
3	Discharge Shore – Best interests of the Service	DNPers, DDNPers
4	Discharge Shore – Inadequacy	DNPers, DDNPers
5	Discharge Shore – Alcohol	DNPers, DDNPers
6	Discharge Shore – TU (Remediable)	DNPers, DDNPers
7	Discharge Shore – Failure of NAPWT	DNPers, DDNPers, NPT TLs
8	Discharge Shore – Financial Irresponsibility	DNPers, DDNPers, NPT TLs
9	Discharge Shore – Persistent RNFT failure	DNPers, DDNPers, NPT TLs
10	Discharge Shore – Unsuitable During Training	DNPers, DDNPers, NPT TLs
11	Discharge Shore – TU (Irremediable)	DNPers, DDNPers, NPT TLs, COs of Captain rank (in certain circumstances)
12	Discharge Shore – Unhappy Under 18 year olds	DNPers, DDNPers, NPT TLs, COs of Captain rank (in certain circumstances)
13	Discharge Shore - Obesity	DNPers, DDNPers, NPT TLs, COs of Captain rank (in certain circumstances)

14	Compassionate Discharge	DNPers, DDNPers, NPT TLs, COs of Captain rank (in certain circumstances)
15	Conscientious Objection	DNPers, DDNPers
16	Approve transfer to the Reserve	NPT Career Managers
17	Postponement of an individual's discharge or transfer to the Reserve	DNPS, NPT TLs
18	Landing of ratings	DNPers, DDNPers, NPT TLs
19	SNLR, Shore & Reversion of ratings as a result of Service Penalty	DNPers, DDNPers, NPT(LM)TL

2. Army competent authorities.

COMPETENT ARMY AUTHORITIES FOR TCOES AND TO AUTHORISE DISCHARGE		
Item No	Column 1	Column 2
	Reason or Grounds for Discharge	Competent Army Authority
1	Transfer to the regular reserve - by right, having given appropriate notice.	CO
2	Transfer to the regular reserve - on payment.	CO
3	Transfer to the regular reserve - on compassionate grounds	GOC
COMPETENT ARMY AUTHORITIES TO AUTHORISE DISCHARGE		
Item No	Column 1	Column 2
	Reason or Grounds for Discharge	Competent Army Authority
4	Transfer to the regular reserve – at soldier's request.	DM(A)
5	Transfer to the regular reserve – after 16 years service	CO
6	Not finally approved for service.	Recruiting Officer
7	Defective enlistment	CO
8	False answer on enlistment	CO
9	Unsuitable for service	CO
10	On medical grounds.	DG APC/CO
11	Temporarily medically unfit	DG APC
12	Permanently medically unfit	DG APC
13	Reached age limit for service	CO
14	By right having given notice	CO
15	From extended Service, having given notice	CO
16	From recruit training	CO
17	After reduction in rank	CO
18	Completion of engagement	CO
19	On family grounds	CO
20	On sentence of dismissal by a CM	CO
21	On sentence of dismissal with disgrace by a	CO

	CM	
22	Termination of extended service - WO1 - WO2 - SNCO - JNCOs and Privates	DM(A) GOC Bde/Garrison Commander CO
23	At soldier's request – on payment	CO
24	At soldier's request – after completion of 16 year's Service	CO
25	At SOLDIER'S REQUEST - more than 22 year's service	CO
26	At soldier's request – on compassionate grounds.	GOC
27	No longer required – after civil conviction.	Bde/Garrison Commander
28	No longer required - misconduct	Bde/Garrison Commander
29	Retention undesirable	Bde/Garrison Commander
30	Unsuitable for further service – psychopathic delinquent	GOC
31	Appointment to a commission	DG APC
COMPETENT ARMY AUTHORITIES TO AUTHORISE DISCHARGE		
Item No	Column 1	Column 2
	Reason or Grounds for Discharge	Competent Army Authority
32	Re-enlisting on another engagement	DG APC
33	On reduction in establishment	DG APC
34	Change in Corps requirement	DG APC
35	Not required for further army service – failing to reach standard	Bde/Garrison Commander
36	Not required for army service – below physical entry standard	CO
37	Not required for full army career.	DG APC
38	Services no longer required	DM(A)
39	All transfers to the reserve or discharge	DM(A) is the competent Army authority to authorise any transfer to the Reserve or discharge under any of the relevant headings and may exceptionally do so even if the terms, as laid down in Queen's Regulations for the Army applicable to any particular cause of transfer to the Reserve or discharge concerned have not been complied with fully.

3. **Competent RAF authorities.**

a.

COMPETENT AIR FORCE AUTHORITIES FOR TCOES		
Item No	Column 1	Column 2
	Reason or Grounds for Discharge	Competent Air Force Authority
1	For the purpose of approving an application to change engagement.	Air Sec
2	For the purpose of approving an application to transfer to the reserve by a person in air force service.	Air Sec
3	For the purpose of approving the revocation of consent to the restriction of rights.	Air Sec
4	For the purpose of approving a shorter term of service in the reserve.	Air Sec
5	For the purpose of consenting to the conversion of terms of service of a person in air force service.	Air Sec
6	For the purpose of consenting to the continuance of service of a person in air force service.	Air Sec
7	For the purpose of consenting to the continuance of service of a person in air force service on an open engagement in the Princess Mary's Royal Air Force Nursing Service who is unable to complete 22 years' service before the date of his 55th birthday	Air Sec

b.

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
1	On expiration of a non-pensionable engagement or at own request having given 18 months' notice or on application for premature voluntary release before completing time for pension.	Air Sec	Air Sec	Air Sec	Air Sec
2	With a view to Service pension,	Air Sec	Air Sec	Air Sec	Air Sec

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
	having completed time for pension.				
3	At own request with a view to Service pension or within 3 months of the end of engagement in order to take up civil employment.	Air Sec	Air Sec	Air Sec	Air Sec
4	For misconduct or following civil conviction.	CINC	AFB	AFB	AFB
5	At the discretion of the competent authority in the following circumstances:				
	(a) in the case of voluntary withdrawal from training by:				
	1. officer cadets undergoing initial officer training	Commandant RAF College & Director of Recruitment(RAF)			
	2. trainee non-commissioned aircrew prior to the award of a flying badge.		CO		
	(b) in the case of an airwoman because of pregnancy.	Air Sec	Air Sec	Air Sec	Air Sec
	(c) in the case of an airman who cannot be discharged under any other heading.	Air Sec	Air Sec	AFB	AFB
	(d) in the case of a directly entered List 1 medical trainee or a directly	(i) The Deputy CINC Air Command (ii) Air Sec			

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
	entered technician who is withdrawn from training or who fails on passing out and is unwilling to be remustered to, or trained for, another trade.				
	(e) in the case of an airman who is withdrawn from, or fails, trade training and cannot be offered training in another trade because he is unsuitable for trades in which there are vacancies or there are no vacancies in trades for which he is suitable.	Air Sec			
	(f) in the case of an airman who elects to be discharged in lieu of compulsory transfer/ remustering from a sensitive trade or who applies for discharge after failing to qualify for remustering at his rank level.	Air Sec		AFB	
	(g) in the case of an airman who is medically unfit for his present trade and has declined an offer of employment in a suitable	Air Sec		Air Sec	

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
	alternative trade.				
	(h) in the case of an airman who, through circumstances beyond his control is medically unfit for the full range of duties in his trade or category and the individual considers that the resultant effect on his career prospects is unacceptable.	Air Sec	Air Sec	Air Sec	Air Sec
	(i) in the case of an airman who is withdrawn from recruit training.	CO			
6	Compassionate grounds.	Air Sec	Air Sec	Air Sec	Air Sec
7	On appointment to a commission.	CO	CO	CO	CO
8	Invalidated				
	(a) below current air force medical standards.	Air Sec	Air Sec	Air Sec	Air Sec
	(b) physically unfit for air force service as aircrew.		Air Sec		Air Sec
9	Not likely to maintain the required air force medical standard				
	(a) in the case of an airman whose disabilities are discovered on medical examination within 21 days of enlistment.	CO	CO		

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
	(b) in the case of an airman discharged within 6 months of enlistment.	CO	CO		
10	In the case of a non-commissioned aircrew found medically unsuitable for air force service as aircrew but not physically unfit for ground duties.		(i) Air Sec (ii) CO in the case of directly entered aircrew cadets		Air Sec
11	In the case of an airman found to be unsuited to a Service environment.	Air Sec	Air Sec	AFB	AFB
12	Having given a false answer on attestation or having made a misstatement on enlistment.	Air Sec	Air Sec		
13	For inefficiency.	CINC	AFB	AFB	AFB
14	Services no longer required				
	(a) in the case of an airman found to be unsuitable during recruit training.	CO	CO		
	(b) in the case of an airman found to be unsuitable in trade, category or rank.	CINC	AFB	AFB	AFB
	(c) in the case of an airman who cannot be allowed to remain in the Service because he is unable to meet Service obligations	Air Sec	Air Sec	Air Sec	Air Sec

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
	through circumstances beyond his control or because of a permanently reduced medical employment standard for whom a medical discharge would not be appropriate.				
15	Not likely to reach the standard required for air force service				
	(a) in the case of officer cadets who fail initial officer training.	Commandant RAF College and Director of Recruitment (RAF)			
	(b) in the case of non-commissioned aircrew who fail training prior to the award of a flying badge.		CO		
16	In the case of non-commissioned aircrew found to be below the required standard for air force service other than those under item 19.		Air Sec		
17	In the case of non-commissioned aircrew who fail OCU training prior to giving productive aircrew service.		Air Sec		
18	In the case of a Warrant			Air Sec	Air Sec

COMPETENT AIR FORCE AUTHORITIES TO AUTHORISE DISCHARGE					
Item No	Column 1	Column 2			
		Competent Air Force Authority			
	Reason or Grounds for Discharge	Ground Trades other than Warrant Officer	Non Commissioned Aircrew other than MACR	Warrant Officers	MACR
	Officer/MACR who is reduced to the ranks and claims discharge.				
19	On redundancy.	Air Sec	Air Sec	Air Sec	Air Sec
20	In the case of an airman who is surplus to requirements in a specific trade and rank.	Air Sec	Air Sec	Air Sec	Air Sec
21	Statutory right of recruits in phase 1 training.	CO	CO		

WARRANT OFFICER'S RIGHT TO DISCHARGE ON REDUCTION IN RANK

1. A warrant officer (WO) who has been reduced to the lowest rank or rate⁴⁰ as a result of a sentence in Service proceedings, has a right to claim discharge unless warlike operations exist or a call-out order is in force under RFA 96, sections 52, 54 or 56. A claim for discharge should be made within 28 days of the reduction in rank and discharge must be effected as soon as reasonably practicable. This allows a former WO to leave the Service promptly following conviction or administrative reduction in rank or rate if he does not wish to remain in the Service.
2. Where a CM sentence is suspended, the 28 days do not begin to run unless the sentence is activated. If the sentence is activated, the 28 days will run from the date of the activation.
3. Where the CM's sentence is one of immediate custody, but the CM grants bail when passing sentence, the WO does not (yet) have a right to claim discharge because the effect will be to prevent the sentence from taking effect. If bail is withdrawn before the appeal is heard, or the appeal is abandoned, or the CMAC confirms the sentence, the 28 days will begin to run. If the CMAC substitutes another sentence involving reduction to the ranks (without bail being previously withdrawn), the WO gains the right to claim discharge and the 28 days begin to run. If the CMAC quashes the conviction (without bail being previously withdrawn), or substitutes another sentence not involving reduction to the ranks, the WO does not acquire the right to claim discharge.
4. Where the CM's sentence is one of immediate custody and bail is granted after the WO has begun to serve the sentence, the WO may not claim discharge if he has not already done so. It does not matter for this purpose whether the grant of bail in these circumstances will have the effect of restoring the WO's rank/rate. If the 28 days do not start to run because bail is granted, it starts to apply again if bail is withdrawn, or the CMAC confirms the sentence, or the CMAC substitutes another custodial sentence or sentence of detention (unless it is suspended), or the CMAC substitutes a sentence of reduction to the ranks. If the CM granted bail and it was not withdrawn before the appeal was heard and the 28 days did not therefore begin to run (the right to discharge did not yet occur), the WO can claim the right to discharge if the CM's sentence was not such as to involve reduction to the ranks but the CMAC's sentence was or the CM's sentence was such a sentence and so is the sentence substituted by the CMAC.
5. A WO may not claim discharge (if he has not already done so) where, within the 28 days, the Court Martial Appeal Court (CMAC) quashes the conviction. Similarly, a WO may not claim discharge (if he has not already done so) where, within the 28 days, the CMAC substitutes another sentence which would not itself involve immediate reduction to the ranks (if such reduction had not already occurred). However, there may be exceptions to this general rule as demonstrated in the case studies below.

⁴⁰ See the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009/1215; certain trades and branches have a minimum rank imposed that is higher than the minimum rank for the Service.

Case Studies

1. A WO is convicted of offences A and B and awarded detention for A and a fine for B. The CMAC quashes the conviction of A, but (under CMAA68 s.13) substitutes a sentence of reduction to the ranks for B. In this case the WO does not lose the right to claim and the 28 days continues to run.

2. The CMAC quashes a conviction but orders a retrial. At the retrial, the WO is sentenced to reduction to the ranks or an immediate custodial sentence or an immediate sentence of detention. The 28 days start to run afresh. Likewise, if at the retrial, the WO is given a suspended sentence and that sentence is later activated, the 28 days start to run on activation.

6. If a sentence substituted by the CMAC would itself involve immediate reduction to the ranks (for example, the CM's sentence was immediate detention and the CMAC substituted reduction to the ranks) the 28 days continue to run. If the sentence substituted by the CMAC is a suspended sentence, the WO loses the right to claim discharge because the WO rank/rate will be restored. If the suspended sentence is later activated, the 28 days start to run afresh.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX C TO
VOL1 CH 18
JSP 830 MSL
revised 08/09

DECLARATION OF AGREEMENT TO REMAIN IN THE REGULAR FORCES

T-SL-TCES01

Declaration made under regulation 8 of the Armed Forces (Forfeiture of Service)(No.2) Regulations 2009.

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corp)

In accordance with regulation 8 of the Armed Forces (Forfeiture of Service)(No.2) Regulations 2009, I hereby declare that I agree to continue to serve in the regular forces while a call-out order under section 52 or 54 of the Reserve Forces Act 1996 is in force.

Provided that I shall have the right to be discharged transferred to the reserve forces at the end of three months' notice given by me to my commanding officer.

Date

Signature of member of the regular forces

Signature of witness

Name of witness

Address of witness

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX D TO
VOL1 CH 18
JSP 830 MSL
revised 08/09

ELECTION TO POSTPONE DISCHARGE OR TRANSFER TO THE RESERVE

T-SL-TCES02

Election made under regulation 8 of the Armed Forces (Forfeiture of Service)(No.2) Regulations 2009.

Service number

Rank/Rate

First name

Family name

Army only - (Regt/Corp)

In accordance with regulation 8 of the Armed Forces (Forfeiture of Service)(No.2) Regulations 2009, I hereby irrevocably elect to be a person to whom regulation 14 of those regulations applies.

Date

Signature of member of the regular forces

Signature of witness

Name of witness

Address of witness

PROTECT - PERSONAL DATA (WHEN COMPLETE)

1-18-D-1

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Chapter 19

Service of process

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Chapter 19

Service of process

Introduction

1 This chapter provides guidance to the commanding officer (CO) and those advising him on procedures when the CO is served with any process (see paragraph 2 below) in relation to maintenance proceedings against a Service person¹ under his command; see also [Chapter 3](#) (Jurisdiction and time limits). The maintenance may be for the spouse or civil partner of the person against whom the order is made, a child of that person or of the spouse or civil partner, or any other child treated as a child of the family. The maintenance proceedings may be for a maintenance order, variation of an order already made, revocation of a maintenance order, or the revival of an old maintenance order where circumstances have changed. A maintenance order for the purposes of the regulations means an order made or registered in or confirmed by a court² in the UK.

2. Service of process means the actions required by the court to bring documents used in court proceedings to a party's attention. This can be difficult when a Service person is serving overseas or lives in Service single accommodation. Service authorities³ are not generally responsible for the service of court documentation⁴ on Service personnel who, in their private affairs, are party to legal proceedings in the civil courts in the UK or abroad. However, regulations⁵ made under section 355 of the Armed Forces Act 2006 (the Act) provide for such documentation in relation to maintenance proceedings to be served on the CO instead of directly on the Service person. The CO cannot delegate any of his functions in relation to service of process. These regulations do not apply to relevant civilians.

Court jurisdiction

3. Service of maintenance proceedings issued in the Magistrates Court or other equivalent court is not effective outside the UK. If the proceedings have been issued in the County Court or High Court or other equivalent court, this restriction does not apply and they can be served anywhere in the world. In case of doubt, staff legal advice should be sought.

Service of maintenance proceedings

4. If a CO receives such court documentation (unless paragraph 6 applies), he must as soon as reasonably practicable hand the documentation to the Service person who is party to the proceedings and inform him that he is to report to the CO the conclusion of the court proceedings.

5. Service on the CO (or on the Service person) will be regarded as having taken place on the day shown in the table below, subject to the exceptions in paragraph 6:

¹ See section 367(1) and (2)(a), (b), (c) or (e) of the Act for the definition of a person subject to Service law.

² The statutory provisions which apply are: The Maintenance Orders (Facilities for Enforcement) Act 1920 or registered in such a court under Part 1 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 or Part 1 of the Civil Jurisdiction and Judgements Act 1982 or Council Regulation (EEC) No 44/2001.

³ See single Service guidance (QRRN Chapter 58, especially Articles J.5808 and J.5809; Army QR 6.180 and AGAI 65; RAF J1804) for guidance on service of any civil proceedings except maintenance.

⁴ Court documentation which includes summons, writs, judgements, applications and directions.

⁵ The Armed Forces (Service of Process in Maintenance Proceedings) Regulations 2009/1093.

Method of service	Day of service
First class post (or alternative service which provides for delivery on the next working day).	The second day after it was posted
Delivering the document to or leaving it at a permitted address	The day after it was delivered to or left at the permitted address
Facsimile (Fax)	If it is transmitted on a business day before 4pm, on that day; in any other case, on the business day after the day on which it is transmitted
Other electronic method	The second day after the day on which it is transmitted

Circumstances where service has no effect

6. Where any court documentation is served on the CO, service is not effective if within 21 days of the date on which the process is served, the CO certifies to the court that the Service person is:

- a. On active service. For these purposes, active service is defined as: an action or operation against an enemy; an operation outside the British Islands for the protection of life or property; the military occupation of a foreign country or territory;
- b. Under orders for active service and it would not be reasonably practicable for the Service person to comply with the requirement of the process; or
- c. Absent without leave.

7. It is for the CO to decide whether it would be reasonably practicable for the Service person to comply with the requirement of the process when he is under orders for active service or on active service, for example, the Service person's ability to attend a hearing, or produce documentation or information requested. Where a Service person is under orders for active service (whether on pre-deployment training or about to deploy) and in the CO's view it would not be reasonably practicable for him to attend the hearing, the CO may determine that service has no effect. If in doubt, the CO should seek staff legal advice. In such circumstances, the CO should complete the Certificate of non-effective service at [Annex A](#) and return it along with the process to the court, as soon as reasonably practicable.

8. The Service person should be informed as soon as reasonably practicable of the action taken by the CO and be provided with a copy of the certificate. Additionally the Service person is to be informed of the requirement to report to the CO the conclusion of the court proceedings. A copy of the certificate is to be retained until the CO has been notified that the proceedings have been concluded. This is in case of any legal challenge.

Transitional guidance

9. Generally, service of process, on a Service person or that person's CO, before implementation of the Act (ie before 31 October 2009) will be deemed to have been effected under the Act⁶. Under the Act⁷, with respect to cases in which service of process is to be of no effect, reference to service of process includes service on a Service person's CO before

⁶ Section 355 of the Act.

⁷ Section 355(2)(b) of the Act.

commencement. Transitional arrangements apply in some areas; staff legal advice should be sought where an action or event occurs immediately before or after implementation, or spans the period immediately before and after implementation.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX A TO
VOL1 CH 19
JSP 830 MSL
revised 08/09

CERTIFICATE OF NON-EFFECTIVE SERVICE

TS-SL-SOP01

Regulation 4 Armed Forces (Service of Process in Maintenance Proceedings) Regulations 2009)

Court

Case number

Applicant (name of applicant)

Respondent (name of service person concerned)

Ship/unit/establishment

Rank (Commanding Officer)

Name (Commanding Officer)

I hereby acknowledge service of the following documents

Document 1

Document 2

Document 3

Document 4

has not been effected on the Respondent.

In accordance with the provisions of section 355 of the Armed Forces Act 2006 and regulation 4 of the Armed Forces (Service of Process in Maintenance Proceedings) Regulations 2009, I certify that the Respondent is:

- On active service, or
- Under orders for active service and it would not be reasonably practicable for the service person to comply with the requirements of the court documentation, or
- Absent without leave.

Signature

Address

Date

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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Chapter 20

Forfeitures and deductions

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Chapter 20

Forfeitures and deductions

Introduction

1. **General.** Any Service person¹ may be liable to have his pay² forfeited or have deductions made from his pay in certain specified circumstances in consequence of the provisions of The Armed Forces (Forfeitures and Deductions) Regulations 2009 ('the Regulations') made under the Armed Forces Act 2006 (the Act)³. Pay may be forfeit, that is a person may lose his right to pay, for any period of absence from duty specified in the Regulations. Pay may be deducted, or reduced in amount, to meet any specific sums, including outstanding fines and Service compensation orders (SCO). Deductions from pay may also be authorised in respect of prescribed maintenance orders, assessments or calculations or in satisfaction of judgement debts.
2. **Authorised forfeitures and deductions.** Further guidance and policy on implementing, effecting and enforcing forfeitures and deductions is contained in JSP 754 (Tri-Service regulations for pay and charges⁴), where such forfeitures and deductions are made in accordance with the Regulations. In addition, JSP 754 may authorise certain deductions which are outside the scope of the Regulations⁵. However, it is important to note that JSP 754 does not and must not authorise the forfeiture of pay⁶ nor does it authorise any deduction from Service pay that is within the scope of the Regulations. JSP 754 should always be consulted where consideration is being given to making an order for forfeiture or deductions of pay under the Regulations.
3. **Limitations.** A Service person must always remain in receipt of a minimum rate of pay, notwithstanding any order for deductions⁷ to which he may be subject. This minimum rate is prescribed by the Armed Forces (Forfeiture and Deductions) (Minimum Rate of Pay) Regulations 2009 and further guidance is contained at JSP 754 (Tri-Service regulations for pay and charges).

Forfeiture: Absence from duty

4. Under the Regulations, the Defence Council, or authorised officer⁸, can make orders authorising the forfeiture of the pay of a Service person in respect of certain periods of absence from duty set out at paragraphs 5 to 10 below.
5. **Absence amounting to an offence.** A Service person may have his pay forfeit in respect of the following:
 - a. Any day during which he was absent from duty and in respect of which the Defence Council, or authorised officer, is satisfied that the conduct of the Service person amounts to an offence of desertion or absence without leave⁹; or

¹ See glossary for definition of a Service person and [Chapter 3](#) (Jurisdiction and time limits).

² Any amount authorised to be deducted from the pay of a person subject to Service law may also be deducted from any bounty, allowance or grant which may be due to him – section 341(6).

³ Sections 341 and 342 of the Act.

⁴ Schedule to the Royal Warrant made under section 333 of the Act.

⁵ Sections 333(3) and (4) of the Act.

⁶ Section 333(5) of the Act.

⁷ Section 341(4) of the Act. The Service person may agree to further deductions, but in any event there will be – if the deductions are insufficient to meet the liability in question (e.g. a civil court judgment) – an accrual of arrears in respect of that liability, which will be enforceable until the liability is absolved.

⁸ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 3(1). Authorised officers are listed in MSL Vol 3.

b. Any day during which he was absent from duty and in respect of which the Defence Council, or authorised officer, is satisfied that the conduct of the Service person amounts to an offence under section 97(1)(a) of the Reserve Forces Act 1996 of failing to attend, in the case of a full-time service commitment, to begin the period of full-time service contemplated by the commitment¹⁰.

6. Where the Service person has been found guilty of an offence of desertion or absence without leave, reference to the memorandum of conviction or record of summary hearing should be sufficient for the Defence Council, or authorised officer, to be satisfied that the conduct of the Service person amounts to an offence of desertion or absence without leave. However, care must be taken in those cases where there has been no finding of guilt in respect of a charge of desertion or absence without leave. These cases are likely to arise where a decision has been made that it is not in the public, including Service, interest to prosecute the Service person or where he is still a deserter or absent. Further guidance as to when it may be appropriate to dispense with Service proceedings following desertion is contained at [Chapter 10](#) (Absence and desertion).

7. In those cases where there has been no finding of guilt, the Defence Council, or authorised officer, should adopt a similar approach to the evidence as they would at a summary hearing of the matter. They should be satisfied that all the elements of the offence are established by reference to the evidence and should consult the guidance contained at [Chapter 7](#) (Non-Criminal Conduct (Disciplinary) Offences), and [Chapter 10](#) (Summary Hearing, Dealing with Evidence). Similarly, care should be taken where the Defence Council, or authorised officer, exercise their powers outlined at paragraph 5b above, authorising forfeiture of pay. Again, they should be satisfied that all the elements of the offence are established by reference to the evidence¹¹.

8. **Time spent in detention or imprisonment.** A Service person may have his pay forfeited in respect of the following:

a. Any day of imprisonment or detention awarded under the Act and served by him¹². This embraces all custodial sentences and hospital orders which may be imposed by the Court Martial (CM), along with all sentences of detention which may be imposed by the CM or at summary hearing¹³. It should be noted, however, that where a Service person is held in either pre-charge or post-charge custody, he will remain in receipt of his pay as normal¹⁴ on the basis of the legal presumption of innocence until proven guilty. Pay may only be forfeit for a period in post-charge custody where there is a subsequent finding of guilt and the CM or officer directs that the time in post-charge custody will count as time served towards any sentence of detention or detention imposed¹⁵; or

b. Any day of absence from duty by reason of imprisonment or detention to which he is liable in consequence of an order or sentence of a civilian court anywhere¹⁶. It should be noted that where a Service person is held remanded in custody before or during trial, he will remain in receipt of his pay as normal¹⁷ on the

⁹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 3(1)(a) and 3(3).

¹⁰ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(a) and 3(3).

¹¹ In cases where there has been a finding of guilt reference to the memorandum of conviction or record of summary hearing should suffice.

¹² The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(b) and (c).

¹³ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(2).

¹⁴ JSP 754 (Tri-Service regulations for pay and charges).

¹⁵ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(b).

¹⁶ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(c), (d) and (e). This provision embraces ECHR and non-ECHR countries. Legal advice should always be sought where forfeiture of pay is being considered in respect of periods of detention or imprisonment overseas.

¹⁷ JSP 754 (Tri-Service regulations for pay and allowances).

basis of the legal presumption of innocent until proven guilty. Pay may only be forfeit for this period where the Service person is subsequently convicted of an offence and the court directs that the period spent remanded in custody will count as time served towards any sentence of imprisonment or detention imposed.

9. **Time spent captured by the enemy.** Any Service person who is absent from duty in consequence of having been captured by the enemy will continue to receive his pay. However, the Service person's pay may be forfeited where his capture by the enemy or continued absence was caused by an intentional breach of duty, a failure to escape or where he has been assisting the enemy, as outlined below:

a. **Intentional breach of duty¹⁸.** In these cases the Defence Council, or authorised officer, must firstly be satisfied that the Service person has been found guilty of an offence under Part 1 of the Act. This may be established by reference to the memorandum of conviction or record of summary hearing. Secondly, the Defence Council, or authorised officer, must be satisfied that the Service person was captured by the enemy as an immediate consequence of the conduct forming the subject matter of that offence and his intentional breach of duty. Clear evidence, including witness, documentary and real evidence, will be required to establish these facts and legal advice should be sought in this regard; or

b. **Failure to escape¹⁹.** In these cases the Defence Council, or authorised officer, must firstly be satisfied that the Service person has been convicted of the offence of failure to escape under section 5(2) of the Act. This may be established by reference to the memorandum of conviction. Secondly, the Defence Council, or authorised officer, must be satisfied that the Service person was absent in consequence of that failure to escape. Clear evidence, including witness, documentary and real evidence, will be required to establish these facts and legal advice should be sought in this regard; or

c. **Assisting an enemy²⁰.** In these cases the Defence Council, or authorised officer, must be satisfied that the Service person has been convicted of an offence of assisting the enemy under section 1(2) of the Act over the period of absence in question. This may be established by reference to the memorandum of conviction.

10. **Sickness or injury resulting from an offence of which found guilty.** The general principle is that where a Service person is absent from duty due to sickness or injury he will continue to be paid for the duration of his absence. However, the Service person's pay may be forfeited where the Defence Council, or authorised officer, is satisfied of each of the following²¹:

- a. There was a period of absence due to sickness or injury²²; and
- b. That sickness or injury was contributed to or caused by the Service person's own conduct²³; and
- c. The Service person has been found guilty of an offence under the Act in respect of that conduct²⁴.

¹⁸ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(g).

¹⁹ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(h).

²⁰ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(i).

²¹ The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(f).

²² This should be established by clear evidence, including witness, documentary and real evidence.

²³ This should be established by clear evidence, including witness, documentary and real evidence.

²⁴ This may be established by reference to the memorandum of conviction or record of summary hearing.

11. The offences to which this guidance is most applicable are those of malingering under section 16(1) of the Act²⁵. However, any other offence which results in injury to the offender (such as injuries received during an assault on another person, whilst causing criminal damage or as a result of dangerous driving) may also result in the forfeiture of pay.

Remittance of forfeitures

12. Under the Act, the Defence Council, or authorised officer, have a statutory power enabling them to remit any forfeiture imposed as a result of absence from duty (see paragraphs 4 to 10 above)²⁶. The Defence Council, or authorised officer, should exercise their power to remit any forfeiture whenever an order for forfeiture of pay should not have been made. This will be the case where an order forfeiting pay was made on the basis of a finding of guilt under the Act which was subsequently overturned on appeal. The requirement to remit an order for forfeiture may also arise where new evidence comes to light casting doubt on an earlier decision to order the forfeiture of pay. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

Forfeiture: Service supervision and punishment order (SSPO)

13. Whilst the forfeiture of pay in paragraphs 5 to 11 above results from a Service person's absence from duty, receiving the punishment of a SSPO²⁷ will also result in pay being forfeit. An SSPO is designed to punish and reform offenders without the need for detention and accordingly, during a period of an SSPO, a Service person will not be absent from duty.

14. The forfeiture of pay pursuant to an SSPO is mandatory, pursuant to section 173 of the Act and provides that the offender shall forfeit one-sixth of his gross pay²⁸ for the duration²⁹ of the SSPO. See also [Chapter 13](#) paragraph 84 for further detail (Summary hearing sentencing and punishments).

Deductions: Payment of civilian (criminal) penalties

15. **Orders by civilian courts.** Where a relevant person (a Service person other than a member of the reserve forces undertaking any training or duty)³⁰ has been ordered by a civilian³¹ (criminal) court anywhere to pay an amount of money (e.g. by way of fine, penalty, damages, compensation or costs), then the Defence Council or authorised officer may order deductions from that person's pay in satisfaction of that amount (or part thereof).

16. **Limitations.** Deductions may only be authorised in respect of orders made by civilian (criminal) courts where the amount (or part thereof) required by the court order has been paid by or on behalf of a Service authority³². A Service authority should only make payment of an amount (or part thereof) due under an order of a civilian (criminal court) where the order is recognised as legitimate and where non-payment of such an amount is likely to result in enforcement action which will render the relevant person unavailable for Service

²⁵ That is to say, by any act or omission, caused, aggravated or prolonged any injury he had, or caused another person to injure him. See [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) for full details of the ingredients of the offence).

²⁶ Section 342(3) of the Act.

²⁷ Sections 173 and 174 of the Act and [Chapter 13](#) (Summary Hearing Punishments).

²⁸ i.e. full pay (excluding allowances) before deduction of income tax and earnings related National Insurance contributions.

²⁹ An SSPO can be imposed for 30, 60 or 90 days – see section 173(2) of the Act and [Chapter 12](#) (Defences, mitigation and criminal responsibility).

³⁰ Section 342(4) of the Act - a person subject to service law by reason of section 367(1) or 367(2)(a), (b), (c) and (e) - viz. persons under section 367(2)(d) (reserve force members undertaking any training or duty) are *excluded*.

³¹ Reference to a civilian court is to a court of ordinary criminal jurisdiction – Section 374 of the Act.

³² The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 4(1).

when he is required to be so available see JSP 754 for further guidance (Tri-Service regulations for pay and charges).

17. It should be noted that no order for deductions may authorise a deduction to be made before the date that payment of the amount (or part thereof) is required by the court³³. Accordingly, where a civilian (criminal) court makes an order for payment of an amount by instalments, deductions may not be authorised in excess of or in advance of the court ordered instalments. Further, where a civilian (criminal) court allows time for payment of a sum due under a court order, deductions may not be authorised before the time for payment has expired.

Deductions: Loss or damage to public or Service property

18. The Regulations specifically provide that an order for deductions in respect of loss or damage to public or Service property may not be made in any of the circumstances set out in subparagraphs a and b below³⁴.

a. Where a court or officer has sentenced the relevant person for a Service offence and on passing sentence had power to make a SCO in respect of that damage to or that loss of property, whether or not a compensation order was made.

b. Where, in circumstances involving a finding that the relevant person was not guilty of intentionally, recklessly or negligently causing that damage to or that loss of property, he has been found not guilty of a Service offence. This applies where at trial, summary hearing or appeal to the SAC, the relevant person is found not guilty of an offence under section 24 of the Act in relation to the damage or loss of property in question. It also applies where at trial, summary hearing or appeal to the SAC, the relevant person is found not guilty of any other Service offence and it follows, from that finding, that he is also not guilty of an offence under section 24 of the Act in relation to the damage or loss of property in question.

19. In circumstances other than those at paragraphs 18a and b above, the Defence Council, or authorised officer, may make an order for deductions from the pay of a relevant person³⁵ in respect of any loss or damage incurred to public or Service property. However, the Defence Council, or authorised officer, may only make such an order for deductions where it is satisfied that the relevant person's conduct that caused the damage amounted to an offence under section 24 of the Act.

20. In order to be satisfied that the relevant person's conduct amounted to an offence under section 24 of the Act, the Defence Council, or authorised officer, should adopt a similar approach to the evidence as they would at a summary hearing of the matter. They should be satisfied that all the elements of the offence are established by reference to the evidence and should consult the guidance contained at [Chapter 7](#) (Non-criminal conduct (disciplinary offences)) and [Chapter 10](#) (Summary hearing, dealing with evidence).

21. It should be noted that the total sum authorised to be deducted from the pay of the relevant person in respect of the damage to or loss of property must not exceed £1000³⁶.

22. **Variation/revocation.** Subject to the requirements set out at paragraphs 19 - 21 above, the Defence Council, or authorised officer, may, by further order, vary any order for

³³ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 4(2).

³⁴ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 5(2).

³⁵ A service person other than a member of the reserve forces undertaking any training or duty - Section 342(4) of the Act.

³⁶ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 5(4).

deductions made in respect of compensation for loss or damage³⁷. The Defence Council or authorised officer may also, by further order, revoke an order for deductions made in respect of compensation for loss or damage³⁸. The Defence Council, or authorised officer, should exercise their power to vary or revoke an order for deductions whenever an order for deductions is inappropriate or should not have been made. This may arise where new evidence or information comes to light casting doubt on an earlier decision to make an order for deductions. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

Deductions: Satisfaction of financial penalty

23. Where a Service person is required to make payment in respect of a financial penalty which has been imposed against him, the Defence Council, or authorised officer, may make an order authorising deductions from pay in or towards satisfaction of that financial penalty³⁹. No such order should be made before the end of the relevant appeal period or whilst an appeal is pending against that financial penalty.

24. **Meaning of financial penalty.** In the context of forfeitures and deductions, a financial penalty refers to any of the following:

- a. Any fine or SCO imposed under the Act⁴⁰. This includes any fine or SCO imposed on a Service person at summary hearing or court-martial. It also includes any fine or SCO which a Service parent or guardian⁴¹ has been ordered to pay under section 268 of the Act (i.e. in relation to a relevant civilian aged under 18 who is convicted of an offence and where the punishment includes payment of a fine or compensation⁴²); or
- b. Any sum which is ordered to be paid as a result of a declaration by the court⁴³ that a recognizance is to be forfeited under section 236(3) of the Act⁴⁴. In essence, this means that, having entered into an undertaking (a recognizance), to pay a specified sum if the offender commits another offence within a specified period the Service parent or guardian responsible for that offender is ordered to pay any sum up to the full amount of that recognizance, as a result of the offender being convicted of a new offence⁴⁵; or
- c. Any order as to payment of costs made by virtue of regulations under section 26 Armed Forces Act 2001, or by virtue of section 27 of that Act⁴⁶. The former provision concerns circumstances where the court⁴⁷ is satisfied that one party to the proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to those proceedings and, accordingly, makes an order as to payment of those costs. Section 27 is concerned with costs against legal representatives.

³⁷ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 5(5).

³⁸ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 5(6).

³⁹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 6(1).

⁴⁰ Section 342(4)(a) of the Act.

⁴¹ i.e. a person who is subject to Service law or Service discipline – see section 268(8) of the Act.

⁴² See section 268 of the Act and [Chapter 13](#) (Summary hearing sentencing and punishment) and [Chapter 16](#) (Financial penalty enforcement orders).

⁴³ 'Court' in this context means the CM or the Service Civilian Court.

⁴⁴ Section 342(4)(b) of the Act.

⁴⁵ See sections 233 to 236 of the Act and [Chapter 16](#) (Financial penalty enforcement orders). As with fines and SCOs under paragraph 24a, the 'offender' refers to a relevant civilian aged under 18 who is convicted of an offence and the 'Service parent or guardian' means a person who is subject to Service law or Service discipline.

⁴⁶ Section 342(4)(c) of the Act.

⁴⁷ 'Court' in this context means the CM, the Summary Appeal Court, the CM Appeal Court and the Service Civilian Court (see Armed Forces Act 2001, section 26(1)).

25. **Limitations.** No order for deductions in respect of a financial penalty may authorise a deduction to be made before the date that payment of the amount (or part thereof) is required by the court⁴⁸ or officer⁴⁹. Under the Act, a court or officer may direct payment of a fine or SCO by instalments⁵⁰. In that event, any deductions ordered to satisfy the fine or SCO should correspond with the number and amount of each instalment ordered by the court or officer. Deductions may not be authorised in excess of or in advance of the court ordered instalments. Further, where a court or officer allows time for payment of a fine or SCO, deductions from pay may not be authorised before the time for payment has expired.

26. **Variation/revocation.** Subject to the limitations set out at paragraph 25 above, the Defence Council, or authorised officer, may, by further order, vary or revoke any order for deductions made in respect of financial penalties⁵¹. The Defence Council, or authorised officer, should exercise their power to vary or revoke an order for deductions where the financial penalty has been varied or the Service person has subsequently been given time to pay or subsequently been allowed to pay by instalments. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

Deductions: Satisfaction of judgment or order enforceable by a UK court (other than maintenance orders – see paragraphs 31 – 44 below)

27. The Defence Council, or authorised officer, may make an order authorising deductions to be made from pay and to be appropriated in or towards satisfaction of any amount that a relevant person⁵² is required to pay by virtue of any judgment or order enforceable by a UK court⁵³. This applies to judgments in civil⁵⁴ (non-criminal) cases of UK and non-UK courts, excluding maintenance orders, which are dealt with at paragraphs 31 - 44 below. Where the judgment or order has been made by a non-UK court, the power to authorise deductions should only be exercised where the judgment or order has been registered in a UK court. JSP 754 (Tri-Service regulations for pay and charges) should be consulted for further guidance.

28. **Limitations.** No order for deductions in respect of a civil judgement or order enforceable by a UK court may authorise a deduction to be made before the date that payment of the amount (or part thereof) is required by the court⁵⁵. It follows that where a civil (non-criminal) court makes an order for payment of an amount by instalments, deductions may not be authorised in excess of or in advance of the court ordered instalments. Further, where a civil (non-criminal) court allows time for payment of a sum due under a court order, deductions may not be authorised before the time for payment has expired.

29. **Variation/revocation.** Subject to the limitations set out at paragraph 28 above, the Defence Council, or authorised officer, may, by further order, vary or revoke any order for deductions made in respect of a judgement or order enforceable by a UK court⁵⁶. The Defence Council, or authorised officer, should exercise their power to vary or revoke an order for deductions where the civil judgement or order has been varied or the Service person has subsequently been given time to pay or subsequently been allowed to pay by instalments. Further, consideration may be given to varying or revoking an order for deductions whenever

⁴⁸ 'Court' in this context means the CM or the Service Civilian Court.

⁴⁹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 6(2).

⁵⁰ Section 251 of the Act. See also [Chapters 9, 12](#) and [13](#), all of which have parts explaining instalments.

⁵¹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 6(3) and 6(4).

⁵² I.e. a person subject to service law by virtue only of sections 367(1) or 367(2) (a), (b), (c) or (e) of the Act.

⁵³ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 11(1). The reference to a judgment or order enforceable by a court in the UK includes a judgment enforceable by the Enforcement of Judgments Office (*i.e.* in Northern Ireland) – see section 342(5)).

⁵⁴ For criminal cases see the Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 4 and paragraphs 15 and 17 of this chapter.

⁵⁵ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 11(3).

⁵⁶ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 11(4) and 11(5).

an order for deductions is inappropriate or should not have been made. This may arise where new evidence or information comes to light casting doubt on an earlier decision to make an order for deductions. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

30. **Suspension.** Where pay is suspended, the Defence Council or authorised officer may treat any extant order for deductions from pay in respect of a judgement or order enforceable by UK courts as being in suspense⁵⁷. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

Deductions: Maintenance payments

31. Service pay is not subject to the provisions that exist to enforce the maintenance liabilities of those in civilian employment⁵⁸. However, under the Act and the Regulations, there is an equivalent regime in place for Service personnel in relation to enforcement of maintenance liabilities.

32. **Maintenance orders.** The Regulations enable the Defence Council, or authorised officer, to make orders for deductions from the pay of a relevant person⁵⁹ in order to satisfy the terms of a maintenance order made by both UK and non-UK courts. A maintenance order falls within the terms of the Regulations if it requires a relevant person to make payment in respect of⁶⁰:

- a. The maintenance of his spouse or civil partner; or
- b. The maintenance of any child of his, his spouse⁶¹ or his civil partner⁶²; or
- c. The maintenance of any other child who has been treated by him and his spouse or him and his civil partner as a child of their family; or
- d. Any costs incurred in obtaining an order as described at sub-paragraphs a, b and c; or
- e. Any costs incurred in proceedings on appeal against, or for the variation, revocation or revival of an order as described at sub-paragraphs a, b and c.

33. **Maintenance order of a court in the UK or Sovereign base areas of Akrotiri and Dhekelia.** In respect of those maintenance orders made by a UK court or court in the Sovereign Base Areas of Akrotiri and Dhekelia, the criteria to be applied before an order for deductions is made is relatively straightforward; where a maintenance order falling within the terms of the Regulations (paragraphs 32a – e) has been made, the Defence Council, or authorised officer, may make an order for deductions. However, such an order for deductions may only authorise deductions in or towards satisfaction of a payment which the relevant person is required to make under the maintenance order⁶³. Further, such an order

⁵⁷ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 11(6).

⁵⁸ For example, Attachment of Earnings Orders under the Attachment of Earnings Act 1971 – which provides for orders to be made enabling deductions from earnings in order to secure maintenance payments.

⁵⁹ A Service person other than a member of the reserve forces undertaking any training or duty – section 342(4) of the Act.

⁶⁰ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 9(1).

⁶¹ References to a spouse include, in relation to an order made in proceedings in connection with the dissolution or annulment of a marriage, references to the person who would have been the spouse of the relevant person if the marriage had subsisted - The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 9(3).

⁶² References to a civil partner include, in relation to an order made in proceedings in connection with the dissolution or annulment of a civil partnership, references to the person who would have been the civil partner of the relevant person if the civil partnership had subsisted - The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 9(4).

⁶³ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 7(1).

for deductions must not authorise a deduction to be made before the date that payment of the amount is required by the court⁶⁴.

34. Variation/revocation of maintenance orders of a court in UK or Sovereign base areas of Akrotiri and Dhekelia. Where a court in the UK or Sovereign Base Areas of Akrotiri and Dhekelia varies a maintenance order, the Defence Council, or authorised officer, will need to review any extant order for deductions. The Defence Council, or authorised officer, should vary an extant order for deductions where appropriate and must vary such an order where necessary to meet the requirements at paragraph 33 above⁶⁵. So, for example, where a court in the UK or Sovereign Base Areas of Akrotiri and Dhekelia varies a maintenance order, thereby increasing the payments required, it is likely it will be appropriate for the Defence Council, or authorised officer, to vary any order for deductions accordingly. Where a court in the UK or Sovereign Base Areas of Akrotiri and Dhekelia varies a maintenance order, thereby reducing the payments required below those under an extant order for deductions, the Defence Council, or authorised officer, must vary the order for deductions in accordance with the requirement at paragraph 33 above (that is, no order for deductions may order deductions in excess or in advance of the payments required under a maintenance order).

35. If a UK court or court of the Sovereign Base Areas of Akrotiri and Dhekelia has revoked a maintenance order, the Defence Council, or authorised officer, must revoke any order for deductions previously made. This is because if a maintenance order has been revoked it can no longer require a person to make payments and therefore all deductions in respect of it must cease as they would no longer have authority.

36. Even where the UK court or court of the Sovereign Base Areas of Akrotiri and Dhekelia has not varied or revoked a maintenance order, subject to the requirements at paragraph 33, the Defence Council, or authorised officer, may still vary or revoke any order for deductions made in respect of a maintenance order⁶⁶. The Defence Council, or authorised officer, should consider exercising their power to vary or revoke an order for deductions whenever an order for deductions is inappropriate or should not have been made. This may arise where new evidence or information comes to light casting doubt on an earlier decision to make an order for deductions. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

37. Suspension. Where pay is suspended, the Defence Council, or authorised officer, may treat any extant order for deductions from pay in respect of a maintenance order of a court in the UK or Sovereign Base Areas of Akrotiri and Dhekelia as being in suspense⁶⁷. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

38. Maintenance order of a court outside the UK or Sovereign base areas of Akrotiri and Dhekelia (foreign court). In respect of maintenance orders of a foreign court, the Defence Council or authorised officer may make an order for deductions where:

- a. A maintenance order falling within the terms of the Regulations (paragraphs 32a – e above) has been made and the maintenance order has been registered in or confirmed by a UK court⁶⁸; or

⁶⁴ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 7(2).

⁶⁵ See JSP 754 for further guidance (Tri-Service regulations for pay and charges).

⁶⁶ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 7(3) and 7(4).

⁶⁷ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 7(5).

⁶⁸ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(2).

b. The Defence Council or authorised officer is satisfied that the maintenance order is capable of being registered in a United Kingdom court⁶⁹; or

c. Where the relevant person is serving outside the UK, the Defence Council, or authorised person, is satisfied that if the relevant person was resident in the UK the maintenance order would be capable of being registered in a United Kingdom court⁷⁰.

39. A maintenance order is capable of being registered in a UK court if it is an order that can be registered under Part 1 of the Maintenance Orders (Reciprocal Enforcement) Act 1972, Part 1 of the Civil Jurisdiction and Judgments Act 1982 or Council Regulations (EC) No. 44/2001⁷¹. Maintenance orders can also be registered in, or confirmed by, a UK court under the Maintenance Orders (Facilities for Enforcement) Act 1920. It should be noted that foreign maintenance orders may only generally be registered in a UK court where the person against whom the order is made is resident or has assets in the UK (hence the power to make an order for deductions under the criteria at paragraph 38c above).

40. The ability to make orders for deductions prior to the registration of a foreign maintenance order in a UK court mitigates the significant delays and welfare problems that may arise in the process of registering a foreign maintenance order in a UK court (which are often exacerbated when the Service person is serving overseas). However, where an order for deductions is made in these circumstances, the payee under a foreign maintenance order should be required to take reasonable steps to register that foreign maintenance order in a UK court. Accordingly, the Defence Council, or authorised officer, should exercise their powers under regulation 8(5) to impose conditions on the duration of orders for deductions made on the basis that the maintenance order is capable of being registered in the UK. The Defence Council, or authorised officer, may impose conditions authorising that deductions in respect of the unregistered order shall not continue beyond a specified date or after the expiry of a specified period. Further guidance is contained at JSP 754 (Tri-Service regulations for pay and charges).

41. Finally, it should be noted that orders for deductions in respect of foreign maintenance orders may only authorise deductions in or towards satisfaction of a payment which the relevant person is required to make under the foreign maintenance order (or, in the case of a maintenance order registered in or confirmed by a UK court, a payment which he is required to make under the maintenance order as so registered, confirmed or varied)⁷². Further, such an order for deductions must not authorise a deduction to be made before the date on which payment is required to be made under the maintenance order (or in the case of a maintenance order registered in or confirmed by a UK court, before the date on which the payment is required to be made under the maintenance order as so registered, confirmed or varied)⁷³.

42. **Variations/revocation and suspension of maintenance orders (foreign court).** Where a foreign court has varied a maintenance order, the Defence Council, or authorised officer, will need to review any extant order for deductions made in respect of the previous maintenance order. The Defence Council, or authorised officer, should vary an extant order for deductions where appropriate and must vary such an order where necessary to meet the requirements at paragraph 41 above⁷⁴. Similarly, when a UK court has varied a foreign maintenance order, registered in or confirmed by a UK court, the Defence Council, or authorised officer, will need to review any extant order for deductions made in respect of the

⁶⁹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(3)(a).

⁷⁰ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(3)(b).

⁷¹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(10).

⁷² The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(2).

⁷³ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(3) and 8(4).

⁷⁴ See JSP 754 for further guidance (Tri-Service regulations for pay and charges).

previous maintenance order. The Defence Council, or authorised officer, should vary an extant order for deductions where appropriate and must vary such an order where necessary to meet the requirements at paragraph 41 above.

43. If a foreign court has revoked a maintenance order, the Defence Council, or authorised officer, must revoke any order for deductions made in respect of that order⁷⁵. This is because if a maintenance order has been revoked it can no longer require a person to make payments and therefore all deductions in respect of it must cease as they would no longer have authority⁷⁶.

44. Even if the foreign court has not varied or revoked a maintenance order, subject to the requirements at paragraph 41, the Defence Council, or authorised officer, may still vary or revoke any order for deductions made in respect of a maintenance order⁷⁷. The Defence Council, or authorised officer, should consider exercising their power to vary or revoke an order for deductions whenever an order for deductions is inappropriate or should not have been made. This may arise where new evidence or information comes to light casting doubt on an earlier decision to make an order for deductions. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

45. **Maintenance assessments/maintenance calculations.** The Regulations make provision for pay to be deducted from a Service person in order for him to meet his obligations regarding periodical payments due in accordance with a maintenance assessment or calculation made under the Child Support Act 1991 or the Child Support (Northern Ireland) Order 1991. Where the Defence Council, or authorised officer, makes such an order, the order may only authorise deductions in or towards satisfaction of an obligation on his part to make a periodical payment in accordance with a maintenance assessment or calculation⁷⁸. Further the order for deductions must not authorise a deduction to be made before the date on which the relevant person is obliged to make the periodical payment⁷⁹.

46. **Variation/revocation and suspension.** Subject to the requirements at paragraph 45 above, the Defence Council or authorised officer may, by further order, vary any order for deductions in respect of a deduction for pay for child maintenance⁸⁰. The Defence Council or authorised officer may also revoke an order for deductions in respect of a deduction for pay for child maintenance⁸¹. The Defence Council, or authorised officer, should consider exercising their power to vary or revoke an order for deductions whenever an order for deductions is inappropriate or should not have been made. This may arise where new evidence or information comes to light casting doubt on an earlier decision to make an order for deductions. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

47. Where the Secretary of State or the Department of Health and Social Services for Northern Ireland has made a decision which supersedes a maintenance calculation or has cancelled a maintenance assessment, the Defence Council or authorised officer must revoke an order for deductions in respect of the maintenance calculation or maintenance assessment. This is because if an assessment/calculation has been superseded or cancelled a person will no longer be obliged to make payments in respect of it and therefore all deductions in respect of it must cease as they would no longer have authority⁸².

⁷⁵ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 8(2) and (3).

