Manual of Service Law
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MINISTRY OF DEFENCE

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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 2012.

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, crimininal 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 Reed Elsevier (UK) Ltd trading as Lexis Nexis Butterworth, and, in the case of Archbold's Pleading, Evidence and Practice in Criminal Cases and Phipson on Evidence, of Messrs. Sweet & Maxwell, Ltd.

JSP 830 Manual of Service Law

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Amend No	Date	Details	Source	Inserted by:*	Signature*	Date*
1	14/3/11	1-13-8 – clarify “acting rank” for summary sentencing purposes.	DALS			
2	16/3/11	1-8-45 – particulars of the charge should refer to **s5(1)** not **s5(2)**	DALS			
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* Print versions only.

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 to 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 trail) 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 trail) Annex D
SERIOUS SERVICE OFFENCE	See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 79.
SERVICE CIVILAIN 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

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 Midshipman	Lieutenant Second Lieutenant	Flying Officer 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	Petty Officer	Corporal of Horse	Sergeant
OR-5	Petty Officer Naval Nurse	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 Guardsman 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

Chapter 9

Summary hearing and activation of suspended sentences of Service detention

Annexes

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 hearing[5] 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 they commit 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 must[6] 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.

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[5] A summary hearing in which the accused denies the charge.

[6] 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 functions[7] to subordinate commanders (see paragraph 7) and they 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 they wish 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 lieutenant[8]. 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)[9]; 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 to[10]:

a. Offences[11] that require HA permission to deal with.

b. Offences alleged to have been committed during the operational[12] period of a suspended sentence of detention[13].

c. Charges brought against a person above the rank or rate of chief petty officer, military or marine colour sergeant or flight sergeant.

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[7] See rule 3(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216

[8] 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.

[9] When considering this course of action the subordinate commander should consult his CO or take legal advice.

[10] 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.

[11] Those within section 54(2), of the Act.

[12] 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.

[13] Rule 3(3)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

d. Charges brought against a person of or above the rank or rate of petty officer, military or marine sergeant or air force sergeant, where the subordinate commander is of the rank of naval lieutenant, military or marine captain or flight lieutenant.

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 commencement[14] of the summary hearing a subordinate commander considers that they should not continue to hear the charge (e.g. his powers of punishment may not be sufficient should they find the charge proved), they 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 DSP[15], see Chapter 6 (Investigation, charging and mode of trial) but before doing so they 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 they do 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 they 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 serious[16] criminal conduct offences listed below should be heard summarily[17], if they are below the rank of rear admiral, major-general or air vice-marshal, they 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:

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[14] 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.

[15] Section 123(2)(e) of the Act.

[16] It is within section 54(2) of the Act.

[17] Such charges can only be heard summarily by the CO in person with HA permission.

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; 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 indictable[18] offences above[19].

14. The application to HA must be made as soon as is reasonably practicable after the charge is brought[20] and must contain[21]:

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 provide[22] 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

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[18] See glossary.

[19] Section 43 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 5(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[22] Rule 5(4) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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 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, they must apply to HA for extended powers[23]. 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 brought[24] (which may be after the CO has complied with the preliminary procedures (see part 2 below) and must contain[25]:

a. The CO's reasons for considering his powers of punishment might be insufficient, should the charge be found proved, unless they have 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 they need extended powers[26]. This should include details of the punishment for which they are 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.

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[23] For the extended powers that are available see section 133(1) of the Act.

[24] In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

[25] Rule 6 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[26] Rule 6(2)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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)[27].

20. In the exceptional event that the CO considers it necessary to apply for extended powers after they have complied with the preliminary procedures but before they proceed to hear the charge summarily (ie before they have 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, they 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 orders[28].** Where a CO is to hear the charge against an accused who is subject to a suspended sentence of detention, they 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 they are 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, they must[29] 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 contain[30]:

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;

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[27] Rule 6(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[28] See part 8 on activation hearings.

[29] Rule 7 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[30] Rule 30(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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 offences[31] committed by the offender during the operational period of the suspended sentence of detention;

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 hearings[32] (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 they 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. They may also consider that they need extended powers of punishment for the ABH charge and if they consider that the suspended sentence might need to be activated for a term in excess of 28 days, they must[33] 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. They must make an application for extended powers in order to be able to award this combination of sentences.

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[31] In Service proceedings or civilian court.

[32] Rule 7(2)(d) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[33] 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 must[34]:

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 writing[35] of his right:

(1) To elect CM trial[36];

(2) To be represented by an accused's assisting officer (AAO)[37] (see paragraph 37);

(3) To question witnesses whose evidence is requested by the CO[38];

(4) To give evidence[39];

(5) To provide evidence of witnesses[40]; and

(6) To appeal to the SAC[41];

c. If appropriate, provide the accused with information about the activation of suspended sentences of detention[42] (see Part 8 for further guidance);

d. Provide the accused with[43]:

(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;

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[34] Rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[35] 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.

[36] Section 129 of the Act.

[37] Rule 10 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[38] Rule 15 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[39] Rule 16 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[40] Rule 17 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[41] Section 141 of the Act.

[42] Section 193 of the Act.

[43] 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 they may consider seeking legal advice and that this should be a matter that they discuss with his AAO, if they have 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, they need not provide a further copy[44] 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)[45]:

a. The CO must inform the accused in writing[46] of:

(1) His power to make an order[47] to activate a suspended sentence of detention (an 'activation order');

(2) The accused's right of appeal[48];

(3) The accused's right to make a submission[49] to the CO either orally or in writing about[50]:

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[44] Rule 8(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[45] 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).

[46] 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

[47] Section 193 of the Act.

[48] Sections 141 and 195 of the Act.

[49] Rule 23(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

(4) The appropriateness of making an activation order; and

(5) The terms of the order;

b. The CO must provide the accused with the following documents[51] 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 hearings[52] 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, they may not fix a time for the hearing until they have received notification of the outcome of the application.

33. **Changing the time for a hearing[53].** If the CO considers it necessary to change the time of a hearing they must do so observing the need to ensure the accused receives a minimum of 24 hours notice. If the CO has applied to HA for the following, they must not fix a time for a new hearing until they have received the result of the application:

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[50] 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).

[51] Rule 8(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[52] Part 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[53] Rule 9, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

a. Permission to hear a charge summarily[54], see paragraph 13;

b. Permission to use extended powers of punishment[55], see paragraph 17; or

c. Permission to use extended powers for the purposes of activating a suspended sentence of detention[56], 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 offences[57]). 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 they are able to get free legal advice contacting a staff lawyer if they themselves require 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. They are a Service person[58] and remain as such while carrying out this function;

b. They are of at least the rank or rate of petty officer or military, marine or air-force sergeant; and

c. They consent to the nomination.

37. Where the accused has difficulty in finding a suitable person to represent him, they may request the assistance of the CO. In this event, the CO must provide a pool of at least

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[54] Rule 5 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[55] Rule 6 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[56] Rule 30 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[57] Section 42 of the Act.

[58] Subject to Service law.

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 they are 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 they must cancel the hearing and provide a pool of suitable candidates. They are then to re-fix the hearing for a time not less than 24 hours after they 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. They may also hear, at a single hearing, a number of charges against one or more accused if the charges are founded on the same facts[59]. 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 they are 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 charge is amended in the preceding paragraph should be followed. The CO should adjourn to take staff legal advice on this issue if they are 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

[59] Rule 11(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

declined. The CO then starts the hearing by reading the charge or charges to the accused and asking him to state whether they admit or deny 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 point[60], for as short a time as possible, if they consider 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 they 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 they admit or deny the charge[61].

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 accused[62]. 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, they 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, they 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 they may only refer if this power has been delegated to him by the CO). See paragraph 50 below;

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[60] Rule 24 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[61] Rule 3(7) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[62] 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 they 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 they 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 they 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 they 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 dismiss[63] the charge at any stage of the hearing, unless they determine that the charge has been proved. They may not determine that the charge has been proved unless, on the basis of all the evidence heard, they are sure that the accused committed the offence charged. For the CO to be sure, they must believe that the charge is proved beyond reasonable doubt; this is the criminal standard of proof. A CO has a power to discontinue[64] a charge which has been allocated[65] 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 they will be in future.

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

[63] Section 131(2) of the Act.

[64] The effect of doing so is that the matter remains unresolved. The CO should only use this power with staff legal advice.

[65] Section 120(4) of the Act.

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, they 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 they intend to admit the charge prior to the start of the summary hearing, the CO may decide that they wish 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 following[66]:

a. The name rank/rate and Service number of the accused;

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;

[66] Rule 27 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.

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 sentence[67];

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.[68] 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 hearing[69] by making an order (Annex I - Record of Activation Hearing) if, during the operational period[70] 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 they have just heard has been proved, they are to sentence the offender at the same time as they consider 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.

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 sentence[71]. Therefore, a subordinate commander should not find himself having to deal with activation of suspended sentences.

Preliminary questions for the accused

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[67] Section 252(1)(a) of the Act.

[68] See Chapter 14 (The summary hearing sentencing guide)

[69]. 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.

[70] 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.

[71] Rule 3(3)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

61. Before commencing the hearing, the CO should confirm the Service number, rank/rate and name of the accused. They 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 hearing[72] and that (if applicable) the accused understands that the suspended sentence of detention they are under may be activated. The CO should then check that the accused understands his rights in relation to electing CM trial[73].

Election for CM - decision

62. Where the accused confirms that they have 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 they admit or deny 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, they must be treated as if they denied the charge.[74] 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.

[72] Rule 12(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[73] 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.

[74] 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 order[75]:

a. Evidence given by the CO's witnesses[76];

b. Evidence of the accused if they choose 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 witnesses[77] (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 statements[78] and those statements have been provided to the accused[79] 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 they are not so satisfied, they 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 witness[80] 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. They must then allow the accused (or the AAO) to ask questions of the witness. The CO may then question the witness himself if they so desire. Once the witnesses have given their evidence, the CO should warn all witnesses not to discuss their evidence outside the hearing.

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[75] Rule 13 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[76] Rule 15(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[77] 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.