⁷⁶ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(1).

⁷⁷ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 8(7) and 8(8).

⁷⁸ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(1).

⁷⁹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(2).

⁸⁰ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(3).

⁸¹ The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(4).

⁸² The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(1).

Remission of deductions

48. Under the Act, the Defence Council (or an authorised officer) has a statutory power enabling it to remit the following deductions⁸³:

- a. Those relating to payment of civilian penalties (paragraphs 15 - 17 above); and
- b. Those relating to loss/damage to public or Service property (paragraphs 18 - 22 above).

The Defence Council, or authorised officer, should exercise their power to remit an order for deductions whenever an order for deductions is inappropriate or should not have been made. This may arise where new evidence/information comes to light casting doubt on an earlier decision to make an order for deductions. For further guidance, reference should be made to JSP 754 (Tri-Service regulations for pay and charges).

Deductions: Recoveries under Royal Warrant

49. Section 333 of the Act provides that the Royal Warrant may authorise deductions from pay of members of the regular or reserve forces -

- a. In respect of anything (including any service) supplied;
- b. In order to recover any overpayment or advance; or
- c. In order to claim any "relevant" payment. It should be noted that a payment is relevant if it was made on condition that it would or might be repayable in specified circumstances and any such circumstance has occurred.

The authority, procedures and guidance to be followed in these cases is contained in JSP 754 (Tri-Service regulations for pay and charges).

⁸³ See section 342(3) of the Act.

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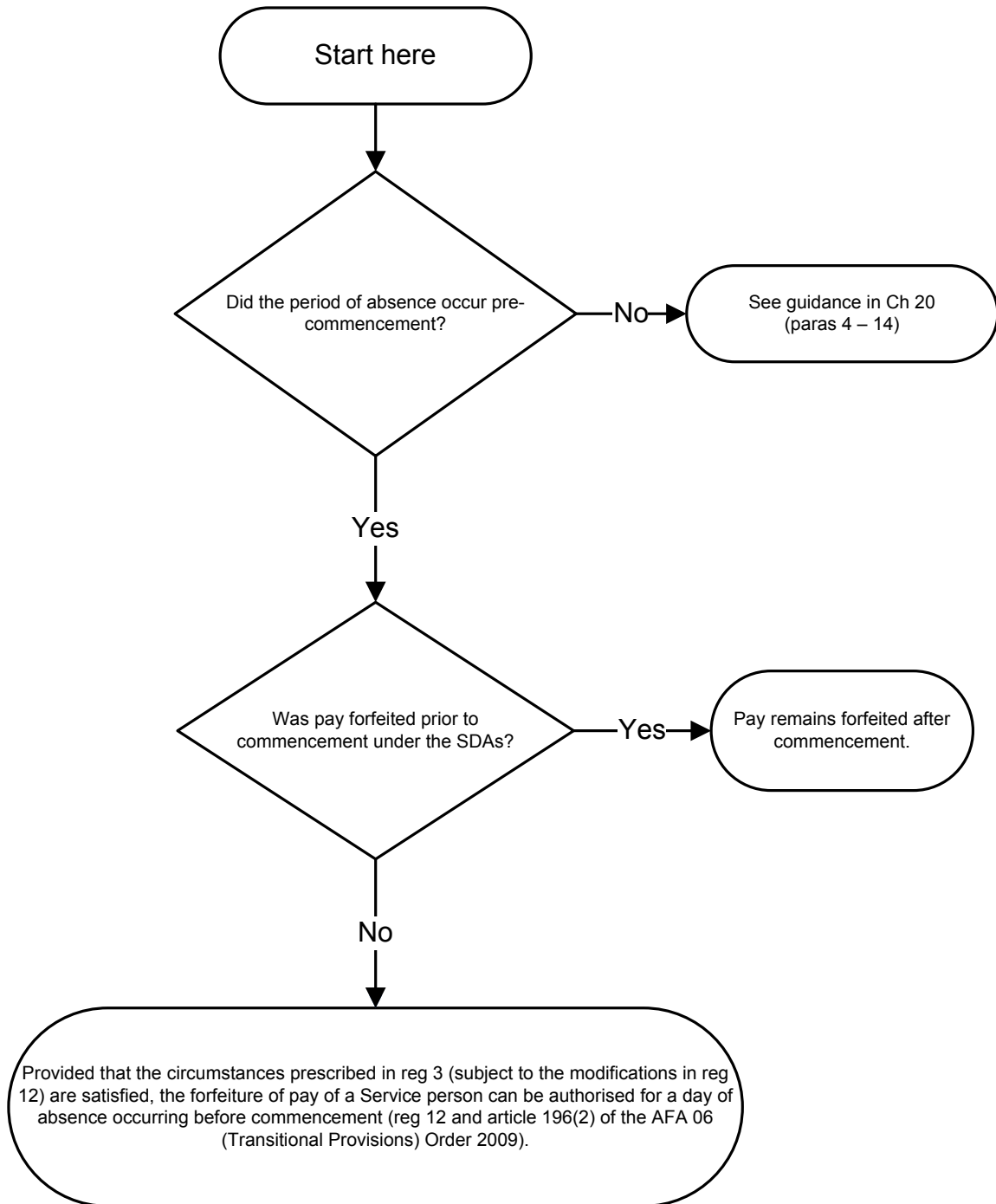
Transitional guidance regarding forfeitures and deductions

1. This annex provides an overview of the transitional arrangements relating to forfeitures and deductions. The transitional arrangements apply to circumstances which occur wholly or partly before the commencement of the Regulations (i.e. before 31 October 2009). In particular, this annex:
 - a. Deals with pay forfeited, prior to commencement, in respect of absence from duty (figure 1);
 - b. Explains the circumstances in which pay might be forfeited post commencement in respect of absence from duty occurring prior to commencement (figure 1);
 - c. Explains the circumstances in which a deduction may be made from pay post-commencement in respect of a liability occurring or an order made prior to commencement; and (figure 2),
 - d. Explains the circumstances in which a deduction may be made from pay post-commencement in respect of matters occurring prior to commencement (figure 2).
2. The situations described in this annex are dealt with in general terms and are not exhaustive. If there is any doubt, or if the circumstances of a case are not dealt with in this chapter or annex, staff legal advice should be sought.
3. For the purposes of this annex, an SDA financial penalty means:
 - a. A fine or stoppages imposed by virtue of any provision of the SDA (including a fine with respect to which an order for a Service parent or guardian to pay a 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 by virtue of a forfeited recognizance.

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Figure 1

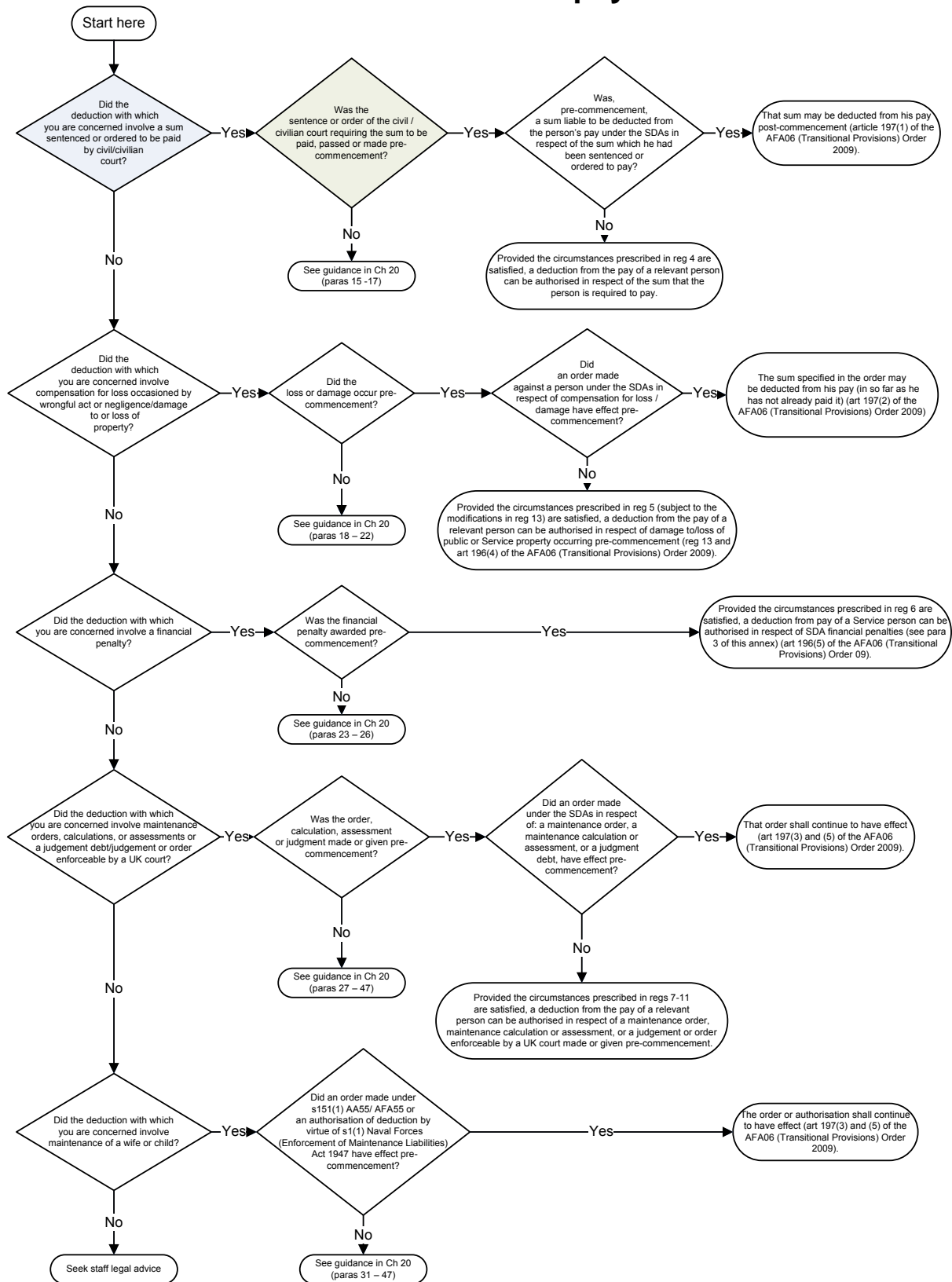
Forfeiture of pay - absence from duty



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Figure 2

Deduction from pay



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Chapter 21

Compulsory drug testing (CDT) and post incident drug and alcohol testing (PIDAT)

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Chapter 21

Compulsory drug testing and post incident drug and alcohol testing

Part 1 - Misuse of drugs and alcohol

Introduction

- 1. Drugs.** The misuse of drugs is incompatible with the demands of Service life and poses a significant threat to operational effectiveness. The implications of drug misuse are particularly damaging and the illegal possession and misuse of controlled drugs is an offence under both Service and civil law. Drugs impair judgement and reliability, reduce fitness, damage health, degrade performance, harm team cohesion and Service ethos - as well as being harmful personally, to family relationships and to society generally. It is Service Personnel Board policy that there is no place in the armed forces for those who misuse drugs. Only in exceptional circumstances will any member of the armed forces be retained following drug misuse.
- 2. Alcohol.** The nature of the Services' role demands the highest standards from its personnel, who are required to perform exacting duties, which often directly affect the lives of their colleagues. Social drinking may play a part in group bonding; however, it is recognised that those who misuse alcohol or suffer from alcohol dependency are a potential hazard to themselves, their families and their colleagues. Personnel are liable to be called for duty at any time. Therefore, the excessive consumption of alcohol and, in some situations, any alcoholic consumption, may adversely affect their capability to perform their duties safely and accurately. Misbehaviour, unfitness for duty due to alcohol, and drinking and driving offences may be dealt with as offences under the Armed Forces Act 2006 (the Act).
- 3. Testing.** To reflect the risks posed by the misuse of drugs and alcohol within the armed forces and to act as a major part of the Services' deterrent strategy the Services operate CDT and PIDAT regimes. The following guidance outlines the law and tri-Service policy in relation to alcohol and drug testing within the Services and should be seen as initial guidance and background information to inform Commanding Officers (COs) of their responsibilities in this area. Further detailed guidance on policy and procedures is contained in JSP 835 (Alcohol and Substance Misuse and Testing).

Part 2 - Legislative provisions

The law

4. The Armed Forces Act 2006 (the Act) and regulations made under it¹ provides for testing for drugs and alcohol to be carried out in specified circumstances on personnel subject to Service law and in some cases, on civilians subject to Service discipline. The results of such tests are not admissible² as evidence in disciplinary proceedings for a Service offence. However, the provisions contained within the Act do not limit the statutory powers to test for alcohol and/or drugs under the Police and Criminal Evidence Act 1984 or the Road Traffic Act 1988³; nor do they affect the admissibility of evidence obtained under those statutes in any proceedings⁴.

Definitions

5. For CDT purposes drug⁵ means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971 whilst for PIDAT it means either a controlled⁶ drug as above or any other drug specified by subordinate legislation for these purposes. Sample, encompasses a sample of breath or urine where it is required to test for alcohol or a sample of urine where it is required to test for drugs. Samples may not be invasive samples, such as blood. Persons being tested must consent to the taking of any sample⁷. Failure to comply with a requirement to give a CDT sample is an offence and failure without reasonable excuse to comply with a requirement to give a PIDAT sample is also an offence⁸.

Regulations

6. Regulations governing the obtaining and analysis of samples, the Armed Forces (Drug Testing) Regulations 2009 and the Armed Forces (Post Incident Alcohol and Drug Testing) Regulations 2009, are in [Chapter 37](#) (Armed forces Act 2006 – Statutory Instruments and Defence Council Regulations). These regulations provide authority for a number of procedural matters such as the number of samples a person may be required to provide, the procedures employed to analyse samples and the training and qualifications of those persons carrying out such analysis.

¹ Sections 305-308 of the Act, the Armed Forces (Drug Testing) Regulations 2009, the Armed Forces (Post Incident and Alcohol Testing) Regulations 2009.

² Section 308(3) of the Act.

³ Section 308(4) of the Act.

⁴ Section 308(4) of the Act.

⁵ Sections 305(4) and 307(2) of the Act.

⁶ Within the meaning of the Misuse of Drugs Act 1971 for example: cannabis, cocaine and ecstasy.

⁷ Sections 307(3), (4), and (5) of the Act.

⁸ Sections 305 - 306 of the Act.

Part 3 - Compulsory drug testing

Policy and administration

7. **Aim.** The aim of the CDT programme is to provide an effective deterrent capability, in the most cost-effective manner, in support of the armed forces' wider measures to prevent drug misuse within the Services. Each Service conducts its own CDT programme of testing.

8. **Liability for testing.** CDT is conducted randomly among all personnel subject to Service law⁹ serving in single-Service, NATO and joint-Service units in the United Kingdom and overseas. Civilian staffs working with the Services and personnel from other nations on exchange duty are excluded from the programme.

9. **Consequences of a positive test result.** Whilst evidence of drug misuse obtained by CDT sample cannot be used to support disciplinary action, it may be sufficient to satisfy the evidential standard (the balance of probabilities) for administrative action.

10. **Retention of personnel.** Exceptionally, in some cases of drug misuse involving young Service personnel the CO may consider that the offender need not be discharged from the Service¹⁰. Tri-Service policy allows COs to recommend the retention of personnel:

- a. Who meet all the following exceptional circumstances:
 - (1) Young (under 25) personnel;
 - (2) Below the rank/rate of leading hand or corporal;
 - (3) First time offence,
 - (4) The prospect for reforming the individual is good, and;
 - (5) In all other respects the individual is considered a promising Service person whose retention would be in the interests of the Service.
Consideration should include: Service record; the contents of any representation; any expressed attitude towards drug misuse; and any background circumstances to the incident; or
- b. Who have provided a statement that satisfactorily explains the presence of a drug, for example, inadvertent or accidental ingestion such as spiking that is accepted as valid by the CO, or cannot be refuted on scientific grounds, and which is supported by independent evidence, including circumstantial evidence (e.g. drink "spikers" known to be operating in a particular pub/club).

The decision as to whether an individual may be retained is to be taken by the Appropriate Authority¹¹ in accordance with single-Service practice.

The law

⁹ Including members of the Reserve Forces see section 367 of the Act.

¹⁰ See RN PLAGOS, AGAI 63 Volume 5, Instruction 4. RAF personnel who deliberately and knowingly misuse Class A drugs will not be retained in the Service.

¹¹ RN: Nav Sec/Army: DMA/ RAF: Higher Authority or CO.

11. A drug testing officer¹² may require a person subject to Service law to provide a sample of urine to test for drugs¹³. This statutory power underpins the operation of our random drug testing programme (CDT) under which all members of Her Majesty's forces, regardless of rank or rate, are subject to periodic random testing. There is no requirement for a person to be suspected of drug misuse before a urine sample can be demanded. Where disciplinary action is more appropriate, a person suspected of drug misuse should not be tested under CDT arrangements; in such circumstances, the Service Police should be called to investigate. The selection of personnel for CDT should remain random to ensure that the process continues to be seen as a deterrent, any other testing must be justified¹⁴ and capable of withstanding legal scrutiny. The power¹⁵ to drug test randomly may not be exercised in connection with the investigation of an offence or of a serious incident¹⁶, or where the drug testing officer (or his CO) is the CO of the person to be tested¹⁷.

12. **Consequence of failure to provide a sample.** A person commits an offence¹⁸ if he fails to comply with a requirement to provide a sample of urine for analysis when required to do so by a drug testing officer¹⁹. On conviction at Court Martial (CM) trial an offender will be liable to any of the punishments available to the CM²⁰, but any sentence of imprisonment or detention imposed may not exceed 51 weeks. Administrative discharge from the armed forces²¹ is possible where an individual is not dismissed following conviction by CM. An offence of failing to provide a sample is also capable of being dealt with summarily, but the powers of punishment of the CO do not include dismissal. Administrative discharge will need to be considered where an offence is dealt with summarily.

¹² See section 305(4) of the Act and the Armed Forces (Drug Testing) Regulations 2009, regulation 2.

¹³ Section 305(1) of the Act.

¹⁴ For example when information has been received that a person or identified group of persons may be misusing drugs and there is insufficient evidence for a police investigation.

¹⁵ Section 305(2) of the Act.

¹⁶ Section 305(2) of the Act.

¹⁷ Section 305(2) (a) of the Act.

¹⁸ Section 305(3) of the Act.

¹⁹ Such an offence may be dealt with summarily-see section 53(1)(i) of the Act.

²⁰ Section 164 of the Act.

²¹ Under QRRN 3626, Army QR Chapter 9 Section 3, and RAF QR 1028.

Part 4 - Post incident drug and alcohol testing

Policy and administration

13. **Aim.** The purpose of PIDAT is to inform Service Inquiries, which may be convened following serious incidents or near misses that have resulted in, or created a risk of, death or serious injury to any person or serious damage to property. The PIDAT regime applies to all incidents and accidents including, but not limited to, maritime, air, range and training accidents. Currently the PIDAT regime only covers incidents occurring on the UK mainland and in home waters.

14. **Liability for testing**²². Service personnel and relevant civilians²³ are liable for testing where:

- a. An incident has occurred which in the opinion of their CO resulted in, or created a risk of, death or serious injury to any person or serious damage to any property, and
- b. In the opinion of the officer it is possible that the person may have caused or in any way contributed to:
 - (1) The occurrence of the incident;
 - (2) Any death or serious injury to any person, or serious damage to any property resulting from it, or
 - (3) The risk of any such death, injury or damage.

15. The CO, as the Designated Officer (DO) may, in order for it to be ascertained whether or to what extent the person had or has had alcohol or drugs in his body, require the person to provide a sample for analysis.

16. Personnel of one Service attached to another are liable to be tested under the arrangements of the Service to which they are attached as well as their own, as are certain categories of exchange officers²⁴.

The law

17. **Authority for sample collection/testing.** A CO may order PIDAT but may delegate the authority to his immediate subordinate²⁵ in command or to such other officer as he considers to be appropriate, as necessary and when appropriate to do so (for example, during a period of absence from the unit). Where more than one CO is involved in a single incident each can decide within their command who should be tested. This may involve consultation between COs to identify appropriate individual(s), which should be done by agreement at the time.

²² Section 306(3) of the Act.

²³ In reality as the regime is limited to the UK, relevant civilians are unlikely to be tested.

²⁴ Officers subject to the Visiting Forces Act – Australia, Canada, New Zealand and ROI.

²⁵ This will usually be an OF3.

18. **Consequences of failure to provide a sample.** It is an offence²⁶ for an individual to refuse without reasonable excuse to give a sample²⁷ when required to do so²⁸. On conviction at CM an offender will be liable to any of the punishments available to the CM²⁹, but any sentence of imprisonment or service detention imposed may not exceed 51 weeks. Administrative discharge from the armed forces³⁰ is possible where an individual is not dismissed following conviction by CM. An offence of failing to provide a sample is also capable of being dealt with summarily, but the powers of punishment of the CO do not include dismissal. Administrative discharge will need to be considered where an offence is dealt with summarily.

²⁶ Section 306(4) of the Act.

²⁷ A sample of breath and/or urine.

²⁸ Such an offence may be dealt with summarily.

²⁹ Section 164 of the Act.

³⁰ Under QRRN 3626, Army QR Chapter 9 Section 3, and RAF QR 1028.

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Chapter 22

Powers of officers to take affidavits and declarations

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Chapter 22

Powers of officers to take affidavits and declarations

Introduction

1. The Armed Forces Act 2006¹ (the Act) authorises certain officers outside the British Islands to take affidavits or declarations from persons subject to Service law or civilians subject to Service discipline where an otherwise qualified person, for example, a solicitor may not be available. This enables people who are serving overseas to attend to such legal business as requires affidavits or declarations. The procedures to be followed by officers who are approached to take affidavits and declarations are set out below.

The administering officer

2. The administering officer is an officer authorised to take an affidavit or declaration if he is subject to Service law and is of, or above, the rank of naval lieutenant commander, military or marine major, or air force squadron leader. Additionally, legally qualified officers subject to Service law of the rank of naval lieutenant, military or marine captain or air force flight lieutenant may also take affidavits and declarations. Legally qualified officers are solicitors, barristers or advocates in the jurisdictions of England and Wales, Scotland or Northern Ireland, or similarly qualified lawyers in the Channel Islands, the Isle of Man, a Commonwealth country or a British overseas territory, and are subject to punishment or disability for breach of professional rules². The administering officer attests to the validity of the affidavit or declaration.

Procedures where the affidavit or declaration is for use in England, Wales and Northern Ireland

3. The following procedure describes that for taking an affidavit for use in England, Wales and Northern Ireland. However, in some cases a deponent³ might object to being sworn or a statutory declaration may be required. In these circumstances the procedure set out below is subject to the relevant modifications set out at paragraph 8 below.

- a. Where practicable, the affidavit should be in the deponent's (i.e. the person who is to be sworn) own words.
- b. An affidavit must commence with the words "I [full name] of [full address] state on oath ...". It is essential to the validity of an affidavit that it commences with the statement that the deponent "states on oath".
- c. The affidavit should set out the deponent's occupation or if he has no occupation, his description.
- d. The affidavit should bear the deponent's signature at the end of the affidavit, opposite the jurat⁴ (see paragraph 6 below).

¹ Section 352 of the Act.

² Section 352(4)(b)(iv) and (5) of the Act.

³ The deponent is someone who signs an affidavit or testifies under oath.

⁴ The jurat of an affidavit is a statement set out at the end of the document which is signed by the person making the affidavit (the deponent).

e. Where the deponent is giving evidence in his professional capacity, the affidavit should also contain the address at which the deponent works, the employer's name and the position he holds.

f. If the deponent is giving evidence to proceedings in which he is a party, this should be stated within the affidavit.

4. It is not necessary for the officer administering the oath to review the contents of the affidavit in great detail or to seek to establish its veracity. However, the administering officer should review the wording of the affidavit and satisfy himself that any and all alterations have been initialled by himself and the deponent. Where erasures have been made and words or figures written on or over the erasures, the administering officer should write the words or figures again in the margin above his initials. In no circumstances should any alteration be made after the deponent has been sworn.

5. The person making the affidavit should sign his name in the presence of the administering officer, if he has not done so already. If he has already done so, the officer should ask him his name and if the signature is his. The administering officer should then administer the oath in the manner appropriate to the religious beliefs of the deponent. The form of oaths is set out at paragraphs 11 and 12 below. If the administering officer has any doubts about the procedure to be followed or is faced with an unusual situation (for example, a blind or illiterate deponent or someone who does not appear to know what is happening), staff legal advice should be sought.

6. The jurat must immediately follow the preceding text and not be placed on a separate page. The jurat should contain the rank and full name of the administering officer and the date and place where the affidavit was sworn, as in the following example:

Sworn at Wentworth Barracks, Herford, Germany this [-----] day of [-----] 2008 <p style="text-align: right;">(signature of deponent)</p> Before me, Lieutenant Commander/Major/Squadron Leader Frederick John Bloggs, an officer authorised to take affidavits by virtue of Section 352(1) of the Armed Forces Act 2006 <p style="text-align: right;">F J BLOGGS (signature and rank)</p>
--

The administering officer should mark exhibits as follows:

This is the exhibit marked A referred to in the affidavit of (name of deponent) sworn before me this [-----] day of [-----] 2008 <p style="text-align: right;">F J BLOGGS (signature and rank)</p>

Procedures where the affidavit or declaration is for use in Scotland

7. Where an affidavit is for use in Scottish proceedings, it will take the form set out below. If the person objects to being sworn, the following is subject to the modifications set out at paragraph 8.

["Berlin], the [----] day of [-----] 2008; in the presence of [here must be set out the full name and qualifications of the officer who is to administer the oath] appeared [here follows the name of the person to be sworn] who being solemnly sworn (and interrogated) depones that [here is set out the evidence contained in the affidavit]. All of which is truth as the deponent shall answer to God".

The person to be sworn and the administering officer then sign their names. The oath is then administered in a manner appropriate to the religious beliefs of the person to be sworn. The form of oaths is set out below at paragraphs 11 and 12. Exhibits will be marked as explained in paragraph 6.

Procedure where the deponent objects to being sworn but wants to affirm

8. Where a deponent states that he objects to being sworn⁵, he may affirm, in which case the procedures set out in paragraphs 3 to 7 still applies but with the following exceptions:

- a. The declaration should commence "I [full name] of [full address] do solemnly and sincerely affirm ..." and accordingly instead of saying the words "I swear by almighty God", the deponent will say "I do solemnly and sincerely affirm".
- b. Where the word 'sworn' is used, it should be replaced by the word 'affirm'. 'Affirmation' should also replace the word 'affidavit'.

Statutory declarations

9. In circumstances where a person is to make a statutory declaration:

- a. The declarant signs the declaration in the presence of the administering officer. The administering officer and the person making the declaration should initial any alterations at this point.
- b. The administering officer then says to the person who wishes to make the declaration (whilst pointing to the declaration and the signature on it) "is that your name and handwriting?" On receiving an affirmative response, the declarant says or repeats after the administering officer the form of solemn affirmation set out in paragraph 13 below.
- c. The administering officer then completes the declaration showing the date and place at which the declaration was taken and his own full name and rank and then signs underneath as follows:

⁵ He may, for example, have no religious belief or state that the taking of an oath is contrary to his religious belief.

Declared at Wentworth Barracks,
Herford, Germany
this [-----] day of [-----] 2008

(signature of declarant)

Before me, Lieutenant Commander/Major/Squadron Leader Frederick John Bloggs, an officer authorised to take declarations by virtue of Section 352(1) of the Armed Forces Act 2006

F J BLOGGS (signature and rank)

The administering officer should mark exhibits as explained in paragraph 6 above, substituting for the word 'affidavit', the word 'declaration', then sign.

Manner of administering oaths and affirmations

10. Oaths and affirmations are administered in the following manner in accordance with the religious beliefs of the person to be sworn:
 - a. The person taking the oath shall hold the New Testament, or if a Jew the Old Testament, in his uplifted hand and shall say, or repeat after the administering officer, the appropriate oath set out in paragraph 11 below.
 - b. If any person to whom an oath is administered desires to swear in the form and manner in which an oath is usually administered in Scotland, he may do so with uplifted hand and saying or repeating after the administering officer, the Scottish oath set out in paragraph 12.
 - c. If none of the forms of oath provided is appropriate to the religious beliefs of the person taking the oath, an oath may be administered in such form and manner as the person taking the oath declares to be binding on his conscience in accordance with his religious beliefs.
 - d. A person making a solemn affirmation instead of taking an oath shall say or repeat after the person administering it, the affirmation set out in paragraph 13 below.
11. **Form of oath.** "I swear by Almighty God that this (pointing to the signature) is my name and handwriting and that the contents of this my affidavit are true, and (if there is an exhibit), there is now shown to me marked (A) the (description of exhibit) referred to therein".
12. **Form of Scottish oath.** "I swear by Almighty God as I shall answer to God at the great day of Judgement that this is my name and handwriting and that the contents of this, my affidavit, are true, and (if there is an exhibit), there is now shown to me marked (A) the (description of exhibit) referred to therein".
13. **Form of solemn affirmation.** "I solemnly, sincerely and truly declare and affirm that the contents of this, my declaration, are true, and (if there is an exhibit), there is now shown to me marked (A) the (description of exhibit) referred to therein".

Transitional guidance

14. The relevant sections of the SDAs⁶ dealing with the taking of affidavits and declarations are repealed by the Act but this will not affect the validity of those documents completed pre-commencement (ie before 31 October 2009). Where an action or event occurs immediately before or after implementation, or spans the period immediately before and after implementation transitional provisions may apply and staff legal advice should be sought on the way ahead.

⁶ Section 204(2) of Army Act 1955 or Air Force Act 1955.

Chapter 23

Exemption from tolls and charges

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Chapter 23

Exemption from tolls and charges

Introduction and Legal framework

1. **Legislative provisions.** Section 349 of the Armed Forces Act 2006 (the Act) provides that, in certain circumstances, vehicles from any of Her Majesty's forces (regular and reserve forces) are exempt from tolls and charges. This chapter describes those circumstances.
2. **Scope of exemptions.** The tolls and charges from which exemption is given are those only in the United Kingdom and the Isle of Man which fall into the following categories:
 - a. Any toll or charge levied for passing over a road, bridge or through a tunnel, e.g. M6 Toll Road, Dartford Crossing or Mersey Tunnel; or
 - b. Any scheme which imposes charges for keeping or using a vehicle on particular roads, e.g. London congestion charge. This provision does not exempt civilian pattern livery MOD vehicles from displaying a road fund licence. However, green fleet¹ vehicles with a valid FMT1001 should be exempt from displaying a road fund licence.
3. **Application of section 349 of the Act.** The vehicles to which section 349 applies are those that belong to, or are being used for the purposes of any of Her Majesty's forces and accordingly, the following situations fall within the Act:
 - a. **Vehicles belonging to Her Majesty's forces.** The passage of any green fleet, white fleet or grey fleet² Royal Navy, Army, Royal Air Force or Royal Marine vehicle (including those belonging to the reserve forces) along any road, bridge or tunnel in the United Kingdom or Isle of Man where a toll or charge is ordinarily payable. The exemptions apply at all times that such vehicles are being driven because neither white/grey nor green fleet vehicles should be used unless authority has been given to do so and moreover, any such use should only be for an official, authorised journey. Accordingly, the exemptions also apply regardless of whether or not the vehicle in question is being driven by a member of Her Majesty's forces; however, the vehicle must be under the control of the armed forces.
 - b. **Vehicles used for the purposes of Her Majesty's forces.** The passage of any vehicle not belonging to Her Majesty's forces, but which is being used for the purposes of Her Majesty's forces (including the reserve forces), along any road, bridge or tunnel where a toll or charge is ordinarily payable. Therefore, the exemptions apply to any person driving a private vehicle (including a hire vehicle), provided that he is authorised to use it for a duty for the purposes of Her Majesty's forces and is so using it at the time of the toll/charge being levied.
4. **Unauthorised use of vehicles.** The use of green, white or grey fleet vehicles by Service personnel without authorisation, i.e. either using the vehicle without the proper authority or deviating from an authorised route in such a vehicle (e.g. taking a vehicle home

¹ 'Green fleet' refers to operational military vehicles which are usually painted in operational colours – e.g. green or desert. The VRN is white lettering on a black background configured as two letters, two numbers, two letters.

² 'White fleet' and 'grey fleet' refer to civilian vehicles operated by the MOD. Both have standard UK civilian VRN configurations. White fleet vehicles are used for administrative and non-operational transportation requirements. Grey fleet vehicles are covert, low profile vehicles used in security operations.

before or after a duty journey and where the taking of the vehicle home was not recorded and authorised on the official paperwork) could result in disciplinary action being taken under the Act³. In addition, the offending person can be asked to reimburse any costs unlawfully incurred, including paying any tolls, costs or administrative charges which the offender sought to avoid by wrongly claiming an exemption.

Policy and administration

5. Whilst the scope of the exemptions under the Act covers all roads, bridges and tunnels, current tri-Service agreements have only been negotiated with some operators. The policy document for reference is JSP 800, volume 5 (Defence Movement and Transport Regulations) and this should be consulted for the current state of exemptions. Similarly, in relation to the statutory provision regarding schemes which impose charges for keeping or using a vehicle on particular roads, the only area in which tri-Service policy currently operates within London. In both of these instances, the exemption is 'automatic', i.e. it is applied at source, such that registered qualifying vehicles are effectively given free passage. The detailed guidance on how these exemptions are applied and operated by the Services is provided in the JSP⁴.

6. In any situation where it is contended that an exemption should have applied or where there is an instance of an automatic exemption not being applied, it will be necessary for the driver concerned to pay the relevant toll or charges as necessary and subsequently reclaim them (see paragraph 7 below).

7. **JPA.** When a Service person undertakes a duty journey by a vehicle belonging to or for the purposes of Her Majesty's forces, or is travelling by private motor vehicle pursuant to authority to do so, the costs of any charges or tolls necessarily incurred by that person can be reclaimed in accordance with JSP 752 (Tri-Service Regulations for Allowances), via JPA iExpenses. Any claim made by non-Service personnel should be administered through the usual arrangements; for civil servants this will be electronically via HRMS.

³ For example, a charge under section 25 of the Act – misapplying public or service property.

⁴ See JSP 800, volume 5 Chapter 3.

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Chapter 24

Redress of individual grievance: Service complaints

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Chapter 24

Redress of individual grievance: Service complaints

Introduction

1. This chapter provides an overview of the procedures to follow in order that Service complaints raised by Service personnel and former Service personnel are handled and resolved using a process that is efficient, fair and transparent.
2. Detailed guidance on Service complaints is contained in JSP 831 (Redress of Individual Grievance: Service Complaints), which deals with the redress process under sections 334 to 339 of the Armed Forces Act 2006 (the Act), the related Statutory Instruments and The Armed Forces Redress of Individual Grievances (Procedures and Time Limits) Regulations 2007¹. The system came into effect on 1 Jan 08. Arrangements for dealing with complaints of discrimination, harassment and bullying are also contained in JSP 763 (The MOD Harassment Complaints Procedure), which covers both Service and civilian personnel.

Legal basis

3. The Act gives a person subject to Service law² who thinks he has been wronged in any matter relating to his Service³, the statutory right to make a Service complaint. It also gives such a right to a person who is no longer subject to Service law, who thinks that he was wronged in a matter relating to his service while he was subject to Service law. Under Defence Council Regulations, a complaint can only be made by an individual; there is no process for group complaints.

Transitional arrangements

4. The new Service complaints process does not apply in relation to any complaint that was brought before 1 Jan 08. Therefore, any Service complaint submitted after 1 Jan 08 will be dealt with under the system described in JSP 831 and Service complaints submitted before this date will be dealt with under the previous system. It is the date that the complaint is submitted rather than the date of the matter complained of that dictates the system under which it is considered.
5. However, the new rules under the Armed Forces (Redress of Individual Grievance) Regulations 2007 about which matters are excluded from the redress system apply only to matters arising after 1 Jan 08. A Service complaint submitted within the time limits after 1 Jan 08, but referring to a previously un-excluded matter that occurred or started before that date will be dealt with, but under the new system.
6. Advice should be sought from the appropriate staff legal adviser if in doubt about how transitional arrangements might affect a Service complaint.

¹ a. The Armed Forces (Redress of Individual Grievances) Regulations 2007 are at JSP 831, Annex B.
b. The Armed Forces (Service Complaints Commissioner) Regulations 2007 are at JSP 831, Annex C.
c. The Armed Forces Redress of Individual Grievances (Procedures and Time Limits) Regulations 2007 are at JSP 831, Annex D.

² This includes both regular and reserve service.

³ Certain types of complaint are excluded. See JSP 831, Chapter 2.

Principles

7. **Resolution.** The intent is that complaints are dealt with at the lowest possible level and resolution achieved quickly and where possible, informally. Every effort should be made to resolve a complaint informally, but the making of a Service complaint in accordance with the legislation is a legal right and a person who is in the process of seeking informal resolution should be aware that they have the right to submit a Service complaint at any time within the time limits. The difference between a Service and an informal complaint is explained in JSP 831, Chapter 2. Redress, where justified, should be granted at the lowest possible level, within powers to do so.
8. **Justice.** All those involved in the Service complaints process should act fairly, openly, without bias, in a reasoned manner and avoiding unnecessary delay. If a complaint is made about an identified person, that person should be given reasonable opportunity to state their case and to correct or contradict any evidence relevant to them. They should be given full details of any allegation made against them and a reasonable opportunity to respond. The complainant should also be given a reasonable opportunity to comment on or correct any information which the person deciding the complaint may wish to rely on.
9. **Investigation.** It is essential that the facts of each complaint are established as clearly as possible. Posting or discharge is not to be considered as a valid basis for excluding an individual from the inquiry.
10. **Information and disclosure.** The principle of providing information and disclosure to the complainant and any other person who might be affected by the outcome of the complaint is an important aspect of the redress process. The CO will provide with his decision any information relied on to make a decision, so that all those who might be affected by a complaint understand the basis of the decision. Subsequently, if the complaint is to be considered at other levels by the superior officer (SO) or at the Defence Council level⁴, all documentation and information received that may be relevant to a decision will be disclosed before a decision is made on the complaint. The complainant and others who may be affected by the outcome of the complaint are offered the opportunity to see and comment upon the disclosed documents and information. Disclosure is subject to exclusions where appropriate and consistent with Information Rights legislation, i.e. the Data Protection Act 1998, the Freedom of Information Act 2000 and the Environment Information Regulations. Privileged and protected information and advice is not to be disclosed or paraphrased, except when advised to do so by the relevant legal adviser. If doubt exists on any aspect of disclosure, staff legal advice should be sought.
11. **Delay.** Unreasonable delay is unacceptable. In minimising delay, all those involved in the Service complaints process must ensure that this is not achieved at the expense of justice or appropriate investigation. All those involved in the Service complaints process have a responsibility to be reasonable and to expedite the handling of the complaint by responding to correspondence and requests for information within the timescales specified in JSP 831, Chapters 3, 4 and 5.
12. **Standard of proof.** In assessing a complaint, the decision maker at each level must establish if there are sufficient grounds to uphold the complaint. The basis for the decision is the standard of proof used in employment law – it is enough if the person dealing with the case considers that a wrong probably occurred (balance of

⁴ At the Defence Council level a Service complaint may be resolved by a single Service Board or a SCP.

probabilities). In other words, at the very least, there must be evidence to show that it was more likely than not that the wrong alleged by the complainant occurred.

13. **Dishonest or unfounded complaints.** Service complaints will be assumed to have been made in good faith⁵ and complainants have a right to be protected against victimisation for making such a complaint, even if it is not upheld. Complainants must be satisfied that their complaint is based on objective fact. Complaints should be made honestly and there should be no intent or deliberate act or omission to cause harm, distress or nuisance. Dishonest or unfounded complaints, that show intent or deliberate acts or omissions to cause harm, distress or nuisance may in themselves constitute harassment and if found to be groundless, could result in administrative or disciplinary action being taken against the complainant. Staff legal advice should be sought in deciding if a complaint is dishonest, in which case the complaint should be rejected and the complainant informed in writing. If any doubt exists about whether a complaint is dishonest or groundless, it should be treated as a valid complaint.

Key features of service complaints process

14. **General.** The key features of the complaints process are that:

- a. Complaints are resolved at one of three levels.
- b. Complaints may be dealt with by a Service Complaint Panel (SCP).
- c. Certain categories of complaint will have an independent person on the SCP.
- d. The Service Complaints Commissioner (the Commissioner) may receive allegations and refer those of certain types to the chain of command for action as Service complaints, should the Service person alleged to have been wronged wish to make such a complaint. Referrals by the Commissioner carry additional reporting requirements; full details are in JSP 831, Chapters 3, 5 and 7. The Commissioner will report to Parliament on the efficiency, effectiveness and fairness with which the complaints process has operated.
- e. Service complaints will be submitted on a single form.

15. **Levels.** The Service complaints process has a maximum of 3 levels: the prescribed officer, usually the CO (roles and responsibilities of the CO are detailed in JSP 831, Chapter 3); the superior officer (SO) (roles and responsibilities of the SO are in JSP 831, Chapter 4); and the Defence Council level (roles and responsibilities in JSP 831, Chapter 5). The CO should consider carefully whether he can effectively deal with the complaint in reasonable time. Should the CO not be able to do so or lack the authority to grant the redress sought or another appropriate redress, he may refer the complaint to the SO or may refer it directly to the Defence Council level. The same considerations apply to a SO who receives a case. At each of the first two levels, if the complainant is not satisfied with the proposed resolution of the complaint or the redress to be granted, he may require that the complaint is referred to the next higher level for consideration.

⁵ The fact that a complaint is not upheld does not mean that it was made in bad faith. A complaint is made in bad faith where there is evidence that the complainant has been dishonest rather than, for example, that they were confused and upset.

16. **Secretariat.** The complaints process is supported by secretariats. The secretariats have 2 main components; a central secretariat and the secretariats of the three single-Services. The central secretariat is part of the central staff reporting to DG SP Pol through D SP Pol SC and DD SP Pol SC. The single-Service secretariats are embedded within their single-Service chain of command in their separate locations.

17. **The Service Complaint Panel.** Once a complaint reaches the Defence Council level (Level 3) it will normally be considered by a single-Service Board or a SCP. A SCP will normally consist of 2 officers of at least 1* rank, usually of the same Service as the complainant. SCPs will operate with the full delegated powers of the Defence Council appropriate to the case being considered. Guidance as to which types of complaints should be dealt with by a single-Service Board or a SCP is in JSP 831, Chapter 5.

18. **Independence.** Although a SCP will normally consist of two serving officers, there will be an additional independent member to hear certain categories of complaint. The independent member must not be a member of the Armed Forces or the Civil Service. A SCP will include one independent member in any case delegated to a SCP in which the complaint:

- a. Alleges discrimination.
- b. Alleges harassment.
- c. Alleges bullying.
- d. Alleges dishonest, improper, or biased behaviour.
- e. Alleges failure of health care professionals to provide medical, dental or nursing care where the Ministry of Defence was responsible for providing the relevant care.
- f. Alleges negligence in the provision by Ministry of Defence health care professionals of medical, dental or nursing care.
- g. Concerns the exercise by a Service policeman of his statutory powers as a Service policeman.
- h. Involves a Service complaint about a decision to reject a Service complaint that arose from a referral by the Commissioner of an allegation, and which related to any of the issues in sub paragraphs a to d above.
- i. Involves a complaint about a decision at the first or second level not to allow a complaint to proceed, following a referral by the Commissioner of an allegation of matters covered by sub paragraphs a to d above.

19. **Service Complaints Commissioner.** The Commissioner is a statutory appointment made by the Secretary of State. The Commissioner has the following roles:

- a. To provide an alternative point of contact for individuals, either Service personnel or third parties, who wish to make an allegation of bullying,

harassment and related issues listed in paragraphs 18 a - d above, about a Service person.

- b. To refer such allegations to the chain of command for action.
- c. To provide the Secretary of State for Defence with an annual report to be laid before Parliament, on the efficiency, effectiveness and fairness of the Service complaints process over the reporting period.

The Commissioner may also receive allegations that a Service person has been wronged in a matter not related to those on paragraphs 18 a - d. The Commissioner does not have a statutory power to refer these types of allegations to the chain of command for action, but he or she may choose to do so. Further details on the roles and responsibilities of the Commissioner are in JSP 831, Chapter 7.

20. **Service complaints form.** Although a Service complaint can be submitted initially in any written format, the complaint should subsequently be submitted on a standardised Service complaint form (JSP 831, Annex F) to provide to officers dealing with the complaint clear information about the complaint and the redress sought.

21. **Reference to the Sovereign.** An officer may request that his Service complaint be referred to the Sovereign, if the Defence Council or Single-Service Board made the final decision on a complaint. An officer may not request that his Service complaint be referred to the Sovereign if the final decision on any aspect of a Service complaint was made by a SCP, see JSP 831, Chapter 5.

Chapter 25

Service inquiries

The law governing Service inquiries and relevant guidance is set out in JSP 832 (Guide to Service Inquiries) to which reference should be made. The principal legislation governing Service inquiries is the Armed Forces Act 2006, section 343 and the Armed Forces (Service Inquiries) Regulations 2008 [SI 2008 No. 1651] See [Chapter 37](#) (Armed Forces act 2006 – Statutory Instruments and Defence Council Regulations). JSP 832, 1.6 sets out other JSPs to which reference should be made depending upon the circumstances. Legal advice must be sought in relation to any decision whether or not to establish an inquiry.

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Chapter 26

Safeguarding children: Armed forces child protection powers

Introduction

1. This chapter provides an overview of child protection powers available through the Armed Forces Act 1991 (AFA 91) as amended by the AFA 2006 (the Act) and the related Statutory Instrument¹. It includes an overview of the procedures that may need to be followed in order to safeguard children residing or staying outside the British Isles with Service families or with the families of civilians subject to Service discipline (relevant civilians). Detailed guidance on safeguarding children is contained in JSP 834 (Safeguarding Children), which covers all aspects of safeguarding of children. This is wider than child protection under the AFA 91, as amended by the Act, which focuses on the particular measures with legal effect which may be taken, usually when a specific risk to the wellbeing of a child has been identified.

2. In the UK, the MOD does not lead on safeguarding; as with all other local, regional and national service provision, this is the responsibility of the appropriate authorities². The statutory duties and powers for such authorities include those that relate directly to child protection. MOD staff will cooperate with the statutory authorities in discharging their responsibilities. Typically this is enabled through the chain of command with the advice and assistance of specialist staff, such as the single-Service welfare agencies. The full range of such support is articulated in JSP 770 (Welfare).

3. Overseas, however, the MOD seeks to replicate, as far as appropriate and practical, the same procedures and levels of service as would be found in England. In general, this is delivered as a matter of policy and practice. For child protection, however, specific powers are available in AFA 91, as amended by the Act, that mirror those that would be available in relevant legislation³ to Local Authorities in England.

Legal basis

4. AFA 91 as amended by the Act provides for:
- a. The application for, making of, variation and discharge of assessment orders;
 - b. The making, review and discharge of protection orders; and
 - c. The removal of children by Service Police in an emergency.

Under the changes made by the Act, these powers are no longer held by a CO, but by relevant practitioners (applications for assessment orders), Service Police (removal in an emergency) or judge advocates (all other matters). The continued involvement of the chain of command is summarised in this chapter and is described in detail in JSP 834 (Safeguarding Children).

¹ The Armed Forces (Protection of Children of Service Families) Regulations 2009/1107.

² In England and Wales, Local Authorities; in Scotland, Social Work Departments; in NI, Health and Social Services Trusts.

³ Particularly the Children Act 1989 as amended by the Children Act 2004.

Principles

5. **Definitions.** A full list of definitions and glossary of terms are in the Annexes to JSP 834 (Safeguarding Children). For the purposes of this chapter:

Child	Anyone who has not yet reached their 18 th birthday. This includes members of the Armed Forces, whose status or entitlement to services or protection under the Children Act 1989 does not change ⁴ .
Child in need of protection	A child who is suffering, or likely to suffer, significant harm unless action is taken (such as removal to safe accommodation) to safeguard or promote their welfare.
Child protection enquiry	Making enquiries to decide whether a relevant authority should take action to safeguard or promote the welfare of a child who is suffering, or likely to suffer, significant harm ⁵ .
Harm/significant harm	The result of not mitigating the risk of neglect or physical, emotional or sexual abuse. Detailed categories of abuse are defined in JSP 834 (Safeguarding Children).

6. **Duty to safeguard.** The basic tenet in the practice and policy of safeguarding is that it is a parental responsibility to bring up children and that it is in the best interests of all children to be brought up in their own families wherever possible. State (relevant authority) intervention must be seen from the perspective of the duty to safeguard and promote the welfare of children. Intervention should only be considered where it is assessed that a child may be in danger of significant harm. However, if the danger of significant harm exists then intervention must be.

7. **Working together.** The expectation that all parties will work together in order to safeguard and promote the welfare of children is captured in the Government publication Working Together to Safeguard Children (2006). This publication draws the attention of relevant local and national authorities to the circumstances of Service families and to the single-Service welfare agencies that provide specialist welfare and social work support to the Armed Forces. It also summarises the mechanisms for the passage of information between authorities for children in need of protection that move between countries or authorities; for example, between the UK (where local or equivalent authorities have the lead) and overseas (where MOD assumes the lead, through overseas commands).

8. **Children in need of protection.** Only a child assessed as in need of protection can be the subject of a protection order or, in an emergency, removed from its family for its own protection. These are children who are suffering, or likely to suffer, significant harm unless action is taken (such as removal under a protection order) in order to safeguard or promote its welfare. Guidance on the thresholds for such actions can be found in JSP 834 (Safeguarding Children).

9. **Confidentiality.** General guidance on confidentiality is available in JSP 834 (Safeguarding Children). In all areas of child protection work, the need for confidentiality is governed by the need to protect and maintain the interests of the child above all other considerations. Particular care must be taken to prevent further harm to a child at risk or distress to a family by the unnecessary disclosure of case details. Most practitioners will also

⁴ See also 2009DIN01-024 Policy on the care of Service personnel under the age of 18.

⁵ See also Children Act 1989 section 47.

be governed by professional codes of conduct which they must observe. However, it is essential that information is shared where failure to do so would otherwise risk harm to the child concerned.

Key elements of child protection under AFA 91 and the Act

10. **General.** All children should be safe and should be able to develop to their full potential without risk or fear of abuse in any form. The safeguarding of children is vital and child protection procedures must be well known, effective and work consistently both in the UK (where local and other devolved authorities take the lead) and across all overseas commands. AFA 91, as amended by the Act, provides for child protection powers that may be used in order to meet the needs of safeguarding children living in the Service community overseas. The main components of these powers are summarised below however detailed guidance should be followed as contained in JSP 834 (Safeguarding Children). The following paragraphs do not provide comprehensive guidance on the law.

11. **Assessment orders.** An assessment order is a tool to ensure that a child can be seen and assessed by relevant practitioners in order to determine whether that child is suffering, or likely to suffer, harm. It may also be required in order to ensure that the child can be assessed for need for special services, without which, outcomes for the child such as a reasonable standard of health or development will not be achieved. The order must specify the date by which an assessment is to begin and will be for a period of not more than 7 days. Those involved who are capable of producing the child for assessment are required to do so and will be committing an offence if they intentionally obstruct this objective. The subject child, however, if of sufficient understanding to make an informed decision, may refuse to submit to any examination or assessment. The process for assessment orders includes:

a. **Applications.** An application for an assessment order can be made in writing, by an appropriate practitioner to a judge advocate. An applicant will usually be a statutorily qualified and registered social worker, but may be a registered medical practitioner. Most overseas commands will have appropriately qualified and registered staff directly in support of the command. Some smaller locations have arrangements for on-call support from other locations. In isolated locations where there is no command or on-call support, it may be necessary to repatriate the family to the UK on the basis that the family cannot be adequately supported in the isolated location. It should be noted that the chain of command is not empowered directly to apply for an assessment order but, in view of their command responsibilities, should be kept aware of any significant concerns that may lead a practitioner to consider making an application.

b. **Making of assessment orders.** Once an application is received, the court administration officer (CAO) must set, and inform the applicant of, a date, time and place of a hearing. It is the applicant's responsibility to take reasonable steps to ensure that those involved (such as the child, parents, others with parental responsibility or with whom the child is residing such as fosterers, or others with a right to contact with the child, for example, through a contact order) are given at least 7 clear days' notice of the details of the hearing. The judge advocate must consider any representations made by the applicant or those involved before deciding whether or not to make an assessment order. Representations can be heard in person or by live link if this is in the best interests of the child or the only practical or expeditious way to consider the application. For example, this may be the most practical arrangement when the application is being made from a remote location where there is no judge advocate on hand or easily available. The judge advocate must ensure that: a written record is made of the substance of any representations, notice is given

of any decision made and the reason for it, and a copy of the assessment order (if made) is provided to the applicant and those others involved.

c. **Variation and discharge.** Any person involved (as described above including the child, parents, others with parental responsibility, etc.) can apply, in writing, to a judge advocate to have the assessment order varied or discharged. The judge advocate must afford an opportunity for representations to be heard from the applicant of the original order and others involved before considering variation or discharge. If the assessment order is varied or discharged, the judge advocate must ensure that notice is given of his decision, with reasons and a copy of the amended order (if relevant), to all those afforded an opportunity to make representations.

12. **Protection orders.** Any person can apply to a judge advocate for a protection order if there is reasonable cause to believe that a child is likely to suffer significant harm unless action is taken. The action will be either:

a. To remove the child from their current to other accommodation (for example, from their home to an emergency foster home); or

b. To prevent removal of the child from where it is being accommodated (for example, to ensure a child is not removed from hospital).

13. An application for a protection order may also be made by a person who has been designated in an Assessment Order to make or assist in, an assessment and who is being frustrated in that assessment. That person must have reasonable cause to suspect that the child is suffering, or likely to suffer, significant harm and believe that access to the child is required as a matter of urgency. Once a protection order is made, a responsible person (typically a social worker with specialist child protection training) will ensure that the child is removed to or retained in appropriate accommodation. That person is responsible for safeguarding or promoting the child's welfare, including returning the child to the care of the person from whose care he was removed if it appears that it is safe to do so. If subsequently the circumstances change again and the protection order is still in force, the responsible person can remove the child without recourse to a judge advocate. The process for protection orders includes:

a. **Making of protection orders.** A judge advocate must receive any application in writing and ensure that it states the grounds for the order as well as the location (address of the accommodation) of the child and sufficient information to enable the child to be identified. As with assessment orders, the judge advocate must afford an opportunity for those involved to make representations before making an order. He may dispense with this step if it would be impractical, would cause unnecessary delay or if it would not be in the best interests of the child. He can impose exclusion requirements on a person as part of the order; for example, requiring a person to leave or prohibiting them from entering relevant premises where the child lives or a defined area within which the premises is located.

b. **Variation and review.** The maximum duration of a protection order is 28 days, though a judge advocate can specify a shorter period when the order is made. If a shorter period is specified and the judge advocate is satisfied that there is reasonable cause to believe that the child concerned is likely to suffer significant harm unless the order is extended, he can extend the order under the same provisos as making the order. Exclusion requirements of a protection order may be varied or revoked by a judge advocate on written application specifying the grounds on which it is made and under the same provisos as making the order. In general, the protection order itself must be reviewed by a judge advocate every 7 days unless it is due to end

that, or the following, day. The same provisos apply on representations and in addition, the judge advocate may require (by written notice) those involved to provide him with specified information relating to the order.

c. **Discharge.** A judge advocate may not discharge a protection order within 72 hours of having made, reviewed or extended it. Otherwise, he may consider a written application specifying the grounds for discharging the order. The same provision for representations applies, except that the responsible person must be afforded an opportunity to make representations.

d. **Live television link.** As with applications for assessment orders, a live link may be considered for the application, variation, review and discharge of protection orders.

14. **Removal of children by Service Police in an emergency.** The Act amended AFA 91 to include powers for the Service Police to take children into their protection for a period of up to 72 hours. As with protection orders, this may mean removal from accommodation (for example, the child's home) or prevention of removal from a safe place (for example, a hospital). The Service policeman must inform an authorising Service Police officer (of OF2 rank or above and at least the same rank as the informing Service policeman) as soon as reasonably practical of what steps he has taken or is proposing to take and details of where the child is being accommodated. He must also inform the child, if he believes the child capable of understanding, of what action has been or may be taken and why and determine the wishes and feelings of the child. The authorising Service Police officer must inquire into the case and approve the accommodation that the child is in or ensure that the child is moved to other appropriate accommodation. He must also do what is reasonable to safeguard and promote the welfare of the child. The child's parents, others with parental responsibility, those with whom the child was residing immediately before being taken into Service Police protection and those with a contact order, must be informed of the action taken or planned and must be allowed any contact with the child that, in the opinion of the authorising Service Police officer, is both reasonable and in the child's interest. These powers are not a substitute for the appropriate use of assessment and protection orders and are for emergency use only.

Further advice and guidance

15. Safeguarding children in general and child protection powers in particular can be a complex and emotive area. Comprehensive guidance is available in JSP 834 (Safeguarding Children), in single-Service policy⁶ and in overseas command policy. However, direct advice on specific cases should be sought at the earliest opportunity from expert practitioners, especially the appropriate command specialist social work support staff.

Transitional guidance

16. The 2009 Regulations make transitional provision as to how processes, wholly or partly, begun under the 1996 Regulations are to be completed after the revocation of the 1996 Regulations (i.e. after 30 October 2009). Legal advice should be sought as to what effect the transitional provisions have in relation to particular cases.

⁶ RN: NPFS/RM policy documents, Army: LFSO 3351 and AGAI 83, RAF: AP3392 Volume 2 Chapter 24.



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MINISTRY OF DEFENCE

31 October 2009

Equality and Diversity Impact Assessment Statement

This policy has been equality and diversity impact assessed in accordance with Departmental policy. This resulted in:

Part 1 screening only completed (no direct discrimination or adverse impact identified / policy is a reflection of statutory requirements and has been cleared by a Legal Adviser). This policy is due for review in Dec 2010.

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Glossary

Terms used in Volumes 1 and 2

Phrase	Definition
THE ACT	Armed Forces Act 2006.
ADDUCED	Offered as evidence.
ARRAIGNMENT	The process by and moment at which the accused enters a plea to a charge in a Service court.
APPLICABLE SERVICE OFFENCE	During an investigation the Service Police can only take fingerprints and samples when the alleged offence is an 'applicable Service offence' as listed in the PACE application order
BASIC POWERS	.Sentencing powers of a commanding officer to whom extended powers of punishment (see below) have not been granted by Higher Authority. See Chapter 13 Annex A for individual punishments and whether extended powers are required
BRITISH ISLANDS British Isles is also used in the MSL, see Chapter 3 (Jurisdiction and time limits)	The United Kingdom (England, Scotland, Wales and Northern Ireland) the Channel Islands and the Isle of Man.
COMMANDING OFFICER	The officer who is in command of a person for the purposes of any provision made by or under the Act. Throughout the manual it is used to describe the commanding officer and anyone who is authorised to act on his behalf (see subordinate commander below). Where a paragraph specifically refers to the Commanding officer and him alone it will be highlighted. See Chapter 2 (Meaning of commanding officer) for more detail.
COMMANDING OFFICER'S DELEGATED POWERS	Powers that a commanding officer has delegated under a power granted under the Act or any subordinate legislation under the Act (see subordinate commander below).
COMMANDING OFFICER'S INVESTIGATION	An investigation into a potential offence under AFA 06 section 115(4)(a) which is not conducted by Service Police. This process, which may be formal or informal may be used by a commanding officer, or people acting on his behalf, to gather evidence in order to determine whether there is sufficient evidence to charge a person with a Service offence
CRIMINAL CONDUCT OFFENCES	Any Service offence under sections 42 - 49 of the Act which is a criminal offence under the law of England and Wales (or

	would be punishable if committed in England or Wales), for example, theft, burglary, rape, common assault and inflicting grievous bodily harm.
DESIGNATED AREA	See Chapter 3 (Jurisdiction and time limits) Annex A
DISCIPLINARY (NON-CRIMINAL CONDUCT) OFFENCES	Service offences which can be committed by a Service person as listed under sections 1 – 41 of the Act some of which are also applicable to a civilian subject to Service discipline.
EVIDENTIAL SUFFICIENCY TEST	There is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted.
EXTENDED POWERS	Extended powers of punishment granted to a commanding officer by higher authority that extend his basic powers (see basic powers above).
HIGHER AUTHORITY (HA)	For these purposes higher authority means any office in the commanding officer's chain of command who is superior in that chain of command to the commanding officer
INDICTABLE OFFENCE	An offence that may be heard in a Crown Court. An indictable only offence is one that can only be heard in a Crown Court.
INCHOATE OFFENCES	Where a person has attempted to commit an offence, has incited someone to commit an offence or has conspired to commit an offence.
MUST / SHOULD	MUST = A mandatory legal requirement based upon the legislation. SHOULD = A discretionary requirement that ought be complied with as a matter of policy.
OBJECTIVE TEST	Where a reasonable person would think it appropriate/inappropriate for someone to do/not do something. The test is applied to the mind of an ordinary, reasonable person rather than to the mind of the person making the decision (compare with subjective test below).
OPERATIONAL PERIOD	The period during which, whilst under a suspended sentence, if an offender commits a further offence the suspended sentence is capable of being activated. See section 190 of the Act.
PRESCRIBED CIRCUMSTANCES	Prescribed circumstances are additional circumstances in which the Service Police must be made aware or in which a decision on charging must be taken by the DSP. See Chapter 6 (Investigation,

	charging and mode of trial) Annex E
RECORDABLE OFFENCE	Recordable offences are those offences under section 42 of the Act for which the corresponding offences under the law of England and Wales are recordable on the PNC. Additionally, there are also a number of Service offences that are recordable (sections 11(1), 14, 24(1), 27, 28, 29, 30, 39, 40 and 42 of the Act)
RELEVANT CIVILIAN	A (civilian) person who is subject to Service discipline. They must fall into the category of Schedule 15 of the Act. For more detail see Chapter 3 (Jurisdiction and time limits).
RELEVANT OFFENCE	.See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 94 and Annex A.
SERVICE COURT	The Court Martial, the Summary Appeal Court and the Service Civilian Court.
SERVICE OFFENCE	Include both criminal conduct offences and disciplinary offences under Sections 1 - 49 of the Act.
SERVICE PERSON	A Service person is a member of the regular forces or of the reserve forces (when on duty) and is subject to Service law.
SCHEDULE 1 OFFENCES (Part 1)	Criminal conduct offences that may be dealt with at summary hearing without permission of HA.
SCHEDULE 1 OFFENCES (Part 2)	Criminal conduct offences that may be dealt with at summary hearing with permission of HA.
SCHEDULE 2 OFFENCES	If an alleged offence is listed in Schedule 2 the CO is under a duty to ensure the Service Police are made aware. See Chapter 6 (Investigation, charging and mode of trial) Annex D
SERIOUS SERVICE OFFENCE	See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 79.
SERVICE CIVILIAN COURT (SCC)	The SCC can only sit outside the UK and has jurisdiction (where it is not a matter for the CM) to try any Service offence committed outside the British Islands by a civilian subject to Service discipline.
SERVICE COMPENSATION ORDER	An order imposed on a person by a commanding officer, the Court Martial, the Summary Appeal Court, the Service Civilian Court or the Court Martial Appeal Court to compensate a victim.
STAFF LEGAL ADVISER	A Service lawyer who is the legal adviser in a person's chain of command.
SUBJECTIVE TEST	Where a person believes he has

	reasonable grounds for doing/not doing something. The test applies to the mind of the person making the decision (compare objective test, above).
SUBORDINATE COMMANDER	Under the Act an officer to whom powers have been delegated by a commanding officer.

Abbreviations

AA55	Army Act 1955
AAO	Accused's Assisting Officer
ABH	Actual bodily harm
ADC	Additional duties commitment
AFA55	Air Force Act 1955
AFA96	Armed Forces Act 1996
AFA06	Armed Forces Act 2006
AFCLAA	Armed Forces Criminal Legal Aid Authority
AFCO	Armed Forces Careers Office
AGAI	Army General and Administrative Instruction
ANO	Air Navigation Order
AO	Assisting Officer
AP	Air Publication
ASA	Appropriate Superior Authority
ASP	Authorising Service policeman
AWOL	Absent without leave
BR	Book of Reference
CAA	Civil Aviation Authority
CAO	Court administration officer
CBF	Commander British Forces
CDT	Compulsory drugs testing
Ch	Chapter
CJA	Criminal Justice Act 2003
CM	Court Martial
CMAC	Court Martial Appeal Court
CO	Commanding Officer
CONDO	Contractors on deployed operations
CPIA	Criminal Procedure and Investigations Act
CPS	Crown Prosecution Service
DAO	Defendant's Assisting Officer
DEFCON	Defence Condition
DE&S	Defence Equipment and Support
DIN	Defence Internal Notice
DO	Designated officer
DOB	Date of birth
DSP	Director of Service Prosecutions
DX	Document exchange
ECHR	European Court of Human Rights
EOIT	Equal opportunities inquiry team
FLAGO	Fleet Administrative and General Orders
FLC	Front Line Command
FPEO	Financial penalty enforcement order
FTRS	Full Time Reserve Service
HA	Higher Authority
IL	Increment level
JPA	Joint Personnel Administration
JSP	Joint Service Publication
JSU	Joint Support Unit
LANDSO	LAND Standing Order
LFSO	Land Forces Standing Order

MCS	Military Courts Service
MCTC	Military Corrective Training Centre
MOD	Ministry of Defence
MOU	Memoranda of understanding
MSL	Manual of Service Law
MTD	Manned training days
NAAFI	Navy, Army and Air Force Institutes
NATO	North Atlantic Treaty Organisation
NCAO	Naval court administration officer
NCO	Non-commissioned officer
NDA57	Naval Discipline Act 1957
NOK	Next of kin
NPM	Naval Provost Marshal
NRPS	Non-regular permanent staff
OAO	Offender's assisting officer
OCI	Officer in charge of the investigation
PACE	Police and Criminal Evidence Act
PfP	Partnership for Peace
PIDAT	Post incident alcohol and drug testing
PJHQ	Permanent Joint Head Quarters
PLAGO	Personnel, Legal, Administrative General Orders
PNC	Police National Computer
PW	Prisoner of War
QR	Queen's Regulations
QRRN	Queen's Regulations Royal Navy
r.	Rule
RAF	Royal Air Force
RAH	Record of activation hearing
reg.	Regulation
RFA96	Reserve Forces Act 1996
RAFP	Royal Air Force Police
RM	Royal Marines
RMP	Royal Military Police
RN	Royal Navy
RNMPU	Royal Navy missing persons unit
RNP	Royal Navy Police
RO	Reviewing officer
ROPs	Restriction of privileges order
RRP	Relevant residential premises
RSH	Record of summary hearing
RTA	Road Traffic Act
s.	Section
ss.	Sections
SAC	Summary Appeal Court
SBA	Sovereign Base Areas
SCC	Service Civilian Court
SCE	Service Children's Education
SCO	Service compensation order
SCP	Service Complaint Panel
SDA	Service Discipline Acts
SF	Special Forces
SIB	Special Investigations Branch
SJS	Service Justice System

SNCO	Senior non-commissioned officer
SO	Superior officer
SOFA	Status of Forces Agreements
SPA	Service Prosecuting Authority
SPCB	Service Police Crime Bureau
SPVA	Service Personnel and Veterans Agency
SSAFA	Soldiers, Sailors, Airmen and Families Association
SSBN	Ship Submersible Ballistic Nuclear
SSIC	Single-Service inquiry co-ordinator
SSPO	Service supervision and punishment order
SSVC	Services Sound and Vision Corporation
TACOS	Terms and conditions of service
the Act	The Armed Forces Act 2006
TI	Technical instruction
WO	Warrant officer
XO	Executive officer

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Equivalent Service ranks/rates

NATO Code (STANAG 2116)	RN	Army ¹	RAF
OF-10	Admiral of the Fleet	Field Marshal	Marshal of the Royal Air Force
OF-9	Admiral	General	Air Chief Marshal
OF-8	Vice-Admiral	Lieutenant General	Air Marshal
OF-7	Rear Admiral	Major General	Air Vice Marshal
OF-6	Commodore	Brigadier	Air Commodore
OF-5	Captain	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant-Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
	Midshipman	Second Lieutenant	Pilot Officer Acting Pilot Officer ²
OR-9	Warrant Officer Class 1	Warrant Officer Class 1	Warrant Officer Master Aircrew
OR-8	Warrant Officer Class 2	Warrant Officer Class 2	
OR-7	Chief Petty Officer Chief Petty Officer Naval Nurse	Staff Corporal Staff Sergeant Colour Sergeant, RM	Flight Sergeant ³ Chief Technician ⁴
OR-6 OR-5	Petty Officer Petty Officer Naval Nurse	Corporal of Horse Sergeant	Sergeant
OR-4	Leading Rate Leading Naval Nurse	Corporal Bombardier	Corporal
OR-3		Lance Corporal Lance Bombardier	
OR-2	Able Rate Ordinary Rate Student Naval Nurse	Marine Private however described including: Gunner Sapper Signalman Guardsmen Fusilier Kingsman Rifleman Ranger Airtrooper Driver Craftsman	Junior Technician Senior aircraftman(T) Multi-skilled technician Leading aircraftman Aircraftman

¹ Royal Marine rank structure corresponds to Army structure and seniority

² Junior to Second Lieutenant

³ A qualified RAF Musician appointed to the post of Drum Major retains his normal rank while holding the appointment

⁴ A qualified RAF Musician appointed to the post of Drum Major retains his normal rank while holding the appointment

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Chapter 27

The Summary Appeal Court

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Chapter 27

The Summary Appeal Court

Part 1 - Introduction

Audience

1. This Chapter provides guidance to all personnel who are involved professionally in processing appeals to the Summary Appeal Court (SAC). They include: the commanding officer (CO); the Director of Service Prosecutions (DSP) as the respondent to the appeal¹; Reviewing Officers (RO); unit administrative staff; and the Military Court Service (MCS). The appellant's legal representative and assisting officer may also derive benefit from its content². Comprehensive procedural guidance for units is contained in the Manual of Service Law (MSL), [Chapter 15](#) (Summary hearing review and appeal), Part 2.

Organisation of the chapter

2. The chapter outlines the constitution and fundamental features of the SAC and the procedures to be followed before, during and after appeals from summary and activation hearings in accordance with Part 6 of the Armed Forces Act 2006 (the Act) and the Armed Forces (Summary Appeal Court) Rules 2009. The earlier parts deal with general matters such as the membership of, and the constitution of the court, uncontested appeals and witness notification and summons. This is followed by the preliminary matters to the appeal hearing and then guidance is provided on the order of procedure at the appeal itself appropriately sub-divided to cover both types of appeal: those against punishment and those against finding. The latter parts cover miscellaneous matters including evidence and service of documents.

Summary Appeal Court – an overview

3. The purpose of the SAC is to hear appeals from summary hearings (including appeals against the activation of a suspended sentence of detention by a CO) where personnel have a universal right of appeal. Appeals may be made against both the finding and punishment, which may be contested or uncontested by the respondent³, or against the punishment only. The SAC is a standing court and may sit anywhere, whether within or outside the United Kingdom⁴, and in practice will usually sit in one of the Service courts centres. It works in conjunction with the Service prosecuting authority (SPA) headed by the DSP and the court administration officer (CAO). The key features of the court include: the universal right of appeal; the possibility of the RO referring a finding or punishment to the SAC on behalf of an offender (this requires the Judge Advocate General to give leave to refer the case, after which the appeal is treated as if it were brought by the offender), see [Chapter 15](#) (Summary hearing review and appeal); a complete re-hearing for an appeal against both finding and/or punishment and the restriction of the court's power to pass sentence, in the event the finding is confirmed, that is no more severe than the punishment awarded by the officer who heard the charge.

¹ Section 141(4) of the Act.

² [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) provides further detailed guidance.

³ See [Chapter 15](#) (Summary hearing review and appeal).

⁴ Section 140(2) of the Act.

The judge advocate

4. A judge advocate presides over the court and ensures that the proceedings are conducted in accordance with the law of England and Wales. Unlike in a CM trial the judge advocate participates in determining the facts and hence whether the finding should be upheld or quashed.

The court administration officer (CAO)

5. The CAO makes the administration arrangements for the SAC and exercises his functions (other than that of specifying the lay members for any proceedings) subject to the direction of the judge advocate. He may delegate any of his functions to a member of the MCS⁵.

Constitution of the SAC

6. The court consists⁶ of a judge advocate and two lay members except for preliminary and ancillary proceedings where there are no lay members⁷. The lay members may comprise 2 officers or one officer and one substantive WO. Officers must have held a commission for at least 3 years and be of the minimum rank of sub lieutenant, military or marine lieutenant or flying officer or have been a substantive WO immediately before receiving a commission. The senior member is to be of minimum rank of lieutenant commander, major or squadron leader. No member of the court is to be of junior rank/rate or junior in the same rank/rate to the appellant. Only one WO may sit as a member of a particular SAC hearing, and then only if he is of equivalent rank/rate or of senior rank/rate to the appellant. Where the court is to hear an appeal from co-appellants one of whom is an officer and the other is of the rank of WO or below, each member must be at least of equivalent rank to the most senior co-appellant. The ranks/rates referred to in this paragraph are substantive.

Officers and warrant officers not qualified or ineligible for membership of the court

7. Sections 143 and 144 of the Act make provision for the professional and particular circumstances when officers and warrant officers are either not qualified or ineligible for membership. In addition a person is ineligible for membership of the court if he has served on the same unit as the appellant since the commission of the offence that is subject to the appeal, or if he was a member of the SAC or of the CM for any previous proceedings involving the appellant⁸.

Specifying members of the court and notification of time and place for hearing of the appeal

8. The CAO is responsible for making arrangements for SAC proceedings, including preliminary proceedings if necessary, as soon as practicable after the receipt of advance information from the DSP⁹ (See [Annex A](#) Notice of application for a preliminary hearing T-SL-SAC03). For this purpose the CAO will notify relevant parties of the time and place of the

⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 21.

⁶ Section 142 of the Act.

⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 34.

⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 36.

⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 42 and 43.

hearing, specify court members and consult the Judge Advocate General who will specify a judge advocate for the proceedings.

Part 2 - Uncontested appeals

DSP to give notice of decision to contest appeal

9. Where the DSP is notified of an appeal¹⁰ against finding he must give written notice to the CAO, within 28 days, indicating whether or not he intends to contest the appeal¹¹. The DSP may apply to the Judge Advocate General to extend this period: an extension may be granted if it is considered in the interests of justice to do so¹².

10. Having given notice to contest an appeal in accordance with paragraph 9 above, the DSP may give notice to the CAO that he no longer wishes to contest the appeal. Where the DSP does not provide notice within 28 days to contest the appeal, the failure will be deemed notice that he does not intend to contest the appeal¹³.

Powers of the court in uncontested appeals

11. Where the DSP has given notice that he does not intend to contest an appeal against finding, the court must quash the finding against which the appeal was brought. The power of the court to quash such a finding¹⁴ may be exercised by the Judge Advocate General without a hearing¹⁵. Any decision of the Judge Advocate General in the exercise of these powers must be recorded in writing and signed by him. The CAO is responsible for notifying such decision to the appellant, the appellant's CO, the DSP and the reviewing authority if the appeal was referred by the reviewing authority¹⁶.

¹⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 15, 16 or 17.

¹¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 19(1).

¹² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 19(4).

¹³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 19(3).

¹⁴ Under Section 147(1)(a) of the Act.

¹⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 20(2)(a).

¹⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 20(3)(d).

Part 3 - Witnesses and summonses

Notification of witnesses

12. Where any person is required to give evidence in any proceedings before the court¹⁷, the CAO is responsible for notifying that person of the date, time and place at which he is required to attend¹⁸.

13. If the appellant requests the CAO to notify a witness on his behalf, the appellant is to provide the CAO with adequate information in sufficient time to enable notification to be made. If the CAO is unable to notify a witness as requested, or if, in his opinion, it is not reasonable to notify a witness, he is to inform in writing the judge advocate and the appellant.

Privileges of witnesses and others

14. A witness before the SAC or any other person whose duty it is to attend the court is entitled to the same immunities and privileges as a witness before the High Court in England and Wales¹⁹.

Issue of witness summons on application to a judge advocate

15. A party who wishes the judge advocate to issue a witness summons must apply as soon as practicable after becoming aware of the grounds for doing so²⁰ using the form of application for a summons to witness (T-SL-CM04) which can be found at [Chapter 29](#) (Court Martial proceedings), alternatively the application may be made orally²¹. The party applying must serve the application²² on the CAO in the manner directed by the judge advocate. Where the application is made in writing it must contain the same declaration of truth as a witness statement. Where a person is served with a witness summons, he is entitled to be reimbursed the expenses incurred in respect of his attendance²³. Application to withdraw a witness summons may be made under Rule 53 and oral applications in respect of the attendance of witnesses under Rule 54 of the Armed Forces (Summary Appeal Court) Rules 2009.

Warrant to arrest

16. If the judge advocate is satisfied by evidence on oath that a witness summons would not procure a person's attendance, he may issue a warrant to arrest that person and bring him before the court. In addition a judge advocate may issue a warrant to arrest a witness who has failed to attend SAC proceedings²⁴. Where a person has been arrested under a warrant to arrest in these circumstances he is to be transferred to Service custody and brought before a judge advocate for a review of custody as soon as is practicable. If he has not been brought before a judge advocate within 48 hours of his arrest he must be released²⁵. If the person is retained in custody a periodic review will take place before a judge advocate²⁶.

¹⁷ See [Chapter 29](#) (Court Martial proceedings) Annexes G and H.

¹⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 49(1).

¹⁹ Section 150 of the Act.

²⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 50(4).

²¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule s 50, 51 and 54.

²² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 50(8).,Rule 50(5) provides guidance on the content of the application.

²³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 57.

²⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 55.

²⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 55(6)(b).

²⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 56.

Part 4 - Preliminary proceedings

Listing of proceedings

17. When the CAO has received advance information²⁷ he must forward it to the judge advocate general and request him to determine whether preliminary proceedings are necessary and to specify a judge advocate for the appeal proceedings (See [Annex A](#) Notice of application for a preliminary hearing T-SL-SAC03). The CAO must then appoint a time and place for the preliminary or appeal proceedings as required²⁸.

Listing of further preliminary proceedings

18. At the direction of a judge advocate or on receipt of an application from the DSP or appellant, the CAO is to appoint the date, time and place at which the preliminary hearing will take place²⁹ and issue an appropriate notice in writing to those concerned. (See [Annex A](#) Notice of application for a preliminary hearing T-SL-SAC03). During preliminary proceedings the judge advocate may give directions as appear to him to be necessary to secure the proper and efficient management of the appeal³⁰. The judge advocate may make an order or ruling on any question as to the admissibility of evidence; any question as to joinder or severance of charges; and any other question of law, practice or procedure relating to the appeal³¹.

19. Unless the judge advocate directs otherwise, preliminary proceedings will take place before the judge advocate in open court. The judge advocate may direct that the preliminary hearing take place in chambers and without notice to the appellant³² where he is satisfied it is necessary or expedient in the interests of justice.

Power of the court to hear more than one appeal at the same time - joinder of appeals

20. The court may decide to hear two or more appeals at the same time where it appears to be in the interests of justice to do so. The court may decide this of its own motion or on the application of the respondent or an appellant in one or more of the appeals to which the application relates. The power of the court to make a determination will be exercised by a judge advocate sitting alone.

21. Before refusing an application or making a determination in accordance with paragraph 20, the judge advocate will allow the respondent and the appellant in any of the appeals, to which the application or determination relates, the opportunity of making representations to him. Where a judge advocate makes such a determination, he will direct the CAO to specify the time and place for the hearing of each of the appeals to which the determination relates.

²⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 42.

²⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 43(b).

²⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 44(1). There is no prescribed form for such an application.

³⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 47(1).

³¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 47(2).

³² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 45.

Part 5 - Procedure for hearing an appeal

22. This part provides guidance on matters relating to the administration of the court and some of the matters that may arise before and during the appeal itself.

Sittings of the court

23. Generally the SAC must sit in open court unless the judge advocate directs the court to sit behind closed doors ('in camera')³³ on the grounds that it is necessary or expedient in the interests of the administration of justice to do so. Where the SAC sits in closed court only the members of the court and any person under instruction may remain present. If it appears to the judge advocate necessary in the interests of justice, proceedings may be adjourned from time to time. The court must not sit other than on a business day unless in the opinion of the judge advocate it is necessary to do so. After the commencement of the proceedings the judge advocate will direct the times and days on which the court shall sit³⁴.

Objections to lay members

24. At the commencement of any proceedings, the names of the persons specified to sit as lay members of the court (including any person specified as a waiting member) and the name of any interpreter must be read to the appellant. Any party to the proceedings may object to any lay member on any reasonable ground³⁵.

25. The judge advocate must rule on any objection to a lay member before the lay member is sworn. If an objection to a lay member is upheld, the judge advocate must discharge him.

26. Any waiting member in respect of whom no objection has been made or allowed shall take the discharged lay member's place³⁶; and, if there is no such waiting member, the hearing of the appeal is to be adjourned. If an objection to the interpreter is allowed³⁷, the judge advocate must adjourn proceedings until the CAO has appointed a replacement.

Oaths and affirmations

27. After the appellant has been given the opportunity to challenge the members of the court, oaths must be administered to each of the lay members, and to any person in attendance under instruction, in the presence of the appellant³⁸. The form and manner of the oaths are outlined at Schedule 1 to the Armed Forces (Summary Appeal Court) Rules. Any interpreter appointed by the CAO must have an oath administered to him before he acts³⁹; see [Annex B](#) for oaths and affirmations.

Termination of proceedings

28. The judge advocate must terminate any proceedings with lay members if he considers it in the interests of justice to do so or a lay member dies or is unable to continue to attend proceedings; lay members shall be discharged under these circumstances. The

³³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 90(1).

³⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule s 22(2).

³⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 37(2).

³⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 38.

³⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 29(3).

³⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule s 28 and 39.

³⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 29(2).

termination of proceedings for the reasons outlined above does not bar further appeal proceedings in relation to the relevant appeal⁴⁰.

Procedure to be adopted where more than one appeal against finding

29. Where at a hearing it is necessary for the court to determine more than one appeal against finding, those appeals must be heard at the same time and must be determined before any appeal against punishment, awarded in respect of any finding, is heard.

⁴⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 32(5).

Part 6 - Appeal against punishment

30. This part provides guidance in relation to the practice and procedure of the court with respect to the exercise of its powers for the hearing of an appeal against punishment in relation to: any proceedings where the court has upheld a finding that a charge has been proved; any proceedings where the court has substituted a finding that another charge has been proved⁴¹; and an appeal against punishment⁴².

Information provided by DSP before punishment

31. Where the proceedings relate only to any punishment awarded, or previous sentencing in respect of the appellant was terminated⁴³, the respondent must address the court on the facts of the case. Where practicable the respondent must inform the court of:

- a. The appellant's name, rank or rate, name, age and unit.
- b. The appellant's Service record.
- c. Any recognised acts of gallantry or distinguished conduct and any decoration to which he is entitled.
- d. Any previous convictions⁴⁴ of the appellant for Service and civilian offences and any sentence in respect of such an offence. Relevant offences⁴⁵ committed in another member state are also to be included. Those offences that are spent under the Rehabilitation of Offender's Act are to be indicated as such.
- e. Particulars of any formal police cautions.
- f. The appellant's rate of pay (including allowances and deductions), terminal benefits and pension entitlements⁴⁶.
- g. Whether the CO had extended powers⁴⁷.
- h. The punishment awarded by the CO.
- i. Whether the CO made an activation order, if so, the previous offence and the punishment awarded for that offence.
- j. Where the offender is no longer subject to Service law refer to Armed Forces (Summary Appeal Court) Rules 2009, rule 86(5).

Determining disputes on facts (Newton Hearing)

32. Where, on an appeal that relates only to the award of punishment, there are disputed facts in the case, any issue of fact may be tried by the court⁴⁸. Where an issue of fact is tried, the judge advocate may direct the respondent to call any witness to give evidence, and the respondent and the appellant may, with the leave of the judge advocate, adduce

⁴¹ Section 147(1)(b) of the Act.

⁴² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 83.

⁴³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 86.

⁴⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 86(2)(d).

⁴⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 86(2)(d)(iii).

⁴⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 86(2)(f) and 86(5).

⁴⁷ Under Sections 133(1) & (2), 134(1), 135(1), or 136(1)(b) of the Act.

⁴⁸ Armed Forces (Summary Appeal Court) Rules 2009/11211, rule 84.

evidence. The court (consisting of both the judge advocate and the members) will sit in closed court while deliberating on its findings on the issue of fact and any such issue will be determined by a majority of the votes of the members of the court. The decision of the court on the issue of fact, and the reasons for it will be announced in open court by the judge advocate.

Mitigation of punishment

33.. The appellant may call witnesses in mitigation of punishment or as to character and may personally address the court in mitigation. The appellant may also produce to the court any document or written report. Unless the respondent requires otherwise, any document or report need not be adduced in compliance with the strict rules of evidence.

Pre-sentence report and previous convictions

34. Where the CAO has arranged for a pre-sentence report to be prepared prior to the proceedings, he must provide the DSP and the appellant with a copy before the start of the hearing. Similarly, where the DSP has obtained a record of the appellant's previous convictions in advance of the proceedings, he is to provide the CAO and the appellant with a copy prior to the hearing⁴⁹.

Deliberation on, and pronouncement of, punishment

35. The court (consisting of the judge advocate and the members) shall close to deliberate on its decision on any punishment awarded. No other person may be present except a person in attendance for instruction⁵⁰. The vote of each member of the court should be given in reverse order of seniority and before the vote of the judge advocate. Any such decision, and the reasons for it, will be announced in open court by the judge advocate.

⁴⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 85(2).

⁵⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 27(2).

Part 7 - Appeal against finding

36. This part applies to the hearing of an appeal against a finding at a summary hearing that a charge has been proved.

Address to the court

37. Where the appeal is against finding, the respondent and the appellant may each address the court once with respect to the case against the appellant on the charges being heard by the court⁵¹. If the respondent is to address the court he must do so immediately before adducing any evidence; the appellant may address the court immediately after the close of his case or, where there is more than one appellant, after the close of the case of each of the appellants. The respondent or appellant may, with the leave of the court, address it at any time during the hearing on any matter relating to the appeal or the charges that are being heard by the court. Also see Rule 75(4), Armed Forces (Summary Appeal Court) Rules 2009, in respect of the exercise of the Court's powers under Section 147(1)(b) where the court wishes to substitute another finding.

Provisions that are to apply where there are two or more appellants

38. The following provisions⁵² apply where the court has decided to hear appeals by more than one appellant at the same time. The respondent's case on each of the charges before the court must be put before the case of any of the appellants, and the respondent may generally make only one address.⁵³ Where the same legal representative represents two or more appellants, he may make only one address to the court. The judge advocate must decide immediately before the hearing of the appeals the order in which the appellants are to put their case and to address the court.

39. The court must not close to deliberate on its decision in relation to any of the findings until the close of the case for each of the appellants and each of the appellants has had the opportunity to address the court.

Presence of witnesses

40. Except where the person is the appellant, or is present to give expert evidence or evidence as to a person's character, a person who is to be called to give evidence must not, except by leave of the judge advocate, be present at the hearing of an appeal against a finding until he is called to give evidence and examined⁵⁴.

41. If while a witness is under examination a question arises as to the admissibility of an answer following a question put to him or otherwise with regard to the evidence, the judge advocate may direct the witness to withdraw until the question is determined.

42. The judge advocate may direct any person, who is to give expert evidence or evidence as to a person's character, to withdraw from the court if he considers that the person's presence is undesirable.

⁵¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 75.

⁵² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 76.

⁵³ In pursuance of Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 75(1).

⁵⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 78.

Examination of witnesses

43. The judge advocate may question any witness or put to a witness a question from a lay member. The judge advocate must give direction on the examination and cross-examination of witnesses. If it appears to the judge advocate to be in the interests of justice, he shall allow postponement and the recall of witnesses by any party⁵⁵.

Witness not called by respondent

44. Where the respondent does not intend to call as a witness:

- a. Any person whose statement has been served on the appellant as part of the evidence for the respondent; or
- b. Any person in respect of whose evidence he has served notice as part of the respondent's papers,

unless the appellant waives the requirement, the respondent is to serve notice in writing on the appellant that he does not intend to call that person or tender that person at the hearing of the appeal for cross-examination by the appellant.

Submission of no case to answer

45. At the close of the respondent's case, the appellant may submit, in respect of any charge, that the respondent has failed to establish a case for him to answer. The judge advocate must hear and rule on such a submission in the absence of the lay members. If the submission is allowed, the judge advocate must direct the court to quash the finding⁵⁶.

Finding for the appellant before conclusion of the case for the appellant

46. The court may at any time after the close of the case for the respondent find for the appellant, provided that the respondent has been given an opportunity to address the court on whether such a finding should be made⁵⁷. This power may only be exercised at the invitation of the judge advocate.

The case for the appellant

47. Only when the evidence of the respondent's witnesses has been heard, may the appellant give evidence should he choose to do so; he is not obliged to do so. In the event that he chooses to give evidence he will be liable for cross examination by the respondent and questioning by the judge advocate. Where he does so, the appellant must give evidence first before any other witnesses for the appellant are called.

Evidence in rebuttal

48. With the leave of the judge advocate, the respondent may call or recall a witness to give evidence on any matter raised by the appellant in relation to a charge which the

⁵⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 77(2).

⁵⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 79(3).

⁵⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 81.

respondent could not properly have dealt with or foreseen before the appellant disclosed his case.

Deliberation on finding

49. When the court deliberates on its finding in relation to each charge no other person may be present, except a person in attendance for instruction⁵⁸. During its deliberation on any such finding, the court shall not separate until the decision on the finding has been reached, unless the judge advocate directs that, in the interests of justice, the court may separate.

50. The vote of each member of the court must be given orally; and the vote of each member of the court should be given in reverse order of seniority and before the vote of the judge advocate.

Substituted finding – power to convict for offence other than that charged

51. The court has the power to acquit the appellant of the charge specifically charged in the charge sheet but if the facts still amount to an allegation of another Service offence, the court may convict on that other offence. If the court exercises the power to substitute a finding it shall specify the charge that has been proved.

Record of decision of the court on finding

52. The decision of the court on each finding, and (except where the decision is to quash the finding) the reasons for it, will be announced separately in open court by the judge advocate. The decision on each finding and the reasons for it, will be recorded in writing. The trial result notification form (T-SL-TRN2) found at [Annex C](#) may be used for this purpose.

Punishment

53. If the appeal is against finding and punishment, the court will consider the finding first and then go on to consider the punishment in light of their decision. If the finding on any charge is confirmed the court will be presented with information relating to the appellant's previous convictions, formal discipline record etc and mitigation, see Part 6.

Wasted costs and closing the court

54. Before closing the court the judge advocate deals with costs, if appropriate. The jurisdiction of the court to make an order:

- a. As to the payment of costs incurred by a party to proceedings as a result of an unnecessary or improper act or omission by or on behalf of another party to the proceedings⁵⁹; or
- b. Disallowing or ordering the legal or other representative⁶⁰ to meet the whole or any part of any wasted costs

⁵⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 27.

⁵⁹ As described in section 26(1) of the Armed Forces Act 2001.

⁶⁰ As defined in section 27(3) of the Armed Forces Act 2001.

may be exercised by the judge advocate sitting alone, and he may direct the other members of the court to withdraw for the purpose of exercising the jurisdiction.

Part 8 - Powers of the court

Appeal against finding

55. **Contested appeal.** Where the DSP opposes an appeal against finding, the proceedings take the form of a rehearing of the charge. The SAC may confirm a finding, quash it or substitute it with a finding that another charge has been proved. Where the SAC quashes a finding it must also quash any accompanying punishment. After rehearing the evidence in respect of punishment, the SAC may confirm the punishment or quash it and substitute another punishment. The SAC cannot substitute a punishment unless the substituted punishment was capable of being awarded by the hearing officer who awarded the original punishment at the summary hearing⁶¹ and it is a punishment that the SAC considers is no more severe than the original punishment. Where the appellant was convicted of multiple charges and decides to appeal against finding and/or punishment on one of the charges, the SAC, should it allow the appeal, will adjust accordingly the global sentence that the appellant originally received⁶².

56. **Uncontested appeal.** If the appeal is uncontested, where the DSP as respondent does not oppose the appeal, the finding being appealed against will be quashed⁶³ by the SAC. Where the appeal is uncontested the powers of the SAC are exercised by a judge advocate sitting alone and the Court Administration Officer (CAO) is responsible for informing the appellant, the appellant's CO and the DSP of the outcome.

Appeal against punishment

57. The powers of the court on an appeal against punishment are:

- a. To confirm the punishment awarded; or
- b. To quash the punishment and award in substitution for it any punishment that it would have been in the powers of the officer who held the summary hearing to award and in the opinion of the court is no more severe than the punishment originally awarded. This will be recorded on the trial result notification T-SL-TRN02 ([Annex C](#))

⁶¹ See section 147(3)(b)(i) of the Act.

⁶² [Chapter 13](#) (Summary hearing sentencing and punishment) provides guidance on global sentences.

⁶³ Rule 20(1) of the Armed Forces (Summary Appeal Court) Rules 2008.

Part 9 – Evidence

Rules of evidence

58. The rules as to the admissibility of evidence before the SAC are governed by the Armed Forces (Summary Appeal Court) Rules 2009. The rules of evidence applicable in a trial on indictment in England and Wales generally apply⁶⁴, but there are procedures which are particular to the SAC. See Part 11 of Armed Forces (Summary Appeal Court) Rules 2009, for full details on evidence at the SAC. The following paragraphs summarise a few of the important differences to the civilian system.

59. **Attendance or giving evidence by live link.** Any person, who is not in the place where the proceedings are being held, may attend by live link if the judge advocate so directs. This includes witnesses who may give evidence. An application may be made to the judge advocate for permission to attend by live link or the judge advocate may direct such a course of action⁶⁵.

60. **Use of documents to refresh memory.** The Criminal Justice Act 2003 section 139 does not apply to the SAC, however a person giving oral evidence may refresh his memory from a document made or verified by him at an earlier time or a transcript of a sound recording⁶⁶.

⁶⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 59.

⁶⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 25.

⁶⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 63.

Part 10 – Miscellaneous

Custody during proceedings

61. Custody during proceedings is addressed at Volume 1 [Chapter 5](#) (Custody).

Proof of service facts and records

62. **Service of documents.** The appeal process as a whole is time-critical and consequently there are strict time constraints that must be complied with when transmitting documents between parties to the appeal. Documents may be served by a number of acceptable methods including: personally, by post, DX, FAX and other electronic means. The judge advocate may also direct service by any other method if the particular circumstances demand. Proof of service may be achieved in a number of ways. The Armed Forces (Summary Appeal Court) Rules 2009, Part 2 lays out the various time constraints and acceptable methods for the service of documents.

63. **Record of proceedings.** A record must be made of any proceedings. The Armed Forces (Summary Appeal Court) Rules 2009, rule 30 details the contents of the record and the responsibilities of the CAO with regard to despatching the record of preliminary proceedings to the Judge Advocate General and the parties to the appeal. The record of proceedings is to be kept in the custody of the Judge Advocate General for not less than six years from the conclusion of the appeal proceedings or the conclusion of the preliminary proceedings where there are no further proceedings⁶⁷. A copy of the record of proceedings, or any part of it, shall be provided to any party to the proceedings without charge. A charge may be levied by the Judge Advocate General for the provision of a copy of the proceedings to any other person⁶⁸. There are exceptions to the provision of copies of the proceedings that were held in camera and disclosure may also be restricted for reasons of security⁶⁹.

Exhibits

64. Exhibits must be marked sequentially with a number or letter and signed by or on behalf of the judge advocate. If the exhibit cannot be signed, a label is to be attached to it for this purpose. Exhibits are to be kept with the record of proceedings unless the judge advocate directs otherwise⁷⁰.

Application to the court to state a case

65. An application may be made to the SAC to have a case stated for the opinion of the High Court on the grounds that any decision of the SAC is wrong in law or is in excess of jurisdiction. It is to be made in writing and served on the CAO and the appellant or the DSP, as the case may be, within 21 days after the date of the decision in respect of which the application is made. The application is to state the grounds on which the decision of the court is questioned. The CAO is to serve the application on the judge advocate, who presided over the proceedings to which the application relates, as soon as it is practicable for him to do so⁷¹.

⁶⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 30(5).

⁶⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 30(6)(b).

⁶⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 30(7) & (8).

⁷⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 31(3).

⁷¹ Under section 149(2) of the Act; see Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 92 to 94, for further detail on applications and procedure.

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Save as

Print Form

ANNEX A TO
VOL2 CH 27
JSP 830 MSL
revised 08/09

NOTICE OF APPLICATION FOR A PRELIMINARY HEARING

TS-SL-SAC03

Financial Penalty Enforcement Order (Section 322 of the Armed Forces Act 2006: the Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009)

From;

Rank/Rate <input type="text"/>	First name <input type="text"/>
Family name <input type="text"/>	Service number <input type="text"/>
Ship/unit/establishment/address <input type="text"/>	

To; THE COURT ADMINISTRATION OFFICER

APPLICATION FOR A PRELIMINARY HEARING IN THE MATTER OF

Rank/Rate <input type="text"/>	First name <input type="text"/>
Family name <input type="text"/>	Service number <input type="text"/>

As respondent appellant appellant's legal representative
 I hereby apply for a preliminary hearing to take place before the commencement of the hearing of the appeal.

PROTECT - PERSONAL DATA (WHEN COMPLETE)

I would wish to address the following matters at the preliminary hearing

I estimate that the length of time required for such a preliminary hearing will be

It is requested that the witnesses whose details are given below be summoned by the Court to attend the hearing

Signature

Date

Send copies to

Appellant
Appellant's Legal representative
or Respondent

OATHS AND AFFIRMATIONS⁷²

Part 1 - Manner of administering oaths and affirmations

1. The person taking the oath shall hold the New Testament, or if a Jew the Old Testament, in his uplifted hand and shall say, or repeat after the person administering it, the oath provided in Part 2 of this annex for that category of person.
2. If any person to whom an oath is administered desires to swear in the form and manner in which an oath is usually administered in Scotland, he may do so with uplifted hand and saying or repeating after the person administering it, the Scottish oath provided in Part 3 of this annex for that category of person.
3. If a person objects to swearing an oath he shall be permitted to make a solemn affirmation instead of taking an oath as provided in Part 4 of this Annex. In a case where it is not reasonably practicable, without convenience or delay to administer an oath in the manner appropriate to a person's religious belief, he shall be permitted to make a solemn affirmation instead of taking an oath. Moreover, in such a case the person may be required to make a solemn affirmation.

Part 2 - Forms of oath

Lay members

I swear by Almighty God that I will well and truly try the appellant before the court according to the evidence; I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Summary Appeal Court, unless required to do so in due course of law.

Persons in attendance for instruction

I swear by Almighty God that I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Summary Appeal Court, unless required to do so in due course of law.

Witness

I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

Interpreter

I swear by Almighty God that I will well and faithfully interpret and make true explanation of all such matters and things as shall be required of me according to the best of my skill and understanding.

Part 3 – Form of Scottish oath

The form of Scottish oath for a witness is 'I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth'⁷³

⁷² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 28(3) and Schedule 1.

⁷³ For Scottish oaths in criminal proceedings see the Act of Adjournment (Criminal Proceeding Rules) 1996/513.

Part 4 - Form of solemn affirmation

I [full name] do solemnly, sincerely and truly declare and affirm the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

PROTECT PERSONAL DATA (WHEN COMPLETED)

Annex C to
Vol 2 Ch 27
JSP 830 MSL**SUMMARY APPEAL COURT****RECORD OF PROCEEDINGS AND RESULT NOTIFICATION**

The guidance reproduced in this form is approved and published by the Judge Advocate General. The Services and the Ministry of Defence are not responsible for the contents, which therefore do not necessarily represent Ministry of Defence policy.

One TRN2 form is required for each appellant

A. APPEAL DATA	OJAG-Case Reference	
	Number:	
Service: <small>Delete not applicable</small>	Royal Navy / Royal Marines / Army / Royal Air Force	
Location:	Held at	
Dates: <small>Do not include preliminary proceedings</small>	First day 20.....continuing on (list dates) Last day 20	

B. APPELLANT	Surname, first name(s)	Rank/Rate	Service number
	Ship/Unit/Station:	Capbadge <small>(Army only)</small>	

C. CHARGE(S) <small>(briefly list all the relevant charges; also attach a copy of the charge sheet(s))</small>	Was there an appeal against Finding on each charge? <small>(State as appropriate)</small> YES or NO	Outcome for each Finding appealed if applicable: <small>(Insert as appropriate)</small> APPEAL ABANDONED / FINDING CONFIRMED / FINDING QUASHED / GUILTY OF SUBSTITUTED CHARGE
1.		
2.		
3.		

4.		
5.		
(Use a continuation sheet if necessary) Details of any Substituted Charge		

OJAG Case Reference Number:		Appellant (Surname)	
---------------------------------------	--	-------------------------------	--

<p>D. PUNISHMENT</p> <p>Give details of Punishment awarded at summary hearing:</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>AFA06 s 131(5) requires a global sentence for all charges</p>	<p>Outcome of appeal against Punishment: (Select one option only)</p> <p><input type="checkbox"/> APPEAL ABANDONED</p> <p><input type="checkbox"/> PUNISHMENT CONFIRMED</p> <p><input type="checkbox"/> PUNISHMENT QUASHED</p> <p><input type="checkbox"/> SUBSTITUTED PUNISHMENT AWARDED: ↓</p> <p>(Give details, with numbers in words and figures)</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
---	---

E. DIRECTIONS of Judge Advocate for post-hearing follow-up action, if any, including recommendations as to costs		
G. SIGNATURE	Form to be checked, signed & dated by the Judge Advocate	
JUDGE ADVOCATE: Print name	Signed	Date signed

Court Officer must fax the completed TRN2 immediately to:

All cases: MCS - 94344 8060; CMRS - 94344 8048; AFCLAA - 94344 5691; SPCB - 93835 5244; OSC(A) (PTS) - 94344 8053;

plus if:

RN or RM appellant: FLEET (DCS Law) - 93832 5755

RAF appellant: HQ Air Comd (Air Pers Casework) - 95221 6853

Custodial sentence case: MCTC - 94660 6708

When case is concluded, return file with the original of this TRN2 Record of Proceedings to:

Office of the Judge Advocate General

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Chapter 28

Court Martial constitution and roles

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Chapter 28

Court Martial constitution and roles

Introduction

1. This chapter is divided into two parts. Part one provides guidance on the constitution of the Court Martial (CM), including the rules which govern the size and membership of CM boards where lay members are required. Part two introduces court officials and parties to proceedings who perform roles in relation to the CM.

Part 1 - CM constitution

Status and jurisdiction of the CM

2. The Armed Forces Act 2006 (the Act) establishes the CM as a standing, permanent court¹. The CM may sit anywhere, within or outside the United Kingdom², and has the jurisdiction to try any Service offence³.

3. In addition to trial proceedings, CM proceedings encompass preliminary proceedings (relating to trial and sentencing proceedings), sentencing proceedings, variation proceedings ('slip rule'), activation proceedings, ancillary proceedings and appellate proceedings (on appeal from the Service Civilian Court (SCC)), see [Chapter 29](#) (Court Martial proceedings). The constitution of the court may vary depending upon the type of proceedings, status of the defendant or offender, and any previous or proposed constitution of the court for relevant proceedings. The variations in constitution according to these factors are explained in the following paragraphs.

General requirements for CM proceedings constitution

4. **Judge advocate.** For all CM proceedings there must be a judge advocate⁴ and that person will be selected and then specified for a hearing by or on behalf of the Judge Advocate General⁵.

5. **Minimum number of lay members.** Other than where the judge advocate deals with matters sitting alone⁶ the CM will consist of the judge advocate and other persons who sit as members of the CM, known as 'lay members'⁷ but sometimes referred to as 'board members'.

6. All CM proceedings requiring lay members must have at least three lay members⁸ but no more than five lay members sitting on a CM board⁹. In the majority of cases, the board will consist of three members; however, in the most serious cases the minimum number of lay members required will be five¹⁰. This is in order to bring additional Service experience to the trial and, where necessary, the sentencing of such cases. Five lay members are required when¹¹:

a. In trial proceedings, any defendant is charged with an offence listed within Schedule 2 of the Act;

b. In trial proceedings, any defendant is charged with an offence for which he could, if convicted, be sentenced to more than seven years' detention under section 209 of the Act (for those aged under 18 at the commencement of the proceedings) or seven years' imprisonment (for those aged 18 or over at the commencement of the proceedings);

¹ Section 154(1) of the Act.