[78] Rule 15(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[79] Rule 8(1)(c)(iii) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[80] If the CO knew in advance that they wanted to question a witness they 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[81].** The accused is given the option of giving evidence, but they 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, they 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[82].** The accused may introduce the evidence of witnesses. Where the accused has been given at least 48 hours notice of the hearing, they may not introduce the evidence of a witness unless they have notified the CO at least 24 hours in advance of the hearing, or the CO has given permission. The CO might give permission if they consider 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 writing[83]. 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 they 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 they are not so satisfied, they 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 fact[84] 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 witnesses called in these circumstances either orally or in writing. Oral evidence may be

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[81] Rule 16, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[82] Rule 17 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[83] Rule 17(2)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[84] Rule 15(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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 they allow 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 they call 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, they 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 adduced[85]. 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 matter[86] 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. They may not determine that the charge has been proved unless, on the basis of all the evidence heard, they are sure that the accused committed the offence charged. For the CO to be sure, they 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 they are 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, they 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, they should announce his finding. They 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 they have just heard at the same time as they determine whether they should activate the suspended sentence. Before they sentence for the charge they have just heard or considers activation (if applicable), the CO must give the accused the opportunity to[87]:

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 given in writing, the evidence must be read to

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[85] Rule 18 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[86] Rule 20(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[87] Rule 22(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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. They 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 they may award before they go 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 officer[88] 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, they 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, they should sentence the accused[89]. If they are 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 they consider 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.[90] 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, they must give and record his reasons for doing so at the same time.

Reasons for sentence

79. When the CO passes sentence they must explain in ordinary language and in general terms the reasons for the sentence. For example, if the CO imposes a custodial sentence, they must explain why the offence is sufficiently serious to warrant such a sentence[91]. They must include in his reasons, the following:

a. Any credit given for admitting the offence (if applicable)[92];

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[88] 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.

[89] Section 131(4) of the Act.

[90] Section 132 of the Act.

[91] Section 252 of the Act.

[92] 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 order[93] 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 application[94] 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 SAC[95];

b. His right to seek independent legal advice on whether to exercise his right of appeal. The CO should also inform the offender that they may be legally represented at any appeal and they 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 immediately[96] (see Part 6, Post hearing action, paragraph 106).

81. Most punishments awarded at summary hearing take effect immediately[97]. 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 they wish 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 they do 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 they are unable to make a decision whether to appeal within that period, they may apply for extra time. Full guidance can be found in Chapter 15 (Summary hearing review and appeal).

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[93] E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO order, suspended sentence order etc.

[94] Section 252 of the Act.

[95] Section 141 of the Act.

[96] Section 290 of the Act.

[97] The CO may delay the date on which some punishments will take effect, see Chapter 13 (Summary hearing - sentencing and punishments).

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 they 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 they decide to activate, they 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 they must also:

a. Inform the accused of the terms[98] of the order;

b. Remind the accused of his right of appeal[99]; and

c. Remind the accused that they may choose to commence the sentence of detention immediately[100] (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 they wish 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[101] 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 they do 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 they wish to appeal. Should the offender consider that they are unable to make a decision whether to appeal within that period they 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 they do not elect to commence the activated sentence immediately they will commence the sentence on expiration of the initial period[102] 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, they should announce his decision giving reasons for that decision and annotate the RSH accordingly.

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[98] How much of the suspended sentence will be activated and for how long.

[99] Section 141 of the Act.

[100] Section 290 of the Act.

[101] See Annex G (Brief for an accused assisting officer)

[102] 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[103].** 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 they dispute 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 sentencing[104].

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 procedure[105] (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 they consider can give relevant evidence and from the accused if they wish 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 they are not bound by it. If they think the accused is correct that a certain witness can give relevant evidence, they are 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, they 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 they only punched the victim. The CO makes a determination on these facts and if they find that, beyond reasonable doubt, only punches were involved, they 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.

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[103] Rule 21 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[104] Rule 21(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[105] Rule 21(3)-(6) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

Sentencing

93. When the CO has determined the facts of the case they 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 they have just heard at the same time as they determine whether they should activate the suspended sentence. Therefore, before they sentence for the charge on which they have just determined the facts or before they consider activation (if applicable), the CO must give the accused the opportunity to[106]:

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 they may award before they go 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 officer[107] 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, they may address the CO on the appropriateness of making an activation order and the appropriate terms of such an order if it were made[108]. 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 they were 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, they must proceed as if the accused had denied the charge[109] (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 (they may adjourn for legal advice if they are unsure), they must determine that the charge is proved and record his finding.

96. **Considering the sentence.** The CO is then to sentence the accused[110]. If they are 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

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[106] Rule 22(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[107] 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.

[108] 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).

[109] Rule 19 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[110] Section 131(4) of the Act.

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 any disciplinary record of the accused. The CO may, if they consider 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 punishments[111]. 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 they must give and record his reasons for doing so at the same time.

Reasons for sentence

98. When the CO passes sentence they must explain in ordinary language the general terms of and the reasons for the sentence. For example, if the CO imposes a custodial sentence, they must explain why the offence is sufficiently serious to warrant such a sentence[112].

99. They 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 order[113] 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 application[114] (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 SAC[115];

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[111] Section 132 of the Act.

[112] Section 252 of the Act.

[113] E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO, suspended sentence order etc.

[114] Section 252 of the Act.

[115] Section 141 of the Act.

b. His right to seek independent legal advice on whether to exercise his right of appeal. The CO should also inform the accused that they may be legally represented at his appeal and they 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 immediately[116].

101. Most punishments awarded at summary hearing take effect immediately[117]. 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 they wish 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 they do 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 they are unable to make a decision whether to appeal within that period, they 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 they 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

[116] Section 290 of the Act.

[117] The CO may delay the date on which some punishments will take effect, see Chapter 13 (Summary hearing sentencing and punishments).

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.

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 they decide to activate, they 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). They should give his reasons for his decision and annotate the RSH accordingly. If an order is made they must also:

a. Inform the accused of the terms[118] of the order.

b. Remind the accused of his right of appeal[119].

c. Remind the accused that they may choose to commence the sentence of detention immediately [120](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 they wish 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[121] 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 they do 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 they wish to appeal. Should the offender consider that they are unable to make a decision whether to

[118] How much of the suspended sentence will be activated and for how long.

[119] Section 141 of the Act.

[120] Section 290 of the Act.

[121] See Annex G (Brief for an accused's assisting officer)

appeal within that period they 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 they do not elect to commence the activated sentence immediately they will commence the sentence on expiration of the initial period[122] 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, they should announce his decision, give reasons for that decision and annotate the RSH accordingly.

[122] 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 immediately[123]. If they so choose, 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 determined[124].

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 hearing[125].

111. Once the RSH has been completed, the unit should ensure that the details are recorded on JPA (see paragraph 116 below).

112. Where an offender is under a suspended sentence of detention at the time they are 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-Service[126] 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).

Legal aid for appeal

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[123] Section 290(2) of the Act.

[124] Section 290(5) of the Act.

[125] Rule 27(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[126] RN PLAGOS, Army AGAI 62 Annex G, RAF QR 1057

114. In the interests of the accused and avoidance of delay, if the individual wishes to apply for legal aid for an appeal, they should be provided with the necessary forms and given any help they 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 recovered[127] 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 order[128] for example where his circumstances have changed such that they are 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 review[129]. When carrying out such a review the CO may discharge the SCO or they 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 they may not do so in relation to a SCO in respect of personal injury as such compensation may only be awarded by the CO.

[127] In full immediately or by instalments or by deductions made for the offender's pay in full on one occasion or by instalments

[128] Section 251 of the Act.

[129] Section 177 of the Act

Part 7 - Election for CM trial

119. **Election.** If the accused elects CM trial[130], 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 they wish 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 they may apply immediately for legal aid, see JSP 838 (The Armed Forces Legal Aid Scheme).

[130] 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 Islands[131] by a civilian court[132]

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 they are subsequently convicted by a court in the British Islands, the CO may not delegate the power to conduct an activation hearing[133].

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 they consider they need extended powers for the purposes of activation because they are likely to order the period of activation to exceed 28 days they must make an application to HA for extended powers[134]. The application must contain[135]:

a. The CO's reasons for considering that they need 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 SAC[136] 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

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[131] See glossary.

[132] 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.

[133] Rule 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[134] 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.

[135] Rule 30(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[136] These records may be obtained from the MCS.

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;

d. Copies of[137]:

(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 procedures[138]

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 order[139] to activate a suspended sentence of detention (an activation order);

b. His right to representation[140] (see paragraph 131 below);

c. His right of appeal to the SAC[141]; and

d. His right to make a submission[142] (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:

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[137] Rule 31(1)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[138] Rule 31 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[139] Under section 193 of the Act.

[140] Rule 33, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[141] Section 141 of the Act.

[142] Rule 34(1)(c) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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 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 powers[143]; 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, they may not fix a time for the hearing until they have received notification of the result. Where they have 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 hearing[144].** 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 they have applied to HA for permission to use extended powers for the purposes of activating a suspended sentence of detention[145] until they have 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)).

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[143] For the purposes of Section 194, of the Act.

[144] Rule 32, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[145] Rule 32(1)(b), of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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 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, they may request the assistance of the CO[146]. 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 they are 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 they must cancel it and provide a pool of suitable candidates. They are then to re-fix the hearing for a time not less than 24 hours after they 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. They are a Service person[147] 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. They are of at least the rank or rate of petty officer or military, marine or air-force sergeant; and

c. They consent to the nomination.

132. **Adjournments.** The CO may adjourn a hearing at any point if they consider 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

[146] Rule 33(5), of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[147] Subject to Service law.

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.

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 character[148]:

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 officer[149] 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 they 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;

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[148] Rule 34(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[149] 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.

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.

139. **Making an activation order**. Where the CO decides to activate a suspended sentence of detention after a subsequent conviction in the British Islands, they must go on to make the activation order at Annex I form T-SL-SH02 (Record of activation hearing). In doing so, they 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, they 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, they should annotate his reasons accordingly on the record of activation hearing (RAH).

141. **Actions by the CO once they have decided to make an order.** The CO must inform the offender of his decision whether or not to make an order and they are to give the offender his reasons for his decision. If an order is made they must also:

a. Inform the accused of the terms[150] of the order;

b. Remind the accused of his right of appeal[151]; and

c. Remind the accused that they may choose to commence the sentence of detention immediately[152] (see post hearing action Part 6).

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[150] How much of the suspended sentence will be activated and for how long.

[151] Section 141 of the Act.

[152] Section 290 of the Act.

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 they wish 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 OAO[153] 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 they do 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 they wish to appeal. Should the offender consider that they are unable to make a decision whether to appeal within that period, they 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 hearing[154].

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)[155] for the purposes of review, normally not later than 24 hours after the activations hearing. The RAH should be retained under single-Service[156] 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, they should be provided with the necessary forms and given any help they 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.

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[153] Annex O (Brief for offender's assisting officer at an activation hearing).

[154] Rule 27(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[155] Chapter 15 (Summary hearing review and appeal)

[156] 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 they are still the accused's CO after commencement,[157] 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)[158]. 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;[159]

(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 they admit or deny each charge (which, in the case of a summary dealing under AA/AFA55, the accused may not yet have been asked).

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[157] 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.

[158] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 54(3).

[159] 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 they did not have a reasonable time to prepare before the summary dealing or trial began.

150. If an officer other than the accused's CO[160] began to hear a charge before commencement but did not record a finding, they may continue the hearing (subject to article 49 of the Armed Forces Act 2006 (Transitional Provision etc) Order 2009) - see Annex S to 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 charge[161]. 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 they were given the opportunity to elect court-martial trial on the charge before commencement[162]. If the hearing began before commencement, they must similarly be given the opportunity to elect Court Martial trial before the hearing continues, even though they 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 elect[163].

153. If the accused elected court-martial trial under AA 1955 or AFA 1955 but withdraws [164] the election after commencement, any summary hearing will be held under AFA06. The CO may not apply for extended powers[165]. The accused has no right to elect Court Martial trial unless the charge is amended after it is referred back[166].

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 heard[167]. 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

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[160] This includes an appropriate superior authority.

[161] Such a delegation may have been made before commencement, and will take effect from commencement.

[162] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 54(2).

[163] 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.

[164] "Withdraws" is shorthand: more accurately, the DSP refers the charge back to the CO with the accused's consent.

[165] But they 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.

[166] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 61(2).

[167] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 61(3).

the SDAs[168]. 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.

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 commencement[169].

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, they may apply for permission before commencement[170]. Higher authority may give permission before or after commencement[171].

b. An application for extended powers for the purposes of AFA06 section 133(1) or (2), 134, 135(1) or 136(1)(b)[172] may be made before commencement.[173] Higher authority may grant such an application before or after commencement.[174]

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 commencement[175].

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

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[168] 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.

[169] Schedule 2, paragraph 2, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[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 they are not yet the accused's CO when they make the application.

[171] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 59(2).

[172] 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.

[173] 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 they are not yet the accused's CO when they make the application.

[174] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 59(2).

[175] Schedule 2, paragraph 6, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

nomination as an accused's assisting officer, if of sufficient rank or rate) where they 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 commencement[176]. 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 they are not yet the accused's CO at the time when they make 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'[177]. 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'[178].

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 AFA06[179]. This means they may award up to 90 days' detention, even though they could not have awarded more

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[176] Schedule 2, paragraph 5(2,) Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[177] For SDA offences which are "capable of being heard summarily", see Annex B to Chapter 6 (Investigation, charging and mode of trial).

[178] See Annex C to Chapter 6 (Investigation, charging and mode of trial).

[179] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 60.

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 commencement[180]. 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 they find 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 they find it proved at a summary hearing after commencement.

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 made[181].

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 sentence[182], the CO may activate the sentence under AFA06 section 193[183]. But they 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 they find 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);

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[180] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059 article 59(4).

[181] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 62.

[182] That is it is not more than one year since the sentence was suspended.

[183] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 97(1).

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 sentence[184].

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 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) they 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 sentence[185].

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 approval[186]. 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 approval[187]. In each case the written record of the hearing must contain the reasons that the CO is required to give[188].

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 CMAC) under NDA57, the CO cannot activate the sentence himself. They must, however, notify the court administration officer of the finding so that the Court Martial can consider whether to do so[189].

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 they were subject to a suspended sentence of detention passed at a summary trial (or by the SAC) under NDA57, and they are still subject

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[184] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009, Schedule 2, paragraph 8.

[185] Schedule 2, paragraphs 10(2) to (5), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[186] That is, higher authority need not give reasons, but the offender must be informed of any reasons that higher authority does give.

[187] Schedule 2, paragraph 10(6), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[188] Schedule 2, paragraph 11, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[189] Schedule 2, paragraph 12, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

to the suspended sentence[190], 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 193[191]. But, if the CO decides that in his view the sentence should be activated, they 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 above[192]. The matters that the CO must take into account in deciding whether to seek approval for an activation order, and the reasons they 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 above[193].

[190] i.e. it is not more than one year since the sentence was suspended.

[191] The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 97(2).

[192] Schedule 2, paragraph 14, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

[193] Schedule 2 paragraphs 15 and 16 Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

Annex A to
Vol 1 Ch 9
JSP 830 MSL

APPLICATION BY THE CO TO HEAR A CHARGE SUMMARILY

HMS WALES
BFPO 000

Higher Authority
Address

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 record[194]; 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.

[194] Not to include any record of Administrative Action

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

Annex B to
Vol 1 Ch 9
JSP 830 MSL

APPLICATION BY A CO TO HA FOR EXTENDED POWERS

HMS WALES
BFPO 000

Higher Authority
Address

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.
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.

Annex E to
Vol 1 Ch 9
JSP 830 MSL

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. They proceeded to HMS LORD where they wish to meet some of his Service friends. They were 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 they 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 they were under the legal age to both buy and consume alcohol and further that they were 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, they were 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 they were in trouble and that they were 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 they had been instructed by one of the guard staff to wait in the TV Room and while there they had panicked and rushed out of the room. They admitted that bumping into Private Meredith and that act was reckless, but claimed that it had been an accident. They 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 they heard shouting coming from behind him. They 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 they 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 they were eventually restrained using cable ties and the assistance of Corporal Henson. In interview, Smith accepted CSO Wilson's version of events. (These facts form the basis of the third charge.)

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. They are 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 they do not wish to do so. Where the accused has difficulty in finding a suitable person to represent him they 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 they:

a. Are a Service person and remains as such whilst carrying out this function;

b. Are of at least the rank or rate of petty officer or military, marine or air-force sergeant; and

c. Consent 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.

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 to 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 they understand 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 they 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 they are able to get free legal advice contacting a staff lawyer if they themselves require 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 they understand 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 they intend 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 summarily[195]. 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 they 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 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 they decide it appropriate, the CO will activate the suspended sentence by way of a separate order after they have sentenced

[195] Section 54(2) of the Act.

the accused for the offence they are 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 they 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 they should not admit the charge if they 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 they want the attendance of a CO's witness, they have 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 they think 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 they will give reasons for that sentence. Once the CO has given his reasons they will, if applicable, go on to inform the offender of his decision on whether they are making an order for full or partial activation of the suspended sentence of detention and they 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 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 they understand that the sentence will not commence until the end of the 14 day appeal period unless they choose 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,

[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).

ensure that they are aware that they 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 they cannot be charged for the same offence again. You must also inform him that they 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 they are 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 they are aware of his right to ask for the appeal period to be extended, where they feel they need 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 they may be entitled to Legal Aid should they 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 they were 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 they have 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, they 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 they have 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, they are bound by it if it has been administered in such form and with such ceremonies as they have 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 they 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, they 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".

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[197] For Scottish oaths in criminal proceedings see the Act of Adjournal (Criminal Proceeding Rules) 1996/513.

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 they have 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**[198]. 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 they understand that the sentence will not commence until the end of the 14 day appeal period unless they choose 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 they are aware that they 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 they are 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 they are aware of his right to ask for the appeal period to be extended, where they feel they need 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, they will inform the offender of his decision on whether they are making an order for full or partial activation of the suspended sentence of detention and they 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 they may be entitled to Legal Aid should they 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).

[198] 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. They are 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 they do not wish to do so. Where the offender has difficulty in finding a suitable person to represent him they 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 they:

a. Are a Service person and remains as such whilst carrying out this function.

b. Are 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.

Chapter 10

Absence and desertion

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 taken[199], usually within 4 hours[200] 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 efforts[201] 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.

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[199] In addition to any other actions specified in RN QRRN Chapter 40 and TI 35, Army LANDSO 3200 and RAF AP3392 Volume 4.

[200] This is not an absolute requirement and COs should apply judgement to determine the most appropriate time to commence action to locate the absentee.

[201] 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 CO[202], 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 absentee[203] from the first day of absence. The effect will be that pay is suspended retrospectively from the first day of unauthorised absence[204]. The certificate has 4 purposes:

a. It aids recovery of the Service person by the appropriate single Service mechanisms[205];

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 State[206].

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 cancelled[207].

7. Copies of the certificate of absence should be sent to the following external addressees:

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	1. DRM 2. NPM(E) A & D for RNMPU 3. Area NPM 4. PSyA RN for SO2 CI	1. FLC/Theatre HQ (for J1 discipline staff and Service police) – officers only. 2. Formation HQ (for J1) 3. Service Police Crime Bureau.	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

[202] 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.
[203] 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.
[204] For detail on suspension and forfeiture see paragraph 40.
[205] RN QRRN Chapter 40, TI 35 and FLAGO Chapter 16; Army LANDSO 3200; and RAF AP3392 Volume 4.
[206] Section 316(2)(b) of the Act.
[207] A certificate will be cancelled where a Service person is found not to have been absent without leave during the relevant period.

	5. NCHQ for		Crime Bureau.
5. For Absentees on sailing, addressees listed in FLAGO 1614.	SO2 G1 RM Disc 6. Service Police Crime Bureau	4. Defence Vetting Agency - where absentee holds a sensitive post.	
6. Theatre HQ for J1 staff (if overseas)	7. Theatre HQ for J1 staff if overseas.	5. HQ Intelligence and Security for the Command (and Division if in UK).	

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 day[208] 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 specify[209] 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)[210]/Royal Navy Missing Persons Unit (RNMPU) will notify appropriate civil police forces of unauthorised absentees. This evidence of unauthorised absence[211] should be in the form of the certificate of absence at Annex C.

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 CO[212], 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 Missing[213] and the relevant casualty

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[208] 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.
[209] Annex C, Paragraph 15 'Other Information'.
[210] SPCB Ops Room is contactable by telephone on 0239228 (GTN 93835) 5170/5180 and by fax on 02392285179, e-mail: SPCB-CCRIO-OPS-Group Mailbox.
[211] Section 316(2)(b) of the Act.
[212] CO here includes subordinate commanders.
[213] 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.

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 their 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 person[214], 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 their authority, the Service Police or the prosecutor.

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 possible[215]. The civil police are required to hand over a certificate containing specified information at the same time, along with a certified copy of any custody records raised and maintained for the person whilst he was under arrest[216](see paragraph 17).

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[214] The Armed Forces (Warrants of Arrest for Service Offences) Rules 2009/1110, rule 2.
[215] Section 313(4) of the Act.
[216] Section 319(1) of the Act and The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108 Regulation 4]

15. **Arrest by civilian police without a warrant.** An officer of a UK[217] or British overseas territory[218] 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 leave[219]. Where a person is arrested in these circumstances, he must be brought before a court of summary jurisdiction in the territory in which he was arrested[220]. In England and Wales, this is the magistrates' court. The court may either release the suspect, or arrange for them to be transferred to service custody, or release them subject to a condition that he reports to such place or person as may be specified for the purpose of enabling them to be taken into service custody[221] – see paragraphs 19 to 25 below.