² Section 154(2) of the Act.

³ Section 50(1) of the Act. For definition of 'Service offence' see section 50(2) of the Act and [Chapter 6](#) (Investigation, charging and mode of trial).

⁴ Section 155(1)(a) of the Act.

⁵ Section 155(5) of the Act.

⁶ See [Chapter 29](#) (Court Martial proceedings) for circumstances in which a judge advocate sits alone; see also paragraph 9 below.

⁷ Section 155(1)(b) of the Act.

⁸ Section 155(1)(b) of the Act.

⁹ Section 155(1)(b) of the Act.

¹⁰ Section 155(2)(a) of the Act.

¹¹ Armed Forces (Court Martial) Rules 2009 rule 29.

c. Any defendant is to be sentenced in relation to an offence to which paragraph 6.a or 6.b applies, unless rule 27 of the Court Martial Rules applies (proceedings without lay members); or

d. A sentence that was passed by a board consisting of five lay members by virtue of paragraph 6.c is to be varied¹².

7. **Additional lay members.** In certain circumstances an additional one or two lay members may supplement the usual three or five member CM boards¹³. This provision is designed to help to avoid the situation in which a trial might collapse because a lay member can no longer fulfil the role (eg. due to death, illness or compassionate leave) and the number of remaining lay members therefore falls below the minimum required. This power may only be exercised if, in the opinion of the judge advocate, the proceedings:

a. Are likely to last more than ten court days; or

b. If held outside the UK and Germany are likely to last more than five court days.

8. Where necessary in these circumstances, the judge advocate will direct that the number of lay members is to be four, five, six or seven as the case may be¹⁴. However, such a direction cannot be made after commencement of the proceedings¹⁵ to which they relate unless the judge advocate had previously given a direction for additional members before the proceedings commenced and the number of lay members has been reduced to the minimum number required for those proceedings (either three or five as required) because of objections to the lay members¹⁶. In such circumstances the judge advocate is likely to adjourn proceedings until the CAO has appointed the requisite additional one or two lay members.

9. **Judge advocate sitting alone.** A judge advocate can exercise any power of the court sitting alone except¹⁷:

a. The power to try a defendant or appellant;

b. The power to sentence an offender (except for civilian offenders, to whom Part 1 of Schedule 3 of the Act applies, and ex-Service personnel offenders, to whom Part 2 of Schedule 3 of the Act applies¹⁸, see paragraph 10e below);

c. The power to vary a sentence (except where there were no lay members for sentencing or the judge advocate directs that variation proceedings are to be conducted without lay members¹⁹); and

d. The power to make an activation order (except where there were no lay members for the original sentence).

10. The judge advocate will sit alone in the following situations (this list is not exhaustive):

a. During all preliminary proceedings, including arraignment;

¹² Armed Forces (Court Martial) Rules 2009 Part 15.

¹³ Section 155(2)(a) of the Act and the Armed Forces (Court Martial) Rules 2009 rule 30.

¹⁴ Section 155(7) of the Act and the Armed Forces (Court Martial) Rules 2009 rule 30(1).

¹⁵ Such as trial, sentencing or variation proceedings.

¹⁶ Armed Forces (Court Martial) Rules 2009 rule 30(4).

¹⁷ Section 155(2)(b) of the Act and the Armed forces (Court Martial) Rules 2009 rule 28.

¹⁸ In the circumstances set out in the Armed Forces (Court Martial) Rules 2009 rule 27(3)(b).

¹⁹ Armed Forces (Court Martial) Rules 2009 rule 120.

- b. During any proceedings in order to give a ruling on any question of law, practice or procedure to which the lay members should not be party. This includes but is not limited to: questions of admissibility of evidence; applications for a summons or warrant, a live link, or to adduce a complainant's previous sexual history²⁰; submissions of no case to answer; questions as to whether a question should be put; and issues of fitness to stand trial;
- c. To make a ruling as to a wasted costs order;
- d. During sentencing proceedings of civilian offenders²¹;
- e. During sentencing proceedings where the offender is a former member of the armed forces who has either been tried by a CM in which no lay member was subject to Service law or in relation to whom a guilty plea or pleas were entered in relation to all charges for which he is to be sentenced, and, had he pleaded not guilty, the nominated board for the trial would have consisted entirely of civilian lay members²²;
- f. During variation proceedings where either of sub-paragraphs d and e above applied in relation to the sentence awarded during previous sentencing proceedings²³;
- g. During variation proceedings where it is not possible for the minimum number of original lay members who dealt with the sentencing proceedings to which the variation proceedings relate to reassemble, and the judge advocate gives a direction that no lay members should take part in those proceedings²⁴;
- h. For activation proceedings where sub-paragraphs d and e above applied in relation to the sentencing proceedings at which the suspended sentence of imprisonment or detention, or the detention and training order which is the subject of the activation proceedings was awarded²⁵; and
- i. For ancillary proceedings²⁶.

Role of the CAO

11. Lay members for proceedings of the CM are specified by or on behalf of the CAO²⁷. The CAO will decide from which pool of potential lay members the lay members can be drawn (the potential pools include MOD civil servants, members of the local ex-patriate community abroad, and members of the RN, RM, Army and RAF). Having drawn the names at random from the selected pool, and having checked that they are not ineligible for board membership for any reason (see paragraphs 19 - 25 below), the CAO will specify who the lay members should be. The nomination of lay members is a matter entirely for the CAO²⁸.

12. The constitution of each court is dealt with on a case-by-case basis according to statutory requirements, and the principles outlined below. The overriding principle is that the constitution of the court should be fair, with lay members drawn at random from the widest pool of potential members.

²⁰ Youth Justice and Criminal Evidence Act 1999, section 41(2).

²¹ Armed Forces (Court Martial) Rules 2009 rule 27(3)(a).

²² Armed Forces (Court Martial) Rules 2009 rule 27(3)(b).

²³ Armed Forces (Court Martial) Rules 2009 rule 27(4).

²⁴ Armed Forces (Court Martial) Rules 2009 rule 27(4)(b) and rule 120.

²⁵ Armed Forces (Court Martial) Rules 2009 rule 27(5).

²⁶ Armed Forces (Court Martial) Rules 2009 rule 27(6).

²⁷ Section 155(6) of the Act.

²⁸ For this purpose, MCS will be guided by the Military Court Service Standing Operating Instructions.

Constitution of the board

13. **Service personnel.** A Service defendant will ordinarily be tried by lay members wholly of his own Service²⁹. However, where a defendant is tried with a co-defendant from a different Service, the lay membership of the court will be a mixture of Service personnel from different Services. Each defendant will always have at least one lay member of his own Service on the board of the CM.

14. **Civilians (including ex-Service personnel).** Where a defendant is a civilian, but is not an ex-Service person, the proceedings should take place before an entirely civilian board unless there are exceptional circumstances that justify a mixed board or a Service board. Where the defendant is an ex-Service person, the court may consist of either civilian lay members or Service lay members, or be a mixed board. In each situation the constitution of the court will be assessed on a case-by-case basis³⁰. Where the board includes civilian lay members and Service personnel the president of the board will be the senior Service member of the board³¹. If the board is all civilian there will be no president of the board.

Rank of lay members for CM proceedings

15. **President of the board.** As a matter of law, the ability of any person to act as president of the board is subject to him being of a minimum rank of lieutenant commander, major or squadron leader, and that he is superior in rank to any person to whom the proceedings relate (defendant, offender etc.)³². The senior Service lay member (including where the lay membership of the board includes both Service personnel and civilians) will be the president of the board³³.

16. **Officers.** An officer is not qualified for court membership unless they have held a commission in the armed forces for at least three years, or for periods which aggregate to three years or immediately before being commissioned was a warrant officer³⁴. In addition an officer should not be appointed as a lay member unless he is of or above the rank of sub-lieutenant, military or marine lieutenant or flying officer.

17. **Warrant officers.** Warrant officers must hold the substantive, not acting, rank of warrant officer³⁵. Warrant officers may only be lay members where the subject of the proceedings is of or below the rank of warrant officer³⁶.

18. **Additional restrictions on rank of lay members.** In addition to the general restrictions as to who is qualified to be the president of the board or another lay member, the rank of the president of the board and rank of the lay members will depend on the rank or rate (if any) of the subject of the proceedings (defendant or offender as the case may be) in the following situations:

a. **Defendant/offender of or above the rank of commodore, brigadier or air commodore.** As a matter of law, the president of the board must be senior in rank or

²⁹ For Royal Marines personnel, 'own Service' is the Royal Navy.

³⁰ If necessary, MCS may seek advice from MOD DGLS.

³¹ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

³² The Armed Forces (Court Martial) Rules 2009 rule.34(3).

³³ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

³⁴ Section156(2) of the Act.

³⁵ Section156(3) of the Act.

³⁶ The Armed Forces (Court Martial) Rules 2009 rule 31(1).

senior within the same rank to the defendant³⁷; as a matter of policy the other lay members should be of no lower rank than commodore, brigadier or air commodore;

b. **Defendant/offender of or above the rank of lieutenant commander, major or squadron leader.** As a matter of law the president of the board must be of superior rank to the person to whom the proceedings relate³⁸ and as a matter of policy should be of no lower rank than naval captain, colonel or group captain; and

c. **Defendant/offender of or below the rank or rate of warrant officer.** As a matter of policy, one lay member may be a warrant officer on a 3-man board and up to two warrant officers may be lay members on a 5-man board³⁹.

Eligibility of lay members

19. Although an officer or warrant officer might otherwise be qualified to be a lay member (see paragraphs 13 - 18 above) he might be ineligible to sit on particular proceedings. To avoid the potential of any real or perceived bias (eg. through his involvement with the Service disciplinary system) an officer or warrant officer is not qualified for CM membership if he/she is⁴⁰:

- a. A member of the Military Court Service (MCS);
- b. A member of or on the staff of the Service Prosecuting Authority (SPA);
- c. A Service policeman;
- d. A member of the Royal Army Chaplains' Department or the Royal Air Force Chaplains' branch⁴¹ or a Naval Chaplain⁴²;
- e. A barrister or solicitor in England and Wales;
- f. An advocate or solicitor in Scotland;
- g. A barrister or solicitor in Northern Ireland; or
- h. The equivalent of a barrister or solicitor in the Channel Islands, Isle of Man, a Commonwealth country or a British Overseas Territory.

20. In addition, notwithstanding that an officer or warrant officer may generally be qualified for membership for CM proceedings, there will be certain circumstances in which he finds himself ineligible because he was involved in investigating the charge or because of his command relationship to the defendant⁴³. An officer or warrant officer will be ineligible if he:

- a. Was the CO of the defendant between the offence being committed and the defendant being arraigned (and where a defendant is arraigned for more than one offence, the date of the earliest offence triggers the CO's ineligibility⁴⁴);
- b. Has taken part in investigating the charge(s) against the defendant; or

³⁷ The Armed Forces (Court Martial) Rules 2009 rule 34(4).

³⁸ The Armed Forces (Court Martial) Rules 2009 rule 34(3)(c).

³⁹ Section 155(3) of the Act and The Armed Forces (Court Martial) Rules 2009 rule 31(1).

⁴⁰ Sections 156(4) and (5) of the Act.

⁴¹ Section 156(4)(d) of the Act.

⁴² Armed Forces (Naval Chaplains) Regulations 2008.

⁴³ Sections 157(1) and (2) of the Act.

⁴⁴ Section 157(3) of the Act.

c. Has conducted an inquiry, either alone or with other persons, into the matter which is the subject of the charge(s) against the defendant.

21. A Service person will also be ineligible for lay membership in the circumstances outlined at paragraphs 23 - 25 below, which apply to both Service and civilian lay members.

Eligibility of civilian personnel

22. Civilians who are subject to Service law at the time of the proceedings are not qualified for lay membership of a board⁴⁵. In addition, the following may not be civilian lay members⁴⁶:

- a. Those under 18 and those of the age of 70 years or older at the commencement of the proceedings;
- b. Those who are not UK nationals (as defined by paragraph 11 of Schedule 15 of the Act);
- c. The mentally disordered⁴⁷;
- d. Those disqualified from jury service⁴⁸;
- e. Members of the MCS; and
- f. Staff of the SPA.

Eligibility of lay members – both Service and civilian personnel

23. **Personnel serving in/attached to the same unit as any person to whom the proceedings relate.** Any person, Service or civilian, is ineligible for lay membership of a board for any proceedings of the CM if, at any time between the commission of the offence and the proceedings in relation to that offence for which he may be nominated to be a lay member, he and any party to whom the proceedings relate (defendant/offender) were serving in the same unit⁴⁹. These rules apply to trial, sentencing, variation, appellate and activation proceedings⁵⁰.

24. **Membership of court during previous proceedings.** Any person who was a member of the board during previous proceedings in relation to any person to whom the proceedings relate will be ineligible for membership of the court for later proceedings⁵¹. Thus, a member of a board which sentenced an offender to a suspended sentence of detention will be ineligible to be a member of the board for activation proceedings where the offender has committed an offence during the operational period of that suspended sentence. However, a person is not ineligible for membership where the previous proceedings were terminated as a result of successful challenges to other lay members⁵². Thus, where a member of a board is sworn in for the trial of any matter but the defendant successfully challenges other potential members of the board such that the number of potential members falls below the statutory

⁴⁵ The Armed Forces (Court Martial) Rules 2009 rule 33(1).

⁴⁶ The Armed Forces (Court Martial) Rules 2009 rule 33(2).

⁴⁷ Under Part 1 of Schedule 1 to the Juries Act 1974 (The Armed Forces (Court Martial) Rules 2009 rule 33(3)(a)).

⁴⁸ Under Part 2 of Schedule 1 to the Juries Act 1974 (The Armed Forces (Court Martial) Rules 2009 rules 32(1) – (5)).

⁴⁹ Serving in the same unit in the case of civilians means attached to the same unit see the Armed Forces (Court Martial) Rules 2009 rule 32(10).

⁵⁰ The Armed Forces (Court Martial) Rules 2009 rules 32(1) – (5).

⁵¹ The Armed Forces (Court Martial) Rules 2009 rule 32(6).

⁵² The Armed Forces (Court Martial) Rules 2009 rule 32(9).

number required (see paragraphs 5 - 8 above), the sworn member could be selected for membership of the board at a later trial when sufficient lay members are assembled to try the case.

25. There are two exceptions to this rule:

a. **Sentencing proceedings.** Members of the board for any trial or appellate proceedings in which any offender was convicted of any offence for which he is to be sentenced may be members of the board for those sentencing proceedings⁵³; and

b. **Variation proceedings.** Members of the board which sentenced the offender will be members of the board for variation proceedings in relation to the sentence awarded for that offence⁵⁴.

Objections to lay members or constitution of the court

26. Both the prosecution and defence have the right to object to any lay members on any reasonable grounds⁵⁵. The judge advocate will rule as to whether a lay member should be discharged as result of any objection. This right of objection does not apply to sentencing proceedings where all offenders to be sentenced were tried by those lay members, or to variation proceedings⁵⁶.

27. In addition to the general right to challenge lay members before they are sworn, parties may object to the constitution of the court if it appears to be unfairly constituted. In such circumstances a party may make representations to the judge advocate either at a preliminary hearing or at the trial or sentencing proceedings before the proposed members are sworn.

⁵³ The Armed Forces (Court Martial) Rules 2009 rule 32(7).

⁵⁴ The Armed Forces (Court Martial) Rules 2009 rule 32(8) (but see also rule 120).

⁵⁵ The Armed Forces (Court Martial) Rules 2009 rule 35.

⁵⁶ Armed Forces (Court Martial) Rules 2009 rule 35(5).

Part 2 - CM roles

28. The purpose of this section is to introduce those court officials and parties to proceedings who perform roles relating to the CM. It does not provide detailed descriptions of their functions. These are dealt with in [Chapter 29](#) (Court Martial proceedings).

Judge advocates

29. A CM will always have a judge advocate⁵⁷. A judge advocate will be either⁵⁸:
- a. The Judge Advocate General;
 - b. A person appointed as an assistant to the Judge Advocate General (including the Vice Judge Advocate General); or
 - c. A puisne judge⁵⁹ of the High Court nominated by or on behalf of the Lord Chief Justice to sit as a judge advocate following a request by the Judge Advocate General.

In practice, the judge advocate at a CM will ordinarily be one of the assistants to the Judge Advocate General.

30. The judge advocate is in many ways the equivalent to the judge in a civilian Crown Court in England and Wales. Accordingly, it is the judge advocate who will give rulings and directions on questions of law, procedure and practice at the CM⁶⁰. However, there is one important material difference. Whereas a judge will always sentence alone in a Crown Court, at the CM the defendant will be sentenced by a CM board consisting of the judge advocate and lay members, except in the circumstances described in paragraphs 9 and 10, above.

Lay members - general

31. Lay members may perform two types of role during proceedings of the CM. In the event of a contested trial or during appellate proceedings on appeal from the SCC, they will be required to determine the innocence or guilt of the defendant, in the same way as a jury would at a trial on indictment in the Crown Court. In the event of a conviction, either following a guilty plea or a guilty finding, the lay members may be required, in conjunction with the judge advocate, to determine the sentence to be imposed on the offender. Where they have previously been involved in sentencing proceedings they will have a re-sentencing function during variation proceedings. However, civilian lay members will only perform these functions when they form part of a board which also consists of Service personnel, though not in the case of a civilian offender. Guidance for lay members on their functions at a CM is set out JSP 836 (A guide to Court Martial and the Summary Appeal Court).

President of the board

32. The senior Service lay member (where any Service members are present) will be the president of the board⁶¹. This applies whether the court consists entirely of Service personnel or is a mixed board of Service personnel and civilians. Where there is no Service

⁵⁷ Section 155(1) of the Act.

⁵⁸ Section 362 of the Act.

⁵⁹ 'Puisne' is pronounced 'puny'. A puisne judge is any judge of the High Court other than the heads of each division. The word puisne means junior and is used to distinguish High Court judges from senior judges sitting at the Court of Appeal.

⁶⁰ Section 159(1) of the Act.

⁶¹ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

person on the board there will be no president of the board but the lay members will be invited by the judge advocate to elect a spokesperson to deliver the verdict.

Court administration officer

33. The CAO is responsible for the administration of the CM. That person, who is appointed by the Defence Council, is the CAO for the SCC and SAC as well as for the CM⁶².

34. The CAO may delegate any of his functions in relation to the court to a member of the MCS⁶³, and in practice will delegate most of his administrative functions.

Director of Service Prosecutions

35. The Director of Service Prosecutions (DSP) is the head of the SPA and is responsible for the prosecution of offences at the CM⁶⁴. The DSP is appointed by Her Majesty the Queen⁶⁵, and must be a qualified lawyer⁶⁶. The DSP may be a civilian or a Service person.

Prosecuting officers

36. The DSP may appoint officers to be prosecuting officers⁶⁷ and, unless the DSP directs otherwise, a prosecuting officer may exercise any of the DSP's functions⁶⁸. In practice, therefore, whilst the DSP is responsible for prosecuting offences at CM, this function will be routinely performed by the prosecuting officers appointed to the SPA. However, whilst a uniformed lawyer must have conduct of the case the DSP may appoint himself or other civilian counsel to be the lead advocate for CM proceedings should the need arise. All prosecuting officers must hold a relevant legal qualification⁶⁹.

Defendant's assisting officer

37. The Defendant may nominate a Defendant's Assisting Officer (DAO) to assist him in preparing for CM proceedings. The DAO's role is primarily administrative, although he may assist an unrepresented defendant to prepare a plea in mitigation. He has no legal standing at the proceedings of the CM, has no right to speak unless he appears as a witness (for example as a character witness), and is not there to represent the defendant. A full summary of the DAO's responsibilities is at Annex B to [Chapter 29](#) (Court Martial proceedings).

Defence representation

38. The defendant may appoint a legal representative to act for him. The legal representative may be a civilian legal adviser or a Service legal adviser and must hold a relevant legal qualification⁷⁰.

Other court officials

⁶² Section 363 of the Act.

⁶³ The Armed Forces (Court Martial) Rules 2009 rule 15(2).

⁶⁴ The DSP's role in directing the bringing of charges allocated for trial by Court Martial is set out in [Chapter 6](#) (Investigation, charging and mode of trial).

⁶⁵ Section 364(1) of the Act.

⁶⁶ Section 364(2) and (4) of the Act.

⁶⁷ Section 365(1) of the Act.

⁶⁸ Section 365(4) of the Act.

⁶⁹ Section 365(2) and (5) of the Act.

⁷⁰ The Armed Forces (Court Martial) Rules 2009 rule 39(2).

39. The MCS and individual Services will provide a number of court officials to assist at military court centres to ensure the smooth running of trials and other court proceedings. The following paragraphs outline the officials and their duties in broad terms. Further details of the specific duties and ranks/grades of the officials identified in this section can be found in the MCS standing operating instructions.

40. **Court officer.** The responsibility for the administration of the CM at military court centres lies with the court officers who are permanent Civil Service staff of the MCS. Court officers may delegate any of their functions to other members of the MCS staff or Service personnel as required.

41. **Court usher.** The Service of the defendant (or one of the defendants if there are co-defendants from different Services) will provide an individual to act as court usher to the CM. The court usher, as directed by the court officer, will provide basic administrative assistance to the CM equivalent to that of an usher in a civilian Crown Court in England and Wales.

42. **Verbatim court recorder.** A verbatim court recorder will be provided, under contract with the MCS, to maintain an appropriate record of proceedings at the CM.

43. **Escort.** The Service of the defendant will provide an individual to act as escort to the defendant. Where there are co-defendants of different Services, each co-defendant will have an escort of their own Service.

Chapter 29

Court Martial proceedings

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Chapter 29

Court Martial proceedings

Part 1 - Introduction

- 1. Audience and extent of guidance.** The purpose of this chapter is to provide guidance to all who have a professional interest in the procedure to be followed at trials by the Court Martial (CM) and related proceedings. Among those it is designed to inform are the staff of the Director of Service Prosecutions (DSP), the Military Court Service (MCS) and the legal representatives of defendants and others to whom CM proceedings relate. Anyone who is the subject of proceedings before the CM may also seek guidance from this Chapter, and Defendant's Assisting Officers (DAO) may also derive benefit from its content. This guidance does not seek to prevent, by omission or otherwise, what is allowed in accordance with law. Readers are advised to consult the relevant legislation and legal texts for further information. Separate guidance is published jointly by the Judge Advocate General (JAG) and the MCS for the information of those nominated to serve as members of a CM board¹.
- 2. Scope of CM proceedings.** CM proceedings include the determination of contested cases in which the defendant enters not guilty pleas (trials), the consideration of guilty pleas and the determination of sentence following conviction (sentencing proceedings). Related to these proceedings are preliminary proceedings before a judge advocate sitting alone during which arraignment will take place (i.e. the plea(s) will be taken), trial management issues and points of law and procedure will be dealt with. If not conducted during sentencing proceedings, the CM may hold separate activation proceedings for the activation of suspended sentences of detention and imprisonment. The CM also has the power to conduct variation proceedings to correct errors in sentencing, and ancillary proceedings (before a judge advocate sitting alone) relating to enforcement of sentences awarded by the CM. In addition, the CM has an appellate jurisdiction for appeal from the Service civilian court (SCC).
- 3. Organisation of chapter.** This chapter outlines the procedures to be followed for all proceedings before the CM in accordance with the Armed Forces Act 2006 (the Act) and the Armed Forces (Court Martial) Rules 2009, both of which are reproduced in full in Volume 3 of the MSL. The chapter is divided into 12 parts. Part 1 is the introduction. Part 2 deals with general administrative matters, including service of documents, advance information and listing. Part 3 details matters common to all CM proceedings. Part 4 deals with assistance to defendants and legal representation of parties to the proceedings. Part 5 provides information about preliminary proceedings and the matters which may be dealt with during such proceedings, including joinder and severance of charges and arraignment. Part 6 describes the methods available for securing the attendance of witnesses and the defendant. Part 7 deal with rules of evidence particular to CM proceedings. Parts 8 and 9 outline the trial procedure of the CM and the separate sentencing proceedings. Part 10 gives guidance on activation proceedings. Part 11 deals with appeals from the SCC (appellate proceedings). Finally Part 12 outlines ancillary proceedings.
- 4. Forms.** The forms for use in CM proceedings are contained in the Annexes to this chapter. These forms may be subject to periodic change and up to date forms can be requested from the court administration officer (CAO). The forms are available electronically and may be amended to suit requirements.

¹ JSP 836 A guide to Courts Martial and the Summary Appeal Court (Volume 1: Guide to Procedure; and Courts Martial and the Summary Appeal Court Guidance and Volume 2: Guide for Court Members)

Part 2 – Administration, service of documents, advance information and listing

Court administration

5. **Court administration officer (CAO).** The CAO is responsible for making arrangements for the CM to sit, any preliminary proceedings, ensuring that all relevant persons are informed of the constitution of the court, time and place of sitting and any other matters relevant to the efficient conduct of the trial as regards administration. In doing so he must follow any direction given by a judge advocate, with the exception of specifying any lay members for proceedings². The CAO may delegate any of his functions in relation to the court to a member of the MCS³.

6. **Court recorders and interpreters.** A sound recording must be made of all proceedings⁴, and therefore a verbatim court recorder will also usually be required unless the judge advocate directs otherwise. In some circumstances an interpreter may be required. In either case, the CAO is responsible for the appointment of a court recorder or interpreter for any proceedings.

Listing and notification of proceedings

7. **Listing of proceedings.** The CAO is responsible for listing proceedings, in consultation with the judge advocate where necessary. Proceedings will usually be conducted in one of the Military Court Centres, but may be listed to take place elsewhere in order to meet the operational requirements of the armed forces or for other good reason (such as reasons of security, witnesses having disabilities or serious illness, special measures requiring a change of location etc...).

8. **Notification of proceedings.** Whenever proceedings are listed or re-listed, the CAO must give notice in writing⁵ of the time and place appointed for commencement or resumption of the proceedings to the following⁶:

- a. Each person to whom the proceedings relate;
- b. The legal representative (if any) of each such person;
- c. The CO of each such person;
- d. The DSP;
- e. Where the proceedings are for the hearing of an application, the applicant and
- f. Any such other person as the JAG may direct.

Once the lay or waiting members for the proceedings have been identified, their name and rank or rate and ship/unit/establishment (Service personnel) or position (Crown servants) are also to be notified to the above persons as soon as reasonably practicable⁷.

² Armed Forces (Court Martial) Rules 2009 rule 15(1).

³ Armed Forces (Court Martial) Rules 2009 rule 15(2).

⁴ Armed Forces (Court Martial) Rules 2009 rule 23(e).

⁵ Service of the notice in writing of the time and place of the proceedings by the CAO will be in accordance with the Armed Forces (Court Martial) Rules 2009 rules 5 - 12.

⁶ Armed Forces (Court Martial) Rules 2009 rule 17(1).

⁷ Armed Forces (Court Martial) Rules 2009 rule 17(2) and 17(3)

Service of documents

9. The requirements as to the service of documents are the same regardless of who issues the document. However, the mode of service varies depending upon the recipient. In each case where service is by an electronic method (e.g. DX, fax or e-mail) there is no requirement to provide a paper copy⁸.

10. **Service on a person to whom the proceedings relate.** For Service personnel, service may be affected in the following ways⁹:

- a. By service on him personally¹⁰;
- b. If he is a Service person¹¹, by post in a letter addressed to them at his/her ship/unit/establishment;
- c. If he is not a Service person, by leaving it at or posting it to his usual or last known place of abode;
- d. By post in a letter addressed to his legal representative's place of business; or
- e. By DX, fax, electronic mail or other electronic means to his legal representative where the representative has given such an address and has not refused to accept service by that means.

11. **Service on the CAO.** Service on the CAO may be by post, DX (if available), fax, electronic mail or other electronic means to one of the offices of the Military Court Service, or, with the agreement of a member of the MCS, personally on that member of that service.¹²

12. **Service on the DSP.** Documents may be served on the DSP by post, DX (if available), fax, electronic mail or other electronic means to the Service Prosecuting Authority's (SPA) principal office, or with the agreement of a prosecuting officer, the SPA's main office in Germany, or with the agreement of a prosecuting officer, personally on that prosecuting officer¹³.

13. **Service on other individuals.** For persons to whom none of paragraphs 10 to 12 relate (eg. witnesses, parent, guardian etc), service may be¹⁴:

- a. On the individual personally. For relevant civilians this may be done by delivering the documents to the CO of the recipient and the CO arranging for the document to be served on the recipient. Where this method of service is chosen, the CO must arrange for the document to be served as soon as is reasonably practicable¹⁵;
- b. If he is a Service person, by post in a letter addressed to him at his ship/unit/establishment; or

⁸ Armed Forces (Court Martial) Rules 2009 rule 12.

⁹ Armed Forces (Court Martial) Rules 2009 rule 5.

¹⁰ This may be done by delivering the documents to the CO of the recipient and the CO arranging for the document to be served on the defendant. Where this method of service is chosen, the CO must arrange for the document to be served as soon as is reasonably practicable – see Armed Forces (Court Martial) Rules 2009 rule 11.

¹¹ For subject to Service law – see [Chapter 3](#) (Jurisdiction and time limits).

¹² Armed Forces (Court Martial) Rules 2009 rule 6.

¹³ Armed Forces (Court Martial) Rules 2009 rule 7.

¹⁴ Armed Forces (Court Martial) Rules 2009 rule 8.

¹⁵ Armed Forces (Court Martial) Rules 2009 rule 11.

c. If he is not a Service person, by leaving it or posting it to him at his usual or last known place of abode.

14. **Service on a corporation.** Documents to be served on corporations may be served¹⁶:

a. By post to:

(1) The corporation's principal office in the UK;

(2) If that address is not readily identifiable, any place in the UK where it carries on its activities or business; or

(3) If neither (i) nor (ii) applies, its principle office (anywhere in the world); or

b. By DX, fax, electronic mail or other electronic means where the corporation has provided such an address and has not refused to accept service by that means.

15. **Service of documents by another method.** The methods of service listed above are not exhaustive and the judge advocate may direct service by another method. In doing so he must make an order specifying the method to be used and the date on which the document is to be served. In addition he may also specify a time by which a document must be served¹⁷.

16. **Date of service.** Generally the date of service is taken to be the day the document is handed over. However, the following provisions also apply¹⁸:

a. Where a document has been served by post within the UK the date of service is deemed to be on the fifth day after it was posted; documents posted from the UK to an address abroad or vice versa are deemed to be served on the tenth day after being posted;

b. Where a document has been served by DX it will be deemed to be served on the fifth day after dispatch;

c. Where a document has been served by fax or other electronic means it will be deemed to be served the day after it was transmitted;

d. Where the addressee responds to a document earlier than any of the days described above it will be deemed to be served the day the response was sent.

17. **Proof of service.** Where any of the methods of service designated at paragraphs 9 to 14 have been used, service by that method must be assumed if the person who served it produces a certificate to that effect and the contrary is not proved.¹⁹

¹⁶ Armed Forces (Court Martial) Rules 2009 rule 9.

¹⁷ Armed Forces (Court Martial) Rules 2009 rule 10.

¹⁸ Armed Forces (Court Martial) Rules 2009 rule 13.

¹⁹ Armed Forces (Court Martial) Rules 2009 rule 14.

Part 3 – Proceedings – general

Proceeding to be held in open court

18. **Presumption of open proceedings.** CM proceedings are held in open court, subject only to the provisions of the Rules²⁰. This means that the proceedings must be made open to anyone who wishes to observe, including members of the public and press.

19. **Proceedings in camera.** The Rules make provision for restrictions on public access and reporting. The judge advocate may order the court to sit behind closed doors (or '*in camera*') on the grounds that it is necessary or expedient in the interests of the administration of justice to do so.²¹ He may take into consideration (but is not limited to) the likelihood that, if no order is made, the DSP will abandon the proceedings or be unlikely to bring comparable proceedings in the future for fear that information useful to an enemy or prejudicial to national security might be disclosed.

20. The application for an order to sit in camera must be determined at an oral hearing and be heard in camera unless the judge advocate directs otherwise²². Such a hearing may be conducted at any time during proceedings, but it will usually be apparent at an early stage that an application for proceedings in camera will be required and thus may best be dealt with during preliminary proceedings, see paragraphs 51 to 60.

21. Where he makes an order, the judge advocate must postpone or otherwise adjourn the proceedings (or the part of the proceedings to which the order relates) for at least 24 hours after making the order or until an application for leave to appeal the order is dismissed or the appeal against the order has been determined²³.

22. **Withholding of information from the public.** The judge advocate may give leave for any name or other matter given in evidence in any proceedings to be withheld from the public²⁴. This rule may be used in, but is not limited to, protection of witnesses and sources of information.

23. **Appeals against orders for proceedings to be held in camera and withholding information.** Appeal against any order that proceedings will not be held openly is to the Appeal Court²⁵. Guidance on the procedure is in [Chapter 31](#) (Court Martial appeal).

24. **Proceedings in the absence of the person to whom they relate.** With the exception of arraignment proceedings, the judge advocate may direct that any proceedings may be held in the absence of any person to whom they relate²⁶, e.g. because the defendant has absconded. However, anyone to whom the proceedings relate will be entitled to be legally represented at such proceedings unless paragraph 56 applies (preliminary proceedings in chambers without notice to defendant).

25. **Deliberation in private.** When the court deliberates on finding, and as so directed by the judge advocate in any other circumstances, the court will deliberate in private with no other person present²⁷. However, personnel in attendance at the proceedings under instruction, and who have been duly sworn²⁸, will be allowed to remain with the court when it

²⁰ Section 158 of the Act

²¹ Armed Forces (Court Martial) Rules 2009 rule 153(1).

²² Armed Forces (Court Martial) Rules 2009 rule 153(2).

²³ Armed Forces (Court Martial) Rules 2009 rule 153(4)(b).

²⁴ Armed Forces (Court Martial) Rules 2009 rule 154.

²⁵ Armed Forces (Court Martial) Rules 2009 rule 155.

²⁶ Armed Forces (Court Martial) Rules 2009 rule 19.

²⁷ Armed Forces (Court Martial) Rules 2009 rule 20(1).

²⁸ Armed Forces (Court Martial) Rules 2009 Schedule 1.

deliberates on sentence, a dispute of fact after a guilty plea²⁹ (Newton hearings), whether to make an activation order or any other matter where the judge advocate so directs³⁰.

Live links

26. Persons may attend any CM proceedings of any description by live link if the judge advocate so directs³¹. This provision, which is broadly drawn in order to meet the particular requirements of the Service justice system, which operates in continually changing circumstances across the world and even within the UK, includes but is not limited to attendance at a hearing by:

- a. Any legal representative;
- b. Any person who is the subject of the proceedings;
- c. Any witness; and
- d. Any interpreter.

27. **Application procedure and principles.** The application of a live link direction and the procedure to be followed for making such an application lies at the discretion of the judge advocate in the interests of justice. The judge advocate is not bound by any statute regulating live links, save where the statute applies to CM proceedings. If given, a judge advocate may vary or discharge such a direction at any time before or during any hearing to which it applies, and when giving, discharging or varying a live link direction, or refusing the application for one, should give his reasons for doing so.

28. **Definition of a live link.** A live link is any arrangement by which a person who is not in the place where the proceedings are being held is able to see and hear, and be seen and heard by, the court during proceedings. Military Court Centres within the UK and Germany and the Offices of the JAG are equipped with modern live link facilities. In addition, the armed forces have access to video telephone conference (VTC) facilities in many other locations, as do some civilian court centres. The widest use of VTC facilities, within the rules and guidance and in such a way as best supports the administration of justice, should be made wherever appropriate but at the discretion of the judge advocate. For the purpose of live links, the place at which the proceedings are being held is the place in which the judge advocate is located.

29. **Application for a live link.** A judge advocate may give a live link direction either on the application of a party to the proceedings or of his own motion³². Such an application may be made either in the proceedings or, where the proceedings are trial or appellate proceedings, in any related preliminary proceedings. Such an application may be made in writing, and should be made in writing if it is an application to attend preliminary proceedings by live link or if the subject matter of the live link direction is to be considered during any preliminary proceedings using the application for leave to adduce evidence through television link form (T-SL-CM01) at [Annex A](#). When made during proceedings the application may be made orally, but the judge advocate may require written submissions. Any application for a witness to give, by live link, evidence relevant to the determination of guilt or innocence or to the factual basis of sentence should be determined at an oral hearing.

²⁹ Armed Forces (Court Martial) Rules 2009 rule 112.

³⁰ Armed Forces (Court Martial) Rules 2009 rule 20.

³¹ Armed Forces (Court Martial) Rules 2009 rule 18.

³² Armed Forces (Court Martial) Rules 2009 rule 18(5).

30. **Preliminary proceedings.** Preliminary proceedings may be conducted using a live link if the judge advocate so directs. The judge advocate may decide whether to give a live link direction for subsequent CM proceedings at a preliminary hearing. The defendant, the defendant's legal representative, the prosecutor, any witness required at the preliminary hearing, any interpreter or the CAO may be treated as present at a preliminary hearing by live link if the judge advocate so directs.

31. **Defendant/offender attending a sentencing or activation hearing.** The defendant/offender should usually attend at the place at which a hearing in relation to sentencing, including activation proceedings, is being held. However, circumstances may arise in which this is not possible, and in those circumstances the judge advocate may give a live link direction requiring the defendant/offender to attend the hearing (or any number of sentencing hearings) by live link. The consent of the defendant/offender is not required, but may be a relevant consideration for the judge advocate when determining whether to make the direction. The judge advocate may be more likely to give such a direction if it is likely that the defendant/offender will be held in Service custody during any sentencing or activation hearing, or otherwise not be in the place where the hearing is being held. The direction will not be given unless the judge advocate is satisfied that it is in the interests of justice to give the direction. In addition, if the defendant/offender wishes to give oral evidence at the proceedings to which a potential live link direction applies, the judge advocate may wish to know the defendant/offender's views as to whether he can effectively give evidence through the live link. A judge advocate may rescind the direction at any time, including during the hearing in relation to which it was given, if it is in the interests of justice to do so, but this does not prevent him from making a further live link direction in relation to the defendant/offender. If a judge advocate refuses an application for a live link for the defendant/offender's attendance at a sentencing or activation hearing, or for rescinding such a direction, he should give his reasons for doing so.

32. **Witnesses giving evidence by live link.** A live link direction may be made in relation to any witness, whether as to fact, character or otherwise, and whether the witness is in the country in which the proceedings are being held or otherwise. Where a direction is given that a witness (including a defendant) may attend proceedings by live link, the witness cannot give evidence otherwise than by live link without the leave of the judge advocate³³. In addition, the judge advocate may require a specified person to be present with the witness giving evidence by live link to answer under oath any questions relating to the circumstances in which the evidence is given.

33. **Defendant giving evidence during trial.** A defendant may make an application to a judge advocate to give evidence at trial through a live link, and a direction may be made if it is in the interests of justice to do so. When deciding whether to make such a direction a judge advocate may wish to consider (but is not limited to) such factors as: the defendant's age; any compromise to his ability to participate effectively in the proceedings due to his level of intellectual ability, social functioning or any mental disorder within the meaning of the Mental Health Act 1983; and whether use of a live link would enable him to participate more effectively in the proceedings as a witness.

34. **Special measures.** Live links may be used in conjunction with or as part of a special measures direction³⁴ (eg. witness gives evidence by live link, and in private, or judge advocate and counsel remove wigs and gowns), see paragraphs 88 to 89.

Judge advocate sitting alone

³³ Armed Forces (Court Martial) Rules 2009 rule 18(7).

³⁴ Armed Forces (Court Martial) Rules 2009 rule 93(5).

35. The judge advocate may at any time direct the lay members of the court to leave while he hears submissions or gives a ruling on any question of law, practice or procedure to which they should not be party³⁵. This includes but is not limited to: questions of admissibility of evidence; applications for a summons or warrant³⁶, a live link³⁷, or to adduce a complainant's previous sexual history³⁸ submissions of no case to answer³⁹; questions as to whether a question should be put; issues of fitness to stand trial; and wasted costs order. Such matters should be dealt with in the absence of the lay members, and after all parties have been afforded the opportunity to make representations and, where appropriate, adduce evidence. The judge advocate may require skeleton arguments to be submitted in relation to any such issues.

Administration of oaths and affirmations

36. Oaths and affirmations are administered in a similar form and manner to those used in civilian courts in England and Wales⁴⁰, see paragraph 98. The following are required to swear an oath or affirm before participating in CM proceedings:

- a. Lay members of the court⁴¹;
- b. Interpreters⁴²;
- c. Anyone in attendance under instruction⁴³ (usually junior officers, but may include civilian personnel with the leave of the judge advocate);
- d. Witnesses before giving evidence.

Termination of proceedings

37. The judge advocate must terminate proceedings if any of the following situations arise:

- a. The proceedings require a president of the board and the president of the board is for any reason unable to continue to attend the proceedings, and there is no other lay member qualified to be the president of the board⁴⁴;
- b. The proceedings are with lay members and the number of lay members falls below the minimum required for the proceedings⁴⁵; or
- c. He considers for any reason that it is in the interests of justice to do so⁴⁶ (e.g. it is discovered that there is some connection between a lay member and a party to the proceedings resulting in perceived unfairness).

Where this happens the lay members must be discharged⁴⁷, however, this does not bar further trial, appellate, sentencing or activation proceedings in relation to the same

³⁵ Armed Forces (Court Martial) Rules 2009 rule 38.

³⁶ See paragraph 72.

³⁷ See paragraphs 26 to 34.

³⁸ Youth Justice and Criminal Evidence Act 1999 section 41(2).

³⁹ See paragraph 103.

⁴⁰ Armed Forces (Court Martial) Rules 2009 rule 21 and Schedule 1.

⁴¹ Armed Forces (Court Martial) Rules 2009 rule 37.

⁴² Armed Forces (Court Martial) Rules 2009 rule 22.

⁴³ Armed Forces (Court Martial) Rules 2009 Schedule 1.

⁴⁴ Armed Forces (Court Martial) Rules 2009 rules 25(1) and 34.

⁴⁵ Armed Forces (Court Martial) Rules 2009 rule 25(2) and section 155(1)(b) of the Act.

⁴⁶ Armed Forces (Court Martial) Rules 2009 rule 25(3).

⁴⁷ Armed Forces (Court Martial) Rules 2009 rule 25(5).

offence(s)⁴⁸. The judge advocate should then give such directions for the future conduct of the proceedings as he deems appropriate in the proper administration of justice, including directing new proceedings with an entirely new board where appropriate.

Record of proceedings

38. **Content.** A record must be made of all CM proceedings and must include⁴⁹:
- a. The record of plea offered and whether any plea of guilty was accepted by the judge advocate;
 - b. The record of any finding;
 - c. The record of any sentence passed, order made or direction given by the court;
 - d. The record of any sentence passed, order made and any direction given by the judge advocate; and
 - e. A sound recording of the proceedings and, if one has been produced, a transcript of it, signed by the transcriber.
39. **Exhibits.** Each exhibit must be retained with the record of proceedings, unless the judge advocate directs otherwise⁵⁰. Where an exhibit is not retained within the record of proceedings, the judge advocate should ensure that proper steps are taken for its safe custody or proper disposal.
40. **Preliminary proceedings.** Copies of records of preliminary proceedings must be sent to the judge advocate, the DSP and each defendant, however where the preliminary proceedings were held in chambers the defendants will not receive a copy of the record of those proceedings⁵¹.
41. **Custody of records.** The JAG is required to keep the record of the proceedings, any exhibits retained, and any file of correspondence or other papers maintained by the CAO in connection with the proceedings for at least 6 years from the conclusion of the proceedings⁵².
42. **Disclosure of records.** Provision of copies of records is governed as follows⁵³:
- a. **Parties to the proceedings.** The record of any proceedings or part of it, must, subject to sub-paragraph c below, on request, be supplied to any party to the proceedings at no cost. ;
 - b. **Any other person.** In addition, records of proceedings may, subject to sub paragraph c. below, be supplied, on request, to anyone who asks for them. This is subject to payment of any charge fixed by JAG.
 - c. **In camera proceedings and security issues.** Records of proceedings held in camera and related directions do not have to be supplied when requested⁵⁴. In addition, following a request for a copy of a transcript, the Secretary of State may, for reasons of

⁴⁸ Armed Forces (Court Martial) Rules 2009 rule 25(6) – (8).

⁴⁹ Armed Forces (Court Martial) Rules 2009 rule 23.

⁵⁰ Armed Forces (Court Martial) Rules 2009 rule 24(3).

⁵¹ Armed Forces (Court Martial) Rules 2009 rules 23(3) and (4).

⁵² Armed Forces (Court Martial) Rules 2009 rule 23(5).

⁵³ Armed Forces (Court Martial) Rules 2009 rules 23(6) – (8).

⁵⁴ Armed Forces (Court Martial) Rules 2009 rule 23(7).

security, certify that the whole or any part of a record of proceedings must not be disclosed. In this situation the applicant is not entitled to a copy of the record or the part of it to which the certificate relates.⁵⁵

Circumstances not provided for

43. In any circumstances not provided for by either the Act or the Armed Forces (Court Martial) Rules 2009, the judge advocate must ensure the proceedings are conducted in a way which most closely resembles proceedings in the Crown Court in comparable circumstances and, failing that, in such a way as appears to be in the interests of justice⁵⁶.

⁵⁵ Armed Forces (Court Martial) Rules 2009 rule 23(8). See also JSP 400 (Disclosure of Information).

⁵⁶ Armed Forces (Court Martial) Rules 2009 rule 26.

Part 4 – Assistance to defendants and legal representation

Assistance to defendants

44. Service personnel and relevant civilians⁵⁷ facing CM proceedings are entitled to a proper opportunity to prepare for any hearings and in particular to prepare their defence. To this end they must receive advance information and notification of hearings, and receive appropriate assistance to prepare for the hearings. All are entitled to legal representation at any hearings, whether at public or personal expense, see JSP 838 (The Armed Forces Legal Aid Scheme), and in addition, such assistance as can be provided by a DAO.

45. **Defendant's assisting officer (DAO).** In order to assist the process of preparing for CM proceedings, a Service person may request the support of a DAO. When so requested the CO should ensure at least two people are available for the defendant to nominate, and inform the defendant of their names. One of these potential nominees may be someone specifically chosen by the defendant, subject to the general requirements that the nominee should be subject to Service law, at least the rate or rank of petty officer, military, marine or air force sergeant, and consent to be nominated. The defendant does not have to nominate a DAO, but if he does not wish to do so, he should state in writing that he does not wish an appointment to be made. In the case of relevant civilians, if the defendant requests that he do so, the CO may provide names of people who may be nominated as DAO and should do so if possible.

46. **Role of the DAO.** The DAO's role is that of a facilitator, assisting the defendant to complete forms (eg. legal aid application), obtain legal advice and representation, attend interviews, receive supporting papers, attend charging procedures and hearings, obtain character references and referees, and generally support the defendant. The DAO will not be legally qualified and should not become involved in preparing a defence or conducting the defence, although where a defendant chooses to represent himself the DAO may assist him to prepare a statement in mitigation. The DAO should attend CM proceedings with the defendant in a support role, but is not entitled to represent the defendant in any proceedings. The defendant should be advised that the DAO has no right to speak on the defendant's behalf at any proceedings unless he is called as a character witness. [Annex B](#) provides more detailed guidance to the DAO as to his duties and responsibilities.

47. **Legal representation.** Any party to CM proceedings may appoint a legal representative to act on his behalf⁵⁸ and this may be either a Service or civilian lawyer qualified in accordance with paragraph 48. The entitlement to appoint a legal representative does not mean that the defendant or another party to the proceedings must do so (in particular, a defendant is entitled to represent himself if he wishes). Also, there is no entitlement for a defendant to be represented by a Service lawyer in preference to a civilian lawyer, although a Service lawyer may be available in some circumstances⁵⁹. A defendant may apply for Legal Aid for the conduct of his defence⁶⁰, see JSP 838 (The Armed Forces Legal Aid Scheme). Parties to proceedings must inform the CAO of the name and address of his legal representative⁶¹, and should do this as soon as is practicable after that person has been appointed.

⁵⁷ See Volume 3 of the MSL.

⁵⁸ Armed Forces (Court Martial) Rules 2009 rule 39(1).

⁵⁹ The Royal Navy may provide a Service barrister in any case for which one is available. Provision of Service lawyers to Army and RAF personnel may be available in Germany and Cyprus and for a CM occurring abroad.

⁶⁰ JSP 838 (The Armed Forces Legal Aid Scheme) should be consulted for this purpose.

⁶¹ Armed Forces (Court Martial) Rules 2009 rule 39(4).

48. Only those with appropriate legal qualifications may represent a defendant at any preliminary proceedings and before a CM, namely⁶²:

- a. A solicitor or barrister in England and Wales;
- b. An advocate or solicitor in Scotland;
- c. A barrister or solicitor in Northern Ireland; or
- d. The equivalent of a barrister or solicitor in any of the Channel Islands, the Isle of Man, a commonwealth country or British overseas territory.

49. **Civilian defendant – special rule for a ‘young person’.** A civilian subject to CM proceedings who is under the age of 18 at the commencement of the proceedings (a ‘young person’), and has not appointed a legal representative, may with the leave of the judge advocate be represented in any CM proceedings by his parent or guardian. That person may exercise all rights and duties imposed on the defendant on his behalf, with the exception of pleading to a charge (a defendant must plead to a charge himself)⁶³. In addition, the parent or guardian of the young person must be served with any document which must be served on the young person under the Rules⁶⁴.

50. **Conduct of the prosecution.** The DSP will usually be represented during CM proceedings by a barrister or solicitor on the staff of the SPA. These are usually serving officers of the RN, Army or RAF, who will wear dress in court according to the tradition of their Service. Alternatively, the DSP may represent himself, or instruct a civilian barrister or solicitor to act on his behalf as required. Any such person must be qualified in accordance with paragraph 48.

⁶² Armed Forces (Court Martial) Rules 2009 rule 39(2).

⁶³ Armed Forces (Court Martial) Rules 2009 rule 40.

⁶⁴ Armed Forces (Court Martial) Rules 2009 rule 40(2).

Part 5 – Preliminary proceedings and arraignment

Preliminary proceedings

51. **Overview.** Preliminary proceedings may be conducted at any time before the trial commences. The CAO must list all charges allocated for CM for preliminary proceedings on receipt of advance information from the DSP⁶⁵, and will usually do so within 4 weeks of receipt of that information, see paragraph 52. Further preliminary proceedings (subsequent to the initial, automatic, preliminary proceedings) may be directed by the judge advocate or the JAG of his own motion or on an application from the prosecution or defence⁶⁶.

52. **Advance information.** Service of advance information by the DSP is the starting point for all CM trials and sentencing proceedings. Where a charge is allocated for CM trial (i.e. DSP has decided to proceed with the matter) the DSP must as soon as practicable serve advance information in relation to all defendants on the CAO and on each defendant and his legal representative (if any). Such advance information must include:

- a. Copies of the statements of prosecution witnesses on which the prosecution intend to rely;
- b. A list of exhibits, and a statement of where any non-documentary exhibits are held; and
- c. A transcript of any interview with the defendant⁶⁷.

In addition, where there is a possibility of an activation order in the event of conviction on the charge(s) the advance information must also include a notice that the court would have that power if the defendant were convicted⁶⁸. Additional rules exist for the service of advance information in relation to defendants subject to a conditional discharge or an overseas community order⁶⁹. Having received the advance information the CAO must list the charge for preliminary proceedings⁷⁰, see paragraph 51.

53. **Subject matter of preliminary proceedings.** Broadly speaking, preliminary proceedings are called to deal with arraignment, plea and case management issues, and to rule on matters of law which do not require the presence of the lay members of the court. At such a hearing the judge advocate may give any order, ruling or direction on any matter within his jurisdiction to deal with in the absence of the lay members⁷¹. A non-exhaustive list of matters that might be suitable to be dealt with at such proceedings is at [Annex C](#).

54. **Effect of direction, ruling or order.** Directions given at preliminary proceedings have effect throughout any related preliminary proceedings, trial and sentencing proceedings unless altered by the judge advocate who gave the direction or by the judge advocate for those related proceedings⁷². Orders and rulings made in preliminary proceedings have similar effect, save that orders and rulings may be appealed against, with leave of the CM Appeal Court⁷³, in which case the order or ruling may be varied or discharged on appeal. Where an appeal against an order or ruling made in preliminary proceedings is made, preliminary proceedings may continue notwithstanding leave to appeal is granted, but the

⁶⁵ Armed Forces (Court Martial) Rules 2009 rule 45.