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[222]. The person in charge of the station will decide whether to (a) arrange for them to be transferred to service custody (see paragraph 17); or (b) arrange for them to be brought before a court of summary jurisdiction (see paragraphs 19 to 25); or (c) release them subject to a condition that he reports to such place or person as may be specified for the purpose of enabling them to be taken into service custody (see paragraph 18)[223]; 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 containing specified information, along with a certified copy of any custody records raised and maintained for the person whilst he was under arrest, is to be handed over to the person receiving the absentee into service custody at the same time[224]. Whilst it is the duty of the civil police to provide this certificate, a template is provided at Annex F. A Copy of the certificate should be sent to the Service Police Crime Bureau.

18. **Release subject to a reporting condition**. Where the civilian police release an absentee or deserter subject to reporting conditions, a certificate containing the specified information, details of the conditions specified, and certified copies of any custody records raised and maintained while the person was under arrest must be passed as soon as practicable to the Service Police Crime Bureau[225], Although it is the duty of the civil police to provide this certificate, a template is provided at Annex E. A copy of the certificate is to be provided to the absentee or deserter, with the instruction that it be handed to the commanding officer at the place of report[226]).

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 them unless:

a. He admits to the court to being a person subject to Service law who has deserted or is absent without leave.

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[217] References to the UK include England and Wales, Scotland, Northern Ireland and the Isle of Man.
[218] 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.
[219] Section 314 of the Act.
[220] Section 314(4) of the Act.
[221] Section 316(3) of the Act.
[222] Section 315(1) of the Act.
[223] Section 315(4) of the Act.
[224] The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.
[225] The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.
[226] The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108 Regulation 5.

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 them to be transferred to Service custody; or

b. release them 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 them to be taken into Service custody[227].

21. Where the absentee or deserter is in civil custody for some other reason, the court may arrange for them to be transferred to Service custody[228].

22. **Transfer to Service Custody**. Where an absentee or deserter is transferred to service custody, the court is to provide a certificate containing the required information [229]. Whilst it is the duty of the court to provide this certificate, a template is provided at Annex F. If there is likely to be a delay before a person can be transferred into service custody the court may commit the absentee or deserter to be held in civil custody, pending their transfer, in a prison, police station or in any other place provided for the confinement of persons in custody[230].

23. **Release subject to a reporting condition**. When an absentee or deserter is released subject to reporting conditions, the court is required to provide a certificate containing specified information, details of the conditions specified, and certified copies of any custody records raised and maintained while the person was under arrest[231]. The certificate must be passed as soon as practicable to the Service Police Crime Bureau. Although it is the duty of the court to provide this certificate, a template is provided at Annex E. A copy of the certificate is to be provided to the absentee or deserter, with the instruction that it be handed to the commanding officer at the place of report.

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

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[227] Section 316(3) of the Act.
[228] Section 316(3) of the Act.
[229] The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.
[230] Section 316(5) of the Act.
[231] Section 319(1) of the Act and 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 their release[232]. 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) and The Armed Forces (Warrants of Arrest for Service Offences) Rules 2009.

Termination of absence

26. **Termination**. Long term absence is deemed to have terminated when the absentee:

a. Rejoins their 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.

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[232] Section 317 of the Act.

b. Obtain evidence relating to a Service offence for which the suspect is under arrest, by questioning the suspect[233].

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 apply[234]:

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 them; 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 their own protection or, if he is under 17 tears of age, for their own welfare or in their 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 their 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) paragraph 55). 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 their ship, unit or establishment.

32. **Release from post charge custody 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) paragraph 56).

33. **The relevant time for custody.** Note that the 'relevant time' means; in relation to a person arrested under section 67 (the general powers of arrest) of the Act or arrested by an officer of a UK or British overseas territory police force, the time of arrest; and in relation to a person delivered into custody following surrender under section 315 of the Act (deserter or absentee without leave surrendering to civilian police) of the Act, the time of surrender. For full details on custody see Chapter 5.

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[233] Section 99 of the Act.
[234] 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 desertion[235], the CO may decide, with or without 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 their decision and of the period of service to be forfeited[236]. 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.

Annex H provides a format that meets the requirements of the regulations.

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 36.b above[237].

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.

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.

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[235] The Armed Forces (Forfeiture of Service) (No.2) Regulations 2009/1090, regulation 3.
[236] Forfeiture of service applies only to desertion and not absence without leave.
[237] 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 them for that period.

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 service[238].** 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.

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)

[238] Chapter 18 (Terms and conditions of enlistment and service).

43. In addition to the requirement to report incidents or matters of Parliamentary, media and public interest as laid down by single Service instructions[239] 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 process[240]. The individual is to remain on the strength of their 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 entry[241]. 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 pay[242], 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 them (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 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,

[239] QRRN Chapter 39, Army LFSO 3200 and RAF QR J2459C.
[240] See JSP 760, Chapter 12 (Custodial Absence)
[241] RN FLAGO Ch 16, Army QRs 6.178, 6.179 and Annex H to QR Chapter 5, RAF QR 1027.
[242] See the Armed Forces (Forfeitures and Deductions) Regulations 2009/1109.

movement of absentees and updating of records), see single Service guidance[243] and JSPs 760 and 754.

[243] 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 forces[244] are subject to Service law under the Armed Forces Act 2006 (the Act) when[245]:

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 force[246].

2. **Recall**. A person who is recalled[247] 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 service[248] to release or discharge[249].

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 their 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 limits[250] 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 force[251].

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[244] Section 1(2) RFA96.
[245] Section 367(2) of the Act.
[246] Permanent member of a reserve force, see RFA 1996, section 6; this is a reference to the Non Regular Permanent Staff of the TA.
[247] 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.
[248] Acceptance into service, see RFA 1996 section 71
[249] Section 368(2) of the Act.
[250] See Chapter 3 (Jurisdiction and time limits).
[251] Section 55 of the Act.

b. A member of an ex-regular reserve force[252] who has ceased to be subject to an additional duties commitment[253] may not be charged with a Service offence after the end of six months from the date he ceased to be subject to the commitment[254].

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 again[255].

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 top do so in pursuance of orders or regulations under section 4[256].

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 service[257].

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,[258] or begin a period of service under an additional duties commitment,[259] 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,[260] or an employee agreement,[261] 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 branches[262] (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 recall[263].

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[252] Ex-regular reserve force, see RFA 1996, section 2(2).
[253] Additional duties commitment, see RFA 1996, section 25.
[254] Section 56 of the Act.
[255] Section 57 of the Act.
[256] 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).
[257] Accepted into service, see RFA 96 sections 33, 44, 59 and 71.
[258] Full-time service commitment, see RFA 96 section 24.
[259] Additional duties commitment, see RFA 96 section 25.
[260] Special Agreement, see RFA 96 section 28.
[261] Employee agreement, see RFA 96 section 39.
[262] NPT(Res), PS2(Army), ACOS Pers Pol(RAF).
[263] 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 hearing[264] 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 service[265] 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 their CO or at the time the accused is apprehended, whichever is the later[266].

a. Advice should be sought from the staff legal adviser and Service personnel branches[267] 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.

[264] Section 53 of the Act
[265] Full-time reserve service, see RFA 96, section 24
[266] RFA 96 section 107.
[267] NPT(Res), PS2(Army), ACOS Pers Pol(RAF)

Chapter 11

Summary hearing - dealing with evidence

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 sub-paragraph 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. **Drunkenness.** 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 capacity[268] 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 so[269], 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 capacity[270]. 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

[268] But not for example where he had been asked to give his opinion as to whether an accused was drunk.

[269] See DGPL 76/03 – Confidentiality and the Protection of Patient Information written by the Army Medical Directorate which has tri-Service application.

[270] 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.

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 perjury[271], 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 court[272]. 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.

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 civilians[273]. The results of such tests are not admissible[274] as evidence in disciplinary proceedings for a Service offence. Also see JSP 835 (Alcohol and Substance Misuse and Testing).

[271] Sections 2 or 5, the Perjury Act 1911.
[272] The Armed Forces (Service Inquiries) Regulations 2008/1651 regulation 12.
[273] Sections 305 to 308 of the Act.
[274] Section 308(3) of the Act.

Chapter 12

Defences, mitigation and criminal responsibility

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 raised[275] by the accused or is apparent from the facts put forward by them or on their behalf [276] a charge can only be found proved if it is shown to the required standard[277] 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 they 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 they 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

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[275] Until the issue of a possible defence is raised by the accused, its relevance to the charge does not arise.
[276] The accused is not required to assert that they are 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 they can find the charge proved.
[277] 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 they did but for the fact that their inhibitions were reduced due to the effect of alcohol/drugs which they 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'[278]. 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 they were (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 they were 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 they can find the charge proved.

b. For other offences which may be committed intentionally, recklessly or negligently[279], 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 their drink laced unbeknown to them, they will not necessarily, whilst under the influence of such drink, be accountable for all their 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 them 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

[278] That is an offence that can only be committed intentionally (or deliberately) as opposed to an offence that can be committed recklessly.
[279] 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 they are 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 them. 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 they reasonably believe they 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 they can when threatened, but their ability to do so will be relevant to the reasonableness of the force used in their 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 their 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 large[280]. 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 their 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 their arrest by the Service Police they honestly (but mistakenly) believed that the persons seeking to make the arrest were not Service policemen but were impersonating Service policeman. In deciding whether they find 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 them to decide whether the accused genuinely held that belief they 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 offence[281] 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

[280] Section 3, Criminal Law Act 1967.
[281] 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.

belief was genuinely held. Where the issue is raised the officer hearing the charge must be sure that no such belief was held before they can find the charge proved.

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 harm[282] if they do not undertake a criminal act. For example, where an accused claims that another person threatened to seriously harm them unless they stole a digital camera for them.

16. The fact that the accused believes that a threat of death or grievous bodily harm will be carried out if they do not commit the offence is not of itself sufficient if a person 'of reasonable firmness'[283] 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 they 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 their companion (as they are unable to pull the accused to safety) or cutting the rope and saving himself, but accelerating the death of their companion.[284]

19. An accused may have a defence of necessity to an act which would otherwise be criminal if they 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. They 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 they were seeking to avoid or prevent.

20. **Insanity.** Every person is presumed by law to be sane and to be accountable for their 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-

[282] It is possible that a fear of false imprisonment might suffice.
[283] i.e. a person who is not put in fear by the slightest threat.
[284] Archbold 2009 17-128.

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 their vehicle.