⁶⁶ Armed Forces (Court Martial) Rules 2009 rule 46.

⁶⁷ Armed Forces (Court Martial) Rules 2009 rules 43(1) and (2).

⁶⁸ Armed Forces (Court Martial) Rules 2009 rule 44(1).

⁶⁹ Armed Forces (Court Martial) Rules 2009 rules 44(2) and (3).

⁷⁰ Armed Forces (Court Martial) Rules 2009 rule 45(1).

⁷¹ Armed Forces (Court Martial) Rules 2009 rule 49.

⁷² Armed Forces (Court Martial) Rules 2009 rule 49(3).

⁷³ Armed Forces (Court Martial) Rules 2009 rule 50.

related trial proceedings must not commence until the appeal has been determined or abandoned⁷⁴.

55. Application for further preliminary proceedings - hearing in open court. All preliminary proceedings will be in open court unless the judge advocate directs otherwise⁷⁵. Applications for further preliminary proceedings may be made orally to a judge advocate at another preliminary proceeding⁷⁶, or in writing⁷⁷ to the CAO. The application for preliminary proceedings form (T-SL-CM02) at [Annex D](#) may be used for this purpose. When made in writing the application must specify the reason for which further preliminary proceedings are required (i.e. the issues to be addressed), estimate the time required for the proceedings, and should also notify the CAO of any witnesses who will be required. A copy of the application must be sent to any other party to the proceedings⁷⁸.

56. Application for further preliminary proceedings – hearing in chambers in the absence of the defence. An application for further preliminary proceedings to be held in chambers without notice to the defendant⁷⁹ may be made either orally at preliminary proceedings (in the absence of the defence) or in writing. This procedure is exceptional and governed by the application of law to matters such as, but not limited to, overriding public interest and security. The same rules as apply to applications for proceedings in open court⁸⁰ apply, save that a written application is not to be copied to the defendant(s). The application for preliminary proceedings in chambers form (T-SL-CM03) at [Annex E](#) may be used for this purpose. In either situation, a written application is sent to the CAO who will forward it the judge advocate for consideration. The judge advocate will then give directions for a hearing, if one is required.

57. Administrative matters. Either automatically or on receipt of a direction by the judge advocate, the CAO will make all necessary administrative arrangements for a preliminary hearing, including appointing the date, time and place at which the hearing will take place and notifying the parties. The notice will also inform the parties (or, for a preliminary hearing in the absence of the defence, the prosecution) of the matters to be addressed at the hearing, as requested by the judge advocate. CAO will arrange for a verbatim court recorder and, if so requested by the judge advocate, prosecution or defence, an interpreter to be present at the hearing. CAO will arrange for any live links to be operated, and will notify witnesses as required.

58. Preliminary proceedings should automatically be listed 4 weeks after the CAO has received the prosecution papers. For simple AWOL cases, in anticipation of a guilty plea the CAO will normally make arrangements for sentencing proceedings to take place immediately on completion of the preliminary proceedings. Where automatic preliminary proceedings are listed, the CM preliminary hearing plea and case management hearing (PCMA) form (T-SL-DH1) at [Annex F](#) is to be completed by both the prosecution and defence in advance of the proceedings, and if possible a copy is to be sent to the CAO, by electronic means if necessary, as well as to the other parties, not later than 24 hours before the hearing is due to take place.

59. Outline of the prosecution case. The judge advocate may direct the prosecution to prepare an outline of the prosecution case in advance of any preliminary hearing, and to serve a copy of such an outline on each defendant and the judge advocate⁸¹.

⁷⁴ Armed Forces (Court Martial) Rules 2009 rule 50(3).

⁷⁵ Section 158 of the Act.

⁷⁶ Armed Forces (Court Martial) Rules 2009 rule 46(2)(a)

⁷⁷ Armed Forces (Court Martial) Rules 2009 rule 46(3).

⁷⁸ Armed Forces (Court Martial) Rules 2009 rule 46(4).

⁷⁹ Armed Forces (Court Martial) Rules 2009 rule 47.

⁸⁰ See paragraph 55.

⁸¹ Armed Forces (Court Martial) Rules 2009 rule 48.

Procedure

60. The procedure to be followed at preliminary proceedings is determined by the judge advocate. The prosecutor and defendant may address the judge advocate on such matters⁸² indicated in the notice listing the hearing, and the judge advocate or any party present may raise any other matter. The judge advocate may then make directions necessary for the proper and efficient management of the case, and make an order, ruling or direction on any matter. This includes for example, directions for joinder, severance and amendment of charge sheets, and rulings as to admissibility of evidence.

Joinder, severance and amendment

61. **Joinder of charges.** Questions as to joinder of charges should usually be dealt with at a preliminary hearing. The CM may try two or more charges together as long as they are included in the same charge sheet⁸³. For this purpose the DSP may⁸⁴ consolidate the charges from two or more charge sheets into one charge sheet as long as the charges can lawfully be joined⁸⁵. In addition, two or more defendants may be jointly charged with the same offence on the same charge sheet.

62. **Severance.** A judge advocate may direct that two or more offences in the same charge sheet should be separated into two or more charge sheets for separate trial in relation to each charge sheet. In addition, the judge advocate may direct that two or more defendants be tried separately in separate charge sheets. Such directions may be made at any time before commencement of trial proceedings in relation to the original charge sheet⁸⁶. They will usually be made where the judge advocate considers that a fair trial of a defendant may be prejudiced if the charges are not severed, taking into consideration also the requirement for fairness to the prosecution who represent the public interest.

63. **Amendment of charges.** A judge advocate may order the amendment of a charge sheet or charge, whether at preliminary proceedings or trial, and whether or not the defendant has been arraigned, where the charge sheet or charge is defective. However, a judge advocate cannot make such an order unless the amendment can be made without injustice⁸⁷. Where such an order is made the DSP must comply with any requirements for service on the defendant under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009⁸⁸.

Arraignment

64. **Procedure.** The defendant must be arraigned at preliminary proceedings before a judge advocate sitting alone⁸⁹. The defendant is required to plead separately to each charge on which he is arraigned⁹⁰, but need not be arraigned on all the charges in a charge sheet at the same time⁹¹.

65. **Guilty plea.** If the defendant pleads guilty to any charge, the judge advocate must decide whether he should accept the plea. He must not do so unless he is sure the defendant understands the nature of the charge, the general effect of the plea (including that

⁸² See Annex B for matters which may be suitable for preliminary proceedings.

⁸³ Armed Forces (Court Martial) Rules 2009 rule 51(1).

⁸⁴ Armed Forces (Court Martial) Rules 2009 rule 51(2).

⁸⁵ See Indictments Act 1915 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁸⁶ Armed Forces (Court Martial) Rules 2009 rules 52 and 53.

⁸⁷ Armed Forces (Court Martial) Rules 2009 rule 54.

⁸⁸ Armed Forces (Court Martial) Rules 2009 rule 54(4).

⁸⁹ Armed Forces (Court Martial) Rules 2009 rule 56(1).

⁹⁰ Armed Forces (Court Martial) Rules 2009 rule 56(2).

⁹¹ Armed Forces (Court Martial) Rules 2009 rule 56(1).

it is binding and cannot usually be changed to not guilty), and the difference in procedure following a plea of guilty.⁹² The judge advocate should not accept a plea of guilty if in all the circumstances he considers he should not accept the plea, for example when pleading the accused has put forward a defence to the charge or otherwise entered an equivocal plea. If he does not accept the plea he must record a plea of not guilty⁹³.

66. **Not guilty plea.** If the defendant pleads not guilty, does not plead (or enters an equivocal or unintelligible plea, or a plea of guilty is not accepted by the judge advocate), the judge advocate must record a plea of not guilty.

67. **Procedure following arraignment.** The procedure followed after arraignment will depend on a number of factors, including whether the defendant is charged with more than one offence, whether there is more than one charge sheet and whether there is more than one defendant.

a. **Guilty pleas to all charges.** Where the defendant pleads guilty to all charges the CAO must appoint a time and place for the related sentencing proceedings⁹⁴. For simple AWOL charges, this will usually take place the same day, sentencing proceedings having been listed in advance of the preliminary hearing dealing with arraignment. In other circumstances sentencing proceedings will be listed as directed by the judge advocate.

b. **Not guilty pleas to all charges.** Where the judge advocate has recorded pleas of not guilty to the charge(s) the matter will proceed to trial. The judge advocate will either direct the CAO to list the matter for trial, or, if the arraignment occurs immediately before the time listed for trial the court will try the case.

c. **Alternative charges.** A defendant may be charged with two or more alternative charges, listed in order of seriousness. If the judge advocate records a guilty plea to the first of one or more alternative charges, he may (with the DSP's consent) order that the alternative charge(s) should lie on the file, not to be proceeded with without leave of the CM or the Appeal Court⁹⁵. A trial of any remaining charges to which the accused has pleaded not guilty may take place (see sub-paragraph d. below) or, if there are no other charges to be tried, the case will be listed for sentencing proceedings. If the defendant pleads guilty to any of the less serious alternative charges, and not guilty to the remaining alternative charge(s) the procedure will depend on whether that plea is acceptable to the prosecution. If the plea is acceptable, i.e. the prosecution considers that it is not in the interests of justice to proceed with the alternative charge(s), the prosecution may offer no evidence on the more serious alternative charge(s) and a finding of not guilty will be recorded⁹⁶. Any less serious alternative charges may (with the DSP's consent) be ordered to lie on the file. A trial of any remaining charges to which the accused has pleaded guilty may take place, or the case will be listed for sentencing proceedings as appropriate. However, if the prosecution determines that the plea is unacceptable and does not give his consent to the judge advocate recording the plea of guilty, the judge advocate will enter not guilty pleas to all the alternative charges, and trial of the charges for which not guilty pleas have been entered will take place.

d. **Mixed pleas.** Where the judge advocate has recorded mixed pleas (guilty to one or more and not guilty to one or more other charges), unless the judge advocate directs

⁹² Armed Forces (Court Martial) Rules 2009 rule 56(3).

⁹³ Armed Forces (Court Martial) Rules 2009 rule 56(5)(a).

⁹⁴ Armed Forces (Court Martial) Rules 2009 rule 56(4)(b).

⁹⁵ Armed Forces (Court Martial) Rules 2009 rule 57.

⁹⁶ Armed Forces (Court Martial) Rules 2009 rule 58.

otherwise, the trial of any charge to which the defendant has pleaded not guilty will proceed on a separate charge sheet before sentencing proceedings for the guilty plea(s) are conducted. The judge advocate will give directions for the future conduct of the case, and sentence for the guilty pleas will not take place until the not guilty pleas have been tried. A charge should only be left on the file if the prosecution do not wish to proceed on that charge or if it is an alternative charge. In either case the charge can only be left on the file with the DSP's consent.

e. **Offer of no evidence.** Where a plea of not guilty has been recorded and the prosecutor indicates that he intends to offer no evidence in relation to that charge, the judge advocate must record a finding of not guilty⁹⁷. This procedure does not require the lay members to find the accused not guilty.

68. **Change of plea.** A defendant may change his plea from not guilty to guilty at any time before the lay members of the CM withdraw to deliberate on their finding⁹⁸. The defendant will then be re-arraigned, and the charge to which he has pleaded guilty may be the subject of sentencing proceedings before the lay members for the trial. A change of plea from guilty to not guilty may, with the leave of the judge advocate, be made at any time before the court begins to deliberate on sentence. However, if the guilty plea is withdrawn during sentencing proceedings or trial in relation to another charge, those proceedings must be terminated and the matter heard by a court consisting of new lay members⁹⁹.

69. **Restrictions on DSP's powers after arraignment.** Once the defendant has been arraigned the DSP cannot exercise any of his powers under section 125(2) of the Act (amend or substitute a charge, bring an additional charge etc.) without the leave of the court¹⁰⁰. However, where the defendant, having elected CM trial and having been arraigned, gives his consent under section 130(2) of the Act for a charge capable of being tried summarily to be referred to his CO, the DSP may refer the charge to the CO without the court's leave¹⁰¹. If the DSP does, with leave, amend or substitute a charge, bring an additional charge etc under section 125(2) of the Act, he must comply with any requirements for service on the defendant under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

⁹⁷ Armed Forces (Court Martial) Rules 2009 rule 58.

⁹⁸ Armed Forces (Court Martial) Rules 2009 rules 59(1) and (2).

⁹⁹ Armed Forces (Court Martial) Rules 2009 rules 59(3) and (4).

¹⁰⁰ Armed Forces (Court Martial) Rules 2009 rule 60(1).

¹⁰¹ Armed Forces (Court Martial) Rules 2009 rule 60(2).

Part 6 – Securing attendance of witnesses and defendants

Securing the attendance of witnesses

70. There are three formal methods of securing the attendance of witnesses: notification, issue of a witness summons and issue of a warrant for arrest. Each method is briefly outlined in the following paragraphs. The Rules should be consulted as to the detailed requirements.

71. **Notification of a witness.** Where any person is required to give evidence at any proceedings (including but not limited to preliminary proceedings, the trial, sentencing and activation proceedings) the CAO will notify that person of the time and place at which he is required to attend¹⁰². If a defendant requests the CAO to notify a witness, the CAO will do so. If the CAO is unable to notify any witness he must inform the judge advocate and the party seeking to call the witness, preferably in writing.

72. **Witness summons.** The rules as to the issue of witness summons and the circumstances in which they may be issued and withdrawn vary according to whether the summons is requested by a party using the form of application for a witness summons form (T-SL-CM04) at [Annex G](#), issued of the judge advocate's own motion, and whether there are any issues as to duties, rights and confidentiality.

a. **Issue of witness summons on the application of any party to the proceedings.** A judge advocate may if necessary, on the application of a party to the proceedings at any time, issue a witness summons, using the summons to witness form (T-SL-CM05) at [Annex H](#), but only if he is satisfied that the person is likely to be able to give evidence, or to produce a document or thing, that is likely to be material evidence, and that it is in the interests of justice to issue a summons¹⁰³. The procedural requirements¹⁰⁴ for the issue of a witness summons must be complied with, otherwise the application may be refused¹⁰⁵. These requirements include that the application must be made as soon as practicable after becoming aware of the grounds for doing so¹⁰⁶. If the application is made in writing it must contain a declaration of truth¹⁰⁷, and be served on the CAO and as directed by the judge advocate¹⁰⁸, for example on the person to whom the application relates, or on a person affected by the application (such as someone about whom information is held in confidence). Any application must identify the witness and explain what evidence the proposed witness can give or produce, why it is likely to be material evidence, and why it is in the interests of justice to issue a witness summons.¹⁰⁹

b. **Witness summons to produce a document or thing – judge advocate's assessment of relevance and confidentiality.** Where a witness has been summonsed to produce a document or thing, the potential witness may object to its production on the grounds that it is not likely to be material or, even it is likely to be material, the duties or rights, including rights of confidentiality, of the witness or any person to whom the evidence relates outweigh the reasons for issuing the witness summons. The judge advocate may require the proposed witness to produce the evidence for the objection to be assessed. The judge advocate will then assess the

¹⁰² Armed Forces (Court Martial) Rules 2009 rule 62(1).

¹⁰³ Armed Forces (Court Martial) Rules 2009 rule 63(1).

¹⁰⁴ See Armed Forces (Court Martial) Rules 2009 rule 63 in entirety.

¹⁰⁵ Armed Forces (Court Martial) Rules 2009 rule 63(3).

¹⁰⁶ Armed Forces (Court Martial) Rules 2009 rule 63(4).

¹⁰⁷ Armed Forces (Court Martial) Rules 2009 rule 63(7).

¹⁰⁸ Armed Forces (Court Martial) Rules 2009 rule 63(8).

¹⁰⁹ Armed Forces (Court Martial) Rules 2009 rule 63(5).

objection, seeking assistance from the proposed witness or his representative, or a person to whom the evidence relates, and viewing the document or thing as required.¹¹⁰

c. **Issue of a witness summons of the judge advocate's own motion.** A judge advocate may of his own motion issue a witness summons to give evidence or produce a document or thing specified in the summons¹¹¹. A witness issued with a witness summons of the judge's own motion may apply for it to be withdrawn on the grounds that he cannot give or produce evidence likely to be material evidence, or, even if he can, his duties or rights including rights of confidentiality, or those of any person to whom the evidence relates outweigh the reasons for the issue of the summons¹¹². In addition, any person to whom the proposed evidence relates may make an application for such a summons to be withdrawn on the grounds that the evidence is not likely to be material, or even if it is, his duties or rights, including rights of confidentiality, or those of the witness outweigh the reasons for the issue of the witness summons¹¹³.

d. **Application to withdraw a witness summons**

(1) The following people may apply for withdrawal of a witness summons on the grounds specified:

(a) Any party who applied for the witness summons may apply for its withdrawal on the grounds that it is no longer needed¹¹⁴;

(b) The witness summonsed may apply for the witness summons to be withdrawn on the grounds that he was not aware of any application for it and either he cannot give or produce evidence likely to be material or, even if he can, his duties or rights, including rights of confidentiality, or those of the person to whom the evidence relates outweigh the reasons for the issue of the summons¹¹⁵; or

(c) Any person to whom the evidence relates may apply for the witness summons to be withdrawn on the grounds that he was not aware of the application, and either the evidence is not likely to be material, or even if it is, his duties or rights, including rights of confidentiality, or those of the witness outweigh the reasons for the issue of the witness summons.¹¹⁶

(2) Application on any of these grounds must be made in writing as soon as practicable after becoming aware of the grounds for doing so, explaining the grounds on which the summons should be withdrawn. The application must be served on, as appropriate, the witness, the party who applied for the witness summons (where he is not the applicant) and any other person who he knows was served with the application for the witness summons.¹¹⁷

e. **Hearings, oral applications, variation of requirements etc.** The judge advocate may issue or withdraw a witness summons with or without a hearing. Where the application must be made in writing, the judge advocate may give leave for the application to be made orally instead. However the person who wishes to make an

¹¹⁰ Armed Forces (Court Martial) Rules 2009 rule 64.

¹¹¹ Armed Forces (Court Martial) Rules 2009 rule 65(1).

¹¹² Armed Forces (Court Martial) Rules 2009 rule 65(3)(a).

¹¹³ Armed Forces (Court Martial) Rules 2009 rule 65(3)(b).

¹¹⁴ Armed Forces (Court Martial) Rules 2009 rule 66(2).

¹¹⁵ Armed Forces (Court Martial) Rules 2009 rule 66(3).

¹¹⁶ Armed Forces (Court Martial) Rules 2009 rule 66(4).

¹¹⁷ Armed Forces (Court Martial) Rules 2009 rules 66(5) and 66(6).

application orally must give as much notice as the urgency of the application permits to those to whom he would otherwise have served notice and, whilst doing so, explain the reasons for the application and for requesting the judge advocate consider it orally.¹¹⁸

f. **Form of summons.** A proposed form of witness summons (T-SL-CM05) is at [Annex H](#). The only statutory requirement of the summons is that it must contain a warning that failure to comply with the summons may result in the issue of a warrant for the arrest of the person to whom it applies¹¹⁹.

73. **Warrant to arrest.** A judge advocate may issue a warrant to arrest a witness where a witness summons would probably not procure a person's attendance¹²⁰ or the witness has failed to comply with a witness summons¹²¹. Such warrants must be addressed to the Service Police and/or a civilian police force, but can only be addressed to the Service Police where the warrant to arrest relates to a Service person or relevant civilian¹²². Any witness arrested for failing to comply with a witness summons must be transferred to Service custody as soon as practicable, and then be brought before a judge advocate to decide whether he should continue in custody until he appears as a witness at proceedings. If he has not been brought before a judge advocate within 48 hours of his arrest, he must be released¹²³.

Witness expenses

74. Witnesses notified of the requirement to give evidence (see paragraph 71) or served with a witness summons (see paragraph 72a and c) are entitled to travel and other expenses associated with the requirement to give evidence. This may take the form of a travel warrant or voucher entitling them to travel free of charge, and an undertaking by the CAO to pay any other expenses incurred in respect of giving evidence¹²⁴. For civilian witnesses, the CAO will liaise with the witness as to travel requirements. Service witnesses will make their own arrangements for attendance through ship/unit/establishment travel offices.

Securing the attendance of the defendant

75. **Arrest before arraignment.** Once a charge has been allocated for CM trial the judge advocate has power to direct the arrest of the defendant if he is satisfied that taking him into custody is justified¹²⁵.

76. **Arrest after arraignment.** Once a defendant has been arraigned a judge advocate has power to direct the defendant's arrest¹²⁶ at any time before the proceedings are concluded if he is satisfied that taking him into custody is justified. In addition, he has the power to issue a warrant for the defendant's arrest by a civilian police force.

Inspection of bankers' books

77. Where there is a requirement for bank records to be made available for inspection, any party to the proceedings may apply to a judge advocate for an order for the inspection of the bankers' books¹²⁷, the bank will then be issued an order by the judge advocate to permit

¹¹⁸ Armed Forces (Court Martial) Rules 2009 rule 67.

¹¹⁹ Armed Forces (Court Martial) Rules 2009 rules 63(10) and 65(2).

¹²⁰ Armed Forces (Court Martial) Rules 2009 rule 68(1).

¹²¹ Armed Forces (Court Martial) Rules 2009 rule 68(2).

¹²² Armed Forces (Court Martial) Rules 2009 rule 68(3) and (4).

¹²³ Armed Forces (Court Martial) Rules 2009 rule 68(b).

¹²⁴ Armed Forces (Court Martial) Rules 2009 rule 70.

¹²⁵ Armed Forces (Court Martial) Rules 2009 rule 41 and section 111 of the Act.

¹²⁶ Section 111 of the Act.

¹²⁷ Rule 71 and Bankers' Books Evidence Act 1879 section 7.

inspection of bankers' books (T-SL-CM06) using the form at [Annex I](#). A summons to a bank manager form (T-SL-CM07) is at [Annex J](#).

Part 7 – Evidence

Rules of evidence

78. The rules as to the admissibility of evidence of any fact at any CM proceedings are the same as those observed in trials on indictment¹²⁸ in England and Wales, in so far as they are capable of being applied but subject to some modifications outlined below. No person appearing before the CM can be required to answer any question or produce any document which he could not be required to answer or produce in similar proceedings in a trial on indictment in England and Wales¹²⁹.

79. Evidence must be given on oath or affirmation¹³⁰, subject to particular rules regarding the admission of evidence given under a special measures direction¹³¹ (see paragraphs 88 to 89) and unsworn evidence given by a witness who cannot be sworn¹³².

Rules of evidence particular to CM proceedings

80. **Judicial notice.** In addition to the usual rule regarding notoriety, the CM may take judicial notice of all matters within the general service knowledge of the court¹³³.

81. **Application of the Criminal Justice Act 1967 (CJA67).** Section 9 (proof of written statements) and section 10 of CJA67 (proof by formal admission) apply to the CM subject to modifications¹³⁴. In addition to the usual rules on admissibility under section 9 of CJA67 statements are admissible when made by a person outside the UK who at the time of making the statement was subject to Service law or discipline¹³⁵.

82. **Memory refreshing documents.** Section 139 of CJA67 does not apply to CM proceedings. However, comparable provisions have been incorporated into CM proceedings in identical terms to those of that section¹³⁶. A witness is therefore entitled whilst giving evidence to refresh his memory from a document made or verified by him at an earlier stage, or from a transcript of a previous oral account given by him, if he states that the document or oral account records his recollection of the matter at that earlier time and his recollection was likely to have been significantly better at that time. For these purposes, a document may include a recording (visual or sound).

83. **Admission of bad character evidence.** The rules as to admissibility of bad character evidence for CM trials mirror substantially those applicable to a trial on indictment in England and Wales, including where applicable the requirement to give notice:

- a. **Notice of intention to adduce evidence of a defendant's bad character.** If the prosecution intends to adduce evidence of a defendant's bad character or another defendant intends to adduce evidence of a defendant's bad character or to cross-examine him with a view to eliciting such evidence, he must give all parties and the CAO notice of that intention. A notice served by the DSP must be served within 14 days of the DSP serving advance information. A notice served by a defendant must be served within 14 days of the DSP complying or purporting to comply with the initial

¹²⁸ Trial on indictment means trial by the Crown Court.

¹²⁹ Armed Forces (Court Martial) Rules 2009 rule 73(3).

¹³⁰ Armed Forces (Court Martial) Rules 2009 rule 74.

¹³¹ Armed Forces (Court Martial) Rules 2009 rule 74(2)(a).

¹³² Armed Forces (Court Martial) Rules 2009 rule 74(2)(b) and Youth Justice and Criminal Evidence Act 1999 section 56.

¹³³ Armed Forces (Court Martial) Rules 2009 rule 73(4).

¹³⁴ Armed Forces (Court Martial) Rules 2009 rules 75 and 76.

¹³⁵ Armed Forces (Court Martial) Rules 2009 rule 75(1).

¹³⁶ Armed Forces (Court Martial) Rules 2009 rule 77.

disclosure provisions of the Criminal Procedure and Investigations Act 1996 (CPIA96)¹³⁷, or the date on which the DSP disclosed the previous convictions of the co-defendant to whose misconduct the notice if relates, if later. If it is not reasonably practicable to serve the notice within these time limits, the notice must be served as soon as reasonably practicable to do so, and the judge advocate may dispense with the requirement for such notice if satisfied that no injustice would result. Any notice must be served on the CAO and all other parties to the proceedings, and must include the following information¹³⁸:

- (1) A description of the misconduct to which the evidence relates;
- (2) A statement of the evidence of misconduct the party serving the notice intends to adduce or elicit;
- (3) If served by the DSP, the details of any witness he intends to call about the misconduct; and
- (4) The paragraph(s) of section 101(1) of Criminal Justice Act 2003 (CJA03) on which the party intends to rely.

The notice of intention to adduce evidence of bad character form (T-SL-CM08) can be found at [Annex K](#) and should be used for this purpose.

b. **Application to exclude defendant's bad character.** Unless the judge advocate gives leave for an oral application, a defendant who wishes to apply under section 101(3) of CJA03 to exclude his bad character must apply in writing to the CAO and serve a copy on all other parties to the proceedings. The application to exclude evidence of the defendant's bad character form (T-SL-CM09) found at [Annex L](#) should be used for this purpose. When made in writing the application to do so must be served not more than 14 days after receiving notice under paragraph 83a, and must state the date on which the relevant notice was served. If either the court has dispensed with the requirement for written notice or it is not reasonably practicable to make the application within the 14 days limit, the application must be made as soon as is reasonably practicable¹³⁹.

c. **Application for leave to adduce the bad character of a person other than the defendant.** Unless the judge advocate gives leave for the application to be made orally, an application for leave to adduce the bad character of a non-defendant must be made in writing to the CAO and served on all other parties. An application served by the DSP must be served within 14 days of service of advance information. An application served by a defendant must be served within 14 days of the DSP complying or purporting to comply with the initial disclosure provisions of CPIA96 or the date on which the DSP disclosed the previous convictions of the non-defendant to whose misconduct the application relates, if later. If it is not reasonably practicable to make the application within these time limits, the application must be made as soon as reasonably practicable to do so. Any written application must be served on the CAO and all other parties to the proceedings, and must include the following information¹⁴⁰:

- (1) A description of the misconduct to which the evidence relates;

¹³⁷ The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009/988

¹³⁸ Armed Forces (Court Martial) Rules 2009 rule 78.

¹³⁹ Armed Forces (Court Martial) Rules 2009 rule 79.

¹⁴⁰ Armed Forces (Court Martial) Rules 2009 rule 78.

- (2) A statement of the evidence of misconduct the party making the application intends to adduce or elicit;
- (3) If made by the DSP, the details of any witness he intends to call about the misconduct; and
- (4) A statement of the grounds on which the applicant asserts the evidence is admissible.

The application for leave to adduce evidence of the bad character of a person other than the defendant form (T-SL-CM10) can be found at [Annex M](#) and should be used for this purpose.

84. Where any notice or application is required to be in writing it may be served in accordance with the procedures at paragraphs 9 to 15.

85. **Admission of hearsay evidence.** A hearsay statement is a statement which is not made in oral evidence by a witness during a trial but which is relied upon in the trial as evidence of the matter¹⁴¹. As a matter of common law such evidence is inadmissible, but it may be admissible under the CJA03¹⁴².

a. **Notice requirements.** Any party wishing to adduce such hearsay evidence under section 114(1)(d) CJA03 (interests of justice), section 116 (maker of statement unavailable), or section 117 (statement made in a document) must give notice to that effect to the CAO and all other parties to the proceedings. The following procedural requirements must be met:

- (1) **Time limits:** the time limits for compliance with this requirement are:
 - (a) Defendant or co-defendant – not more than 14 days after the prosecutor has purported to comply with initial disclosure requirements (i.e. service of advance information); and
 - (b) Prosecutor – not more than 14 days after the DSP has served advance information.
- (2) **Content of notice:** the notice must give the following detailed information:
 - (a) Details of the statement the party serving the notice proposes to tender in evidence;
 - (b) A copy of the document containing the statement, if not already served on all other parties;
 - (c) Details of the witness who will give evidence, where the notice is served by the DSP and oral evidence of the statement is to be adduced;
 - (d) Details of the section under which the hearsay evidence is admissible in evidence;
 - (e) Where adduced under Criminal Justice Act 2003 s.114(1)(d), which factors under Criminal Justice Act 2003 s.114(2) are relevant, and why; and

¹⁴¹ Armed Forces (Court Martial) Rules 2009 rule 81(6).

¹⁴² Armed Forces (Court Martial) Rules 2009 rule 81.

- (f) Where the statement is evidence that an earlier hearsay statements was made, for what purpose it is tendered under Criminal Justice Act 2003 s.121(1)(a),(b) or (c).

The notice of intention to introduce hearsay evidence form (T-SL-CM11) can be found at [Annex N](#) and should be used for this purpose.

- b. **Effect of serving notice.** Providing these requirements are met, and no counter-notice (see paragraph 85c) has been served, the statement will be treated as admissible by agreement of the parties and the judge advocate will not be required to rule on admissibility.
- c. **Counter-notice.** A party receiving such a notice may oppose it by serving notice within 14 days of receiving the notice of intention¹⁴³. The counter-notice must include the following information:
- (1) The date the notice was served;
 - (2) Whether the objection is to the whole or part of the hearsay evidence, and if only part, which part; and
 - (3) The grounds for objection.

The notice of intention to oppose admission of hearsay evidence form (T-SL-CM12) can be found at [Annex O](#) and should be used for this purpose. Where a counter-notice is received the judge advocate will rule as to admissibility.

86. **Evidence of service matters.** The Rules make special provision for the proof enlistment¹⁴⁴, history of service in the Armed Forces, decorations, orders and various other armed forces-specific issues¹⁴⁵. They also make provision for proof of instructions, regulations and certificates, and decorations badges and emblems¹⁴⁶. Standing and routine orders may be proven by a certificate signed by the CO (or an officer authorised by him to give the certificate) of the person to whom they apply¹⁴⁷, but this rule of evidence does not replace the requirement to produce copies of standing or routine orders where applicable and available.

87. **Expert evidence.** The following procedures apply to evidence from expert witnesses.

- a. **Admissibility.** Expert evidence may be adduced at the CM with the leave of the judge advocate. Leave is not required if the party proposing to rely on the evidence has served a statement of the substance of the evidence¹⁴⁸ on every other party and the CAO at least 14 days before the trial. This must be in writing unless every other party consents to the statement being made orally.¹⁴⁹
- b. **Limiting the number of expert witnesses.** Where more than one party wishes to adduce expert evidence the judge advocate may direct the experts to discuss the expert issues and prepare a statement of the matters on which they agree and

¹⁴³ Armed Forces (Court Martial) Rules 2009 rule 82.

¹⁴⁴ Armed Forces (Court Martial) Rules 2009 rule 83.

¹⁴⁵ Armed Forces (Court Martial) Rules 2009 rules 84 and 85.

¹⁴⁶ Armed Forces (Court Martial) Rules 2009 rule 86.

¹⁴⁷ Armed Forces (Court Martial) Rules 2009 rule 87.

¹⁴⁸ Armed Forces (Court Martial) Rules 2009 rule 88(1).

¹⁴⁹ Armed Forces (Court Martial) Rules 2009 rule 88(2).

disagree, providing reasons for such agreement or disagreement.¹⁵⁰ In order to avoid a proliferation of experts, where more than one defendant wishes to call an expert witness the judge advocate may direct that the evidence be given by one expert only. If the defendants cannot agree which expert to call, the judge advocate may select one expert from a list of experts provided by them, or give direction as to how they should select the expert themselves.¹⁵¹ Where only one expert is called by more than one defendant, each is entitled to give the expert instructions but must copy those instructions to the other co-defendant(s).¹⁵²

c. **Supporting evidence.** An expert may base his opinion or inference on evidence given in a statement by a person reasonably supposed to have personal knowledge of the matters stated, provided the statement is served along with notice of the expert evidence not less than 14 days before the trial and notice is given of the intention for the expert to base his opinion or inference on that evidence.¹⁵³ The relevant supporting statement must have been prepared for the purposes of the proceedings of the CM or the investigation into the alleged offence. In this circumstance the statement on which the expert bases his opinion or inference is evidence of what it states. However, the judge advocate may, on the application of a party to the proceedings, order that these provisions should not apply. Such an order may be made taking into consideration (but not limited to) the following matters: the expense of calling of the witness; whether relevant evidence could be given by that person which could not be given by the expert; and whether that person can reasonably be expected to remember the matters stated well enough to give oral evidence of them.¹⁵⁴

Special measures directions

88. Special measures are a procedure whereby a witness (including a defendant), the value of whose evidence may be diminished due to young age, incapacity (mental or physical), fear or distress can give evidence other than when facing the defendant from the witness stand. Special measures are always under the control of the judge advocate and must be conducted fairly so as not to prejudice any defendant. This includes giving the lay members of the CM such direction as he considers necessary to prevent prejudice¹⁵⁵.

89. The special measures available depend upon in relation to whom and for what reason the special measures direction is given. The provisions of the Youth Justice and Criminal Evidence Act 1999 are applied to the CM¹⁵⁶, and the Rules¹⁵⁷ describe the procedural requirements and safeguards for the application of special measures as well as some of the factors to be taken into consideration by a judge advocate when deciding whether to make a special measures direction. Special measures may be taken in conjunction with live links¹⁵⁸, see paragraph 34.

¹⁵⁰ Armed Forces (Court Martial) Rules 2009 rule 88(3).

¹⁵¹ Armed Forces (Court Martial) Rules 2009 rule 88(5) and (6).

¹⁵² Armed Forces (Court Martial) Rules 2009 rule 88(8) and (9).

¹⁵³ Armed Forces (Court Martial) Rules 2009 rule 89(1) and (2).

¹⁵⁴ Armed Forces (Court Martial) Rules 2009 rule 88(9).

¹⁵⁵ Armed Forces (Court Martial) Rules 2009 rule 100.

¹⁵⁶ Youth Justice and Criminal Evidence Act 1999 (Application to the Armed Forces) Order 2009.

¹⁵⁷ Armed Forces (Court Martial) Rules 2009 rules 89 – 100.

¹⁵⁸ Armed Forces (Court Martial) Rules 2009 rules 93(5) and 18.

Part 8 – Trial procedure

Introduction

90. This part deals with the procedure to be followed where a defendant is to be tried on any charge for which a not guilty plea has been recorded. This is a separate procedure to sentencing proceedings, although sentencing proceedings may take place on completion of a contested trial.

91. Proceedings following a not guilty plea are similar to those in a Crown Court. The judge advocate presides over the proceedings and determines all questions of law, practice and procedure. The lay members determine issues of fact. In the event of a finding of guilty, the judge advocate or the judge advocate and lay members as appropriate determine the issue of sentence at the separate sentencing proceedings. See [Chapter 28](#) (Court Martial constitution and roles).

Opening the proceedings

92. While the ceremonial which accompanies the assembling of the court is not strictly speaking part of the actual trial, it is described below for ease of reference. However, definitive guidance on the procedures to be followed is contained in Courts Martial and the Summary Appeal Court Guidance Volume 1: Guide to Procedure; and Courts Martial and the Summary Appeal Court Guidance Volume 2: Guide for Court Members (JSP 836).

93. No later than 5 minutes before the appointed start time for the trial the Court Usher will open the Court. The defendant, DAO, legal representatives and court recorder will take their places in the court room. Public and press enter and take their places.

94. When those parties to the proceedings who are present at the court have taken their places, the judge advocate will enter and deal with any remaining preliminary matters in the absence of the president of the board and the lay members. This may include the arraignment of the defendant at preliminary proceedings where no previous preliminary proceedings have taken place, the accused has not previously been arraigned on a charge, or the accused wishes to change his plea, see paragraphs 64 to 69. The judge advocate having dealt with any preliminary matters, the president of the board and other lay members enter the courtroom and take their places.

Objections to/replacement of members of court or interpreter

95. Before the trial commences, the names of the persons specified to sit as lay members of the court (including any person specified as the waiting member) are read to the defendant¹⁵⁹. At this stage the defendant and prosecution will be asked whether they have any objection to any of the members of the court.

96. Any party to the proceedings may object, on any reasonable grounds, to any lay member or interpreter before that person is sworn¹⁶⁰. Objections will be determined by the judge advocate who will announce his decision in open court¹⁶¹. If an objection to a lay court member is allowed that lay member will be discharged by the judge advocate and leave the court, and any waiting member in respect of whom no objection has been made or allowed

¹⁵⁹ Armed Forces (Court Martial) Rules 2009 rule 35(1).

¹⁶⁰ Armed Forces (Court Martial) Rules 2009 rules 35(2) and 22(3).

¹⁶¹ Armed Forces (Court Martial) Rules 2009 rules 35(3) and 22(3).

will take his place¹⁶². If the president of the board is objected to and no other lay member is qualified to be the president of the board the proceedings will be adjourned until another lay member has been specified¹⁶³.

97. Each defendant has the right to object in this manner on any reasonable grounds. Where there are two or more defendants who are to be tried separately by the same court, and one objects to any lay member, it is open to the judge advocate to adjourn the trial of that defendant and proceed with the trial of the other. However, the procedure to be followed in this event is a matter for the judge advocate.

Administration of oaths and affirmations

98. After the defendant has been given the opportunity to challenge the members of the court and interpreter, oaths or affirmations are administered to the lay members of the court, any person under instruction and any interpreter in the presence of the defendant¹⁶⁴, in the form and manner set out in sections 1 and 3 to 6 of the Oaths Act 1978 as modified by Schedule 1 to the Armed Forces (Court Martial) Rules 2009. See the form of oaths and affirmations at [Annex P](#).

Trial procedure

99. **Commencement of trial.** The trial commences immediately after the last lay member has been sworn. The lay members cannot be sworn until the defendant has been given an opportunity to challenge them¹⁶⁵.

100. **Opening addresses.** Before calling the witnesses for the prosecution, the prosecutor may make an opening address.¹⁶⁶ The judge advocate may also give leave for the defence to make an opening address, after the prosecution opening and before the first prosecution witness is called.

101. **Examination of witnesses.** A witness who appears before the CM or any other person who has a duty to attend the court is entitled to the same immunities and privileges as a witness who appears before the High Court in England and Wales¹⁶⁷. Examination, cross-examination and re-examination of witnesses is conducted according to the law of England and Wales, and under the control of the judge advocate. The prosecution will usually call each of its witnesses in turn, examining each in chief, and then tendering each for cross-examination before re-examining them. In addition to the prosecution and defence asking questions of witnesses, the judge advocate may question any witness or put any question from a lay member¹⁶⁸. The defence will then call their witnesses, the defendant giving his evidence first if he is to give evidence. Examination of witnesses follows the same pattern as for the prosecution witnesses. However, the judge advocate may do any of the following things if it is in the interests of justice to do so¹⁶⁹:

- a. Allow a request by the prosecution or defence that cross-examination or re-examination be postponed;
- b. Call any witness from whom the court has not already heard;

¹⁶² For the procedure to be followed in the event of the number of lay members being reduced below the minimum number required for the proceedings see [Chapter 28](#) (Court Martial constitution and roles).

¹⁶³ Armed Forces (Court Martial) Rules 2009 rules 34(8) and (9).

¹⁶⁴ Armed Forces (Court Martial) Rules 2009 rules 37 and 22(2).

¹⁶⁵ Armed Forces (Court Martial) Rules 2009 rule 35.

¹⁶⁶ Armed Forces (Court Martial) Rules 2009 rule 101.

¹⁶⁷ Section 162 of the Act.

¹⁶⁸ Armed Forces (Court Martial) Rules 2009 rule 102(1).

¹⁶⁹ Armed Forces (Court Martial) Rules 2009 rule 102(2).

- c. Recall a witness or permit the prosecution or defence to recall a witness;
- d. Permit the prosecution to call a witness after the close of the prosecution case; or
- e. Permit the defendant to give evidence after calling another witness.

102. Presence of witnesses. Witnesses should give evidence in person and while present in court, and for this purpose a witness may with the leave of the judge advocate attend by live link¹⁷⁰, such that he is able to see and hear and be seen and be heard by the court¹⁷¹. See paragraph 32 for witnesses giving evidence by live link. Except for the defendant and any expert or character witness, a witness as to fact must not, except by leave of the judge advocate, be in court while not under examination¹⁷², and the judge advocate may ask any witness under examination to withdraw while he considers whether a question is admissible¹⁷³. The judge advocate may direct any expert or character witness to withdraw where he considers his presence is undesirable.

103. No case to answer. Once the prosecution case has closed, the defendant may make a submission of no case to answer in relation to any charge¹⁷⁴. Such an application must be made to the judge advocate, sitting alone. If the submission is successful the judge advocate must direct the court to find the defendant not guilty on the charge in relation to which the submission has succeeded, and if the submission is not successful, or there are other charges for which no such submission was made, the trial will continue.

104. Defence case. Following the closure of the case for the prosecution, the defence case proceeds in the usual manner. Where the defendant intends to adduce evidence as to fact other than by giving evidence himself, he may make an opening address outlining the case for the defence before the evidence is given, but if he has already made an opening speech at the beginning of the trial he may only make a further opening address at this time with the leave of the judge advocate¹⁷⁵. The defendant may give evidence in his defence if he wishes, but is not obliged to do so. If he does not, inferences may be drawn from his silence. In the event that he chooses to give evidence he will be liable for cross-examination by the prosecution and questioning by the judge advocate. Where the defendant chooses to give evidence he must usually do so before calling any other witnesses as to fact¹⁷⁶ (but see paragraph 101). The defendant may also choose to call witnesses on his behalf.

105. Finding of not guilty before the conclusion of the defence. The judge advocate may invite the court to consider finding the accused not guilty at any time after the close of the case for the prosecution, provided the prosecutor has been given an opportunity to address the court on such a finding.¹⁷⁷

106. Further evidence called by the prosecution - evidence in rebuttal. The prosecution may call or recall a witness to give evidence, but only with the leave of the court¹⁷⁸. This is an exceptional procedure and will usually only be appropriate in relation to matters raised by the defence which the prosecution could not properly have dealt with before the defendant disclosed his defence or could not have foreseen. Where the

¹⁷⁰ Armed Forces (Court Martial) Rules 2009 rule 18.

¹⁷¹ Armed Forces (Court Martial) Rules 2009 rule 103(4).

¹⁷² Armed Forces (Court Martial) Rules 2009 rule 103(1).

¹⁷³ Armed Forces (Court Martial) Rules 2009 rule 103(2).

¹⁷⁴ Armed Forces (Court Martial) Rules 2009 rule 104. This is subject to the Domestic Violence, Crime and Victims Act 2004 section 6 (submission of no case to answer not permitted in case of murder and manslaughter of a child or vulnerable adult).

¹⁷⁵ Armed Forces (Court Martial) Rules 2009 rule 105(1).

¹⁷⁶ Armed Forces (Court Martial) Rules 2009 rule 105(2).

¹⁷⁷ Armed Forces (Court Martial) Rules 2009 rule 106.

¹⁷⁸ Armed Forces (Court Martial) Rules 2009 rule 102.

prosecutor is permitted to call evidence in this manner, examination must be limited to the purpose for which the witness was called or re-called with the leave of the judge advocate and cross-examination and re-examination will take place in the usual manner.

107. Closing addresses. The prosecution may only make a closing speech if any defendant has called a witness as to fact or given evidence himself. The defence is always entitled to make a closing speech, and will make his closing speech after the prosecutor. In the event that a defence advocate is representing two or more defendants, he may only make one closing speech¹⁷⁹.

108. Summing up and directions by judge advocate. After the closing speeches, the judge advocate will direct the court upon the law relating to the case and summarise the evidence¹⁸⁰. At the conclusion he must direct the court to withdraw to deliberate on each charge. The judge advocate takes no part in deliberation on finding and will not be present with the lay members during that process. If the court requires any further direction on the law during their deliberations it must be given by the judge advocate in open court unless the proceedings are being held in camera¹⁸¹, see paragraphs 19 to 21 for proceedings in camera.

109. Deliberation on finding. During its deliberation on a finding, the court must stay together until the finding has been reached unless the judge advocate directs that they may separate¹⁸², e.g. overnight. Where there are two or more lay members who are Service personnel, the votes of those members must be taken in reverse order of seniority¹⁸³. The finding of the CM on a charge must be determined by a simple majority¹⁸⁴, and in the event of an equality of votes on the finding the court must acquit the defendant¹⁸⁵.

110. Alternative verdicts. Where a person is acquitted of an offence specifically charged in the charge sheet but the allegations still amount to or include (expressly or by implication) an allegation of another Service offence, the court may convict on that other offence¹⁸⁶, subject to the judge advocate directing the board that they may do so. For example, if robbery cannot be proven because of the absence of sufficient evidence of use or threat of force, theft may be found.

111. Announcement and record of finding. Having determined guilt or innocence in relation to each charge, the findings of the court must be announced by the president of the board, on each charge separately. However, this is subject to the judge advocate directing the court that where they find the defendant guilty of one charge they need not record a finding on another charge¹⁸⁷, and if in relation to any charge no finding is recorded the judge advocate may direct that it should lie on the file¹⁸⁸. If the judge advocate is satisfied that the findings announced are acceptable in law, he and the president of the board must sign the record of findings¹⁸⁹. The CM record of proceedings and trial result notification form (T-SL-TRN1) found at [Annex Q](#) may be used for this purpose. If the findings are not acceptable in law, the judge advocate will give the court further direction as to the findings which are open to them and the court will then retire to reconsider their finding.

¹⁷⁹ Armed Forces (Court Martial) Rules 2009 rule 107.

¹⁸⁰ Armed Forces (Court Martial) Rules 2009 rule 108(1).

¹⁸¹ Armed Forces (Court Martial) Rules 2009 rule 109(1).

¹⁸² Armed Forces (Court Martial) Rules 2009 rule 109(2).

¹⁸³ Armed Forces (Court Martial) Rules 2009 rule 109(3).

¹⁸⁴ Section 160(1) of the Act.

¹⁸⁵ Section 160(3) of the Act.

¹⁸⁶ Section 161(1) of the Act.

¹⁸⁷ Armed Forces (Court Martial) Rules 2009 rule 108(2).

¹⁸⁸ Armed Forces (Court Martial) Rules 2009 rule 110(5).

¹⁸⁹ Armed Forces (Court Martial) Rules 2009 rule 110(3).

Part 9 – Sentencing proceedings

Introduction

112. In the event a finding of guilty is recorded, either after a guilty plea or as a result of a trial, sentencing will take place in accordance with [Chapter 30](#) (Sentencing principles, powers and effect) and the JAG sentencing guide (see Volume 3 of the MSL). Proceedings separate from any trial are required for this purpose. Where the court consists of any lay members who are subject to Service law, the full court (including the judge advocate) will consider sentence, and for this purpose the president of the board and lay members will sit with the judge advocate. However, where a trial was conducted wholly with a civilian board, the judge advocate will sentence alone. Similarly where all the offenders are civilians to whom part 1 to Schedule 3 of the Act applies¹⁹⁰ the judge advocate will sentence alone. See [Chapter 28](#) (Court Martial constitution and roles).

113. **Timing of sentencing proceedings.** Where sentencing proceedings follow from a trial they may commence immediately on completion of the trial. However, in some cases it may be necessary to adjourn pending completion of a pre-sentence report or for other reasons. In particular, where two or more defendants are tried separately by the court upon charges arising out the same circumstances, the court may postpone its deliberation on sentence to be awarded to any one or more defendants until it has recorded findings in relation to all of them.

114. **Presence of the offender.** The offender should usually be physically present for all sentencing hearings. This will be particularly important if the sentencing proceedings follow a guilty plea where there has been no previous trial because the offender must be given the opportunity to challenge any court members or interpreter before they are sworn, see paragraphs 95 to 97. In addition, where there is a dispute on the facts after a guilty plea evidence must be called to prove the facts, see paragraph 120. In such circumstances it is desirable the offender is present at the place at which the proceedings take place. However, the offender, as may any other party to the proceedings, witness or other person may with the leave of the judge advocate attend by live link.

Opening the proceedings

115. The ceremonial which accompanies the assembling of the court for sentencing proceedings is outlined in JSP 836 (A guide to Courts Martial and the Summary Appeal Court Volume 1: Guide to Procedure; and Courts Martial and the Summary Appeal Court Guidance and Volume 2: Guide for Court Members).

116. There will be an interval between the completion of a trial and sentencing proceedings in order to allow the defence to finalise mitigation and for the lay members to assemble on the bench with the judge advocate. No later than 5 minutes before the appointed start time for the sentencing proceedings the court usher will open the court. The offender, DAO, legal representatives and court recorder will take their places in the court room. Public and press enter and take their places.

117. When those parties to the proceedings who are present at the court have taken their places, the judge advocate enters and deals with any remaining matters in the absence of the president of the board and the lay members. The judge advocate having dealt with any such matters, the president of the board and lay members will enter the courtroom and take their places with the judge advocate.

¹⁹⁰ Armed Forces (Court Martial) Rules 2009 rule 27(3)(a).

Objections to/replacement of members of court or interpreter

118. Before the sentencing proceedings commence, unless this has previously taken place as part of the trial proceedings, the names of the persons specified to sit as lay members of the court (including any person specified as the waiting member) and any interpreter are read to the defendant¹⁹¹. At this stage the offender will be asked whether he objects to any of the members of the court or the interpreter. Thereafter the same procedure regarding objections to lay members and administration of oaths applies as for trial proceedings, see paragraphs 95 to 98.

Sentencing procedure

119. **Statement of the prosecution case.** Unless sentencing proceedings follow from a trial of all offenders who are to be sentenced together, the prosecutor will address the court on the facts of the case. The prosecutor must make a such a statement where the offender was convicted on a guilty plea (other than when offered in the course of a trial), the proceedings are on appeal against sentence from the SCC, or the offender was convicted in trial proceedings but previous sentencing proceedings in respect of him were terminated¹⁹². The statement of the prosecution case is essentially a summary of the facts on which the prosecution rely to explain the case against the offender.

120. **Dispute on facts (Newton hearing) following guilty plea.** Where the judge advocate has recorded a finding of guilty but there are disputed facts in the case, the judge advocate may direct that any issue of fact may be tried by the court, which consists of the judge advocate and lay members sitting together.¹⁹³ The procedure to be followed is essentially the same as for a contested trial. Having heard the evidence, the court will sit in closed court while deliberating on its finding on the issue of fact. The finding will be determined by a majority of votes, and in the event of equality of votes the court must find for the offender. The finding of fact which will be the basis for sentencing will then be announced in open court by the judge advocate.¹⁹⁴

121. **Additional Information to be provided by the prosecutor.** Once the facts have been presented, or the court has announced its finding of fact, the prosecutor is required to provide certain information, some of which it is mandatory he supply, other of which he must supply if practicable. Where practicable, the prosecutor must present the following information:¹⁹⁵

- a. The offender's age and rank or rate (rank and rate of Service and ex-Service personnel only);
- b. The offender's Service record (Service and ex-Service personnel only);
- c. Any recognised acts of gallantry or distinguished conduct on the part of the offender and any decoration to which he is entitled (Service and ex-Service personnel only);
- d. In respect of any previous convictions of the offender for:
 - (1) Service offences;

¹⁹¹ Armed Forces (Court Martial) Rules 2009 rules 35(1) and 22(3).

¹⁹² Armed Forces (Court Martial) Rules 2009 rule 114(1).

¹⁹³ Armed Forces (Court Martial) Rules 2009 rule 112(1).

¹⁹⁴ Armed Forces (Court Martial) Rules 2009 rule 113.

¹⁹⁵ Armed Forces (Court Martial) Rules 2009 rule 114(2).