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 their 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 they are 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 summarily[285] but can, nevertheless, be a strong mitigating factor. Although a commonly claimed 'defence' particularly in cases of assault, the claim by an accused that they were 'provoked' or 'wound up' by the victim/co-accused must only be taken into account by the officer hearing the charge (if they are satisfied this occurred) as the background to the offence. For example, an accused might claim that their victim 'provoked' them into hitting them because they called their girlfriend "a slag" in front of them and others, or had been making a succession of derogatory comments to them 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 they were not present when the offence was committed. However, an alibi is more than an assertion that they were not in a particular place at a particular time. In order to establish an alibi the accused has to prove that they were somewhere else at the relevant time. Once the accused, by evidence, shows that they were 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 summarily[286]. 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.

[285] It is however a defence to murder, where it reduces the offence to one of manslaughter.
[286] 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.

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 they carried 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 they 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 their family (a custodial sentence, for example). By contrast, a defence is an explanation for the accused's actions that legally excuse or justify their conduct. The accused often contests the accuracy of the allegations against them; 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 they are sure that a defence does not apply they 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 they want that consequence to follow from their 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 them, intends to kill whether the intended victim is two metres away and an easy target or whether they are 200 metres away and it would have taken an exceptionally good shot to hit them. In either case, even if the accused misses they 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 desired[287], but includes consequences which an accused might not want to follow but which they know 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 their 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 they are aware of a risk that exists or will exist; and

b. A result, when they are aware of a risk that it will occur;

and it is in the circumstances known to them, unreasonable to take that risk[288].

36. Proof is required that the accused was aware of the risk and in circumstances known to them, it was unreasonable for them to take the risk. In other words, to prove a person has been reckless, they 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. They 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 they did not think of a certain risk will not be accepted when all the circumstances and probabilities and evidence of what they did and said at the time, show that they 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

[287] In other words - consequences which the accused 'directly intends' to follow.
[288] 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, their failure to do so may be negligent and the charge against them 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 they fail 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 they used or failed to use. If the accused either fails to provide an explanation for their apparently careless driving, or the explanation is objectively inadequate, then the conclusion will be that they were 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**[289]. 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 they may have such an excuse that the officer hearing the charge will have to be satisfied beyond reasonable doubt that they did not have a lawful or reasonable excuse.

42. **Lawful excuse**. A person will have a lawful excuse if they act because of some lawful reason. For example, if a Service policeman breaks down the door of a barrack room to arrest a suspect, they will not commit an offence under section 24 (damaging Service property) of the Act because of the statutory powers they are given under section 90 (entry for purpose of arrest etc) of the Act. Similarly, a person will have a lawful excuse if they acted as they did because they were lawfully obliged to do so. For example, if a person intentionally disposes of Service property because they are 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) they will not have committed an offence.

[289] Section 325 of the Act.

43. **Reasonable excuse**. A person will have a defence if they have a reasonable excuse for acting in the manner alleged. Thus, a person charged with fighting[290] will have a reasonable excuse for their actions if they acted in self defence. Similarly, a person who fails to attend for a duty[291] will have a reasonable excuse if they do not attend because they were involved in an accident and were 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, they will also have a reasonable excuse.

44. In cases where the accused is charged with criminal conduct offences[292] - 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.

[290] Section 21 of the Act.
[291] Section 15 of the Act.
[292] Section 42 of the Act.

Chapter 13

Summary hearing sentencing and punishments

Annexes

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 sentence[293]. 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 CO[294] 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 offence[295]. Those purposes are[296]:

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 public[297].

f. The making of reparation by offenders to persons affected by their offences.

g. If the offender is under 18, regard to his welfare.

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[293] These principles and procedures largely reflect those followed in the civilian courts in England and Wales.
[294] This includes subordinate commanders unless expressed to the contrary.
[295] Non criminal (discipline) and criminal conduct offences.
[296] Section 237 of the Act.
[297] The 'public' includes both the Service and civilian communities.

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 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.

l. 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, must[298] 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 conviction[299]. 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 aggravated[300] for the purposes of sentencing if[301] 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

[298] Section 238(1)(b) of the Act.
[299] Section 238(2) of the Act.
[300] Section 240 of the Act.
[301] Crime and Disorder Act 1998 section 28.

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.

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 he must be treated as holding the substantive form of that rank 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 must be treated as holding their substantive rank.

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 together[302].

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 sentence[303].

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 order[304] 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 application[305].

g. What credit, if any, has been given for any time spent in custody[306].

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).

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[302] Section 131 of the Act. This is also the case for the SAC, see section 147 of the Act.
[303] Section 252 of the Act.
[304] E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO order, suspended sentence order etc.
[305] Section 252 of the Act.
[306] See paragraphs 51 and 52.

Punishments available at summary hearing

26. The punishments that may be awarded at summary hearing are[307]:

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.

h. Additionally the following minor punishments may be awarded[308]:

(1) Stoppage of leave (those below the rank or rate of warrant officer only), see paragraphs 127 – 135.

(2) Restriction of privileges (able rates, marines, soldiers, airmen and army officer cadets only), see paragraphs 137 – 149.

(3) 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 punishment[309] 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 powers[310] 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 rate[311]

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[307] Section 132(1) of the Act.
[308] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009.
[309] Section 132 to 136 of the Act.
[310] Section 132 to 136 of the Act.
[311] Section 132 to 136 of the Act.

can be found at Annex B. Detail on the permitted combinations[312] of punishments can be found at paragraph 32 below.

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 awarded[313]. 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 period[314], 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 allow[315].

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 effect[316], 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.

[312] Section 138 of the Act and the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009, regulation 5.
[313] Section 141(2)(a) of the Act.
[314] Section 141(2)(b) of the Act and Chapter 28 (Summary Appeal Court).
[315] Section 141(3) of the Act.
[316] Section 176(1) of the Act.

Admonition	Service compensation order only.

All other combinations are prohibited[317].

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 days[318]. If he has been granted extended powers[319] he may award a maximum term of 90 days' detention[320].

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' detention[321].

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 detention[322].

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 punishment[323]. Members of the RAF may not be reduced to a rank which is lower than the highest rank held as an airman[324]. 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

[317] Section 138 of the Act and the Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009, regulation 5.
[318] Section 133(1)(b) of the Act.
[319] Section 133(3) of the Act.
[320] Section 133(1)(a) of the Act.
[321] Section 133(2) of the Act.
[322] See Annex A to this Chapter.
[323] Section 293 of the Act.
[324] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009, Regulation 8

reduced to that rank/rate with effect from the day on which the sentence takes effect[325]. 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 accompanying punishment of disrating/reduction in rank[326]. 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 regulations[327], 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 airman[328].

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 pay[329] for the duration of the time served[330]. However, a family maintenance grant may be available for those eligible at the discretion of the CO[331]. 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 sentence[332]. When deciding this, the CO must take into account all available information about the circumstances of the offence or offences[333]. 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. Additional remission can be earned on sentences of over 90 days at the discretion of the Commandant MCTC, up to a maximum remission of one-sixth of the portion in excess of 90

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[325] Section 293 of the Act
[326] Section 138(3) of the Act
[327] RN BR 1066 Chapters 7 and 29, Army AGAI 62 Annex Q, RAF QR 1199A
[328] Section 294 of the Act
[329] Section 342(1)(a) of the Act and Regulation 3(1)(b) of the Armed Forces(Forfeiture and Deductions) Regulations 2009.
[330] JSP 754 (The tri-Service regulations for pay and charges) Chapter 3, section 13 – Suspension/Cessation/Forfeiture of Pay.
[331] JSP 754 (The tri-Service regulations for pay and charges) Chapter 8, section 1 – Statutory Payments and Grants – overview.
[332] Section 242(4) of the Act.

[333] Section 242(5) of the Act.

days. Where consecutive sentences are being served, it is the total period that counts for the purposes of earning additional remission[334].

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 offences[335] for which the sentence is 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

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[334] The Service Custody and Service of Relevant Sentences Rules 2009, SI 2009/1096 rule 70.

[335] Section 243(3) of the Act.

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 mandatory[336], except in limited circumstances[337], 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 matters[338].

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[336] Section 246(2) of the Act.
[337] 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.
[338] Section 247(2) of the Act.

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 activated[339]. 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 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 offender[340]. 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 hearing[341].

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 CO[342] 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.

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[339] Section 247(3) of the Act.
[340] Section 246(5)(b) of the Act.
[341] Section 193(2) of the Act.
[342] The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009, regulation 23.

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.

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 account[343]:

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).

[343] The CO should also consult Chapter 14 (The summary hearing sentencing guide).

(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 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 accordingly[344]. 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 reformative effect noting the restrictions on the maximum aggregate sentence of detention that can be awarded.

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[344] Section 193(4) of the Act.

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

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 only[345]. 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 duration[346] 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.

[345] Section 132(1) Row 6 and section 164(1) Row 10 of the Act.
[346] Section 173(2) of the Act.

71. **Requirements**[347]**.** 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)[348] 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**:

(1) Forfeiture of 1/6th gross pay[349] 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 period[350] during the initial period and subject to a maximum of 1 hour in each 24 hour period[351] 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

[347] Section 173 of the Act and the Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3.
[348] Section 173 of the Act and the Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3.
[349] Section 173(1)(b) of the Act.
[350] The Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3(a).
[351] The Armed Forces (Service Supervision and Punishment Orders) Regulations 2009, regulation 3(a).

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.

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 days[352] (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

[352] RN only – this means Saturday or Sunday daily harbour routine days.

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.

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 order[353]. 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

[353] Section 138 of the Act.

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 punishment[354].

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).

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 factors[355].

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 punishment[356]. 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 CO[357].

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 loss[358]. 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 instructions[359]. 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.

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[354] Section 174(4)(b) of the Act.

[355] Section 248(5) of the Act.
[356] Section 134(2) of the Act.
[357] Section 132(1) Row 2 of the Act.
[358] 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.
[359] RN PLAGO, Army AGAI 62, RAF Manning Staff Instructions.

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 authorities[360].

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 RAF[361].

95. **Extended powers.** A CO does not need extended powers to reduce in rank a lance corporal or lance bombardier in the Army or RM[362]. 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 following[363]:

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 one[364] acting rank[365] 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 airman[366]. 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.

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[360] RN - Director Naval Career Management, Fleet HQ; Army – Army Personnel Centre (APC), Upavon; RAF – ACOS Manning, HQ Air Command.
[361] Section 132(1) Row 3 of the Act.
[362] Section 135(1) of the Act.
[363] Section 135(2) of the Act.
[364] Only a CM can award multi step reduction in rank or disrating.
[365] This includes local acting rate (RN only) see Chapter 14 (The summary hearing sentencing guide).
[366] Section 135(3) of the Act.

100. COs should be mindful of the potential career and future employability consequences of disrating/reduction in rank[367], 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 policy[368] 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 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 754[369] (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 authorities[370].

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' pay[371].

b. All other ranks or rates: 28 days' pay[372].

106. **Extended powers.** If a CO has extended powers he may award an officer or warrant officer a fine of up to 28 days' pay[373].