- (2) Offences in the UK; or
- (3) Relevant¹⁹⁶ offences under the law of another European Union member State,

any sentence awarded for such offence. The prosecutor must indicate clearly any conviction that is spent for the purposes of the Rehabilitation of Offenders Act 1974 (this is usually marked on a list of antecedents);

- e. Particulars of any formal police caution administered to the offender by a constable in England and Wales or Northern Ireland;
- f. Particulars of the length of time the offender has been in custody awaiting trial;
- g. Details of the offender's pay, terminal benefits and future pension entitlements (or, for civilians who have not previously been subject to Service law, details of his employment (if any)¹⁹⁷; and
- h. For civilian offenders who have not previously been subject to Service law, if the offender was under 18 when convicted, whether he has a Service parent or Service guardian.

Much of this information will be recorded on the information for Service courts form (T-SL-SC01) found at [Annex R](#).

122. Where the offender has elected trial by the CM, the prosecutor must tell the court whether any offence for which he is to be sentenced is a relevant offence under s 165 of the Act¹⁹⁸. The provision restricts the sentencing powers of the court following election to those of the CO who could have heard the charge summarily if the offender had not elected trial by the CM. In addition, where the court has the power to make an activation order, to deal with an offence for which the offender was awarded a conditional discharge or an overseas community order was in force, the prosecutor must make this clear to the court and present any facts relating to the previous offence¹⁹⁹.

123. Unless the judge advocate so directs this information need not be adduced in accordance with the strict rules of evidence. In addition, where (as is usually the case) the prosecutor has obtained a record of the offender's antecedents in advance of the hearing, he must serve a copy on the offender and the CAO before the hearing takes place²⁰⁰.

124. **Pre-sentence reports.** A pre-sentence report (PSR)²⁰¹ is an independent report prepared to assist the court during its sentencing deliberations. It is usual for the CAO to arrange for a PSR in advance of any sentencing hearing, and where this has been done, he must serve a copy on the prosecution, the offender and the judge advocate before the time appointed for the sentencing hearing²⁰². The prosecution and defence will then be in a position to assess whether there is anything in the PSR which should be challenged or explained.

¹⁹⁶ For this purpose, an offence is relevant if the act that constituted the offence would have been an offence under UK law if committed in the UK at the time the prosecutor presents the information about the offence to the court. Armed Forces (Court Martial) Rules 2009 rules 114(2)(d)(iii) and 114(3).

¹⁹⁷ Armed Forces (Court Martial) Rules 2009 rule 114(7).

¹⁹⁸ Armed Forces (Court Martial) Rules 2009 rule 114(4).

¹⁹⁹ Armed Forces (Court Martial) Rules 2009 rule 114(5).

²⁰⁰ Armed Forces (Court Martial) Rules 2009 rule 113(2).

²⁰¹ As defined by section 257 of the Act.

²⁰² Armed Forces (Court Martial) Rules 2009 rule 113(1).

125. In some circumstances (eg. AWOL cases in which the preliminary hearing may not have taken place until immediately before the sentencing hearing) a PSR may have been prepared before the defendant's plea is known. In this case, the prosecution must not be served with a copy of the PSR until a plea of guilty has been recorded by the judge advocate or, in the case of a contested trial, the accused has been found guilty.

126. **Mitigation.** The offender may give evidence on oath or affirmation and call witnesses in mitigation of sentence and as to his character. He may produce any document, including written reports, testimonials and references, and also address the court in mitigation of sentence.²⁰³

127. **Offences taken into consideration.** The offender may request the court to take into consideration any other offence committed by him of a similar nature to that to which he has pleaded guilty or has been found guilty. This is a convention under which if a court is informed that there are outstanding charges against an accused who is before the court for a particular offence, the court can, if the offender admits the offences and asks that they be taken into consideration, take them into account when sentencing on all the charges together. The court may agree to take into consideration any such offence as the judge advocate so directs²⁰⁴ and which the court would be empowered to try. A list of the offences which the offender admits having committed and which the court agrees to take into consideration must be signed by the offender and attached to the record of proceedings.²⁰⁵

128. **Decision on sentence.** Having heard from both the prosecution and the defence matters relevant to sentencing, the court, consisting of the judge advocate and lay members, must sit in closed court to deliberate on sentence²⁰⁶. In this event the only person who may accompany the court is any person under instruction. The presence of personnel under instruction is at the discretion of the judge advocate, having consulted the president of the board. Sentence is determined by a majority of the votes of all members of the court²⁰⁷, and in the event of an equality of votes on the sentence, the judge advocate has the casting vote²⁰⁸.

129. Sentencing principles are addressed in [Chapter 30](#) (Sentencing principles, powers and effects). Where the CM convicts a person, the court must pass a separate sentence in respect of each offence of which he is convicted²⁰⁹. The sentence must be recorded in writing, dated and signed by the president of the board and the judge advocate²¹⁰, except where the judge advocate sentences alone, see paragraph 112. The reasons for sentence and the explanation of sentence required by section 252(1) of the Act must be given in open court by the judge advocate²¹¹, and the sentence must be formally announced in open court by the president of the board²¹² unless the judge advocate is sentencing alone, in which case the judge advocate will announce the sentence. With leave of the judge advocate, the president of the board (if a Service person) may make additional remarks to the defendant about the effects of his offending on his Service to which he belongs and the likely effects of the sentence on his Service career²¹³.

²⁰³ Armed Forces (Court Martial) Rules 2009 rule 116.

²⁰⁴ Armed Forces (Court Martial) Rules 2009 rule 115(1).

²⁰⁵ Armed Forces (Court Martial) Rules 2009 rule 115(2).

²⁰⁶ Armed Forces (Court Martial) Rules 2009 rule 20.

²⁰⁷ Section 160(1) of the Act.

²⁰⁸ Section 160(4) of the Act.

²⁰⁹ Section 255 of the Act.

²¹⁰ Armed Forces (Court Martial) Rules 2009 rule 117(1).

²¹¹ Armed Forces (Court Martial) Rules 2009 rule 117(2).

²¹² Armed Forces (Court Martial) Rules 2009 rule 117(3).

²¹³ Armed Forces (Court Martial) Rules 2009 rule 117(4).

130. **Closing the court.** On completion of the sentencing proceedings the lay members will be discharged.

Part 10 – Variation proceedings

Scope of the ‘slip rule’

131. **Common law principles apply.** Variation proceedings are a means by which the CM may, within a short space of time after sentencing proceedings (56 days), correct errors made in sentencing. It includes the power to increase sentence or to activate a suspended sentence. Accordingly its use is confined to errors in certain circumstances including: where new information is received; where it becomes clear that the defendant caused false information to be put before the court; where the court overlooked a statutory provision; and where the sentence has taken effect in some other way than anticipated by the court. It is not designed for use where the sentencing tribunal, on reflection, thinks the sentence is inadequate. The Rules do not specifically prescribe the circumstances in which variation proceedings may take place, and the general principles applicable in civilian proceedings, developed under common law may therefore be applied²¹⁴. The procedure to be followed for the exercise of the power to vary is provided for by the Rules²¹⁵.

132. **Limitation and time limits.** The power to vary a sentence extends to the sentence itself and any order or direction in relation to the sentence. If it considers the sentence to be incorrect, the court may vary that sentence or vary or rescind the order or direction. However, the power can only be exercised within 56 days of the sentence being imposed or the order or direction being made. In addition, the power cannot be exercised in relation to any sentence or order after an appeal or an application for leave to appeal has been determined.

Constitution of the court²¹⁶

133. Where lay members participated in the sentencing or appellate proceedings at which the sentence to be varied was awarded, they should be reassembled to exercise the power. However, the power can only be exercised by the entire original lay board and a judge advocate, or by a judge advocate sitting alone²¹⁷. Lay members may attend the proceedings by live link²¹⁸.

134. If the lay members cannot all be re-assembled for variation proceedings the judge advocate may direct that there are to be no lay members, but only in the following circumstances:

- a. One or more of the original lay members cannot, without substantial inconvenience, attend the proceedings at the time and place appointed;
- b. If the proceedings were postponed until the earliest time at which the judge advocate and all original lay members and the offender could, without substantial inconvenience, attend the proceedings (whether at the place originally appointed or any other place, and including by live link); and
- c. If the sentence were then varied in the way in which it would most likely be varied if all the original lay members were present at the variation proceedings,

²¹⁴ Archbold Criminal Proceeding Evidence and Practice or other practitioners' texts and case law should be consulted.

²¹⁵ Armed Forces (Court Martial) Rules 2009 rule 118.

²¹⁶ See [Chapter 28](#) (Court Martial constitution and roles) for details of the constitution of the court for variation proceedings.

²¹⁷ Wherever possible the judge advocate for the sentencing proceedings should preside, but if this is not possible the JAG may specify another judge advocate for the variation proceedings.

²¹⁸ Armed Forces (Court Martial) Rules 2009 rules 121 and 18.

the offender would be unfairly prejudiced by the postponement. For this purpose 'inconvenience' includes expense and adverse effect on the operational effectiveness of HM forces.

135. For example, an offender is sentenced to 42 days detention having elected CM trial. He has served 24 days of his sentence, and if he is released immediately he can rejoin his ship/unit/establishment which is about to deploy. If he does not return to his ship/unit/establishment immediately, it will have an impact on his future career. If he deploys he will be unable to attend variation proceedings for 2 months. The court made a mistake in that its powers of punishment were limited to 28 days' detention (the CM's powers being capped at CO's powers of punishment without extended powers). The lay members cannot all be reassembled for 15 days, by which time the offender will have deployed if released from custody. The judge advocate may direct that there be no lay members and then substitute a sentence of 28 days' detention or less so that he is not only released from custody but the variation proceedings are complete. See paragraph 138 for an order that the offender be released from custody pending variation proceedings.

Application and procedure for variation proceedings

136. The judge advocate may direct the CAO to constitute the court for the purpose of exercising the power of his own motion or on the application of the prosecution or defence²¹⁹. In the latter case, the application must be in writing and set out the grounds for the application²²⁰, including the reasons why the applicant believes the sentence, order or direction to have been made in error. The judge advocate may allow or refuse an application for variation proceedings, but when refusing must notify the defence and prosecution of the decision²²¹, and should give reasons for the decision.

137. The CAO will list the variation proceedings as soon as practicable on receipt of a direction for variation proceedings. The procedure to be followed at the hearing will be determined by the judge advocate. Any decision to vary the sentence will be by majority of votes, and in the case of equality of votes the judge advocate has a casting vote²²². The sentence will then be announced and reasons given for it, and the president of the board may with leave make additional remarks about the effects of the offence on the Service to which he belongs and on his career, in like manner to normal sentencing proceedings, see paragraph 129²²³.

Release from custody

138. If it appears to a judge advocate that a custodial sentence or sentence of detention was imposed unlawfully or that the maximum term that could have been imposed has expired, a judge advocate may order that the offender be released immediately. Such an order cannot be made if an appeal or application for leave to appeal has been determined. If such an order is made the judge advocate may direct that variation proceedings take place subsequently²²⁴, but is not required to do so.

²¹⁹ Armed Forces (Court Martial) Rules 2009 rule 119(3).

²²⁰ Armed Forces (Court Martial) Rules 2009 rules 119(4)(a) and 119(4)(b) and (c) for the requirement to serve the application on the other party.

²²¹ Armed Forces (Court Martial) Rules 2009 rule 119(5).

²²² Armed Forces (Court Martial) Rules 2009 rule 122.

²²³ Armed Forces (Court Martial) Rules 2009 rule 123.

²²⁴ Armed Forces (Court Martial) Rules 2009 rules 124(4) and 119(2).

Part 11 – Appellate proceedings

139. **Notice of appeal and time limits.** The CM has jurisdiction to hear appeals against both finding and sentence awarded by the SCC. Such appeals are initiated by a notice to the CAO, and the CAO then serving the notice on the DSP²²⁵. Notices of appeal must be served on the CAO within 28 days of the sentence being awarded by the SCC, but this time limit may be extended on application to the JAG before the time limit expires²²⁶.

140. **Leave to appeal out of time.** Where the appeal has not been lodged within the initial 28 day period or such additional time as has been granted by the JAG, an application may be made to the JAG for leave to appeal out of time²²⁷. Such an application must be made to the CAO, must state why the notice of appeal was not served in time, and must be accompanied by a notice of appeal so that if leave to appeal is granted the notice of appeal can be lodged without further delay. Where an application for leave to appeal out of time is made the CAO will forward it (and the accompanying notice of appeal) to both the JAG and the DSP. The JAG will then decide whether to grant the application on the papers, reject it without a hearing, or direct a hearing of the application. If the application is rejected without a hearing the applicant has 14 days beginning with notice of the rejection during which he may serve notice that he requires a hearing of the application. In this circumstance the applicant is entitled to a hearing, which will take place before a judge advocate.

141. **Procedure on appeal.** If the JAG or a judge advocate grants leave to appeal out of time, or a notice of appeal is served within the requisite timescales, CM appellate proceedings will be listed by the CAO, and the hearings will take place in the same way as ordinary CM trials (for appeal against finding) and sentencing proceedings (for appeal against sentence, or sentence following a guilty verdict on appeal), including as to composition of the board. However, preliminary proceedings will not be automatically listed by the CAO and the appellant will not be re-arraigned on the charge. This does not prevent the judge advocate from directing that preliminary proceedings should be heard either of his own motion or on the application of the appellant or the DSP (respondent)²²⁸, but the first hearing of the case is likely to be the trial (appellate proceedings) or the sentencing proceedings.

142. **Multiple appellants from the SCC.** If two or more defendants are tried by the SCC and more than one of them appeals, the appeals must be heard together²²⁹.

143. **Abandonment of appeal.** An appellant will be treated as having abandoned his appeal if he fails without reasonable excuse to appear for the appeal²³⁰, or if he withdraws his appeal in writing.

²²⁵ Armed Forces (Court Martial) Rules 2009 rule 125(1) and (2).

²²⁶ Section 285(3)(b) of the Act and Armed Forces (Court Martial) Rules 2009 rule 127.

²²⁷ Armed Forces (Court Martial) Rules 2009 rule 127(1).

²²⁸ Armed Forces (Court Martial) Rules 2009 rules 128(1)(b) and 46.

²²⁹ Armed Forces (Court Martial) Rules 2009 rule 128(4).

²³⁰ Armed Forces (Court Martial) Rules 2009 rule 129.

Part 12 – Activation proceedings

Introduction

144. Where an offender has been awarded a suspended sentence of imprisonment or detention, or is in the period of release under a detention and training order, and commits an offence (the ‘trigger offence’) during the operational period of the suspended sentence or whilst on release, the CM may conduct activation proceedings in relation to the suspended sentence or the detention and training order. This Part outlines the procedure to be followed during activation proceedings. It does not deal with the procedure to be followed during sentencing proceedings before the CM in relation to the offence committed during the operational period of a suspended sentence or while on release. Consideration of activation of suspended sentences and further detention under a detention and training order will be made during sentencing proceedings in those circumstances, see Part 9 of this chapter. Sentencing principles and procedures are dealt with in [Chapter 30](#) (Sentencing principles, powers and effects).

Application for activation proceedings

145. **Report of ‘trigger’ offence to the CAO.** The first stage of convening activation proceedings is the receipt by the CAO of information indicating that activation proceedings should be considered. The relevant information will usually be obtained by the CO as a result of a report to him, either by the offender or the Service Police, of a conviction for an offence in a civilian court in the UK. However, such circumstances may be reported directly to the CAO by any person with the relevant information, including any magistrates’ court, the Crown Court or another civilian court which convicted the offender of the ‘trigger offence’.

146. **Trigger offences for the purpose of CM activation proceedings.** These trigger offences vary depending upon whether a Service court or the CO awarded the sentence and the sentence awarded, as follows:

a. **Suspended sentence of imprisonment awarded by the CM or SCC.** A suspended sentence of imprisonment may be activated as a result of:

- (1) A conviction in a civilian court in the British Islands of an offence committed during the operational period of the suspended sentence; or
- (2) A conviction of a Service offence committed during that period. For these purposes, ‘conviction of a Service offence’ includes conviction by the CM, the SCC, and charges found proved by the CO or the SAC²³¹. However, in the event a person has been awarded a suspended sentence of imprisonment and retained in the Service, charges capable of being tried summarily by the CO will usually be referred to the DSP with a view to CM trial. The suspended sentence would then be dealt with during the normal sentencing procedure for the ‘trigger offence’.

In any of the circumstances at (1) and (2) above, where the offender has not been dealt with in relation to the suspended sentence, activation proceedings may be appropriate and therefore the matter should be reported to the CAO who should then notify the DSP, see paragraph 148²³².

²³¹ It is also possible for civilian courts to deal with certain service offences. In this unlikely event that conviction could also trigger activation of a suspended sentence of imprisonment.

²³² Armed Forces (Court Martial) Rules 2009 rules 131 and 134.

b. **Suspended sentence of detention awarded by the CM.** A suspended sentence of detention awarded by the CM²³³ may be activated as a result of:

(1) A conviction in a civilian court in the British Islands of an offence committed during the operational period of the suspended sentence; or

(2) A conviction of another Service offence committed during the operational period of the suspended sentence²³⁴. The conviction for another Service offence could be by the CM, the CO, the SCC or the SAC. However, in the case of charges capable of being tried summarily the CO will usually refer those charges to the DSP to be dealt with by the CM rather than dealing with them summarily. The suspended sentence would then be dealt with during the normal sentencing procedure for the 'trigger offence'. (Note that a CO does not have the power to activate a suspended sentence of detention awarded by the CM.)

c. **Offence committed during the release period of a detention and training order (awarded by the CM or the SCC).** Offences will only 'trigger' activation in the following circumstances:

(1) The new offence was committed after his release, but before the term of the order ends, and the offender has been convicted of the new offence; and

(2) The new offence is a service offence or an offence in the British Islands; and

(3) The new offence is punishable by imprisonment²³⁵.

If the 'trigger' offence is dealt with by the CM or the SCC, that court should also deal with the detention and training order issue. However, where the offender is convicted of the new offence otherwise than by the CM or SCC, activation proceedings before the CM may be appropriate.

147. Circumstances in which CM activation proceedings do not apply. Whilst the CM has power to activate suspended sentences of detention awarded summarily when dealing with 'trigger' offences referred to the DSP by the CO, it does not have the power to deal with suspended sentences of detention awarded summarily during separate CM activation proceedings. If a CO hears a charge for an offence committed during the operational period of a suspended sentence awarded summarily he must also deal with the suspended sentence.

148. CAO notification to the DSP. On receipt of information indicating that any of the situations in paragraph 146 have arisen and the relevant sentence (suspended sentence or detention and training order) has not been dealt with, the CAO must notify the DSP, forwarding to him any of the following information not already in the DSP's possession:

a. the record of the proceedings at which the original sentence was passed;

b. information concerning the 'trigger' offence and any other offence proved to have been committed by the offender during the relevant period, and the sentence passed for each such offence; and

²³³ CM for this purpose includes the Appeal Court and the Supreme Court (House of Lords), see section 191(7) of the Act.

²³⁴ Section 191(2) of the Act and Armed Forces (Court Martial) Rules 2009 rule 132.

²³⁵ Sections 214(1) and (2) of the Act and Armed Forces (Court Martial) Rules 2009 rule 133.

- c. the record of any proceedings in which a court made, or gave reasons for not making an activation order in respect of the original sentence or a order that the offender be detained, as the case may be.²³⁶

149. **DSP's decision whether to apply for activation proceedings.** The decision whether activation proceedings are appropriate is that of the DSP. On receipt of the information at paragraph 148, the DSP should consider whether, taking all relevant factors into consideration, the CM might activate the suspended sentence or make an order that the offender be detained, see paragraph 155. The following factors may be relevant for this purpose (this list is not exclusive):

- a. The details of the offence(s) for which the suspended sentence of imprisonment or detention, or detention and training order was imposed, and any affinity with the 'trigger' offence, which may indicate a lack of rehabilitation;
- b. Details of the sentence awarded for the original offence; this is indicative of the seriousness of the offence;
- c. Such details that are known of all proved offences committed by the offender during the operational period of the original sentence, and any reasons given for the sentences awarded in relation to those matters;
- d. The reasons given for any decision(s) not to activate the suspended sentence;
- e. The offender's antecedents, including all previous Service offences;
- f. Any mitigation known to have been presented in relation to the suspended sentence or detention and training order; and
- g. Any other matters the DSP considers relevant. For example, the degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed.

150. If the DSP decides that activation proceedings are appropriate he is to submit an application for such a hearing to the CAO and serve it on the offender not later than 28 days after being notified by the CAO of the matters at paragraph 148²³⁷. The CAO must then forward the application to the JAG, along with all the documentation at paragraph 148. On receipt of the application the JAG, or a delegated judge advocate must either:

- a. Issue a summons requiring the offender to appear before the court for activation proceedings; or
- b. Issue a warrant for the offender's arrest²³⁸.

Warrant for offender's arrest

151. If a judge advocate issues a warrant for the offender's arrest it will be addressed either to a civilian police force or the Service Police, or both, depending whether the offender is a Service person or a civilian. On arrest the offender must be transferred to Service custody as soon as practicable and then be brought before a judge advocate for a review of whether he should be retained in custody until he can be brought before the court. If a review has not

²³⁶ Armed Forces (Court Martial) Rules 2009 rule 134(2).

²³⁷ Armed Forces (Court Martial) Rules 2009 rule 134(4).

²³⁸ Armed Forces (Court Martial) Rules 2009 rule 134(6).

taken place within 48 hours of arrest the offender must be released²³⁹. The criteria for keeping the offender in custody is that there are substantial grounds for believing that the offender, if released from custody, will fail to attend the court as required. If retained in custody, the offender will be subject to review of custody at not longer than 8 days intervals. If released, the judge advocate may apply conditions see [Chapter 5](#) (Custody) such as are necessary to ensure the offender attends court as required²⁴⁰. Any such requirements may be varied or discharged by the judge advocate on application by the offender²⁴¹. Meanwhile the CAO will make arrangements for the activation proceedings to take place as soon as possible.

Procedure for activation proceedings

152. **Disclosure by the DSP.** Not less than 7 days before the time appointed for activation proceedings the DSP must serve on the offender any information detailed at paragraph 148 in his possession²⁴².

153. **Procedure during the hearing.** The order of procedure to be followed for activation proceedings will vary depending on the circumstances and will be determined by the judge advocate. Where lay members form part of the court for the proceedings, they will be sworn in (lay members of the court which passed the suspended sentence or detention and training order are disqualified from membership of the court for activation proceedings²⁴³ - see [Chapter 28](#) (Court Martial constitution and roles). The offender will then be asked whether he admits those facts. If the offender does not admit the facts the prosecution will adduce evidence of them and cross-examination and re-examination of witnesses will take place in the usual manner. The judge advocate will then determine whether the relevant facts have been proven²⁴⁴.

154. If the facts are admitted by the offender or proven, the judge advocate will then invite the prosecutor to make a statement of the relevant facts, including the circumstances of the offence for which the original sentence was awarded and of the new offence. The information provided at paragraph 148 may be used for this purpose. The offender will then be given an opportunity to call character witnesses and produce any document, including written reports, testimonials and references, as evidence of his character. He or his legal representative may then address the court as to whether the court should make an order relevant to the sentence to which the activation proceedings relate.

155. **Orders available at activation proceedings.** The relevant orders available to the court for activation proceedings are as follows:

a. **Suspended sentence of imprisonment:**

- (1) An order that the suspended sentence of imprisonment is to take effect with its original term unaltered;
- (2) An order that the suspended sentence of imprisonment is to take effect with the substitution of a lesser term for the original term; or
- (3) If it would be unjust to order either (1) or (2), no order;

²³⁹ Armed Forces (Court Martial) Rules 2009 rule 136.

²⁴⁰ The process of applying conditions is akin to that of applying bail conditions in the civilian jurisdiction, but the term 'bail' is not applicable under the Act.

²⁴¹ Armed Forces (Court Martial) Rules 2009 rule 136(7).

²⁴² Armed Forces (Court Martial) Rules 2009 rule 137.

²⁴³ Armed Forces (Court Martial) Rules 2009 rule 32(6).

²⁴⁴ Armed Forces (Court Martial) Rules 2009 rules 138(3) and (4).

b. **Suspended sentence of detention:**

- (1) An order that the suspended sentence of detention is to take effect with its original term unaltered;
- (2) An order that the suspended sentence of detention is to take effect with the substitution of a lesser term for the original term; or
- (3) No order;

c. **Detention and training order.** An order that the offender be detained in secure accommodation for any part of a period which is equal to the period between the date on which the new offence was committed and the date on which the detention and training order ends.

Each order must include any terms of the order, e.g. for the period for which the sentence is activated.

156. When determining whether to make an order and if so in what terms, a decision must be made on a majority of votes (unless the judge advocate is sitting alone) and in the case of an equality of votes the judge advocate has the casting vote. In similar manner to the announcement of sentence during CM sentencing proceedings²⁴⁵, the judge advocate will then explain the reasons for the order, and the president of the board (if any) will announce the order and its terms (this will be done by the judge advocate if there is no president of the board). However, unlike during sentencing proceedings the president of the board will not make any additional remarks about the effects of his offence on the Service to which he belongs or the likely effect on his career.

²⁴⁵ Armed Forces (Court Martial) Rules 2009 rule 117.

Part 13 – Ancillary proceedings

157. A judge advocate sitting alone may exercise judicial functions in relation to a number of ancillary matters in relation to the CM and SCC (and related appellate) proceedings. These matters are outlined below. For detailed provisions the Rules should be consulted.

Community order proceedings (overseas community order)

158. Where an offender has been awarded by the CM, the Appeal Court (CMAC) or the SCC an overseas community order, and breaches a requirement of that order, an application may be made for a summons or warrant for the arrest of the offender. A judge advocate may issue a summons or a warrant to arrest the offender for the purposes of bringing him before the court, and may at subsequent community order proceedings revoke the order with or without re-sentencing for the offence for which the overseas community order was awarded. He also has the power to dismiss an application for community order proceedings, with or without a hearing²⁴⁶.

159. In addition, a judge advocate may on an application for amendment, amend the requirements of an overseas community order, with or without a hearing²⁴⁷. He may also, on application, extend an unpaid work requirement, with or without a hearing²⁴⁸.

160. Where the offender is arrested, he must be transferred into Service custody as soon as practicable and brought before a judge advocate for a review of custody, or released not later than 48 hours after his arrest. The criteria for keeping the offender in custody is that there are substantial grounds for believing that the offender, if released from custody, will fail to attend the court as required. If retained in custody, the offender will be subject to review of custody at not longer than 8 days intervals. If released, the judge advocate may apply conditions such as are necessary to ensure the offender attends court as required²⁴⁹. Any such requirements may be varied or discharged by the judge advocate on application of the offender²⁵⁰. Meanwhile the CAO will make arrangements for the community order proceedings, or application in relation to those proceedings as the case may be, to take place as soon as possible²⁵¹.

Review of Service compensation order (SCO)

161. The CM has the power to review a SCO awarded by the CM, the SAC or the SCC, and orders made by a CO where the person against whom the order was made is no longer subject to Service law, a member of a volunteer reserve force, or a member of an ex-regular reserve force who is subject to an additional duties commitment²⁵². Such a review may take place where the offender who was awarded the order applies for it to be discharged or reduced, but only where there is no further right of appeal in relation to the proceedings at which the order was made, and only in the following circumstances:

- a. The injury, loss or damage in respect of which the order was made has been held in civil proceedings (e.g. a civil law suit for damages for personal injury) to have been less than the court awarding the order took it to be;

²⁴⁶ Armed Forces (Court Martial) Rules 2009 rules 140 and 142.

²⁴⁷ Armed Forces (Court Martial) Rules 2009 rule 143.

²⁴⁸ Armed Forces (Court Martial) Rules 2009 rule 144.

²⁴⁹ The process of applying conditions is akin to that of applying bail conditions in the civilian jurisdiction, but the term 'bail' is not applicable under the Act.

²⁵⁰ Armed Forces (Court Martial) Rules 2009 rules 141(7), 142(9).

²⁵¹ Armed Forces (Court Martial) Rules 2009 rule 141(8) and 142(10).

²⁵² Section 177 of the Act.

- b. When made in respect of loss of property, the property has been recovered by the beneficiary of the order; or
- c. The person against whom the order was made has suffered a substantial reduction in his means.

162. An application for review of a SCO in these circumstances must be made in writing to the CAO, copy to the beneficiary of the order, and state whether the applicant wishes the order to be discharged or reduced, and if reduced by how much. It must also state the grounds on which the court has power to discharge or reduce the order. On receipt of such an application the JAG may grant the application, dismiss the application or exercise the power under section 177 of the Act in some other way than that applied for. Alternatively he may direct a hearing of the application. However, he may not without a hearing exercise any of the powers to discharge or reduce the order unless at least 14 days have passed since the application was served on the beneficiary, and the beneficiary has not served notice on the CAO of his wish to oppose the application. The CAO will notify both the applicant and beneficiary of the JAG's decision on the papers. Alternatively he will make arrangements for a hearing of the application before a judge advocate sitting alone²⁵³. The procedure to be followed will be determined by the judge advocate, but it is unlikely that any representation from the DSP will be required.

Application for time to pay financial penalty

163. The CM has the power²⁵⁴ to allow payment of a fine or SCO to be paid by instalments or to allow the offender time to pay the amount due. This power applies to fines and SCOs awarded by the CM, the SAC or the SCC, and orders made by a CO where the person against whom the order was made is for the time being subject to Service law, a member of a volunteer reserve force, or a member of an ex-regular reserve force who is subject to an additional duties commitment. An application by an offender for such an order must be made in writing to the CAO, copied to the beneficiary, and state whether the applicant wishes the court to allow time for payment, and if so, how much time, or direct payment by instalments, and if so of what amount and when. On receipt of such an application the JAG has the power to make the proposed order or any other order under section 251 of the Act, dismiss the application or direct a hearing of the application. However, the JAG may only make an order under section 251 of the Act without a hearing if at least 14 days have passed since the application was served on the beneficiary and the beneficiary has not served notice on the CAO of his wish to oppose the application. The CAO will notify both the applicant and beneficiary of the JAG's decision on the papers. Alternatively he will make arrangements for a hearing of the application before a judge advocate sitting alone²⁵⁵. The procedure to be followed will be determined by the judge advocate, but it is unlikely that any representation from the DSP will be required.

Remission of fine

164. Where the CM, the SAC or the SCC has awarded a fine in circumstances in which the offender failed to co-operate with the investigation into his financial circumstances, and thus determined his financial circumstances without full information, it may be appropriate for the CM to remit all or part of the fine after a later inquiry into his financial circumstances²⁵⁶. Such action can be taken either on an application for such remission²⁵⁷, or as a result of an application under paragraph 163. Where the application is for remission of the fine, the

²⁵³ Armed Forces (Court Martial) Rules 2009 rule 145.

²⁵⁴ Section 251 of the Act.

²⁵⁵ Armed Forces (Court Martial) Rules 2009 rule 146.

²⁵⁶ Sections 267 and 249 of the Act.

²⁵⁷ Armed Forces (Court Martial) Rules 2009 rule 147.

application must be made in writing to the CAO, and state the financial circumstances of which the sentencing court was unaware and explain why the applicant failed to co-operate with the court when it investigated his financial circumstances under section 249 of the Act. The application should be dealt with by the judge advocate for the proceedings in which the fine was imposed, and the judge advocate may remit the fine in whole or in part, dismiss the application or direct a hearing of the application. The procedure to be followed will be determined by the judge advocate, but it is unlikely that any representation from the DSP will be required.

Service restraining orders

165. Where the Appeal Court allows an appeal from the CM it may remit the case back to the CM for consideration of a Service restraining order under section 229 of the Act. These orders prohibit the defendant from doing anything described in the order for a fixed period or until a further order is made, and do not require the defendant to have been convicted of an offence. They only apply to those subject to Service law or discipline. On receipt of such a referral the CAO will appoint a time and place for a hearing before a judge advocate sitting alone²⁵⁸. The procedure to be followed will be determined by the judge advocate, who is likely to invite the DSP and the defence to lead evidence admissible in proceedings in the High Court for an injunction under section 3 of the Protection from Harassment Act 1997²⁵⁹. The defendant need not be present for the proceedings, and the court is allowed to make a Service restraining order in his absence.

166. In addition, the DSP, the defendant or any other person mentioned in the order may apply for a variation or revocation of the order²⁶⁰. Such an application must be made in writing to the CAO and specify whether the applicant wishes the court to revoke or vary the order and the grounds for doing so. The judge advocate may dismiss the application, but cannot vary or revoke the order without a hearing. If he dismisses the application without a hearing the applicant will be notified of the decision in writing. If a hearing is required, the CAO will make all necessary arrangements and the procedure to be followed will be determined by the judge advocate, taking into consideration such evidence as would be admissible when making the original order, see paragraph 165.

Variation or revocation of order for a Service parent or guardian to enter into recognizance

167. A Service parent or guardian ordered to enter into recognizance to take proper care of an offender and exercise control of him²⁶¹ may apply for the variation or revocation of the order²⁶². Such an application must be made in writing to the CAO and specify whether the person wishes the court to vary or revoke the order, and why. The judge advocate may vary or revoke the order, or dismiss the application, with or without a hearing. If a hearing is required, the CAO will make all necessary arrangements. The hearing will take place before a judge advocate sitting alone, and the procedure will be determined by the judge advocate. It is unlikely the DSP will be required to be represented at such a hearing.

Contempt of court

168. The CM has the power to deal quickly and effectively with a person who commits contempt of court²⁶³. This includes the power to keep the person in custody until the end of

²⁵⁸ Armed Forces (Court Martial) Rules 2009 rule 148.

²⁵⁹ Section 229 of the Act.

²⁶⁰ Section 232 of the Act.

²⁶¹ Section 233 of the Act.

²⁶² Section 235(4) of the Act and Armed Forces (Court Martial) Rules 2009 rule 150.

²⁶³ Section 309 of the Act.

the day's proceedings before dealing with the contempt of court. These powers may be exercised against any person in the UK, but are only exercisable against a person outside the UK if he is a Service person or a relevant civilian²⁶⁴. The powers may be used in relation to anyone who commits an offence by²⁶⁵:

- a. Refusing to take an oath or make an affirmation when required by the court to do so;
- b. When a witness, refusing to answer any question which the court has lawfully required him to answer;
- c. When attending or brought before the court refusing to produce any document or other thing which is in his custody or under his control and which the court has lawfully required him to produce;
- d. Intentionally interrupting the proceedings of the court or otherwise misbehaving in court; or
- e. Intentionally insulting or intimidating:
 - (1) Any member of the court while that member is acting as such a member or is going to or returning from the court; or
 - (2) Any witness or other person whose duty it is to attend the court, while that witness or other person is attending the court or going to or returning from the court²⁶⁶.

169. If the offender is a Service person or a relevant civilian the court may commit the offender to Service custody for a specified period not exceeding 28 days; impose a fine not exceeding level 4²⁶⁷ on the standard scale, or do both²⁶⁸. If the offender is not a Service person or a relevant civilian, the court may impose on him a fine not exceeding level 4 on the standard scale²⁶⁹.

170. Where any offence under these contempt of court provisions appears to have been committed, the judge advocate may certify the offence, if it took place in the UK, to a court of law in the UK with power to commit the contemnor for contempt, or, in any other case, to the High Court. However, the certification must take place at a hearing²⁷⁰. For this purpose the CAO will appoint a time and place for the hearing and notify the contemnor and the DSP, each of whom is entitled to make representations at the hearing. The court to which the person has been certified as being in contempt may then deal with contemnor as if he had committed the offence in that court, see [Chapter 33](#) (Contempt of Service courts).

²⁶⁴ A person who misbehaves in CM proceedings outside the UK and who is not a Service person or relevant civilian is not subject to the contempt of court provisions of the Act.

²⁶⁵ Section 309(6) of the Act.

²⁶⁶ Section 309(1) of the Act.

²⁶⁷ Level 4 is the scale set in civilian courts.

²⁶⁸ Section 309(2) of the Act.

²⁶⁹ Section 309(3) of the Act.

²⁷⁰ Armed Forces (Court Martial) Rules 2009 rule 151 and section 311(2) of the Act.

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MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

Save as

Print Form

ANNEX A TO
VOL2 CH 29
JSP 830 MSL
revised 08/09

APPLICATION FOR LEAVE TO ADDUCE EVIDENCE THROUGH TELEVISION LINK

T-SL-CM01

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009 rule 18

From (name)

of (Ship/unit/establishment/address)

To Court Administration Officer - Application for Leave to Adduce Evidence through Television Link

In the matter of the defendant:

Service number

Rank/Rate

Forename

Family name

As prosecutor defendant's legal adviser defendant I hereby give notice that an application will be made to the Court Martial for leave to adduce the evidence of a witness, whose name is given below, by way of live television link in proceedings before the Court Martial concerning the above named defendant.

This application will relate in particular to the following charge(s) to be tried:

2-29-A-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

The grounds of the application are as follows:

Witness name

Date of birth if under 18 years of age

The country and place where it is proposed that this witness will be when giving evidence is:

(If required) the person whom it is proposed should accompany the witness is

First name

Family name

Occupation

Relationship to the witness

State the grounds for believing this person should accompany the witness

Signed

Date

Send copies to: Judge Advocate and

Defendant Defendant's Legal Adviser Service Prosecuting Authority

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NOTES FOR THE GUIDANCE OF DEFENDANT'S ASSISTING OFFICER AT THE COURT MARTIAL

Introduction

1. You have been asked to act as the Defendant's assisting officer (DAO) at Court Martial proceedings. These notes give you general guidance on the duties of a DAO. They are not intended to take the place of sensible and appropriate liaison between you as the DAO and the defendant's legal representative. In addition, they have been prepared on the assumption that the defendant intends to appoint a legal representative. You should advise the defendant that it is in his best interests to do so. If the defendant decides not to appoint a legal representative, as is his right, then you as DAO may wish to seek further guidance from an appropriate legal representative in the chain of command.

Eligibility to act as DAO

2. Before undertaking the duties of a DAO you must decide whether you are able to act as the DAO, bearing in mind that certain individuals should not be selected as a DAO, namely;

- a. Any officer who holds delegated powers to act in custody matters within the defendant's chain of command;
- b. Any individual who arrested the defendant for the alleged offence;
- c. Any individual otherwise connected with the case under investigation or any other case in which the defendant is under investigation;
- d. Any individual who has been involved personally in advising the CO about the case;
- e. Legal officers;
- f. Discipline staff;
- g. The medical officer; and
- h. The chaplain/padre.

3. It is preferable that wherever possible a defendant should retain the same DAO until final conclusion of the case. It may take several months from your appointment as DAO to the end of any CM proceedings. If you know that you are likely to be posted before the case concludes or are likely to be away from your ship/unit/establishment for significant periods it may be advisable to suggest that someone else is appointed, but you should in any event first discuss the situation with the defendant.

Process to CM

4. The typical sequence of major events in a case is as follows:
- a. Alleged offence;
 - b. Investigation by CO or Service Police;

- c. Police interview with defendant;
- d. Report of the investigation to DSP (in which case go to 4.f) or CO;
- e. Reference by CO to DSP, or election for CM trial by defendant;
- f. Preferring of charges by the DSP;
- g. Prosecution Papers are served by the CO on behalf of the DSP;
- h. Preliminary Hearing;
- i. Trial proceedings; and
- j. Sentencing proceedings.

See [Chapter 6](#) (Investigation, charging and mode of trial) and [Chapter 9](#) (Summary hearing and activation of suspended sentence of detention)

5. The DAO should be selected when it becomes likely that a defendant will be dealt with by the CM, either for a full trial or for sentencing proceedings. This may not be a clearly defined point in the discipline process and therefore your selection may come at any stage but should be made as soon as possible after it is known the defendant will be dealt with by the CM see [Chapter 29](#) (Court Martial proceedings) paragraph 45 on how a DAO is selected.

Duties of the DAO

6. **Role of the DAO.** The function of a DAO is to support and assist the defendant in preparing for CM proceedings. You should also assist his legal representative in any way that supports the defendant. You are neither legally qualified nor entitled to conduct his defence, and you should ensure the defendant understands that if he is not legally represented he will have to represent himself. In the vast majority of cases the defendant will (and would be well advised to) have a legal representative to conduct his defence in court. You should explain to the defendant that regardless of whether legal aid is granted or not, the employment of a legal representative may be critical in determining the outcome of any trial or sentencing proceedings. This is most important where charges are of a serious nature and it is possible the defendant may lose their rank/rate, career or liberty and, in serious cases, all three. Legal advice can in some circumstances be given by Service lawyers, however in the majority of cases a civilian legal representative will be engaged by the defendant. How legal advice is sought can be found in the pamphlet - Support available to those accused of an offence under the Service Justice System.

7. Your role as DAO is to assist the defendant and any legal representative instructed by acting as the administrative liaison between the legal representative and the ship/unit/establishment and, only where required, to help prepare the defendant's defence or mitigation if you are requested to do so. It is important that you, the defendant and the legal representative, work as a team towards a common goal. To do this effectively you will need to communicate before action is taken. One of the most common complaints from a defendant awaiting trial is that he does not know what is going on.

8. Whatever your Service relationship to the defendant your role as DAO is somewhat different. You are advising and assisting, not telling the defendant what to do; the

defendant is free to reject your suggestions and to dispense with your assistance. You should always make it clear that the defendant has the final say in any choices made in regard to his defence.

9. **Confidentiality.** You should treat anything said to you by the defendant in relation to his defence as confidential. Such confidentiality exists as a matter of policy in order to ensure all defendants are properly advised. You must not, without the defendant's permission, disclose to anyone what the defendant tells you or any other information you discover whilst assisting him to prepare his case. You cannot lawfully be ordered by a senior officer to disclose such information. You should only reveal what has been said to you by the defendant in due process of law (e.g. if required to do so in legal proceedings). Such confidentiality continues after the case has ended and/or your involvement as DAO has ceased for whatever reason. If in doubt, you may seek legal advice from a lawyer, preferably from the defendant's legal representative if he has one, but you should not seek such advice from the chain of command. Additionally you must be particularly careful in what you say to those directly involved in the prosecution of the case, for example, disciplinary staff, Service Police, staff legal advisers, prosecutors etc and you should not become involved in 'off the record' conversations with them.

10. **Conflict of duty.** If you find there is a conflict between your duty as a Service person and your duty as DAO then you may withdraw from the case. If a legal representative is involved you should consult him first.

11. As DAO you also have a duty to the court. If you are involved in preparing any documents in relation to the case (eg. helping to prepare a plea in mitigation) you must not put forward a factual version of events which the defendant has told you is untrue. This does not mean you have to check the truth of everything you are told by the defendant, as your job requires you to accept his explanations regardless of whether you consider them unlikely.

12. Defence statements should always be prepared by the legal representative if the defendant has one. Where the defendant is pleading not guilty to a charge, the defence statement is very important. If he does not have a legal representative, you should reinforce to the defendant the importance of legal representation for the purpose of preparing the defence statement.

13. **Avoiding and managing delay.** Delay will create uncertainty in the defendant and every effort must be made to keep him informed as to what stage the legal proceedings have reached. If the defendant is being adversely affected by any delay you should inform the defendant's legal representative immediately. You have a duty to the Service and the court to make sure things proceed as quickly as possible. You must not contribute to delay and therefore the process must continue regardless of leave, exercise etc. You should consider such matters when consenting to be nominated as the DAO. You should also assist the defendant to engage with the legal process in order to avoid unnecessary delay.

14. **Assisting the defendant.** When assisting the defendant you should:

- a. Encourage and assist him to appoint and meet with a legal representative. The first meeting should ideally take place prior to any preliminary hearing of the CM;
- b. Make notes of your discussions with the defendant, his legal representative and others to whom you speak about the case, in case a record is needed at a later

stage. These notes, dated and signed by you, should be kept with any other papers held by you relating to the case; and

c. Seek advice and guidance from others where appropriate.

15. **Documentation and familiarisation.** As soon as you are selected to be a DAO you should obtain the following MSL chapters, or copies of them, from your ship/unit/establishment discipline staff:

- a. [Chapters 6](#) (Investigation, charging and mode of trial);
- b. [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention);
- c. [Chapter 29](#) (Court Martial proceedings);
- d. [Chapter 30](#) (Sentencing principles, powers and effects); and
- e. [Chapter 31](#) (Court Martial appeal).

These chapters will assist you to familiarise yourself with how the Service Justice System works and the aspects of it that may be faced by the defendant. It is important that you do this in order to support the defendant who will not always understand the process.

16. In the unlikely situation where a defendant chooses not to seek legal assistance and to represent himself you should ensure that he has access to the MSL.

Initial consultation

17. Ensure that any consultation between you and the defendant, and his legal representative where appropriate, is conducted in complete privacy and free from distraction. Remember, you do not have a right to be present when the defendant meets with his legal representative; it is a matter for the defendant and the legal representative as to whether they wish you to attend their meetings. If you do attend meetings with the defendant and the legal representative you must leave at any time they ask you to do so.

18. Once you have familiarised yourself with the procedure you should arrange to meet with the defendant. Ask the defendant to bring any paperwork relating to the case with him. Ask him to read the 'Your rights if you are accused of an offence under the Service justice system' booklet before he arrives, and ensure he is in possession of an application for Legal Aid (JPA Forms T002 A to C). He should return his application for Legal Aid form to you completed as far as he can at the initial meeting with you. Take a note of basic details e.g. name, rank/rate and number, family, home circumstances and background. You will require this information if you are assisting the defendant in preparing his plea in mitigation. Retain the JPA Forms T002 A to C as they may be needed later, see paragraph 24.

19. **Representation.** One of the first points for discussion in your initial consultation is that of legal representation. The defendant has 3 choices for representation:

- a. Representation by a civilian legal representative;
- b. Representation by a Service lawyer (if available); or

c. Represent himself.

The decision on these options rests with the defendant but he may often rely on you for advice, and you should advise him of his options, drawing on the information in the following paragraphs as necessary.

20. AFCLAA are in a position to help the defendant choose a legal representative and can provide details of independent lawyers (who may be barristers or solicitors) for you to approach on his behalf if asked to do so. The legal representative will not be able to carry out any work until Legal Aid is granted unless the defendant is paying privately. When he does start you should explain your role to the legal representative outlining what work you have in hand and ascertain if the legal representative wishes you to undertake any additional work.

21. Employing a lawyer may not be free of charge, even with Legal Aid. If the defendant is pleading not guilty is an able rating, marine, private or airman, it generally will be free but senior ranks or rates will usually have to make a contribution to the legal costs. Therefore, the defendant has to weigh the costs against the possible consequences of not being properly defended. Even where there is a guilty plea, a lawyer may well be able to make a difference to the sentence passed by the court simply by knowing what information the court needs and how to present it. This could make the difference between, for example, dismissal and continuing to serve, or detention in the Military Corrective Training Centre (Colchester) and a fine.

22. The situation in Cyprus, Northern Ireland, Germany and operational theatres is slightly different due to the difficulties in access to civilian legal representatives. The principal difference is that there are Service lawyers stationed there or who have a responsibility to attend in those theatres specifically to provide free legal assistance to Service and dependant personnel. If the defendant has not already engaged the assistance of such a lawyer, see paragraph 26, immediately upon service of the prosecution papers by the CO you should telephone the nearest appropriate Service legal branch²⁷¹ and arrange an appointment for the defendant as soon as possible. The defendant may wish you to attend with him. It should however be noted that it can prove difficult for such legal branches to provide legal representatives for complex and lengthy cases that will occupy a considerable amount of time.

23. The defendant may already have spoken to a Service lawyer if he was interviewed by the Service Police overseas. If this has happened you should try to arrange a consultation with the same officer for the defendant. It should however be remembered that representation by a Service lawyer is a matter for the discretion of the Service legal authority (DNLS/DGALS/DLS(RAF)) according to the resources available.

24. **Legal aid and legal aid application.** Explain to the defendant that it will not cost him anything to apply for Legal Aid if he intends to be represented by a civilian legal representative. In addition, it is not an indication of guilt or innocence, and neither does it commit him to anything. If he wishes to engage a civilian legal representative it will therefore almost invariably be in his interests to apply for legal aid. Whatever his views on plea and representation, and whether applying for financial assistance or not, for administrative reasons every defendant should submit an application on JPA Form T002, for details of the procedure see JSP 838 (The Armed Forces Legal Aid Scheme).

²⁷¹ For Army defendants this must be an RAF legal branch and vice versa.

25. If the application for Legal Aid is accepted then an offer will be made by AFCLAA detailing what financial contribution the defendant may have to make towards the cost of his defence. The defendant can accept or reject the offer but you should advise the defendant to apply and see what the costs will be. The legal representatives available on the scheme are independent lawyers in private practice who have agreed to handle cases at Legal Aid payment rates. They are not employed by or on the side of the armed forces and some have considerable experience of the CM process.

26. **Absence of legal representation.** If the defendant does not already have a legal representative and there is no immediate prospect of the defendant engaging one, you should make a note of the defendant's recollections of the incident and any police interview, and most importantly take the details of any potential witnesses. Warn the defendant against approaching prosecution witnesses, discussing the case with them or asking them to 'drop the charges'. Once the matter is reported the case is out of their hands and any such approach could be deemed a criminal offence (e.g. attempting to pervert the course of justice or witness interference/intimidation). In addition to being an offence, such approaches could also be misconstrued as an admission of guilt of the main offence with which he is charged, even though the approach was made innocently.

27. If the defendant has not yet sought the assistance of a legal representative you should make him aware of the requirement to return various legal papers to the CAO and the SPA within strict time limits see [Chapter 29](#) (Court Martial proceedings). These papers include the defence statement and details of alibi (where applicable). You should strongly advise the defendant to engage a legal representative in order to help him complete these documents.

28. If the defendant decides not to engage a legal representative you should make it clear that you are unable to proceed with assisting in the preparation of the case for presentation in court unless the defendant is not contesting the charge(s) in a relatively straight-forward case (such as absence) and you are being asked simply to assist the defendant in preparing a plea of mitigation. In all other cases, you should leave matters to the defendant, offering to give what other support you can in accordance with paragraph 29.

Action after initial consultation

29. Whether or not the accused has legal representation you may be required to undertake a number of tasks in order to assist the defendant in preparation for the CM proceedings. The following outlines some of those tasks.

a. **Defence witnesses.** You may on occasions have to contact defence witnesses on behalf of the defendant or his legal representative. You should ask them if they are willing to give evidence at the CM. Ensure you obtain their contact details.

b. **Tape recording of the Service Police interview.** Ensure the defendant has access to any tape recording of a police interview by using the appropriate form²⁷². If the form is not available request a copy of the tape by writing to the Service

²⁷² The forms handed to a suspect at the conclusion of each interview are:

MOD F955A – Service Police - Notice to a Person whose Interview has been tape recorded.

MOD F955B – Service Police - Application for a copy of the working copy of a Service Police interview tape.

MOD F955C – Service Police - Application for access to the Master Tape(s) of an interview tape recorded by the Service Police.

Police at the location where he was interviewed specifying the date and other details of the interview. The letter should be signed by the defendant.

c. **Character witnesses.** You should be prepared to assist the defendant to identify and contact character witnesses. Character witnesses may be called whether the defendant is pleading guilty or not guilty. There is no conflict of interest if you wish to act as a character witness yourself.

d. **Defence statement.** Once the prosecution papers have been served, the defence must give a defence statement to the CAO and prosecutor within 28 days. This should only be prepared by the defendant's legal representative, or by the defendant himself if he has chosen not to be legally represented. Failure to provide this information may result in adverse comments being made and adverse inferences being drawn during the trial. If a defendant insists on defending himself, you are not in a position to help him prepare a defence statement. You should advise the defendant to ensure his defence statement is submitted on time.

Action to be taken between service of prosecution papers and end of CM proceedings

30. **General.** Once the prosecution papers have been served on the defendant the case should proceed to trial or sentencing proceedings fairly rapidly²⁷³. During this time the defendant and his legal representative (if he has one) should prepare for the court appearance(s), and you should assist that process.

31. **Meetings with legal representative.** It is important for you to attend the case conferences if the defendant and his legal representative are content for you to do so. Be prepared to make administrative arrangements for the defendant to meet his legal representative even if you are not attending the conference yourself. Make sure the meeting with the legal representative is fully arranged prior to his arrival. Time may be short and this may be the last opportunity to clear up any problems before the CM starts. Where there is a difficulty due to location, remember that the MCS makes extensive use of VTC equipment and that these facilities can be booked if one party cannot attend in person.

32. In Germany or Cyprus you may find time is very short and the legal representative may only arrive the evening before the CM proceedings start. This may be the first face to face meeting between the legal representative and the defendant so there may be more than usual to discuss.