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 inquire[374] 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 offence[375].

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[367] See single-Service guidance.
[368] RN see BR 1066, Army see QR 9.182 and RAF see QR 1199A.
[369] JSP 754 (The tri-Service regulations for pay and charges), article 03.0903.
[370] RN - Director Naval Personnel, Fleet HQ; Army – Army Personnel Centre (APC), Glasgow; RAF – ACOS Manning, HQ Air Command.
[371] Section 136(1)(b) of the Act.
[372] Section 136(1)(a) of the Act.
[373] Section 136(1)(a) of the Act.
[374] Section 249 of the Act.
[375] Section 249 of the Act.

109. Calculations for the purposes of a fine are related to the level of pay (for local, local acting[376] 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 instalments[377].

c. Deductions may be made from the offender's pay[378] 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 order[379] 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 pay[380]. 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.

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[376] RN only.
[377] Section 251(2) of the Act.
[378] Section 342(1)(d) of the Act.
[379] Section 251 of the Act.
[380] 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).

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 rate[381]. 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.

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 SCO[382].

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 reprimand[383] 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:

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[381] Section 136(4)(b) of the Act
[382] Section 138 of the Act
[383] Section 132(1) Row 5 of the Act

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 guidance[384].

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 station[385].

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 days[386]. 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 stopped[387]. The days on which the punishment takes effect should be specified by the person who awards the stoppage of leave[388]. (A commanding officer cannot hear the charge himself and delegate the decision

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[384] RN – PLAGOs/BR 3; Army – AGAI 62 and RAF – Manning staff Instructions.
[385] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(8).
[386] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(1).
[387] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(5)(a).
[388] 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.

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 occur[389]. 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 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 combination[390] 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.

[389] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 3(4).
[390] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 5(2).

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 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 days[391]. 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 ROPs[392]. 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 occur[393]. 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.

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[391] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(3).
[392] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(4).
[393] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(5).

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.

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 it[394] (see paragraph 139 above). The CO may not delegate this function.

Admonition[395]

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.

[394] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 4(6)(b).
[395] The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 regulation 2.

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.

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 damage[396]. 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 property[397]. 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 caused[398].

156. Where an SCO is awarded, special consideration must be given of the financial effects of the punishment[399]; 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 £1000[400]. Where 2 or more SCOs are awarded the combined total must still not exceed £1000[401]. Only a CO may award[402] 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.

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[396] Section 175(1) of the Act.
[397] JSP 341 (Joint Service Road Transport Regulations).
[398] Section 175(3) of the Act.
[399] Section 250(1) of the Act.
[400] Section 137(1) of the Act.
[401] Section 137(2) of the Act.
[402] Schedule 1 to the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009.

b. Payment may be made by instalments[403].

c. Deductions may be made from the offender's pay[404] 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 order[405] for example where his circumstances have changed such that he is no longer able to satisfy the SCO 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) 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 pay[406]. 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 immediately[407] 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 effect[408]. 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

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[403] Section 251(2) of the Act.
[404] Section 342(1)(d) of the Act.
[405] Section 251 of the Act.
[406] JSP 754 (The tri-Service regulations for pay and charges) Chapter 2, Section 6 – Recovery of Items from Pay.
[407] Section 251(2) of the Act.
[408] Section 176(1) of the Act.

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 made[409] in respect of:

a. Bereavement.

b. Funeral Expenses.

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 order[410], see Chapter 16 (Financial penalty enforcement orders).

168. **Review[411].** 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 appeal[412] which could result in the order being varied or ceasing to have effect[413].

169. The CO may discharge the SCO or he may reduce the amount payable if it appears to him that[414]:

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.

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[409] Section 175(4) of the Act.
[410] Section 322 of the Act.
[411] Section 177 of the Act.
[412] 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.
[413] Section 177(2) of the Act.
[414] Section 177(3) of the Act.

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.

173. The guidelines in the table below[415] 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 l 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:

[415] The Criminal Injuries Compensation Scheme 2001 (extant at May 2008).

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 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 CO[416]. 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 priority[417]. 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 so[418].

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[416] Section 250(1) of the Act.
[417] Section 250(2) of the Act.
[418] Section 175(8) of the Act.

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 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).

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[419]	Up to £750.00[420]	Up to £500.00[421]	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

[419] Not to be awarded for personal injury.
[420] Not to be awarded for personal injury.
[421] 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

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.

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.[422] 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).[423] 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.[424]

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).[425]

5. Where detention is awarded under NDA57 after commencement, the CO may suspend the sentence at the time when he awards it.[426] 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.[427]

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.

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[422] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(3).
[423] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(9).
[424] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 57.
[425] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 56.
[426] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(5).
[427] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 55(6).

Effect of SDA sentences

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.[428]

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.[429]

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).[430]

10. A committal order may not be issued under NDA57 section 81(3) after commencement, even if the sentence was passed before commencement.[431] 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;

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[428] 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.
[429] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), articles 138 to 140 and 142.
[430] Section 380 order(The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), articles 141, 143 and 144.
[431] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 137.

(2) During the remainder of the punishment, for a period not exceeding 1 hour each day;

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."[432]

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[433] and may delegate any of these functions to a person of or above the rate of chief petty officer.[434]

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,[435] 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.[436]

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;[437]

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;[438]

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

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[432] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 159(3).
[433] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 159(4).
[434] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 159(5).
[435] Extended powers may be applied for before commencement: see Chapter 9 (Summary hearing and activation of suspended sentence of Service detention)
[436] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 7.
[437] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 102(a).
[438] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), articles 104 and 105.

spent in military, air-force or naval custody after the accused was informed that a charge was to be reported to his CO.[439]

15. A sentence of detention awarded under AFA06 may be made consecutive to a sentence awarded under the SDAs (including one awarded after commencement).[440]

[439] Section 380 order (The Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), article 106(1).
[440] 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

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 their 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 explanation[441] as to the reasons why they have 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).

[441] 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	• Reference to corresponding offences section of the MSL.
Mitigating factors	• Mitigating factors affecting level of sentence – see table below at paragraph 5
Aggravating factors	• Aggravating factors affecting level of sentence – see table below at paragraph 5
Range of punishments	• An indication of typical sentence depending on severity by giving an entry point and low and high levels of seriousness. *With the exception of section 9 (AWOL) offences for which general guidance and a suggested tariff is provided, t*here 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. 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	• 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	• Admission of the offence. • Substantial cooperation with investigators. • Offender relatively young (usually under 21). • Inexperienced Service person. • 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	• 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 them) in respect of all the charges taken together[442]. 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 explain why the offence is sufficiently serious to warrant such a sentence[443]. He must include in their reasons, the following:

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[442] Section 131 of the Act.

[443] Section 252 of the Act.

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 their 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 order[444] 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 application[445]; and

g. The amount of credit, if any, that has been given for any time spent in custody[446].

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	• 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 their station making them unable to return to their unit on time. • Made contact with unit. • Genuine remorse.
Aggravating factors	• 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.

[444] Eg a Service compensation order, order imposing a fine by deductions/instalments, SSPO order, suspended sentence order etc.
[445] Section 252 of the Act.

Range of punishments	**General guidance – for more detail see tariff below** • **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	• 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 their 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 depending on all the facts of the case, including the actual length of absence. • 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 they have 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.

[446] See Chapter 13 (Summary hearing sentencing and punishments).

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	• 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	• 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 their failure would be.
Range of punishments	**Punishment after denial of offence:** • **Low** - Restriction of privileges and/or stoppage of leave • **Entry point** - 5 – 10 days fine • **High** - 4 - 10 days detention **Punishment after admission of offence:** • **Low** - Restriction of privileges and/or stoppage of leave • **Entry Point** - 3 – 7 days fine • **High** - 1 - 7 days detention
Sentencing guidance	• 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	Failure to perform or attend, leaving without permission and neglect of duty contrary to s15 AFA06
Charging reference	MSL Chapter 7 - Non-criminal conduct (disciplinary) offences page 1-7-46
Mitigating factors	• 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	• Deliberate act or omission. • Gross negligence — accused falls well below the level of a competent and careful person of their 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	**Punishment after denial of offence** • **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. **Punishment after admission of offence** • **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	• 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 their act or omission.
Negligent discharge	• 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. **Mitigating factors** • 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: o In a training environment - fine of 2 days' pay. o Trained personnel whilst on range practice/phase 2 - Fine of 3 - 7 days' pay. o 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 their 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	• New to unit/theatre. • Genuine lack of appreciation of the consequences of the contravention. • Genuine remorse.
Aggravating factors	• Order related to security of ship or unit. • Premeditated. • Order was well promulgated and/or repeated. • Wilful.
Range of punishments	**Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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	• 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 their appreciation of their 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	• Disciplinary action is *only* applicable where *culpable negligence*/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)	• 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.