33. **Travel and accommodation.** You should be in close liaison with the defendant's legal representative, especially if overseas. You may have to assist with the booking of accommodation (in liaison with the CAO) but the legal representative is responsible for his own travel arrangements. You are, however, responsible for arranging transport within the country in which the CM is taking place overseas.

34. **Information for Service court.** Before any trial or sentencing proceedings, obtain a copy of the completed information for Service courts form (T-SL-SC01), see [Annex R](#), that your ship/unit/establishment discipline staff provides to the SPA and pass it on to the legal representative. In the event of a conviction the form is normally presented to the CM by the prosecutor and contains the following information:

a. The defendant's age and rank or rate;

²⁷³ It is usual for the first hearing to take place within 4 weeks of service of the prosecution papers.

- b. The defendant's Service record;
- c. Any recognised acts of gallantry or distinguished conduct on the part of the defendant and any decoration to which he is entitled;
- d. Particulars of any offence and any sentence awarded (whether under the Act or otherwise) of which the defendant has been found guilty (during his Service or otherwise);
- e. Particulars of any formal police caution administered to the defendant by a constable in England and Wales or Northern Ireland;
- f. Particulars of the length of time the defendant has been in custody awaiting trial or in custody under a current sentence; and
- g. Details of the defendant's pay, terminal benefits and future pension entitlements.

35. Check the information on the form with the defendant and note any discrepancies. If the defendant has convictions that are not shown you should bring this to the attention of any legal representative.

36. If the defendant has a poor disciplinary record but did not at a previous ship/unit/establishment, try to obtain a reference from his old ship/unit/establishment and discover if the assignment has caused the current problems. Such information can be used as mitigation.

37. **Character witnesses.** In the absence of a legal representative and once you have a firm idea of the trial or sentencing date you should make contact with the character witnesses and request their statements and inform them if you would like them to appear at the CM.

38. The defendant or his legal representative may either present written statements from character witnesses or the witnesses may appear and give evidence in person if they are available and willing. Evidence given in person may have more impact on the court and the witness will be able to answer any additional questions the court may have.

39. **Witness administration.** It is the role of MCS to notify prosecution and defence witnesses to attend at court for the trial. Administration of witnesses should be undertaken in conjunction with MCS and the defendant's legal representative. You should advise the MCS as soon as possible if the defendant or his legal representative wish a witness to attend so that they can notify him of the date on which he will be required.

40. **Pre-sentence reports (PSR).** In cases where a guilty plea is entered or a finding of guilt follows from the trial, the judge advocate may request a PSR. In some circumstances a PSR may be prepared before the defendant's plea is known or before a CM trial. A probation officer will usually interview the defendant and prepare a PSR. The defendant will be asked for his version of events and this will be put into the report. This will be given to the court before the defendant is sentenced. It is vital the defendant co-operates in the production of the report, and you should advise him of this. Ask the defendant for permission to see the report, then obtain a copy. A copy of the report will

be sent direct to the defendant's legal representative if he has one. An advance copy of the PSR may assist in the preparation of the plea in mitigation.

41. **Preparing a plea in mitigation.** In all cases where the defendant is representing himself you should assist him to prepare a written plea in mitigation. This should be done, as far as possible, before any sentencing proceedings, and before a trial if the defendant intends to plead not guilty, for advice on decision see paragraphs 51 – 53.

42. The written plea in mitigation should usually be brief and only include relevant material. Ideally, the plea in mitigation should deal with the following matters:

a. **The offence.** Include any explanation as to why the incident happened and the defendant's perception of the circumstances. Also mention any remorse the defendant has and any apologies he may have made either to the victim or the Service Police. If he has paid compensation to the victim, returned stolen property or made any other recompense to the victim, this should also be mentioned.

b. **The defendant.** Give details of the defendant's Service and disciplinary record if a Service person (including any civilian convictions) and for a civilian any previous convictions. There is no requirement to reveal any Service or civilian offences not mentioned by the prosecution; however, you must not mislead the court on this issue. Comment should be made as to any contribution he has made to life in the unit or society, his personal life and family background including any difficulties at home. Ascertain, for example, whether there are any marital difficulties or recent operational experiences. If the defendant consents, obtain and check his annual reports and refer to these entries in the plea (and attach these documents to the copies of the written plea). In particular, you may wish to refer to favourable entries, and to explain any adverse comments.

c. **The sentence.** Deal with the likely sentence to be passed. Where this is known (the PSR might give an indication of this) you should research the likely impact of that sentence on the defendant, e.g. effect on career, employability etc., and inform the defendant's legal representative.

43. The defendant may wish to support his plea in mitigation with character witness testimony in which case you should liaise with the defendant's legal representative (if he has one) and MCS.

44. The defendant is entitled to address the court in mitigation. He may also provide a written copy of his plea in mitigation together with any character witness statements as long as copies are also provided to the prosecution. The written plea in mitigation should be headed 'Plea in Mitigation of Punishment in the case of...' and should be signed and dated by the defendant.

45. **Preparation for custodial sentence.** If a custodial sentence is a possibility should the defendant be found guilty (or is pleading guilty), you should try to ensure the defendant is prepared for it financially, mentally and physically – particularly if he does not have a legal representative. You should inform the defendant that he will not receive any pay during a custodial sentence and (especially if he has a family) may wish to contact welfare staff to find out what assistance is available. On the day of sentence you should try to ensure that the defendant has full military kit prepared in case he receives a sentence of detention at MCTC.

46. **Final meeting before attending court.** Make sure that you have a final meeting with the defendant the day before the first hearing. You should use this to ensure he

has not changed his mind about plea, see paragraphs 51 - 53, representation etc. and that you are both clear on how things are to proceed.

47. **Other checks before attending court.** Read the administration instruction for the trial or sentencing proceedings carefully and make sure you and the defendant are dressed appropriately for the hearing you are to attend. See JSP 836 (A guide to Court Martial and the Summary Appeal Court).

Preliminary proceedings

48. The first stage of any CM proceedings is the preliminary hearing. Such hearings may be ordered by the judge advocate to take the defendant's plea (during a process called arraignment) and determine matters and actions required in order to bring the case to trial, such as clarifying the number of witnesses required to attend court. The most important thing to be dealt with at such a hearing is the defendant's plea. This will usually be dealt with at the first hearing before the judge advocate, and it is therefore very important that the defendant is properly prepared for this hearing.

49. As soon as you are notified that a preliminary hearing will be held if you haven't done so already assist the defendant to apply for legal aid and seek legal representation. If the defendant decides to represent himself, you should ensure that he has access to the MSL and in particular the references in paragraph 15.

50. In court all matters are addressed through the respective advocates for the prosecution and the defence, although you may be required to provide some immediate advice to the defendant's legal representative. If the defendant is not represented he should speak for himself.

51. **Decision on plea.** The defendant should be made aware that a lesser sentence will almost always be imposed for a guilty plea as opposed to a finding of guilt after a contested trial. An early guilty plea can add force to his mitigation. However, the defendant should not plead guilty to an offence for which he is not responsible.

52. Ask which way the defendant intends to plead (guilty or not guilty). You must not, however, try to persuade the defendant one way or another. How he pleads or presents his case is entirely his own decision. If he is in doubt or wishes to plead not guilty a Service lawyer or a civilian legal representative should represent him. If, after your advice, an unrepresented defendant insists on pleading not guilty after admitting the offence to you and insists on presenting facts to the court that he has told you are untrue, you must tell the defendant that you can no longer be his DAO. He can ask other persons willing to act as DAO to replace you. You must not tell your CO, the new DAO nor anyone else the reason for this. If you find yourself in difficulties seek advice from a staff legal adviser unconnected to the case.

53. If the defendant admits guilt but says the circumstances were substantially different to those set out by the prosecution, for example, he accepts punching the victim but not kicking him or insists he only hit him once rather than several times, you should strongly urge him to seek legal advice. In the absence of a legal representative there is a strict limit on how far you can assist the defendant in the preparation of his case, see paragraph 28, because you are not legally qualified.

During the CM proceedings

54. **Attendance at court.** It may be necessary for you to attend the CM proceedings, and to assist the legal representative as required. Ensure that you will be available for the trial or sentencing proceedings. Discuss in advance of any hearing whether the legal representative wishes you to assist him during the hearing. You may be asked to make precise notes of all the evidence but you might be asked to do other things as well. Noting the evidence can be taxing but is an important task as the legal representative may not be able to record answers to his own questions in a complex case.

55. Once the proceedings have concluded you should meet with the defendant whatever the outcome. If a legal representative is involved, attend with him if he is content for you to do so. If the defendant is in custody ask if there is anyone he would like to have informed.

Appeals

56. The defendant may wish to discuss the possibility of an appeal. Provide a copy of [Chapter 31](#) (Court Martial appeal) to the defendant and his legal representative. If there is no legal representative you should advise the defendant to engage one if he wishes to submit an appeal.

57. **Time limit.** An appeal to the CM Appeal Court should be presented within 28 days. If a legal representative is involved he will deal with any appeal but you should confirm if there are any matters on which he would like your assistance.

58. **Legal aid.** Legal aid may be available for the appeal (if applied for), even if the defendant did not seek such aid for the trial. By its nature, an appeal will often involve complex legal points and the defendant should be strongly advised to apply for legal aid if they wish to appeal. Due to the strict time limits for appeals, any application must be dealt with expeditiously.

PRELIMINARY PROCEEDINGS

1. The matters which may be addressed at preliminary proceedings include, but are not limited to:
 - a. The issues in the case;
 - b. Issues, if any, as to the mental or medical condition of any defendant or witness;
 - c. The number of witnesses whose evidence will be placed before the court either orally or in writing;
 - d. The defence witnesses whose statements have been served and whose evidence the prosecution will agree and accept in writing;
 - e. Any prosecution witnesses whom the defence require to attend the trial;
 - f. Any additional witnesses who may be called by the prosecution and the evidence that they are expected to give;
 - g. Whether any of the parties propose to adduce expert witness evidence and any issues arising from that;
 - h. Facts that are to be admitted and which can be reduced into writing in accordance with section 10(2)(b) Criminal Justice Act 1967, within such time as may be directed at the hearing, and of any witness whose attendance will not be required at the trial;
 - i. Any exhibits and schedules which are to be admitted;
 - j. The order and pagination of the papers to be used by the prosecution at the trial and the order in which the prosecution witnesses are likely to be called;
 - k. Any point of law which it is anticipated will arise in the course of the proceedings;
 - l. Any question as to the admissibility of evidence which appears on the face of the papers, and any authority on which the party intends to rely;
 - m. Any application for an order that all or part of a trial be held in camera;
 - n. Any application for an order relating to reporting restrictions under section 4 or 11 of the Contempt of Court Act 1981;
 - o. Any application to be made for evidence to be given or a person to attend a hearing through live link;
 - p. Any application for a special measures direction under section 19 of the Youth Justice and Criminal Evidence Act 1999;
 - q. Any application for screens, for use by witnesses seeking a visual break between themselves and any relevant parties;
 - r. Whether any video, tape recorder or other technical equipment will be required during the proceedings;
 - s. Where a tape recorded interview has taken place, of any dispute or agreement as to the accuracy of any transcript or summary;

- t. Any other significant matter which might affect the proper and convenient trial of the case, and whether any additional work needs to be done by the parties;
- u. Any matters concerning the proper and efficient management of the case including giving directions to the court administration officer for the listing of the case for trial;
- v. The estimated length of any proceedings, to be agreed more precisely taking account of any views expressed by the judge advocate and the other parties;
- w. Witness availability and the approximate length of witness evidence;
- x. Availability of legal representatives;
- y. Orders prohibiting or restricting the publication of any matter or excluding the public from any proceedings;
- z. Challenges to the jurisdiction of the court;
- za. Objection to a charge on the grounds that it is not correct in law;
- zb. Plea that the court is debarred from trying a charge; and
- zc. Whether there is a need for any further directions.



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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ANNEX D TO
VOL2 CH 29
JSP 830 MSL
revised 08/09

APPLICATION FOR PRELIMINARY PROCEEDINGS

T-SL-CM02

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009 rule 46(4)

From (name)

of (Ship/unit/establishment/address)

To Court Administration Officer - Application for Preliminary Proceedings

In the matter of the defendant:

Service number

Rank/Rate

Forename

Family name

As prosecutor defendant's legal adviser defendant I hereby apply for preliminary proceedings to take place to address the following matters (see Manual of Service Law Chapter 29 Annex C for a non-exhaustive list of matters suitable for preliminary proceedings)

State subject matter of preliminary proceedings

It is requested that the witnesses whose details are given below be summonsed by the judge advocate to attend the hearing
(List witnesses and their addresses)

Signed

Date

Send copies to: Judge Advocate and

Defendant Defendant's Legal Adviser Service Prosecuting Authority



MINISTRY OF DEFENCE

PROTECT - PERSONAL DATA (WHEN COMPLETE)

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Print Form

ANNEX E TO
VOL2 CH 29
JSP 830 MSL
revised 08/09

APPLICATION FOR PRELIMINARY PROCEEDINGS IN CHAMBERS

T-SL-CM03

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009
rules 46(4) and 47

From (name)

of (Ship/unit/establishment/address)

To Court Administration Officer - Application for Preliminary Proceedings in Chambers

In the matter of the defendant:

Service number

Rank/Rate

Forename

Family name

As prosecutor, I hereby apply for preliminary proceedings to take place to address the following matters (see Manual of Service Law Chapter 29 Annex C for a non-exhaustive list of matters suitable for preliminary proceedings)

State subject matter of preliminary proceedings

2-29-E-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

I further apply for the preliminary proceedings to take place in chambers, in the absence of the defence, in accordance with Armed Forces (Court Martial) Rules 2009 Rule 47, for the following reasons (state reasons)

[Empty rectangular box for providing reasons]

It is requested that the witnesses whose details are given below be summoned by the judge advocate to attend the hearing
(List witnesses and their addresses)

--

Signed

--

Date

--

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**Annex F to
Vol 2 Ch 29
JSP 830 MSL**

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**THE COURT MARTIAL: PRELIMINARY PROCEEDINGS
PLEA and CASE MANAGEMENT HEARING (PCMH)**

- This form sets out the Judicial Directions of the Judge Advocate which are to be followed in preparing the case for trial
- These Directions are binding ONLY if the form is signed by the Judge Advocate and stamped by the court
- Defence Representative(s) must complete this form and serve it on the Prosecution in sufficient time before the PCMH to allow the Prosecution to consider it, make the entries required of them and submit it in accordance with JAG Practice Memoranda section 3
- Each side should provide all the information requested, marking boxes as required, indicating proposed directions they seek, and making proper concessions.
- **It may be submitted on paper or (preferably) electronically. Tab key moves from box to box in the form, mouse click puts X in box. Grey boxes do not print.**

Part A Case Data

OJAG Case Reference Number →		
JUDGE ADVOCATE: (signature) BY ORDER	COURT CENTRE STAMP →	
1. Date of plea & case management hearing:		
2. DEFENDANT		
Name, rank & number:		
3. In custody? No <input type="checkbox"/> Yes <input type="checkbox"/> →	Place:	From what date:
4. Representative of Defendant: (give phone no. & email)		
5. Prosecuting Officer at PCMH:	For trial: (give phone no. & email)	

PROTECT – PERSONAL DATA (WHEN COMPLETED)

<p>6. Future case management to be supervised by a Judge Advocate nominated by JAG? No <input type="checkbox"/> Yes <input type="checkbox"/> ➔</p>	<p>Name:</p>
<p>7. Is this case linked with other defendants?</p> <p>No <input type="checkbox"/> Yes <input type="checkbox"/> ➔</p>	<p>List name, rank & number of other defendants:</p>
<p>8. Are any other matters against the Defendant pending in any military or civilian court? No <input type="checkbox"/> Yes <input type="checkbox"/> ➔</p>	<p>Direction:</p>

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Part B Arraignment and Plea

<p>9. Has Defendant received legal advice? Yes <input type="checkbox"/> No <input type="checkbox"/> ➔</p>	<p>Direction:</p>		
<p>10. Is Defendant’s fitness to plead in issue? No <input type="checkbox"/> Yes <input type="checkbox"/> ➔</p>	<p>Direction:</p>		
<p>11. Is the Defendant to be arraigned at the PCMH? Yes <input type="checkbox"/> No <input type="checkbox"/> ➔</p>	<p>Direction:</p>		
<p>12. How does the Defendant plead?</p> <p style="padding-left: 40px;">GUILTY <input type="checkbox"/> [Part C applies to all charges serials 15-21]</p> <p style="padding-left: 40px;">NOT GUILTY <input type="checkbox"/> [Parts D/E apply]</p> <p style="padding-left: 40px;">MIXED PLEAS <input type="checkbox"/> [See below serials 13-14]</p>	<p>11.1 Has the Defendant been advised about credit for pleading guilty, and for early plea?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> ↓</p> <p style="text-align: right;">Direction:</p>		
13.	Charge (briefly)	Plea	Matters in issue
Charge 1.			
Charge 2.			
Charge 3.			
Charge 4.			
Charge 5.			
Charge 6.			

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<p>18. Are any directions necessary in relation to Taken Into Considerations? No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>Direction:</p>
<p>19. Any further direction (e.g. for medical or psychiatric reports): No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>Direction:</p>

<p>20. Further Directions if <i>Newton</i> Hearing required:</p>	<p>20.1 Issues to be resolved:</p>
	<p>20.2 Prosecution to serve any further material by date</p>
	<p>20.3 Defence to serve any further material by date</p>
	<p>20.4 Witnesses required to attend Yes <input type="checkbox"/> No <input type="checkbox"/></p>
	<p>20.5 Specific prosecutor / defence advocate needed? Yes <input type="checkbox"/> No <input type="checkbox"/> Details:</p>
	<p>20.6 Any further directions:</p>
<p>21. Directions re Listing parameters of Guilty Plea / <i>Newton</i> Hearing:</p>	<p>21.3 Time Estimate if over 1½ hours</p>
	<p>21.4 Trial start date / dates bracket / not before date:</p>
	<p>21.5 Preferred / required trial venue:</p>
<p>22. Number of lay members on the board</p>	<p>Three lay members <input type="checkbox"/> Five lay members <input type="checkbox"/></p>

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<p>29.1 Have the parties considered which admissions / schedules can be agreed?</p> <p style="text-align: right;">Yes <input type="checkbox"/> →</p> <p style="text-align: right;">No <input type="checkbox"/> ↓</p>	<p>If the Judge Advocate approves that the proposed admissions / schedules are sufficient –</p> <p>Direction: they are to be drafted by party: and sent to the other party/ies by date: and the other party/ies to respond by date: the agreed admissions/schedules to be filed with the MCS and OJAG by date: or in the absence of agreement, the party responsible for drafting them to seek further directions by date:</p>
<p>29.2 If not agreed, or if the Judge Advocate does not approve the proposed admissions/schedules: →</p>	<p>Direction:</p>

<p>Witnesses</p>	
<p>30.1 Have the parties indicated on Annex A (page 11 below) which Witnesses are to Attend the trial to give oral evidence, and which can be Read? Yes <input type="checkbox"/> No <input type="checkbox"/> →</p>	<p>Direction:</p>
<p>30.2 Direction: If the list of witnesses to Attend and be Read has not been agreed or approved, agreement to be reached and submitted to the Judge Advocate for approval by date: or in the absence of agreement the prosecution to seek further directions by date:</p>	
<p>30.3 Is there an agreed running order in the list of witnesses to attend? (in Annex A – column 5) If not, agreement to be reached and submitted to the Judge Advocate for approval or in the absence of agreement the prosecution to seek further directions</p>	<p>by date: by date:</p>
<p>31. Has the Prosecution indicated prosecution witnesses who need to be summoned? (Rule 63) Yes <input type="checkbox"/> No <input type="checkbox"/> →</p>	<p>Direction: If the Prosecution wish to apply for witness summonses, this is to be done by date:</p>

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<p>32. Has the Defence indicated defence witnesses to attend trial (including for Pre-trial hearing if applicable)?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> →</p>	<p>Direction: If the Defence wish the MCS to arrange for the attendance of any witnesses at the hearing, a list of those witnesses must be provided to the MCS by date:</p>
<p>33. Has the Defence indicated defence witnesses who need to be summoned? (Rule 63)</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> →</p>	<p>Direction: If the Defence wish to apply for witness summonses, this is to be done by date:</p>
<p>34.1 Is it proposed that a witness is to give evidence via video recording and/or live video → conference link, instead of in person in the courtroom e.g. to avoid long-distance travel?</p> <p>No <input type="checkbox"/> Yes <input type="checkbox"/></p>	<p>Details & grounds:</p>
<p>34.2 Direction:</p>	
<p>Exhibits</p>	
<p>35. Has list of prosecution exhibits been completed by the prosecution at Annex B (page 12 below) ?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> →</p> <p>No exhibits <input type="checkbox"/></p>	<p>Direction:</p>
<p>36. Has the Defence responded to the prosecution indicating agreement / challenging the exhibits?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> →</p>	<p>Direction: Defence to respond agreeing or challenging exhibits by date: or failing response, the prosecution to seek further directions by date:</p>
<p>37. Has the prosecution made available in full to the Defence any CCTV evidence?</p>	<p>Yes <input type="checkbox"/> No <input type="checkbox"/> No CCTV <input type="checkbox"/></p> <p>If yes, format (VHS, DVD, MPEG, etc):</p>

PROTECT – PERSONAL DATA (WHEN COMPLETED)

<p>38. Directions: Prosecution to make CCTV available to Defendant’s representative by date: and the Defence to submit any editing proposals by date: and the prosecution to respond by date: and the prosecution to ensure that any CCTV recordings, film, stills or composites to be used at trial are edited as agreed by date: and the agreed material to be filed with the MCS by date: or in the absence of agreement, the prosecution to seek further directions by date:</p>	
<p>39. Does the Judge Advocate require any exhibits to be presented in a particular way in order to be more easily understood by the Court?</p>	<p>Direction:</p>
<p>Interviews with Defendant – written transcripts</p>	
<p>40.1 Have transcripts of Defendant’s interviews been sent by prosecution Yes <input type="checkbox"/> No <input type="checkbox"/> → to defence representative?</p>	<p>Direction:</p>
<p>40.2 Have audio tapes of Defendant’s interviews been sent by prosecution Yes <input type="checkbox"/> No <input type="checkbox"/> → to defence representative?</p>	<p>Direction:</p>
<p>40.3 Directions: Proposals for the editing of the Defendant’s interviews to be drafted by party: and to be served by date: and the other party/ies to respond by date: and the agreed interview transcripts to be filed with the MCS and OJAG by date: or in the absence of agreement, the prosecution to seek further directions by date:</p>	
<p>Special Measures - Witnesses</p>	
<p>41.1 Is it proposed that special measures will be required for any witness? No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>Details & grounds:</p>
<p>41.2 Is it proposed that a witness is to give evidence-in-chief via video recording? No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>Directions:</p>
<p>41.3 Is it proposed that a witness is to be cross-examined via live television link? No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	

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<p>41.4 Is it proposed that any other special measures be taken regarding a witness? (e.g. sight screens, victim support worker) No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	
<p>42.1 Has the prosecution delivered to the defence the transcript of its video recorded witness evidence?</p>	<p>No <input type="checkbox"/> Yes <input type="checkbox"/> No videos <input type="checkbox"/></p>
<p>42.2 Directions: Prosecution to deliver transcripts and the defence to submit any editing proposals and the prosecution to respond and the agreed transcripts to be filed with the MCS and OJAG and the prosecution to ensure that any witness evidence video recording used at trial is edited to correspond with the agreed transcript or in the absence of agreement, the prosecution to seek further directions</p>	<p>by date: by date: by date: by date: by date: by date:</p>
<p>42.3 Any further directions:</p>	
<p>43.1 If video recordings are to be put in evidence, in what technical format will they be provided? (e.g. VHS tapes, DVD, MPEG) Format:</p>	
<p>43.2 Directions: So as to enable compatible equipment to be provided and tested before trial, technical information to be provided to the Court Officer, MCC by party venue by date</p>	

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Expert Witnesses	
<p>44.1 Does the prosecution propose to call expert evidence No <input type="checkbox"/> Yes <input type="checkbox"/> ➔</p>	<p>Details: EW-Pros</p> <p>1. Field of expertise Name</p> <p>2. Field of expertise Name</p>
<p>44.2 If so, have the experts’ reports or proofs been disclosed? Yes <input type="checkbox"/> No <input type="checkbox"/> ⬇ (See below)</p>	
<p>44.3 Does the Defence propose to call expert evidence? No <input type="checkbox"/> Yes <input type="checkbox"/> ➔</p>	<p>Details: EW-Def</p> <p>1. Field of expertise Name</p> <p>2. Field of expertise Name</p>
<p>44.4 Directions: Prosecution / Defendant’s Expert Witnesses’ Reports or proofs to be disclosed by date: Experts of like discipline are to meet by date: and a written statement listing the points of agreement and the points of disagreement with a summary signed by both experts to be filed with MCS by date:</p>	
<p>44.5 Does the Judge Advocate require the expert evidence to be presented in a particular way in order to be more easily understood by the Court? No <input type="checkbox"/> Yes <input type="checkbox"/> ➔ No EW <input type="checkbox"/></p>	<p>Directions:</p>

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Other evidential matters		
<p>45. Does any witness or Defendant need an interpreter or have special needs for which arrangements should be made?</p> <p>No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>State them:</p>	<p>Directions:</p> <p>If the Defence intends to object to prosecution proposals, objection to be filed by date:</p>
<p>46. Introduction of ‘bad character evidence’ or ‘hearsay evidence’: (Rules 78 to 82)</p>	<p>Direction:</p> <p>Any applications regarding hearsay / bad character are to be made by date:</p> <p>Any responses by date:</p>	
<p>47. Preparation of bundle of documents for the board:</p>	<p>Direction:</p> <p>Uniform paginated bundle to be supplied in enough copies for the judge, board members, advocates and witness box.</p> <p>by date:</p>	
<p>48. Is any application to be made for Reporting Restrictions? No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>Direction:</p> <p>Media representatives to be notified of application by date:</p>	

Issues of Law		
<p>49.1 Are there legal issues to be decided before the board is sworn? No <input type="checkbox"/> Yes <input type="checkbox"/> →</p> <p>If so, should they be heard: immediately before the main trial? <input type="checkbox"/> or at a separately arranged hearing? <input type="checkbox"/> (See serial 51 below for listing directions)</p>	<p>State them:</p>	
<p>49.2 Prosecution witness(es) required for any hearing ordered under serial 49.1? No <input type="checkbox"/> Yes <input type="checkbox"/> → (See Annex A for list)</p>		
<p>49.3 Skeleton arguments:</p> <p>On behalf of Prosecution/Defence by date:</p> <p>Any in response by date:</p>		

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<p>49.4 Any further Directions required:</p>	<p>Directions:</p>
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Part E Only if NOT GUILTY Plea – Trial Fixture

<p>50.1 Are there any special matters affecting the trial date e.g. dates to avoid, level of urgency</p> <p>No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>State them:</p>	
<p>50.2 Is the availability of a specific prosecutor or a specific defence advocate a consideration in listing?</p>	<p>Prosecution dates to avoid / “not before” date:</p>	<p>Defence dates to avoid / “not before” date:</p>
<p>50.3 Estimated length of each party’s case:</p>	<p>Prosecution:</p>	<p>Defendant:</p>
<p>50.4 Any further submissions re the trial date to be sent to MCS (to pass to judge) by date:</p>		
<p>51.1 Directions re trial date:</p>	<p>Trial start date / dates bracket / not before date:</p>	<p>Time estimate:</p>
<p>51.2 Venue</p>	<p>Preferred / required trial venue:</p>	
<p>51.3 Minimum Number of lay members on the board required by the Rules</p>	<p>Three lay members <input type="checkbox"/> Five lay members <input type="checkbox"/></p>	
<p>51.4 Actual Number of lay members on the board directed by the Judge Advocate</p>	<p>Three <input type="checkbox"/> Four <input type="checkbox"/> Five <input type="checkbox"/> Six <input type="checkbox"/> Seven <input type="checkbox"/></p>	
<p>52. Is it necessary to hold further Preliminary Proceedings or an arraignment / Plea & Case Management Hearing?</p> <p>No <input type="checkbox"/> Yes <input type="checkbox"/> →</p>	<p>Directions re arrangements, timing, issues:</p>	



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ANNEX G TO
VOL2 CH 29
JSP 830 MSL
revised 08/09

**FORM OF APPLICATION FOR
A WITNESS SUMMONS** T-SL-CM04

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009 rule 63

To Court Administration Officer at;

This is an application by the person named in section 1 for a witness summons to require the person named in section 3 to give evidence produce the document(s) produce the object(s) described in that section. (applicant to select all that apply)

A written application may not be required: rule 63(6). The judge advocate may dispense with service on the proposed witness or give directions for service on others.

Notice to a person served with this application: if you are named in section 3 and you object to being required to produce in evidence the document or object identified in section 3 on the grounds that it is not likely to be material evidence or even if it is, your duties or rights (including rights of confidentiality) or such duties or rights of any person to whom the document or object relates outweigh the reasons for issuing a witness summons, tell the court administration officer at the above address, at once.

If you want to take legal advice about this application, you should do so at once.

The applicant must complete sections 1 to 5.

1. Details of applicant

Name

Address

2. Case details

Name of accused

Case No.

Offences charged

Date of trial (if known)

Trial location (if known)

Date(s) witness likely to be required

3. Details of application

Identity of proposed witness

Name(s) and address(es) of other people served with this application (if any)

What is the nature of the evidence the proposed witness can give/produce?

Empty response box for the first question.

Why is that evidence likely to be material to what is in issue in the case?

Empty response box for the second question.

Why would it be in the interests of justice for the judge advocate to issue a witness summons?

Empty response box for the third question.

If the application concerns: (a) a document/documents; or (b) information apparently held in confidence about someone else, the applicant must identify the person to whom it relates and explain why he/she thinks the judge advocate should issue a witness summons despite any apparent confidentiality of the document(s)/information.

4. Time

When did the applicant become aware of the grounds for making this application?

Explain any delay since that date

5. Declaration

The statements contained in this application are true to the best of my knowledge and belief. I apply for the issue of a witness summons requiring the proposed witness to:

give evidence produce the object(s) produce the document(s)

described in section 3. (select all that apply)

Signed

Dated



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ANNEX H TO
VOL2 CH 29
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revised 08/09

SUMMONS TO WITNESS

T-SL-CM05

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009
rules 63 and 65

To

Name

Rank/Rate

ship/unit/establishment/address

Regarding

Name of the defendant

You are hereby summonsed to appear on

Date

Time

at the address

2-29-H-1

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To

- Give evidence
- Produce the document[s] or thing[s] specified in Part 1 of the Schedule below

- at preliminary proceedings
- at the trial
- at the sentencing proceedings

of the above-named person

You are hereby summonsed to appear on

on Date

at Time

at the address

to produce the document[s] or thing[s] specified in Part 2 of the Schedule below

You will wish to note that failure to comply with this summons may result in the issue of a warrant for your arrest.

Judge advocate

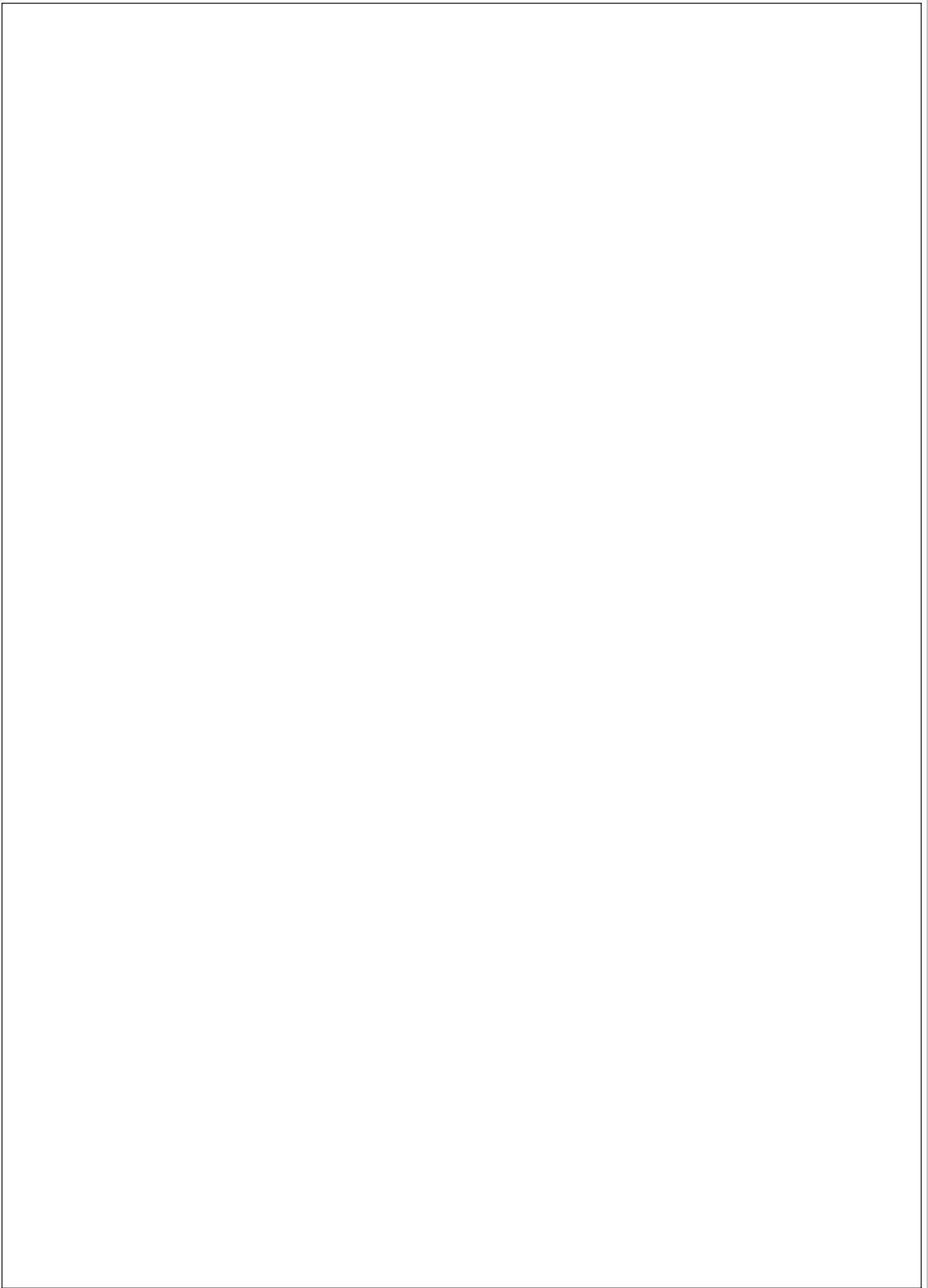
Signature

Date

Part 1-Documents etc. to be produced only at the hearing

A large, empty rectangular box with a thin black border, occupying the central portion of the page. This box is intended for listing documents or other evidence to be produced at the hearing.

Part 2-Documents etc. to be produced prior to as well as at the hearing



Acknowledgement of receipt of Summons to a witness

In the matter of (Name of defendant)

I (full name of witness in BLOCK CAPITALS)

acknowledge receipt of the summons to me to attend

at address

on Date

at Time

Signature

Date

Return to: Court Administration Officer (address)

Intentionally left blank



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ANNEX I TO
VOL2 CH 29
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**ORDER BY JUDGE ADVOCATE TO PERMIT
INSPECTION OF BANKERS' BOOKS**

T-SL-CM06

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009 rule 71

Order by Judge Advocate to Permit Inspection of Bankers' books

To (name of bank)

Regarding the accounts of the defendant (full name)

Whereas the Secretary of State under the powers conferred on him by section 163 of the Armed Forces Act 2006 has directed that the powers conferred by section 7 of the Bankers' Books Evidence Act 1879 may be exercised for the purposes of proceedings before the Court Martial by a judge advocate, and having received from below mentioned, an application to inspect and take copies of entries in the books of the above mentioned bank relating to the accounts of the above specified defendant, I do now, in exercise of the powers conferred on me as a judge advocate, order that the below specified individual or any other person acting on his behalf may inspect and take copies of any entries in any books in the possession of the above mentioned bank accordingly.

Service Number (applicant)

Rank/Rate (applicant)

First name (applicant)

Family name (applicant)

Judge Advocate

Date

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ANNEX J TO
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SUMMONS TO A BANK MANAGER

T-SL-CM07

Armed Forces Act 2006 section 163; The Armed Forces (Court Martial) Rules 2009
rules 63 and 65

To the Manager

Name of bank

In the matter of

First name

Family name

Service number

Rank/Rate

Address (Ship/unit/establishment/address)

I have been informed that you have in your control certain documents which are material to the trial by the Court Martial of the above defendant namely

Description of documents

2-29-J-1

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By virtue of the power given to me by section 163 of the Armed Forces Act 2006 and

- Rule 63 of the Armed Forces (Court Martial) Rules 2009
- Rule 65 of The Armed Forces Act (Court Martial) Rules 2009

I summon you to attend at the

- preliminary proceedings
- trial

At the address;

Date

Time

And to produce a copy of such entries in the books of the bank, and to prove the description of each such book, whether such book was at the time of making of such entry one of the ordinary books of the bank, whether it is in the custody and control of the bank, whether each such entry was made in the ordinary course of the business, and to prove that you have examined the entries and compared such copy with the original, together with such facts concerning the bank as are set out in section 9 of the Bankers' Book Evidence Act 1879,

and so to attend from day to day until you shall be duly discharged

(Note: If you, or a duly authorized officer of the bank, make an affidavit proving all the above matters, in accordance with the Bankers' Books Evidence Act 1879 (enclose relevant paragraphs), and exhibit to reach me by the

Date

the order for you to attend the Court Martial proceedings and give evidence will be withdrawn.)

You will wish to note that failure to comply with this summons may result in the issue of a warrant for your arrest. You are to sign, detach and return the receipt slip below.

Acknowledgement of Receipt of Summons to a Bank Manager

In the matter of (name of defendant)

I (full name of witness in BLOCK CAPITALS)

acknowledge receipt of the summons to me to attend

at (location)

on (Date)

signature

Date



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ANNEX K TO
VOL2 CH 29
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NOTICE OF INTENTION TO ADDUCE EVIDENCE OF BAD CHARACTER

T-SL-CM08

Section 101 of the Criminal Justice Act 2003

1. Details of party giving notice

Name

Whether DSP or co-defendant

2. Case details

Name of defendant(s)

Name of judge advocate (where appointed)

Date the Court Martial is due to convene

Give brief details of the charge or charges to which this application applies

2-29-K-1

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3. Details of this Notice

To the named defendants: You are hereby given notice that bad character evidence, particulars of which are detailed below, is to be adduced or elicited in these proceedings.

The particulars of that bad character evidence are as follows.

In this section state: (a) a description of the bad character evidence and how it is to be adduced or elicited in the proceedings (including the names of any relevant witnesses); and (b) the grounds for the admission of evidence of the defendant's bad character under section 101 of the Criminal Justice Act 2003. Please attach any relevant documentation.

4. Extension of time

Are you applying for an extension of time for Service? Yes No

If yes, state your reasons

5. Signature of party signing notice

Signed

Dated

Intentionally left blank



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ANNEX L TO
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APPLICATION TO EXCLUDE EVIDENCE OF THE DEFENDANT'S BAD CHARACTER

T-SL-CM09

Criminal Justice Act 2003 sections 101(3) and 108(2)

1. Details of the defendant

Name

Date of birth

Address (Ship/unit/establishment/address)

2. Case details

Date the Court Martial is due to commence

Give brief details of the charge or charges to which this application applies

Charge(s)

Date that you were served with the notice that bad character
evidence is to be adduced in these proceedings

2-29-L-1

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3. Details of this application

Include the following information:

(a) why the admission of bad character evidence would have such an adverse effect on the fairness of the proceedings that the court should not admit it;

(b) details as to the length of time between the matters to which the bad character evidence relates and the matters which form the subject of the offence charged;

(c) if you are applying for the exclusion of this evidence on grounds other than section 101(3) of the Criminal Justice Act 2003, please set out such objections.

Note that an application to exclude this evidence under section 101(3) of the 2003 Act can only be made if you have been notified of a party's intention to adduce this evidence under section 101(1)(d) (it is relevant to an important matter in issue between the defendant and the prosecution) or subsection 101(1)(g) (that the defendant has made an attack on another person's character).

Section 101(4) of the Criminal Justice Act 2003

4. Extension of time

Are you applying for an extension of time for Service? Yes No

If yes, state your reasons

5. Signature of defendant

Signed

Dated

Intentionally left blank



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ANNEX M TO
VOL2 CH 29
JSP 830 MSL
revised 08/09

**APPLICATION FOR LEAVE TO ADDUCE
EVIDENCE OF THE BAD CHARACTER OF A
PERSON OTHER THAN A DEFENDANT**

T-SL-CM10

Criminal Justice Act 2003 section 100

1. Details of applicant

Rank/Rate

Name

Service No. (if applicable)

Ship/unit/establishment/address

2. Case details

Name of defendant(s)

Name of judge advocate (where appointed)

Date the Court Martial is due to commence

Give brief details of the charge or charges to which this application applies

2-29-M-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

3. Details of this application

Section 100 of the Criminal Justice Act 2003.
Please attach any relevant documentation.

Please provide the following details:

(a) the particulars of the bad character evidence including how it is to be introduced or elicited in the proceedings. This should also include the names of the relevant non-defendant and all other relevant witnesses; and

(b) the grounds of admissibility under section 100 of the Criminal Justice Act 2003.

4. Extension of time

Are you applying for an extension of time for Service? Yes No

If yes, state your reasons

5. Signature of applicant

Signed

Dated

Intentionally left blank



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ANNEX N TO
VOL2 CH 29
JSP 830 MSL
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NOTICE OF INTENTION TO INTRODUCE HEARSAY EVIDENCE

T-SL-CM11

Criminal Justice Act 2003 section 114

1. Details of party giving notice

Name

Whether DSP, defendant or co-defendant

2. Case details

Name of defendant 1

Name of defendant 2

Name of defendant 3

Name of defendant 4

Name of defendant 5

Name of defendant 6

Name of judge advocate (where appointed)

Date the Court Martial is due to commence

Give brief details of the charge or charges to which this application applies

2-29-N-1

PROTECT - PERSONAL DATA (WHEN COMPLETE)

3. To the named recipient(s) of this notice

I give you notice of my intention to introduce hearsay evidence, details of which are set out below, in these proceedings

[Empty box for details of hearsay evidence]

4. Grounds for introducing the hearsay evidence

On which of the following grounds do you intend to introduce the hearsay evidence?

- (1) it is in the interests of justice for it to be admissible
- (2) the witness is unavailable to attend
- (3) the evidence is contained in a business etc. document
- (4) the evidence is multiple hearsay

Select as appropriate to show which of sections 114(1)(d), 116, 117 or 121 of the Criminal Justice Act 2003 you rely on to introduce the evidence.

Where ground (1) is relied on, specify below which of the factors set out in section 114(2) are relevant and explain how they are relevant.

5. Further details of grounds

6. Details of hearsay evidence

Give brief details of the evidence that you want to introduce as hearsay evidence. A complete copy of that evidence must be attached to this notice, if it has not already been served on the other parties.

The details of the hearsay evidence are as follows

7. Extension of time

Are you applying for an extension of time for Service? Yes No

If yes, state your reasons

8. Signature of party giving notice

Signed

Dated



MINISTRY OF DEFENCE

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ANNEX O TO
VOL2 CH 29
JSP 830 MSL
revised o8/09

NOTICE OF INTENTION TO OPPOSE ADMISSION OF HEARSAY EVIDENCE

T-SL-CM12

Criminal Justice Act 2003 section 114

1. Details of party opposing the admission of hearsay evidence

Name

Ship/unit/establishment/address

Whether DSP, defendant or co-defendant

2. Case details

Date the Court Martial is due to commence

Date that you were served with the notice of intention to
adduce hearsay evidence:

Charge(s)

2-29-0-1

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3. Details of this notice

Give a description of the hearsay evidence that you want to exclude from the proceedings. Specify whether you object to all or part of that evidence.

Set out the grounds for excluding the hearsay evidence that you object to. Any relevant skeleton argument or case law that might bear on the issue may be attached to this notice.

Include the following information:

(a) details of the hearsay evidence that you want to exclude

(b) grounds for excluding the evidence

4. Extension of time

Are you applying for an extension of time for Service? Yes No

If yes, state your reasons

5. Signature of party giving notice

Signed

Dated

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OATHS AND AFFIRMATIONS²⁷⁴

Part 1 - Manner of administering oaths and affirmations

1. The person taking the oath shall hold the New Testament, or if a Jew the Old Testament, in his uplifted hand and shall say, or repeat after the person administering it, the oath provided in Part 2 of this annex for that category of person.
2. If any person to whom an oath is administered desires to swear in the form and manner in which an oath is usually administered in Scotland, he may do so with uplifted hand and saying or repeating after the person administering it, the Scottish oath provided in Part 3 of this annex for that category of person.
3. If a person objects to swearing an oath he shall be permitted to make a solemn affirmation instead of taking an oath as provided in Part 4 of this Annex. In a case where it is not reasonably practicable, without convenience or delay to administer an oath in the manner appropriate to a person's religious belief, he shall be permitted to make a solemn affirmation instead of taking an oath. Moreover, in such a case the person may be required to make a solemn affirmation.

Part 2 - Forms of oath

Lay members

I swear by Almighty God that I will well and truly try the defendant before the court according to the evidence; I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law.

Lay members in appellate proceedings

I swear by Almighty God that I will well and truly try the appellant before the court according to the evidence; I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law.

For lay members in other proceedings

I swear by Almighty God that I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law.

Persons in attendance for instruction

I swear by Almighty God that I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law.

Witness

I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

²⁷⁴ Armed Forces (Court Martial) Rules 2009 Schedule 1.

Interpreter

I will well and faithfully interpret and make true explanation of all such matters and things as shall be required of me according to the best of my skill and understanding.

Part 3 – Form of Scottish oath

The form of Scottish oath for a witness is 'I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth'²⁷⁵

Part 4 - Form of solemn affirmation

I [full name] do solemnly, sincerely and truly declare and affirm the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

²⁷⁵ For Scottish oaths in criminal proceedings see the Act of Adjournal (Criminal Proceeding Rules) 1996. SI 1996/513

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**Annex Q to
Vol 2 Ch 29
JSP 830 MSL**

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**COURT MARTIAL
RECORD OF PROCEEDINGS AND TRIAL RESULT NOTIFICATION**

One TRN1 form is required for each defendant

A. TRIAL DATA	OJAG Case Reference Number: _____		
Defendant's Service: <small>Delete not applicable</small>	Royal Navy / Royal Marines / Army / Royal Air Force / Civilian		
Location:	Held at _____		
All Dates of Trial Proceedings: <small>Do not include arraignment or preliminary proceedings</small>	First day 20.... Continuing on (list dates) Last day20....		
B. DEFENDANT	Surname, first name(s)	Rank/Rate	Service number
Ship/Unit/Station:	Capbadge <small>(Army only)</small>		
C. CHARGES, PLEA & FINDING <small>This is the record of plea and finding required by The Armed Forces (Court Martial) Rules 2009, Rules 23 & 110</small>	Charge(s): <small>(Must be listed briefly – NOT "see attached")</small>	Plea:	Finding or other outcome: <small>(including: judge accepts Guilty plea; prosecution offers no evidence; etc)</small>
	1.		
	2.		
	3.		
	4.		
	5.		
	6.		
	7.		
	8.		
	9.		
Attach a copy of the charge sheet(s)	10.		
Use a continuation sheet if necessary			

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D. SIGNATURES		Findings form to be checked, signed & dated by the Judge Advocate and the President of the Board	
Judge Advocate at Arraignment: Print name		Signed	Date signed
Judge Advocate at contested trial, if any: Print name		Signed	Date signed
President of the Board at contested trial: Print name & rank		Signed	Date signed

OJAG Case Reference Number:	Defendant (Surname)	
E. SENTENCE The CM was:	at the ELECTION of the Defendant?	<input type="checkbox"/> DIRECTED by the DSP? <input type="checkbox"/>
<p>If ELECTION, AFA06 s131 & AF(CM)R09 r161 require a global sentence for all offences</p> <p>If DIRECTED, AFA06 s255 requires a separate sentence for each offence</p>	How many days spent in pre-trial custody (if any) are to be counted towards the sentence?days	

PROTECT – PERSONAL DATA (WHEN COMPLETED)

This is the record of sentence(s)
required by The Armed Forces
(Court Martial) Rules 2009, Rules
23 & 117

Give numbers in words and figures
Use a continuation sheet if
necessary

--	--

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OJAG Case Reference Number:	Defendant (Surname)		
F. SEX OFFENDER			
Is a certificate under Sexual Offences Act 2003 attached to TRN1?		YES	NO
Fax certificate only to the relevant Service staff branch below and the Service Police Crime Bureau		<input type="checkbox"/>	<input type="checkbox"/>
G. DIRECTIONS of Judge Advocate for post-trial follow-up action, if any. Directions as to costs to be on separate form			
H. SIGNATURES		Sentence form to be checked, signed & dated by the Judge Advocate and the President of the Board	
Judge Advocate at sentence: Print name	Signed	Date signed	
President of the Board: Print name & rank	Signed	Date signed	

I. FOR OFFICIAL USE	Defendant's time for appeal expires.....20.....		
	Duration of trial in hearing days Count part of a day as a day		
If Service Compensation Order was made: Give victim's full name, number, unit or home address as applicable & amount	Victim details	Amount in £	
Official completing to print name:	Signed	Date signed	

Court Officer must fax the completed TRN1 immediately to:

All cases: MCS - 94344 8060; CMRS - 94344 8048; AFCLAA - 94344 5691; SPCB - 93835 5244; OSC(A) (PTS) - 94344 8053; plus if
RN or RM defendant: FLEET (DCS Law) - 93832 5755
RAF defendant: HQ Air Comd (Air Pers Casework) - 95221 6853
Custodial sentence case: MCTC - 94660 6708

When case is concluded, return file with the original of this Record of Proceedings to:
 Office of the Judge Advocate General



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INFORMATION FOR SERVICE COURTS

T-SL-SC01

This information is solely for the purposes of sentencing if guilt is established and is to be used only for that purpose. It has no relevance to the charge, the plea, or the process at a contested trial.

Section 1

Service number

Rank/Rate

Name and initials

Branch/Trade/Group

Date entering service

Section 2

Type engagement

Expiry date

Section 3

Date of birth

Age

Section 4 Personal status

Single

Divorced/dissolved

Number of dependant children

Married/civil partnership

Widowed

Section 5

Details of pay, (terminal benefits and future pension) are shown on Schedule 1 to this form.

Details of pay, (terminal benefits and future pension) not required for the SAC

Section 6

Ship/unit/establishment at which he/she will be serving on date of trial/hearing

Trial/Hearing Date

Section 7

He/She is entitled to the following decorations and awards

The following acts of gallantry or distinguished conduct are recorded on his/her formal discipline record

Section 8

He/she holds the substantive rank of

with seniority date of

he/she is qualified to the rank of

and has held the acting rank of

with seniority date of

Section 9

Total accountable days in Service Custody/remand/civil custody

Period of Custody from Date

Period of Custody to Date

Section 12

Schedule 2 to this form sets out details of any of the following matters which appear in the defendant's disciplinary record namely: Offences, including civil police cautions, previously committed by him/her. These offences include offences of which he/she has been convicted by a court prior to his/her enlistment or offences of which he/she has been convicted by Court Martial or by a court other than a Court Martial and found guilty during his/her Service, offences taken into consideration by such courts, and offences found proved at a summary hearing.

Section 13

I hereby certify that the particulars stated above and in the attached schedule are true extracts from the records in my custody.

The information is accurate to date

Signed

Name (printed)

Rank/Rate

Appointment

Date

Schedule 1 - Pay and deductions

Income

Basic Entitlement (Gross)	Daily rate
Additional daily pay on continuous basis (eg SSP/LOA etc)	Daily rate

Deductions

Standard: (eg Accommodation, Food, CILOCT)	Daily rate
Additional deductions (maintenance etc):	Daily rate

Pensions & Terminal Benefits (not required for the SAC)

Exit Type	Date	Immediate Entitlements (Subject to 16 yrs reckonable service for officers, 22 yrs Other Ranks AFPS 75, or aged 40 or over and served at least 18 years AFPS 05)	Preserved Entitlements (at age 60 AFPS 75 or age 55 AFPS 05)	Immediate Resettlement Grant*
Completion of Current Engagement		Pension;	Pension;	
Completion of Current Engagement		Terminal Grant;	Terminal Grant;	
Immediate Dismissal		Pension;	Pension;	
Immediate Dismissal		Terminal Grant;	Terminal Grant;	

*Payable to officers who have completed a minimum 9 years reckonable service and 12 years for ratings/other ranks, but insufficient years service to qualify for immediate pension benefits.