	• Offences committed in the training or operational environment may be considered to be more serious.
In improper place, eg male in female accommodation	• 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	• Given the wide range of possible circumstances, COs should seek advice on individual cases.
Weapons offences	• 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	• **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	• No harm or damage caused. • Impulsive behaviour in perceived emergency. • Level of training. • Lack of supervision. • Genuine remorse.
Aggravating factors	• 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	• 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	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 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	• 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	• 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	**Punishment after denial of offence:** **For offences under s.11(1) (involving violence):** • **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. **For offences under s.11(2) (no-violence):** • **Low** - 4 – 10 days fine. • **Entry point** – 10 - 16 days fine. • **High** – short period of detention/17 – 28 days fine. **Punishment after admission of offence:** **For offences under s.11(1) (involving violence):** • **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. **For offences under s.11(2) (no-violence):** • **Low** - 1 – 7 days fine. • **Entry point** – 7 - 14 days fine. • **High** – short period of detention/14 – 28 days fine.
Sentencing guidance	• 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	• 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	• 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	**Punishment after denial of offence:** **Reckless:** • **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 **Intentional:** • **Low** - 10 – 17 days detention • **Entry point** - 21 – 28 days detention. • **High** - 36 days detention. If offender is in position of responsibility disrating or reduction in rank will usually be appropriate. **Punishment after admission of offence:** **Reckless:** • **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 **Intentional:** • **Low** - 7 – 14 days detention • **Entry point** - 14 – 24 days detention. • **High** - 28 days detention. If offender is in position of responsibility disrating or reduction in rank will usually be appropriate.
Sentencing guidance	• 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	• 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	• Knowledge that deserter or absentee's absence compromises operational effectiveness of unit. • Continued opportunity to apprehend.
Range of punishments	**Punishment after denial of offence:** • **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) **Punishment after admission of offence:** • **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	• 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	• 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	• 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	**Punishment after denial of offence:** • **Low** - Restriction of privileges and/or stoppage of leave • **Entry point** - 5 – 10 days fine • **High** - 21 – 28 days detention **Punishment after admission of offence:** • **Low** - Restriction of privileges and/or stoppage of leave • **Entry point** - 3 – 7 days fine • **High** - 14 – 28 days detention
Sentencing guidance	• The following factors should determine the seriousness of the offending: o The extent of the waste of medical and administrative resources used in treating the pretended illness or injury; o The operational consequences of that person's actions; and o 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	• Accidental. • Genuine remorse.
Aggravating factors	• If information actually reached enemy or certainty that information could reach an enemy. • Operational environment where security may be compromised. • Premeditated.
Range of punishments	**Punishment after denial of offence:** • **Low** - 9 – 17 day fine • **Entry point** - 17 – 24 day fine • **High** - 36 days detention **Punishment after admission of offence:** • **Low** - 7 – 14 day fine • **Entry point** - 15 – 19 days' fine • **High** - 28 days detention
Sentencing guidance	• 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	• Genuine misunderstanding. • Relative youth/inexperience. • Genuine remorse.
Aggravating factors	• Threat of injury. • Operational effectiveness compromised.
Range of punishments	• Minor offences – **Entry point** - 3-7 days' restriction of privileges and/or stoppage of leave.
Sentencing guidance	• 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	**Mitigating factors** • Condition of the property on return to the owner. • Temporary borrowing of another person's property a common practice in the unit. • Genuine remorse. **Aggravating factors** • Previous offences of the same nature. • In uniform. **Range of punishments** • 1 – 7 days fine or restriction of privileges and/or stoppage of leave. **Sentencing guidance** • 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	**Mitigating factors** • Genuine misunderstanding of orders or instructions. • Compassionate circumstances. • Genuine remorse. **Aggravating factors** • Encouraging others to take part in the offence. • In uniform. **Range of punishments** • A minor punishment would be appropriate for a low level offence otherwise a fine or reprimand. **Sentencing guidance** • 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	**Mitigating factors** • Relatively young/inexperienced/welfare. • Genuine remorse. **Aggravating factors**

	• Operational consequences of the failure. **Range of punishments** • 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. **Sentencing guidance** • 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.
Misbehaviour in ship/base/camp	**Mitigating factors** • Uncharacteristic lapse. • Genuine remorse. **Aggravating factors** • Offence committed in front of subordinates. • Effect on the local community. • In uniform. **Range of punishments** • A wide range of punishments may be appropriate from an admonishment to a short period in detention depending on the circumstances of the offence. **Sentencing guidance** • 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	• 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	• 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	**Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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	• 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 their 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 their 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	• 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	• High degree of force used. • Injuries caused. • Protracted fight. • In front of subordinates. • Many parties involved. • In uniform.
Range of punishments	**Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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	• The punishment should reflect the degree of the accused's involvement as well as their 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	• Inexperience. • Absence of malice. • Horseplay. • Genuine remorse.
Aggravating factors	• 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	**Punishment after denial of offence:** **For offence committed intentionally:** • **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. **For offence committed recklessly:** • **Low** - 4 – 10 days fine. • **Entry Point** – 10 - 16 days fine. • **High** – short period of detention/ 17 – 28 days fine. **Punishment after admission of offence:** **For offence committed intentionally:** • **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. **For offences committed recklessly:** • **Low** - 1 – 7 days fine. • **Entry point** – 7 - 14 days fine. • **High** – short period of detention/14 – 28 days fine.
Sentencing guidance	• 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	• Consensual activities not intended to be made public. • Single incident. • Genuine ignorance of proper animal care. • Genuine remorse.
Aggravating factors	• 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	**Punishment after denial of offence:** • **Low** - Restriction of privileges and/or stoppage of leave. • **Entry point** - 5 – 10 days fine. • **High** - 36 days detention or disrating/reduction in rank. **Punishment after admission of offence:** • **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	• 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	• 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	• 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	**Punishment after denial of offence :** • **Low** - Admonishment or restriction of privileges and/or stoppage of leave. • **Entry point** - 10 – 28 days fine. • **High** - SSPO or disrating/reduction in rank. **Punishment after admission of offence:** • **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	• 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	• Low/inconsequential value. • No advantage to the accused. • Consequence of misapplication slight. • Genuine remorse.
Aggravating factors	• 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	**Punishment after denial of offence:** • **Low** - Admonishment or restriction of privileges and / or stoppage of leave. • **Entry point** - 10 – 28 days fine. • **High** - SSPO or disrating/reduction in rank. **Punishment after admission of offence:** • **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	• 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	• Provocation (not associated with professional duties). • Genuine remorse.
Aggravating factors	• 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	**Punishment after denial of offence:** • **Low** – Short period of detention or 10 – 28 days fine. • **Entry point** - 10 – 28 days detention. • **High** - 28 – 90 days detention. **Punishment after admission of offence:** • **Low** – Short period of detention or 7 – 21 days fine. • **Entry point** - 7 – 28 days detention. • **High** - 21 – 60 days detention.
Sentencing guidance	• 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	• Low/inconsequential value. • Special personal or domestic circumstances lying behind theft. • Opportunistic theft not premeditated. • Genuine remorse.
Aggravating factors	• 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	• 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 their 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	• 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 approach should be adopted for all forms of dishonesty for personal gain practised against an employer including travel claim fraud and Service telephone misuse. • **Breach of trust.** Where an individual has used their 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.

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	• See guidance for theft and specific guidance below:
Fraud by false representation or failing to disclose information	• 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	• 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	• 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	• 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 they have benefited at their 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: • **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	• 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	• 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:** • **Low** - Fine and or restriction of privileges/stoppage or leave.

	• **Entry point** – 21 – 28 days detention or disrating/reduction in rank, SSPO. • **High** – 36 – 60 days or detention/reduction in rank. **Punishment after admission of offence:** • **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. **ABH:** **Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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.
Sentencing guidance	• 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	• 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	• Deliberate. • Serious damage. • Damage or loss caused danger to others. • In uniform. • Encouragement of others to engage in activity causing damage.
Range of punishments	**Punishment after denial of offence:** • **Low** - 5 – 18 days fine. • **Entry point** - 18 – 28 days fine. • **High** - 10 – 36 days detention or disrating/reduction in rank. **Punishment after admission of offence:** • **Low** - 3 – 7 days fine. • **Entry point** – 7 - 14 days fine. • **High** - 7 – 28 days detention or disrating/reduction in rank.
Sentencing guidance	• 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	• 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	• 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	**Punishment after denial of offence:** • **Low** - 5 – 18 days fine. • **Entry point** - 18 – 28 days fine. • **High** - 10 – 36 days detention or disrating/reduction in rank. **Punishment after admission of offence:** • **Low** - 3 – 13 days fine. • **Entry point** - 14 – 24 days fine. • **High** - 7 – 28 days detention or disrating/reduction in rank.
Sentencing guidance	• 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.

s.13 AFA 06 OR s.42 AFA 06 AND s.139 CJA 88 or s.1 PCA 53	**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**
Charging reference	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
Mitigating factors	• Not premeditated. • Genuine remorse.
Aggravating factors	• Group action or joint possession. • Weapon actually produced. • People put in fear. • Premeditated.
Range of punishments	**Punishment after denial of offence:** • **Low** – 21 – 28 day fine. • **Entry point** – 21 – 60 days detention. • **High** – 60+ days detention. **Punishment after admission of offence:** • **Low** – 14 – 21 day fine. • **Entry point** – 14 – 42 days detention. • **High** – 42+ days detention.
Sentencing guidance	• 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	• Temporary or momentary obstruction or failure to assist. • Genuine remorse.
Aggravating factors	• Serious consequences from offender's action. • Offence committed in public. • Operational environment. • Group offence.
Range of punishments	**Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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	• 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	• Opportunist. • Poor supervision of detainee. • Poor treatment of detainee. • Genuine remorse.
Aggravating factors	• Planned. • Operational environment. • Injury caused. • Damage caused. • Use of weapon. • Use of force.
Range of punishments	**Punishment after denial of offence:** Entry point is detention due to the offender being in custody. • **Low/Medium** – 21 days detention. • **High** – 36 days detention. **Punishment after admission of offence:** Entry point is detention due to the offender being in custody. • **Low/Medium** – 14 days detention. • **High** – 28 days detention.
Sentencing guidance	• 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	• Lack of Service experience. • Force or threat of force by prisoner. • Genuine remorse.
Aggravating factors	• Experienced Serviceperson. • Operational environment. • Severe consequences of allowing escape. • Multiple escapees. • Gross negligence.
Range of punishments	**Offence committed deliberately:** **Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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. **Offence committed negligently:** **Punishment after denial of offence** • **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. **Punishment after admission of offence** • **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	• 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	• Distraction. • Impulsive action. • No damage or distress caused. • No Intent. • Genuine remorse.
Aggravating factors	• Very low height. • Serious deviation from authorised height. • Pilot in executive position. • Damage or injury caused. • Carrying Ordnance.
Range of punishments	**Punishment after denial of offence:** • **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. **Punishment after admission of offence:** • **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	• 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	• Impulsive action. • Not prolonged annoyance. • Genuine remorse.
Aggravating factors	• 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	**Punishment after denial of offence:** • **Low** –Reprimand or fine. • **Entry point** – Severe reprimand and up to 14 days fine. • **High** – Up to 28 days fine or Forfeiture of seniority. **Punishment after admission of offence:** • **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	• 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	• One-off offence. • Consequence of inaccurate certification slight. • Genuine remorse.
Aggravating factors	• 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	**Punishment after denial/admission of offence:** • **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. **Punishment after denial/admission of offence:** • **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	• 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	• 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	• Amount other than very small. • In a Service environment. • Corruption of others. • Operational environment. • Class A drug.
Range of punishments	**Punishment after denial of offence:** • **Low** – 36 days detention. • **Entry point** – 48 days detention. • **High** – 72+ days detention. **Punishment after admission of offence:** • **Low** – 28 days detention. • **Entry point** – 42 days detention. • **High** – 60+ days detention.

Sentencing guidance	• 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

Annexes

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 Council[447]. 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 they consider 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, they 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. **RN**[1]**.** 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 that is made to activate a suspended sentence of detention, they will treat the order as a punishment for the original offence for which the accused received the suspended sentence[448].

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[447] Section 152 of the Act.
[448] Section 195(1) of the Act.

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) their 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 where 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 hours[449] of the award of the punishment at the summary hearing or activation hearing, as appropriate. Where detention[450] has been awarded and the offender has chosen to start their 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 Islands[451], 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).

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[449] Other than for detention, this should be considered to be 2 working days.
[450] 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.
[451] 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.