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Chapter 30

Sentencing principles, powers and effects

Sentencing principles

1. The Armed Forces Act 2006 (the Act) makes provision¹ in respect of sentencing principles that must be applied at the Court Martial (CM). These principles largely reflect those to be found in the Criminal Justice Act 2003 and which are followed in the civilian criminal courts in England and Wales.
2. Sentencing principles that are applied at the CM are set out in 'Sentencing in Courts Martial: A Short Guide' (The Guide) which is issued by the Office of the Judge Advocate General. That guide is intended to help all concerned in the sentencing of those found guilty at the CM and has been updated to reflect the legislative changes made by the Act in respect of sentencing principles. The Guide can be found in Volume 3 of the MSL.

Sentencing and orders – powers

3. The Act sets out the punishments and orders available to the CM and Service Civilian Court (SCC) when passing sentence. Guidance on these provisions² is contained in The Guide, see paragraph 2 above.

Sentencing – effect of certain sentences

4. Provisions³ of the Act and subordinate legislation⁴ clarify the effects consequent upon the passing by the CM or SCC of certain sentences. Guidance on these provisions is contained in The Guide, see paragraph 2 above.

¹ Sections 237 to 259 of the Act.

² Sections 164, 173 to 236, 282 to 284 and Schedule 3 of the Act.

³ Sections 289 to 304 of the Act.

⁴ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009/1215.

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Chapter 31

Court Martial appeal

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Chapter 31

Court Martial appeal

Part 1 - Introduction

1. This chapter summarises the situations in which appeals may be made from the Court Martial (CM) to the Court Martial Appeal Court (CMAC), and outlines the powers of the CMAC on appeal. It also summarises the procedure to be followed when making an appeal and time limits for appeal, but it does not contain detailed guidance on the law relating to appeal. It is intended primarily for the use of those convicted and sentenced by the CM as a guide to their options for appeal, and for those facing CM proceedings to understand the effect on those proceedings of appeals by others (e.g. the prosecution). Appeal from the CM is a specialist area of law and in all cases legal advice should be sought before submitting an appeal.

2. The CMAC was established by the Courts-Martial (Appeals) Act 1951 for the purpose of hearing appeals from Naval, Army and RAF Courts Martial and is a superior court of record. The judges of the CMAC are normally two or three judges drawn from the Court of Appeal (Criminal Division) and they sit in the High Courts of Justice on The Strand in London. The circumstances in which appeals may be made to this court and the procedures to be followed are contained in the Courts-Martial (Appeals) Act 1968 (c.20) as amended, and the Court Martial (Appeal) Rules 2009. The procedural rules for appeal to the CMAC are contained in the Armed Forces (Court Martial) Rules 2009.

3. Part 1 of this chapter is the introduction. Part 2 deals with the situations in which an application for leave to appeal may be made and the powers of the CMAC in each circumstance, including references made by the Criminal Cases Review Commission and the Attorney General. Part 3 deals with the appeal procedure, bail, costs, legal aid and reporting restrictions relating to appeal. Part 4 deals with special references to the CMAC by a judge advocate. Finally, Part 5 explains the circumstances for appeal from the CMAC to the Supreme Court.

Part 2 - Rights of appeal

Appeal against conviction

4. **Leave to appeal and referral.** A person convicted by a CM may only appeal to the CMAC with the leave of the CMAC. The appeal may be against conviction and against any sentence (where the sentence is not fixed by law) passed on him for the offence for which he was convicted¹. This includes where the conviction or sentence arose as a result of an appeal from the Service Civilian Court². In addition the Criminal Cases Review Commission may refer a case to the CMAC³, see [Chapter 35](#) (The powers of the Criminal Cases Review Commission).

5. **Power to quash conviction.** If the CMAC gives an appellant leave to appeal, the appeal will be heard by the CMAC. At a hearing of the appeal, the CMAC must allow an appeal against conviction if it thinks that the finding of the CM in all the circumstances of the case is unsafe⁴. In all other cases the CMAC must dismiss the appeal.

6. **Power of the CMAC on quashing a conviction.** If the CMAC allows an appeal against a conviction it will quash the conviction and the appellant will be treated as if he had been acquitted by the CM unless there is a re-trial⁵. The CMAC has the power to authorise a re-trial, in which case it will be a matter for the Director of Service Prosecutions (DSP) to decide whether a re-trial is appropriate. The CMAC also has the power to direct a re-trial. If it does so it may direct a re-trial on a different charge(s) to that on which the appellant was originally convicted. Where the appellant was convicted of two or more charges and the CMAC quashes some convictions but not all, it may substitute any sentence(s) which the CM could have passed. However, the sentences for the remaining convictions, taken together, must not be more severe than those passed by the CM (including those passed in respect of convictions that are now quashed)⁶.

7. **Alternative finding.** Where the appellant has been found guilty of an offence to which he did not plead guilty, the CMAC has the power to substitute a finding of guilty to another offence on which the CM could have found the appellant guilty, provided the CM must have been satisfied of the facts which prove him guilty of that other offence. It may then award an appropriate sentence for that offence, but the court cannot pass a sentence of greater severity than the original sentence⁷.

8. **Insanity and unfitness to stand trial.** The CMAC has the power to make various findings on appeal in relation to insanity and unfitness to stand trial. Legal advice should be sought in all cases in which such matters arise⁸.

Appeal against sentence and commencement of sentence on appeal

9. As with appeal against conviction, appeal against sentence of the CM requires the leave of the CMAC. If the appeal is successful the CMAC may substitute any sentence the Court thinks is appropriate, but it must not be of greater severity than that for which the sentence is substituted. An appeal against a sentence passed on single occasion by the CM will be treated as an appeal in respect of sentences passed in relation to all of the sentences

¹ Courts-Martial (Appeals) Act 1968 (c.20) section 8.

² Armed Forces Act 2006 (The Act) section 287(4).

³ Criminal Appeal Act 1995 section 9, and section 321 and Schedule 2 of the Act.

⁴ Courts-Martial (Appeals) Act 1968 (c.20) section 12.

⁵ Courts-Martial (Appeals) Act 1968 (c.20) section 19.

⁶ Courts-Martial (Appeals) Act 1968 (c.20) section 13.

⁷ Courts-Martial (Appeals) Act 1968 (c.20) section 14.

⁸ See Courts-Martial (Appeals) Act 1968 (c.20) sections 16, 21 and 22.

passed on that occasion. In this circumstance the CMAC may not substitute a sentence with one which, when taking the case as a whole, causes the appellant to be dealt with more severely on appeal than he was dealt with by the CM⁹.

10. Unless the CMAC orders otherwise, a sentence passed on appeal takes effect from the day on which the CM passed sentence. However, if the CMAC, on dismissing an application for leave to appeal, considers the application to have been frivolous or vexatious, it may direct that any sentence passed on the applicant by the CM shall begin to run again from the day on which the CMAC dismisses the application. This sanction acts as a disincentive to submitting hopeless appeals.

Appeals against restrictions on public access and reporting

11. Any aggrieved person may, with the leave of the CMAC, appeal against any order or direction restricting access or reporting¹⁰. Such appeals are usually made by the media, but potentially any person can appeal, including the prosecution where the result of the order or the direction is that it will be unable to present its case (eg. because of a risk to national security) or for any other appropriate reason. Where leave to appeal has been sought during preliminary proceedings those proceedings may continue pending the determination or abandonment of the appeal, but related proceedings cannot begin until that time¹¹. The effect of such an appeal is therefore that a CM trial cannot take place until the CMAC has determined the appeal. See the Court Martial Appeal Court Rules 2009 for the powers of the CMAC on an appeal against such an order or direction.

Prosecution appeals against rulings

12. The prosecution has the right of appeal to the CMAC where a judge advocate makes a ruling in relation to a trial by the CM¹². If the prosecution appeal against a ruling is unsuccessful, the defendant will be acquitted on the charge(s) to which the ruling relates. For this reason such an appeal is sometimes referred to as an appeal against a terminating ruling. The prosecution may request an adjournment to consider whether to appeal against a ruling made during a trial by CM. If the prosecution does appeal against a ruling, that ruling will have no effect while the appeal against it is pending. Proceedings may, however, be continued in respect of any other charge which is not the subject of the appeal whilst awaiting the appeal or the prosecution's decision whether to appeal. The CMAC may confirm, reverse or vary any ruling to which the appeal relates¹³.

Referral by the Criminal Cases Review Commission

13. The Criminal Cases Review Commission is an independent public body, set up in 1997 by the Criminal Appeal Act 1995. The Commission reviews possible miscarriages of justice in the criminal courts, including Courts Martial's of England, Wales and Northern Ireland and refers appropriate cases to the appeal courts¹⁴. A reference to the CMAC by the Criminal Cases Review Commission is treated as an appeal by the person under section 285 of the Armed Forces Act 2006 (the Act) against the conviction or sentence as appropriate. See also [Chapter 35](#) (The powers of the Criminal Cases Review Commission).

Unduly lenient sentences

⁹ Courts-Martial (Appeals) Act 1968 (c.20) section 16A.

¹⁰ Armed Forces (Court Martial) Rules 2009 rule 154.

¹¹ Armed Forces (Court Martial) Rules 2009 rule 50.

¹² The Court Martial (Prosecution Appeals) Order 2009, article 4.

¹³ The Court Martial (Prosecution Appeals) Order 2009, article 7.

¹⁴ Criminal Appeal Act 1995 section 9 and Schedule 11 article 1 of the Act.

14. If the Attorney General considers that a sentence or any other order made by a CM in dealing with an offender in respect of an AFA 06 s.42 offence (criminal conduct) is unduly lenient and either:

- a. The corresponding offence under the law of England and Wales, if committed by an adult, is triable only on indictment, or
- b. The case is of a description specified for the purposes of AFA 06 s.273 in an order made by the Secretary of State

he may, with leave of the CMAC, refer the case to the CMAC for it to review the sentencing of the offender¹⁵. However, this power does not extend to a sentence passed by the CM on appeal from Service Civilian Court. If the Attorney General makes such a reference to the CMAC, the CMAC may quash the sentence passed by the CM and substitute another sentence.

Implementation of sentence whilst awaiting appeal

15. The initiation of an appeal does not affect the validity of the sentence of a CM. CM sentences take effect from the date of award unless the sentence is suspended, postponed or to be served consecutive to another sentence of imprisonment or detention.

¹⁵ Section 273 of the Act.

Part 3 - Appeal Procedure

Procedural rules

16. The rules for making an application for leave to appeal, time limits and the conduct of appeals to the CMAC are contained in the Court Martial Appeal Court Rules 2009.

Bail pending appeal

17. The CMAC may grant or revoke bail pending appeal and vary the conditions of bail¹⁶. A single judge may exercise the powers of the court in relation to bail but in the event that the single judge refuses an application by an appellant, the appellant¹⁷ is entitled to have the application reconsidered by a full CMAC. Application for bail to be granted, revoked or varied may be made by the appellant, the DSP or a surety or on reference to the court by the Registrar. Bail cannot be granted, except in exceptional circumstances, to appellants convicted of any of the offences listed in section 25(2) of the Criminal Justice and Public Order Act 1994 (c.33) or an offence under other legislation corresponding to such an offence, where the appellant has previously been convicted of such an offence¹⁸. The time during which an appellant is released on bail does not count as part of the term of detention or imprisonment.

Costs

18. Where the CMAC upholds the appeal, it may, if it thinks fit, direct the payment by the Secretary of State of such sums as appear to the Court reasonably sufficient to compensate the appellant for any expenses properly incurred by him in the pursuance of his appeal (including any proceedings preliminary or incidental thereto) and in carrying on his defence before the CM by which he was convicted. Similarly, where the CMAC dismisses an appeal or an application for leave to appeal, it may, if it thinks fit, order the appellant or applicant to pay the Secretary of State the whole or part of the costs of the appeal or application.

Legal aid

19. An appellant may apply to the CMAC for legal aid for an appeal. See JSP 838 (The Armed Forces Legal Aid Scheme).

Restrictions on reporting of appeals during CM proceedings

20. Reporting restrictions apply where the prosecution appeal or make an application for leave to appeal against a ruling unless either the judge advocate, the CMAC or the Supreme Court orders otherwise. The restrictions apply until the conclusion of the CM proceedings.

¹⁶ The Court Martial Appeal Court (Bail) Order 2009/992.

¹⁷ Using the Form at the Schedule to The Court Martial Appeal Court (Bail) Order 2009/992.

¹⁸ The Court Martial Appeal Court (Bail) Order 2009 SI 2009/992, article 4.

Part 4 - Special reference to the court

21. The Judge Advocate General may make a special reference¹⁹ to the CMAC if it appears to him that the finding of a CM involves a point of law of exceptional importance. The Secretary of State may also make a special reference to the CMAC if it appears to him, on consideration of matters appearing to him to have not been brought to the notice of the CM at the trial, to be expedient that the finding of the CM should be considered or reconsidered by the CMAC. A special reference to the CMAC in this manner is treated, except for costs, as an appeal by the person convicted against his conviction. The Secretary of State may refer the sentence passed on any person convicted by a CM to the CMAC and any such reference is treated, except for costs, as an appeal by the person convicted against sentence.

¹⁹ Courts-Martial (Appeals) Act 1968 section 34.

Part 5 - Appeal to the Supreme Court

22. Either the accused or the DSP may appeal to the Supreme Court against any decision of the CMAC²⁰. Leave to appeal to the Supreme Court may be granted by the CMAC or the Supreme Court but shall not be granted unless it is certified by the CMAC that a point of law of general public importance is involved in the decision and it appears to the Court or the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

23. An application for leave to appeal to the Supreme Court must be made to the CMAC in the first instance, generally within a period of 28 days beginning with the date of the decision which it is desired to appeal²¹. If the CMAC determines that the appeal is a point of law of general public importance but rules that it is not a point that ought to be considered by the Supreme Court, then application may be made to the Supreme Court within a period of 28 days from the date of the CMAC's refusal. If the CMAC determines that the appeal does not concern a point of law of general public importance, no further proceedings may be taken. The CMAC or the Supreme Court may grant an appellant an extension of time to make an application.

²⁰ Court-Martial (Appeals) Act 1968 (c.20) section 39.

²¹ The Courts-Martial (Appeals) Act 1968 section 40.

Chapter 32

Service Civilian Court

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Chapter 32

Service Civilian Court

Introduction

1. **Legal status.** The Service Civilian Court (SCC) is a court created by statute¹, which may sit anywhere outside the UK to try a case allocated to it by the Director of Service Prosecutions (DSP). It consists of a judge advocate sitting alone and resembles the situation of a magistrates' court sitting with a District Judge instead of a lay bench.

2. **Functions and powers.** The SCC is restricted to trying civilians subject to Service discipline (relevant civilian) (for definitions of civilians subject to Service discipline, see [Chapter 3](#) (Jurisdiction and time limits), paragraphs 17 – 33. In the main, especially when trying adults, the SCC will deal with less serious criminal conduct offences (i.e. those which are not indictable in the courts of England and Wales² or do not have aggravating features), and other Armed Forces Act 2006 (the Act) offences which are applicable to relevant civilians³. However when it tries a juvenile, the SCC has the same powers as the Youth Court in England and Wales and therefore has the power to try all but a small handful of homicide and firearms offences.

3. **Referral to the Court Martial (CM).** The DSP will allocate more serious offences, or offences where there are relevant civilian and Service co-accused, for CM trial. However, even when the DSP has allocated a case for trial at the SCC, the judge advocate may decline jurisdiction if he considers it appropriate to do so (see paragraph 17 below). In this situation the case will be tried by the CM.

4. **Time limits.** For any offence committed under section 42 of the Act (criminal conduct), the trial must start within the time limit that exists for that offence within the criminal law of England and Wales. In addition, where a person subject to Service discipline ceases to be so subject after having allegedly committed an offence, any trial must start within six months from the date on which the offender ceased to be subject to Service discipline⁴, unless special dispensation is granted by the Attorney General⁵.

Preliminaries

5. **Charging.** A case will not be allocated to the SCC unless the DSP has issued a direction to a CO that a specified charge is to be brought. For details of charging relevant civilians, see [Chapter 6](#) (Investigation, charging and mode of trial), Part 5 and Annex K.

6. **Advance Information.** Once the case is allocated for SCC trial, the DSP will serve the following⁶ on defendants, defendant's legal representatives and the Court Administration Officer (CAO):

- a. Copies of statements of witnesses on which the DSP intends to rely.
- b. A list of all exhibits, with locations, which the DSP intends to use.

¹ Section 277 of the Act.

² See [Chapter 3](#) (Jurisdiction and time limits), paragraph 43.

³ See [Chapter 3](#) (Jurisdiction and time limits), paragraph 41.

⁴ Section 58(2) of the Act.

⁵ Section 61(2) of the Act.

⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 30.

- c. A transcript of any recording of an interview with the defendant.

Where after the DSP has served advance information he intends to adduce evidence not previously served he must, as soon as is practicable, serve that evidence on the defendant and the CAO. Where this occurs during trial proceedings the evidence must be served on the judge advocate instead of the CAO⁷.

7. **Listing.** On receipt of advance information from the DSP the CAO will forward that information to the Judge Advocate General, list the case for a preliminary hearing and request him to specify a judge advocate for the hearing⁸. The CAO will appoint court officials, including interpreters if required.

8. **Notification of hearings.** The defendant will be served with a notice informing him of the date of his hearing. If the defendant is under 18 or the offence concerned is alleged to have been committed during a period of parental recognizance following a previous conviction⁹, then the CAO will also notify the parent(s) or guardian(s) of the hearing¹⁰.

9. The CAO will notify any person identified by either party as needing to attend a preliminary hearing or the trial, and any person so notified will be entitled to reimbursement of expenses incurred by him as a result of attendance. In respect of any witness whom the CAO is unable to notify, or if he thinks it is not reasonably practicable to notify that person, he must inform the judge advocate, the prosecutor and the defendant of this in writing, giving his reasons for not notifying the person¹¹.

10. **Service of documents.** Documents may be served by a number of acceptable methods including: personally, by post, DX, FAX and other electronic means. The judge advocate may also direct service by any other method if the particular circumstances demand. Proof of service may be achieved in a number of ways. Part 2 of SCC Rules describes the various acceptable methods for the service of documents and the effective date of service. Proof of service may be provided by a signed certificate explaining how and when the document or notice was served.

Methods of securing attendance of witnesses

11. **Summons.** A judge advocate may issue a witness summons on an application by a party to the proceedings or of his own volition¹². The application may be made orally or in writing and is to explain:

- a. What evidence the witness can give;
- b. Why the evidence is material; and
- c. Why the issue of a summons is in the interests of justice.

12. **Arrest.** Where a judge advocate is satisfied that a witness summons would not procure attendance or a person fails to attend before the court in answer to a witness summons without just excuse, the judge advocate may issue a warrant to arrest the witness and bring him before the court. A warrant must¹³ be addressed to a member of a civilian police force if the witness is not subject to Service discipline. A warrant shall only be

⁷ The Armed Forces (Service Civilian Court) Rules 2009, rule 30(3) and (4)

⁸ The Armed Forces (Service Civilian Court) Rules 2009, rule 32.

⁹ Section 233-236 of the Act.

¹⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 27.

¹¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 48.

¹² The Armed Forces (Service Civilian Court) Rules 2009, rules 49-53.

¹³ The Armed Forces (Service Civilian Court) Rules 2009, rule 54(4).

addressed to a member of a Service Police force if the witness is subject to Service law or a relevant civilian, or to an officer of a British overseas territory police force if the court is sitting in such a territory. Note that a warrant cannot be addressed to a foreign police force.

13. **Custody.** Where a witness has been arrested by civil police under a warrant issued by a judge advocate, he is to be transferred to Service custody as soon as practicable or released. If transferred to Service custody, he must be brought before a judge advocate as soon as practicable for a review of whether he should continue to be kept in Service custody. If he does not appear in front of a judge advocate within 48 hours of the arrest, he must be released¹⁴. If the judge advocate is satisfied that there are substantial grounds for believing that the witness would fail to attend the court as required, he may authorise that the witness is kept in custody for a maximum of 8 days, unless a further review takes place. The judge advocate may alternatively require the witness to comply with such requirements as appear necessary to secure his attendance before the court. Failure to comply creates an offence under Section 107(5) of the Act.

14. **Legal representation.** The defendant is entitled to appoint his own appropriately qualified¹⁵ legal representative to act for him throughout the proceedings and must inform the CAO of the name and address of his legal representative as soon as is practicable after the appointment takes place. For the granting of legal aid, see JSP 838 (The Armed Forces Legal Aid Scheme).

15. **Additional evidence.** Having already received the prosecution papers, the defendant is entitled to copies of any additional evidence (or details of its whereabouts) that the prosecutor, prior to commencement of trial, wishes to adduce at the trial.

16. **Witnesses not being called.** Where the DSP no longer intends to call a witness whose statement he has served as part of the advance information he must as soon as practicable notify that fact to each defendant¹⁶.

17. **SCC as appropriate trial venue.** Before the arraignment of the defendant the judge advocate must decide whether to decline jurisdiction and refer the case to the CM for trial¹⁷. Before making its decision, the SCC must provide the DSP with an opportunity to inform the court of any previous convictions that the defendant might have and allow both the DSP and the defendant to make representations about the appropriate venue for trial¹⁸. When making its decision the court must consider the nature of the case; the seriousness of the offence; whether its powers of punishment are sufficient should the charge be proved; any other circumstances it considers relevant; and any representations made by the parties¹⁹. If the court decides that the charge should be tried by the CM, it must refer the charge to the CM²⁰.

18. **Right to elect trial by the CM.** If the SCC accepts jurisdiction to try a charge the defendant must then be offered the right to elect CM trial²¹. This right of election must be exercised before the defendant is arraigned on any charge by the SCC.

19. **Effect of election.** If a defendant elects CM trial then the SCC must refer the charge(s) to the CM for trial by that court. No further action in respect of the charge(s) takes place at the SCC and the election is reported in writing to the CAO. Election on one charge affects other charges and defendants as follows:

¹⁴ The Armed Forces (Service Civilian Court) Rules 2009, rule 54(6).

¹⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 26.

¹⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 30(5).

¹⁷ Section 279(1) of the Act.

¹⁸ Section 279(2) of the Act.

¹⁹ Section 279(3) of the Act.

²⁰ Section 279(4) of the Act.

²¹ Section 280 of the Act and The Armed Forces (Service Civilian Court) Rules 2009, rule 42(2).

a. **One defendant, multiple charges.** Where the SCC is to try together two or more charges against a single defendant, the defendant must be given the opportunity to elect CM trial in respect of each charge against him. An election in respect of any of the charges is deemed to be an election on all the charges and hence they must all be referred for CM trial²².

b. **More than one defendant.** If one of the defendants charged on the same charge sheet elects CM trial the SCC must refer all charges to the CM so all the defendants will be tried by that court²³.

20. **Withdrawal of election.** A defendant who elected CM trial may withdraw that election at any time up until arraignment by that court by giving written notification to the CAO, DSP and any other defendants²⁴.

Preliminary proceedings

21. Preliminary proceedings deal with arraignment, plea and case management issues, and to rule on matters of law. The powers of the court are contained in SCC Rules, rule 36.

22. **Arraignment.** Preliminary proceedings may take place in the absence of the defendant, but a defendant cannot be arraigned in his absence²⁵. Once any pre-arraignment matters are resolved the charge sheet will be put to the defendant and he will be asked whether he pleads guilty or not guilty to each charge against him²⁶. A refusal to plead or an unintelligible plea will be entered as a “not guilty” plea, as will any guilty plea that is not accepted by the court²⁷. Any plea of guilty may, before the plea is accepted by the court, result in an explanation to the defendant of the nature of the charge and the general effect of the plea, especially the different procedures involved between guilty and not guilty pleas. It is for the judge advocate to decide if such an explanation is necessary (e.g. the defendant is a juvenile and/or is not legally represented) and it is designed to enable the court to be satisfied that the defendant is pleading guilty with a proper knowledge of what that means.²⁸

23. **Mixed pleas.** Where there are two or more charges against one defendant and pleas of guilty and not guilty have been entered in relation to those charges, sentencing in relation to the charges to which guilty pleas have been entered shall not proceed (unless the judge advocate directs otherwise) until findings have been announced in respect of each charge to which a not guilty plea has been entered. This applies where, at a joint trial, one defendant has entered a plea of guilty and the other defendant has entered a not guilty plea.

24. **Change of plea.** A defendant may withdraw any not guilty plea and substitute for it a guilty plea²⁹. He can do this at any time during proceedings before the court determines the finding on the charge in question. A defendant may, with the leave of the court, withdraw a guilty plea and replace it with a not guilty plea at any time before the judge advocate passes sentence for the relevant charge.³⁰

Procedure during trial

²² Section 280(5) of the Act.

²³ Section 280 (3) and (5) of the Act and SCC Rules, Rule 42(8).

²⁴ The Armed Forces (Service Civilian Court) Rules 2009, rule 42(6) and (7).

²⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 19(2).

²⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 43(2).

²⁷ The Armed Forces (Service Civilian Court) Rules 2009, rule 43(5).

²⁸ The Armed Forces (Service Civilian Court) Rules 2009, rule 43(3).

²⁹ The Armed Forces (Service Civilian Court) Rules 2009, rule 46(1).

³⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 46(3).

25. **Changes to charge sheet during trial.** Once the trial has started, if the court considers that it is in the interests of justice to amend a charge (having due regard to the fairness to the defendant in so amending) then the court may do so. If the DSP wishes to amend or substitute a charge, discontinue proceedings on a charge or prefer an additional charge, after the trial has commenced then leave must be sought from the court.³¹ Additionally, in respect of any additional charge the prosecution may wish to bring, notice of this intention must be served on the defendant³².

26. **Procedure after guilty plea.** Once the court has accepted and recorded a guilty plea, the DSP will inform the court of the facts of the case and all relevant information. An opportunity will also be given for mitigation on behalf of the defendant to be heard. Thereafter, the court goes on to pass sentence.

27. **Procedure after not guilty plea.** Before calling the prosecution witnesses, the DSP may make an opening address. Defendants may make an opening address only with leave of the judge advocate³³. Thereafter, each prosecution witness in turn will be called to give their evidence on oath, with the rules of evidence being those that apply in the Crown Court in England and Wales.

28. **Misbehaviour in court.** Any person, whether a witness or otherwise, who misbehaves at the SCC is liable to be fined and/or committed to Service custody for contempt of court³⁴, see [Chapter 33](#) (Contempt of Service courts).

29. **Submission of no case to answer.** At any time after the close of the prosecution case, the defendant can submit, in respect of any charge, that the prosecution has failed to establish a case for the defendant to answer. If the court allows any such submission then the defendant will be found not guilty of the charge to which the submission relates³⁵.

30. **Case for the defence.** Following the close of the prosecution case and assuming that the preceding paragraph does not apply, the defendant may give evidence in his defence and also call witnesses but he is under no obligation to do so. Depending on the course adopted, the judge advocate must satisfy himself that the defendant understands the consequences of remaining silent, as well as the liability that he (and any witnesses) will have to being cross-examined by the DSP and that he may face questioning by the judge advocate.

31. **Closing addresses.** A defendant or the DSP may make a closing address, unless they have already made an opening address, where leave of the judge advocate is required. If two or more defendants have the same legal representative, that legal representative can only make one closing address.³⁶

32. **Findings.** Deliberation on findings occurs after any closing addresses, and for each charge the judge advocate will record – in writing, signed and dated - a finding of either guilty or not guilty on the trial result notification. See Annex A (Trial result notification T-SL-TRN01). The finding on each charge is announced in open court in the presence of the defendant, who may – on any finding of guilty – request the court to take into consideration any other Service offence committed by him of a similar nature to that which relates to the guilty finding in question.³⁷

³¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 47.

³² The Armed Forces (Service Civilian Court) Rules 2009, rule 47(2).

³³ The Armed Forces (Service Civilian Court) Rules 2009, rule 85.

³⁴ Section 309 of the Act.

³⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 88.

³⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 91.

³⁷ The Armed Forces (Service Civilian Court) Rules 2009, rule 97.

33. **Power to convict of offence other than that charged.** The SCC has a statutory power to convict any offender of a Service offence other than the one specifically charged in the charge sheet.³⁸ Therefore, although an individual may be acquitted of the offence charged, the SCC can – provided that the allegations in the charge sheet amount to or include (either expressly or by implication) an allegation of a different Service offence – convict the individual of that other offence. ‘Offence’ in this sense also includes an attempted offence.

Rules of evidence

34. The rules as to the admissibility of evidence before the SCC are governed by Part 12 of the SCC Rules. The rules of evidence applicable in a trial on indictment in England and Wales generally apply³⁹, but there are procedures which are particular to the SCC. The following paragraphs summarise a few of the important differences to the civilian system.

35. **Attendance or giving evidence by live link.** Any person, who is not in the place where the proceedings are being held, may attend by live link if the judge advocate so directs. This includes witnesses who may give evidence. An application may be made to the judge advocate for permission to attend by live link or the judge advocate may direct such a course of action⁴⁰.

36. **Use of documents to refresh memory.** The Criminal Justice Act 2003 section 139 does not apply to the SAC, however a person giving oral evidence may refresh his memory from a document made or verified by him at an earlier time or a transcript of a sound recording⁴¹.

37. **Evidence through live link.** Any person may give evidence by live link if the judge advocate so directs, either of his own volition, or on an application⁴².

38. **Special measures.** A judge advocate may give a special measures direction of his own volition or on an application by a party to the proceedings⁴³.

Sentencing and appeal

39. **Mitigation.** An offender, or his legal representative, may call witnesses as to his character, or produce any documentary evidence and address the court in mitigation of sentence.

40. **Available punishments.** The SCC may award the following punishments:

a. **Imprisonment.** The SCC may not award imprisonment for more than 12 months in respect of any one offence and where the SCC imposes 2 or more terms of imprisonment to run consecutively, their aggregate must not exceed 65 weeks.⁴⁴ A person who is under the age of 18 cannot be sentenced to imprisonment.⁴⁵ The SCC may suspend a sentence of imprisonment.⁴⁶

³⁸ Section 281 of the Act.

³⁹ The Armed Forces (Service Civilian Court) Rules 2009, rule 58.

⁴⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 18.

⁴¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 62.

⁴² The Armed Forces (Service Civilian Court) Rules 2009, rule 18.

⁴³ The Armed Forces (Service Civilian Court) Rules 2009, rules 74-84.

⁴⁴ Section 283 of the Act.

⁴⁵ Section 208 of the Act.

⁴⁶ Section 200 of the Act.

b. **Detention and Training Orders.** Offenders under the age of 18 at conviction may be subjected to a detention and training order.⁴⁷

c. **Fine.** The SCC may not award a fine for a section 42 offence (Criminal Conduct), which a magistrates' court in England and Wales could not have imposed.⁴⁸

c. **Service compensation order (SCO).** The SCC may not award a SCO exceeding the limits prescribed for a Magistrates Court.

d. **Service community order.** A Service community order imposes one or more of the requirements in Section 177(1) of the 2003 Act and specifying the local justice area in England and Wales, the locality in Scotland or the petty sessions district in Northern Ireland where the offender resides or will reside⁴⁹.

e. **Overseas community order.** An overseas community order imposes one or more requirements in Section 177(1) of the 2003 Act and does not specify the area where the offender resides or will reside. The SCC must be satisfied that the offender will be able to comply with the requirement and that arrangements will be made for supervision of his compliance.⁵⁰

f. **Conditional or absolute discharge.** A conditional discharge is an order discharging the offender subject to the condition that he commits no Service offence in a specified period. An absolute discharge discharges the offender without conditions.⁵¹

41. **Activation of a suspended sentence.** Where the offender is subject to a suspended sentence of imprisonment, the DSP will inform the court. The SCC may then make an activation order in relation to that suspended sentence⁵².

42. **Conditional discharge or overseas community order in force.** Where the offender is subject to a conditional discharge or there is an overseas community order in force, the DSP shall inform the court.⁵³

43. **Judge Advocate General's Sentencing Guide.** Sentencing will be carried out in accordance with the Judge Advocate General's Sentencing Guide (see volume 3 Sentencing in Court Martial: A Short Guide).

44. **Announcement and recording of sentence.** Unless the award of a sentence is to be deferred, it will be announced, together with the reasons for it, in open court and in the presence of the defendant. The judge advocate will record the sentence in writing and sign and date the record⁵⁴.

45. **Start of sentence.** Apart from suspended sentences, which take effect only when subsequently activated, any sentence passed by the SCC takes effect from the beginning of the day on which it is passed, unless the court invokes some other statutory provision (be it in the Act or any other Act) which confers upon it a power to direct otherwise.

⁴⁷ Section 211 of the Act.

⁴⁸ Section 284(2) of the Act.

⁴⁹ Section 178 of the Act.

⁵⁰ Section 182 of the Act.

⁵¹ Section 185 of the Act.

⁵² The Armed Forces (Service Civilian Court) Rules 2009, rule 96(3).

⁵³ The Armed Forces (Service Civilian Court) Rules 2009, rule 96(3)(b).

⁵⁴ The Armed Forces (Service Civilian Court) Rules 2009, rule 99.

46. **Appeal.** Appeals from the SCC lie to the CM. The procedures are contained in [Chapter 29](#) (Court Martial proceedings).

47. **Application for remission of a fine.** The SCC may consider an application in writing for remission in whole or part of a fine previously imposed by the court, where the offender's financial circumstances are different from those determined by the court when the amount of the fine was fixed.⁵⁵

48. **Ancillary Proceedings.** Where the court has imposed an overseas community order, the officer responsible for supervision may make an application in writing to the court for a summons, or warrant for arrest, where the requirements of the order have been breached. The responsible officer or the offender may make an application in writing to revoke, amend or extend the order.⁵⁶

⁵⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 107.

⁵⁶ The Armed Forces (Service Civilian Court) Rules 2009, rules 100-106.

PROTECT PERSONAL DATA (WHEN COMPLETED)

**Annex A to
Vol 2 Ch 32
JSP 830 MSL**

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**SERVICE CIVILIAN COURT
RECORD OF PROCEEDINGS AND TRIAL RESULT NOTIFICATION**

One TRN3 form is required for each defendant

A. TRIAL DATA	OJAG Case Reference Number:		
Location:	Held at		
All Dates of Trial: Do not include arraignment-only or preliminary proceedings	First day 20.... Continuing on (list dates) Last day 20....		
B. DEFENDANT	Surname, first name(s)		Title (Mr, Mrs, etc)
Appropriate description under AFA06 Sch 15 paras 1-10			Relevant Service (Delete not applicable) RN / Army / RAF
C. MODE OF TRIAL	Decision under AFA06 s 279:	Election offered under AFA06 s 280:	Was that election withdrawn?
	SCC or Court Martial	SCC or Court Martial	Yes / No
D. CHARGES, PLEA & FINDING This is the record of plea and finding required by The Armed Forces (Service Civilian Court) Rules 2009, Rules 22 & 92 Attach a copy of the charge sheet(s)	Charge(s): (Must be listed briefly – NOT “see attached”)	Plea:	Finding:
	1.		
	2.		
	3.		
	4.		
	5.		
	6.		
	7.		
	8.		

PROTECT PERSONAL DATA (WHEN COMPLETED)

	9.		
Use a continuation sheet if necessary	10.		

E. SIGNATURE		Findings form to be checked, signed & dated by the Judge Advocate	
Judge Advocate at Arraignment: Print name	Signed	Date signed	
Judge Advocate at contested trial, if any: Print name	Signed	Date signed	

OJAG Case Reference Number:	Defendant (Surname)
F. SENTENCE	
Give numbers in words and figures	
This is the record of sentence required by The Armed Forces (Service Civilian Court) Rules 2009, Rules 22 & 99	

G. SEX OFFENDER		
Is a certificate under Sexual Offences Act 2003 attached to TRN3?	YES <input type="checkbox"/>	NO <input type="checkbox"/>
Certificate to be faxed only to the Service staff branch below and the Service Police Crime Bureau		

H. DIRECTIONS of Judge Advocate for post-trial follow-up action, if any. Directions as to costs to be on separate form	
---	--

I. SIGNATURE		Sentence form to be checked, signed & dated by the Judge Advocate	
Judge Advocate at sentence: Print name	Signed	Date signed	

J. FOR OFFICIAL USE	Defendant's time for appeal expires20.....	
	Duration of trial in hearing days Count part of a day as a day	
If Compensation was awarded: Give victim's full name, number, unit or home address as applicable & amount	Victim details	Amount in £

PROTECT PERSONAL DATA (WHEN COMPLETED)

Official completing to print name:	Signed	Date signed
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Court Officer must fax the completed TRN3 immediately to:

All cases: MCS - 94344 8060; CMRS - 94344 8048; AFCLAA - 94344 5691; SPCB - 93835 5244; OSC(A) (PTS) - 94344 8053;

plus if:

RN case: FLEET (DCS Law) - 93832 5755

RAF case: HQ Air Comd (Air Pers Casework) - 95221 6853

Custodial sentence case: MCTC - 94660 6708

When case is concluded, return file with the original of this TRN3 Record of Proceedings to:

Office of the Judge Advocate General

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Chapter 33

Contempt of Service courts

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Chapter 33

Contempt of Service courts

Introduction

1. This section sets out the jurisdiction and powers of Service courts to deal with misbehaviour in Service courts, often referred to as contempt of court¹. It includes guidance on the power of Service courts to detain a person before dealing with offences of misbehaviour in court and to certify, for disposal by an appropriate civil court, any act² that would constitute contempt of court if the proceedings were before a court having power to commit³ for contempt.

Jurisdiction

2. The contempt provisions apply in respect of the qualifying Service courts set out below⁴:

- a. Court Martial (CM).
- b. Summary Appeal Court (SAC).
- c. Service Civilian Court (SCC).

For the remainder of this section these qualifying courts are referred to as 'the court'.

3. The following categories of person are subject to the court's powers in relation to offences of contempt⁵:

- a. Any person in the United Kingdom, whether subject to Service law or not.
- b. A person outside the United Kingdom who is subject to Service law (a Service person).
- c. A person outside the United Kingdom who is a civilian subject to Service discipline (a relevant civilian).

4. In relation to offences of contempt, the decisions of the court will be taken by the judge advocate alone⁶.

Offences

5. The following is deemed to be misbehaviour in court that is capable of constituting an offence of contempt of court⁷:

¹ Sections 309 to 312 of the Act.

² Contempt of court is not confined to the offences specified section 309 of the Act.

³ Only certain courts, such as the High Court in England and Wales, have the power to commit (send to prison) a person for contempt of court unless express provision is made in a statute (see sections 309 to 312 of the Act)

⁴ Section 309(5) of the Act.

⁵ Section 309(6) of the Act.

⁶ Section 312(2) of the Act.

⁷ Section 309(1) of the Act.

- a. Refusal by a person to take an oath or make an affirmation when duly required by the court to do so;
- b. Refusal of a witness to answer any question which the court has lawfully required him to answer;
- c. Refusal by a person attending the court, or who is brought before the court, to produce any document or other thing which is in his custody or under his control and which the court lawfully requires him to produce;
- d. Intentional interruption of the proceedings of the court or other misbehaviour in court by a person; or
- e. Intentional insults or intimidation by a person of:
 - (1) Any member of the court while that member is acting as such, or is going to or returning from the court; or
 - (2) Any witness or other person whose duty it is to attend the court, while that person is attending the court or going to or returning from the court.

Power to punish

6. The court's powers to deal with the above forms of misbehaviour depend on the status of the person who is in contempt of court.

- a. If the person is a Service person or a relevant civilian, the court may⁸:
 - (1) Commit the offender to Service custody for a specified period not exceeding 28 days; and/or
 - (2) Impose on the offender a fine not exceeding level 4 on the standard scale⁹.
- b. If the person is not subject to Service law or a civilian subject to Service discipline, the court may impose a fine not exceeding level 4 on the standard scale¹⁰.

7. A court may order that the committal to Service custody for contempt takes place after the end of any sentence of Service detention that a Service court has ordered on a previous occasion or, in the case of the CM, that the court orders on the same occasion¹¹. The court may at any time revoke an order of committal for contempt and, if the person in contempt is in Service custody, order his release¹². Therefore if, for example, the offender made an appropriate apology to the court or gave an undertaking as to his future behaviour, the judge advocate might order the offender's release from custody. The rules regarding custody of persons can be found in the Service Custody and Service of Relevant Sentences Rules 2009/1096 and JSP 837 (Service code of practice for the management of personnel in Service custody and committal to Service custody premises and civil prisons).

⁸ Section 309(2) of the Act.

⁹ Section 309(3) of the Act.

¹⁰ See Archbold 5-403 for standard scale fines section.

¹¹ Sections 312(3) and (4) of the Act.

¹² Section 309(4) of the Act.

8. The court may allow any fine imposed for contempt to be paid in instalments¹³. The court can also allow such time for payment of the fine as it specifies. Additionally, the court has the power, if the person fined makes an application to the court, to vary any order that it makes in relation to that fine.

Power to detain

9. Where a court does not immediately deal with an offence of contempt it may order the offender to be detained in Service custody until the court rises. The offender can therefore be detained until such time as the court decides to adjourn the proceedings which are currently before it. This could be to adjourn for a break over the lunch period or at the end of the day's proceedings. So, for example, when a person interrupts proceedings or otherwise misbehaves in court, the court may order the offender to be detained in Service custody until those proceedings are adjourned.

10. When the court rises, it is to decide whether a further hearing is required and, if not, it will deal immediately with the offence of contempt in accordance with its powers at paragraphs 6 - 12¹⁴. If a further hearing is deemed necessary, the court may either release the offender or order that he be held in Service custody for a further period. This period must end not more than 48 hours from the time at which the offender was first detained for an offence specified in section 309 (see paragraph 5 above)¹⁵. The court may only authorise a period of further custody if one of the following conditions applies¹⁶:

a. The court is satisfied that there are substantial grounds for believing that the offender, if released from Service custody, would:

- (1) Fail to attend any hearing in the proceedings against him; or
- (2) Commit an offence while released; or
- (3) Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

b. The court is satisfied that the offender should be kept in Service custody for his own protection or, if he is aged under 17, for his own welfare or in his own interests; or

c. The court is satisfied that it has not been practicable to obtain sufficient information for the purpose of deciding whether the conditions in sub-paragraphs (a) or (b) above apply.

11. Where a court with power to deal with a person under section 309 of the Act decides not to exercise that power immediately, it may order the following categories of person to detain an offender in custody¹⁷:

- a. A Service policeman.
- b. An officer of a UK police force.
- c. A member of the court staff.

¹³ Sections 312(5) and 251 of the Act.

¹⁴ Section 310(2) of the Act.

¹⁵ Section 310(3) of the Act.

¹⁶ Section 310(4) of the Act.

¹⁷ Section 310(1) of the Act.

Those categories of person listed above may use reasonable force, if necessary, when ordered by the court to detain an offender in Service custody for an offence of contempt.

Certification to civil courts

12. If a person commits an offence listed in paragraph 5 above, for which a civil court has the power to commit for contempt and the Service court has not exercised the powers set out at paragraphs 6 to 8 above, it may certify the offence of contempt¹⁸:

- a. If it took place in the United Kingdom, to any court of law in that part of the United Kingdom which has power to commit for contempt; or
- b. If it took place outside the United Kingdom, to the High Court of England and Wales.

13. The civil court to which the offence is certified may inquire into the matter. After hearing any witnesses produced against or on behalf of the person and any statement that may be offered in defence, the civil court may deal with the offender in the same manner as if the offence had occurred during proceedings before that court¹⁹. Where the Service court certifies an offence to a civil court, it is not permitted to exercise any powers in respect of that contempt.

¹⁸ Sections 311(1) and (2) of the Act.

¹⁹ Section 311(3) of the Act.

Chapter 34

Compensation for miscarriages of justice

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Chapter 34

Compensation for miscarriages of justice

Introduction

1. This chapter sets out the circumstances in which the Secretary of State has a duty to pay compensation for miscarriages of justice. It also specifies the person in the MOD to whom applications for such compensation should be submitted and the factors that will be considered in assessing the amount of compensation payable. This chapter also lists the qualifications needed to be an assessor.

Right to compensation

2. It is for the Secretary of State to determine whether a person has a right to compensation for a miscarriage of justice. If he determines that there is such a right, the amount of compensation is to be determined by an assessor to be appointed by the Secretary of State. Subject to certain exceptions, if a person has been convicted by the Court Martial (CM) and subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State must pay him compensation¹. Where the person who is the subject of the miscarriage of justice is dead, compensation must be paid to his personal representatives. The exceptions to this general rule are that compensation is not payable:

a. If the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted²; and

b. Unless an application for compensation has been made to the Secretary of State³ before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed or he is pardoned.⁴

3. For these purposes, a conviction is deemed to have been reversed if it has been quashed⁵:

a. On an appeal out of time;

b. On a reference under the Court Martial Appeals Act 1968 section 34; or

c. On a reference under the Criminal Appeal Act 1995 section 12A.

However, in a case where a person's conviction for an offence is quashed on an appeal out of time and the person is subject to a retrial, the conviction is not to be treated for these purposes as 'reversed' unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial.

¹ Section 276(1) of the Act.

² Section 276(2) of the Act.

³ Section 276(3) of the Act.

⁴ The Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so. See section 296(3) of the act.

⁵ Section 276(7) of the Act.

Submission of claims for compensation

4. Claims for compensation for miscarriages of justice at the Court Martial should be submitted to the Senior Claims Officer, DS&C (Claims), Zone A, 7th Floor, St George's Court, 2-12 Bloomsbury Way, London WC1A 2SH. An assessor will be appointed on a case by case basis in line with the qualifications outlined at paragraph 7 below to deal with any claim.

Assessment of compensation

5. In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages in civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and any loss of liberty. Further provision is made⁶ as to the limits on the amount of compensation payable. In assessing the amount of compensation payable for suffering, harm to reputation or similar damage, the assessor must have regard in particular to the following⁷:

- a. The seriousness of the offence of which the person was convicted and the severity of the resulting punishment; and
- b. The conduct of the investigation and prosecution of the offence.

6. The assessor may take from the total amount of compensation that he would otherwise have assessed as payable any deduction or deductions that he considers appropriate by reason of either or both of the following:

- a. Any conduct of the person appearing to the assessor to have directly or indirectly caused, or contributed to, the conviction concerned; and
- b. Any other convictions of the person and any punishment resulting from them⁸.

If, having had regard to any matters falling within (a) or (b), the assessor considers that there are exceptional circumstances which justify doing so, he may determine that the amount of compensation is to be a nominal amount only.

Qualifications to be an assessor

7. A person is qualified to be an assessor if he⁹:

- a. Has a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990;
- b. Is an advocate or solicitor in Scotland;
- c. Is a member of the Bar of Northern Ireland, or a solicitor of the Court of Judicature of Northern Ireland, of at least seven years' standing;
- d. Holds or has held judicial office in any part of the United Kingdom;
- e. Is a member (whether the chairman or not) of the Criminal Injuries Compensation Board; or

⁶ Section 276A(5) of the Act.

⁷ Section 276(6) of the Act.

⁸ Section 276A(3) of the Act.

⁹ Schedule 9 Para 1(1) of the Act.

f. Has in a relevant territory¹⁰ rights and duties similar to those of a barrister or solicitor in England and Wales, has had those rights and duties for at least seven years and is subject to punishment or disability for breach of professional rules.

¹⁰ A relevant territory for the purposes of Paragraph 7(f) above is¹⁰: (a) any of the Channel Islands; (b) the Isle of Man; (c) a Commonwealth country; (d) a British Overseas Territory. Schedule 9 paragraph 1(2) of the Act.

Chapter 35

The powers of the Criminal Cases Review Commission

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Chapter 35

The powers of the Criminal Cases Review Commission

Introduction

1. **Independent public body.** The Criminal Case Review Commission (CCRC) is an independent public body which was set up under the Criminal Appeals Act 1995 to review possible miscarriages of justice in magistrates courts and the Crown Courts of England, Wales and Northern Ireland. The Armed Forces Act 2006 (the Act), section 321 and Schedule 11, extend the jurisdiction of the CCRC to the Court Martial (CM) and the Service Civilian Court (SCC).
2. **Powers.** The CCRC has powers to refer cases to the appropriate court for an appeal to be heard. The CCRC does not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of a decision. The CCRC has wide-ranging investigative powers and can obtain and preserve documentation held by any public body (including the Services). The CCRC will also investigate and report to the Court Martial Appeal Court (CMAC) on any matter referred to them by the Court.
3. **Impact on victims.** The CCRC is mindful of the impact that the review of cases can have on the original victims of a crime and their families. It therefore has an established policy that sets out the circumstances in which victims are informed about case reviews and the process for doing so.
4. **Sources.** Reference should be made to the following sources:
 - a. Section 321 and Schedule 11 of the Act (relating to powers of CCRC);
 - b. The Court Martial Appeals Act 1968, section 29A (power to order investigation by CCRC);
 - c. The Criminal Appeal Act 1995 (Part II, as amended by the Act) ;
 - d. The current edition of Archbold, Criminal Pleading Evidence & Practice; and
 - e. CCRC's website: <http://www.ccrc.gov.uk>.

Powers of the CCRC

5. **General.** The CCRC may make a reference to the CMAC for appeal of a conviction, verdict, finding or sentence with or without an application being made by the person to whom it relates.
6. **Court Martial Appeal Court (CMAC).** On an appeal against conviction or an application for leave to appeal against conviction, the CMAC may direct the CCRC to investigate and report to the court in order to resolve any matter relating either to an appeal or an application for leave to appeal
7. **Cases dealt with by the CM.** Where a person has been convicted by the CM (including on an appeal brought from the SCC) the CCRC may at any time refer the conviction to the CMAC.

8. **Sentence.** Where a person has been convicted by the CM and (whether or not the conviction is referred) the CCRC may at any time refer to the CMAC any sentence (other than one fixed by law) imposed by the CM on, or in subsequent proceedings relating to, the conviction. Where a person has been convicted by the SCC and sentenced by the CM on an appeal against sentence only, the CCRC may at any time refer to the CMAC that sentence of the CM and any other sentence imposed by the CM in respect of a connected conviction being a conviction of the same person by the same court on the same day.
9. **Related conviction.** On a reference of a person's conviction the CCRC may give notice to the CMAC that any related conviction (being a conviction of the same person in the same proceedings) is to be treated as referred to the CMAC.
10. **Disability.** Where the CM has found that a person is under a disability and that he did the act or made the omission charged against him, the CCRC may at any time refer either or both of those findings to the CMAC.
11. **Insanity.** Where a finding of not guilty by reason of insanity has been made by the CM, the CCRC may at any time refer the finding to the CMAC.
12. **Cases dealt with by SCC.** Where a person has been convicted of an offence by the SCC the CCRC may, at any time, refer the conviction to the CM and (whether or not they refer the conviction) may at any time refer any sentence on, or in subsequent proceedings relating to, the conviction.
13. **Sentencing after reference.** On a reference to the CM from the SCC, the CM may not impose a sentence more severe than that imposed by the SCC.
14. **References treated as appeals.** A reference of a conviction, sentence or finding will be treated as an appeal by the person against whom it is made.
15. **Supplementary powers.** The main supplementary powers of the CCRC are set out in the Criminal Appeal Act 1995, sections 17 to 22 (relating to obtaining documents and mounting investigations). In relation to a CM or SCC case the CCRC may require a Service to produce documents and materials to the CCRC or give the CCRC access to them and it may require the appointment of the Service Police or another police force to carry out an investigation to assist it.

Conditions of reference

16. **Conditions for making a reference.** A reference will not be made unless:
- a. The CCRC considers that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made;
 - b. The CCRC so consider:
 - (1) In the case of a conviction, verdict or finding because of an argument or evidence not raised in the proceedings which led to it or on any appeal or application for leave to appeal, or
 - (2) In the case of a sentence, because of an argument on a point of law or information not so raised, and
 - c. An appeal has been dismissed or leave to appeal refused.

However, nothing in b(1) or c above will prevent the making of a reference if it appears to the CCRC that there are exceptional circumstances which justify it. For example, inadequate representation of the defence case to the court at trial or on appeal or where the court has developed the law by accepting an argument which has been previously rejected.