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 summarily[452];

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 so[453] (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 permission[454] of HA to hear summarily, that permission had been granted;

f. The punishment is appropriate to the rank of the accused[455];

g. Where punishments are conjoined, that the resulting punishment is legal[456]; and

h. The severity of the punishment is commensurate with the offence proven[457] (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 SAC[458] (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 period[459] of that sentence.

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 SAC[460]:

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[452] See section 52 of the Act
[453] See Chapter 9 (Summary hearing and activation of suspended sentences of Service detention).
[454] Section 54(2), of the Act.
[455] See Chapter 13 (Summary hearing sentencing and punishments).
[456] See Chapter 13 (Summary hearing sentencing and punishments).
[457] See Chapter 13 (Summary hearing sentencing and punishment) and Chapter 14 (The summary hearing sentencing guide).
[458] If awarded by the Court Martial (CM) then any suspended sentence can not be activated by the CO.
[459] This can be anywhere between 3 and 12 month from the date the suspended sentence came into effect.
[460] Protocols within the Services for the provision of documentation to the RO may differ in this respect.

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 summarily[461] and/or permission to use extended powers of punishment had been granted[462].

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 they judge 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 their 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;

b. The officer who was carrying out the activation hearing was empowered to do so[463]; and

[461] 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.
[462] This function can only be undertaken by a CO, see Chapter 9 (Summary hearing and activation of suspended sentences of Service detention).
[463] See Chapter 9 (Summary hearing and activation of suspended sentences of Service detention).

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 SAC[464]:

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 summarily[465] and/or permission to use extended powers of punishment had been granted[466].

17. **Subsequent action by the RO.** The RO is to inquire into those matters they judge 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 their 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' they then gives a global award of punishment; it is likely that the appropriate course of 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

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[464] Protocols within the Services for the provision of documentation to the RO may differ in this respect.
[465] 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.
[466] This function can only be undertaken by a CO, see Chapter 9 (Summary hearing and activation of suspended sentences of Service detention).

19. Where a RO undertakes a review in relation to a Service person from another Service and decides that no further action is necessary, they are to send a copy of the Summary hearing review form (T-SL-SHR01) at Annex A to their 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, they are to inform their 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, after[467] 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 substantial[468] 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 they are 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 appeal[469] within the 14 day appeal period (or any extension to that period that has been authorised[470]) 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.

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 they are of the opinion that:

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[467] 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)

[468] Where the mistake nullifies the entire proceedings see paragraph 23 below.

[469] Section 141(2) of the Act.

[470] Section 141(1) of the Act.

(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 their 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 they want 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 appeals[471] 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 hearing[472] 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 received[473].

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 quashed[474] 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.

30. **Appeal against punishment.** The powers of the court on an appeal against punishment are:

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[471] Section 146 of the Act.
[472] See section 147(3)(b)(i) of the Act.
[473] Chapter 13 (Summary hearing sentencing and punishment) provides guidance on global sentences.
[474] Rule 20(1) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

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 appeal[475] against a finding and/or punishment awarded at summary hearing, including an appeal following the activation of a suspended sentence of detention, they are 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. They are to submit the Notice of appeal form to their 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 made[476], 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;

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[475] Section 141 of the Act.
[476] 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 their 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 summarily[477] and/or permission to use extended powers of punishment had been granted[478]; 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 material[479].

Action by respondent

35. The respondent to the appeal (the DSP) will decide whether to contest the appeal. They must inform the CAO of their decision within 28 days[480] and notify the CO of the appellant. Where the respondent decides to contest an appeal against finding, they are to give notice to the CAO and serve on the CAO[481], the appellant and their 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.

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[477] 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.
[478] This function can only be undertaken by a CO, see Chapter 9 (Summary hearing and activation of suspended sentences of Service detention).
[479] Rule 15(1) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.
[480] 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.
[481] 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 directs[482].

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, they are 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 they 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 their record as appropriate.

Appellant's assisting officer

38. The appellant may nominate an assisting officer[483] to assist them with the preparations for the appeal hearing and during the appeal hearing (although they 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, they 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 their 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 they 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 them, they may ask their 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, they will be free to try and find another who can assist them. Ultimately, the appellant may be required to proceed without the assistance of an assisting officer because they cannot be allowed to frustrate the process by refusing to nominate an assistant.

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[482] Rule 84(1), Armed Forces (Summary Appeal Court) Rules 2009/1211.
[483] 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).

Legal representation of appellant on appeal

40. An appellant[484] has the right to be legally represented[485] 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 representative[486] for that purpose. The appellant's CO is to ensure that the appellant is afforded reasonable opportunity of communicating with their legal representative for the purposes of preparing their case for appeal. The legal representative will be required to provide the following information to the CAO:

a. Their name and address;

b. The name, rank or rate, Service number, Service and unit or establishment of the person for whom they are acting; and

c. The proceedings before the SAC in connection with which they have been instructed.

41. The appellant is to notify the CO or the CAO in writing when they have either transferred their 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)[487], considers that this period is insufficient[488] and that they need more time than 14 days to decide whether to appeal, they may apply to the SAC (via their CO) for permission for more time[489]. In all cases, they are 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 them to state the reasons for the application. The individual is, at the same time, to include with their application any documents they consider 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 they wish to appeal[490], they may apply to the SAC via their CO for leave to do so. They are to complete the Notice of application for leave to appeal out of time form (T-SL-SAC02B) at Annex E, which will require them to provide the grounds for the application[491]. The individual is to, at the same time, include with their application any documents they consider relevant to the application.

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[484] Under section 141 of the Act.
[485] 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).
[486] Subject to rule 41, Armed Forces (Summary Appeal Court) Rules 2009/1211.
[487] 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.
[488] Under section 141(2)(b) of the Act.
[489] Under section 141(2)(b) of the Act.
[490] Under section 141(3) of the Act.
[491] Rule 16(1) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

This additional material is described as the supporting documentation including the proposed notice of appeal. Where the individual is in detention when they decide to apply for leave to appeal out of time, they are not released from detention unless and until a judge advocate decides that the case has merit and grants leave to appeal.

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, they may at any time before the determination of the application, apply to their CO in writing to withdraw their 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 they direct 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 their CO of the judge advocate's intentions. The applicant is to be made aware by their CO of the significance of this decision as soon as possible so that they can take advice and decide whether they wish to apply for a hearing. To apply for a hearing, the applicant must submit a notice in writing to the CAO (through their 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, they 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 their 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 their 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 their 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 their CO) that this does not affect their 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 their interests to discuss this matter with their legal representative and/or their 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 RO[492], 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 abandoned[493] 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 their sentence of detention on the date on which the copy of the notice is received by the appellant's CO[494] (see also paragraph 64). Abandonment will not affect other types of punishments because

[492] Under section 152(4) of the Act.

[493] Rule 24 of the Armed Forces (Summary Appeal Court) Rules 2009/1211.

[494] Section 290(3)(b) of the Act.

all other punishments except detention and Service compensation orders[495] 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 RO[496]

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 appeal[497] within the 14-day appeal period (or any extension to that period that has been authorised[498]). 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, stating why he considers it appropriate that the court consider an appeal and attaching any documents they consider relevant to the application[499] (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 following[500] in respect of a referral following a review of a summary hearing:

a. The application;

b. Any other documents they consider 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)[501] 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 they consider 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)[502] form.

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[495] Section 176(1) of the Act.
[496] Rule 17, Armed Forces (Summary Appeal Court) Rules 2009/1211 & sections 152(4) & (7) of the Act.
[497] Under section 141(2) of the Act.
[498] Under section 141(1) of the Act.
[499] Rule 17(2) Armed Forces (Summary Appeal Court) Rules 2009/1211.
[500] See rule 17 Armed Forces (Summary Appeal Court) Rules 2009/1211.
[501] To be provided by the unit.
[502] To be provided by the unit.

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 writing[503].

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 leave[504] 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 their 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 their commanding officer, as the case may be, within 14 days that they require a hearing of the application[505]. The CO must forward any such notice from the offender to the CAO and the DSP[506].

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 them that:

a. The application made by the RO does not affect their right to appeal or abandon the appeal;

b. There will be no difference in the way the appeal is dealt with;

c. They have a right to legal representation and they may be eligible for legal aid, see paragraph 40 above;

d. They are entitled to an assisting officer, see paragraph 38 above;

e. They should seek assistance from their assisting officer and/or their legal representative if they are at all unsure of any part of the process, but especially if they are thinking of abandoning the appeal; and

f. They 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.

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[503] Rule 17(4) of the Armed Forces (Summary Appeal Court) Rules 2009/1211.
[504] Under sections 152(4) or (7) of the Act.
[505] Rule 17(7) Armed Forces (Summary Appeal Court) Rules 2009/1211.
[506] Rule 17(8) Armed Forces (Summary Appeal Court) Rules 2009/1211.

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, they 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 their purpose.

Effect of appeal on summary punishments

63. Where a punishment is awarded at a summary hearing, in most cases it will take effect immediately[507]. A sentence of detention, however, cannot take effect immediately unless the offender indicates that they want 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 they elect 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 their sentence of detention immediately when the punishment is awarded. If they do not do so, their 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 their 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), their sentence of detention will immediately cease to have effect and they must be released from detention. The sentence will not resume again until the appeal has been abandoned or determined.

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[507] 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 period[508] of a suspended sentence when they 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 may[509] 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 hearing[510] (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 their 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.

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[508] This can be anywhere between 3 and 12 months from the date the suspended sentence came into effect.
[509] Subject to section 195(6) - (8) of the Act.
[510] 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, they 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 service[511]. The CO or the person acting on their 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 arrangements[512]. 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 orginal 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 facilty, 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 – Adminstration of Appeals Process.

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[511] 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).

[512] 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.

Chapter 16

Financial penalty enforcement orders

Annexes

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 courts[513]. FPEOs are made where Service enforcement procedures[514] 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)[515] 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 penalty[516], or

b. A member of the regular forces is about to leave the Service[517] 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 UK[518], or has returned to the UK, and has an unpaid or unrecovered financial penalty.

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[513] The civilian court must be a 'relevant court' see paragraph 11 of this chapter.
[514] 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.
[515] 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).
[516] See paragraph 7 of this chapter.
[517] 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).
[518] 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:[519]

a. A financial penalty (see paragraph 6) has been awarded against a person[520]; and

b. There is no appeal outstanding against the award and any time limit for giving notice of an appeal has expired[521]; and

c. The whole, or any part, of the penalty awarded remains unpaid or un-recovered[522]; and

d. either:

(1) At the time the FPEO is made, the person is not a member of the Services nor a relevant civilian[523]; or,

(2) The person is subject to Service law only because he or she is *a special member of a reserve force*[524] within the meaning of the Reserve Forces Act 1996[525].

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/guardian[526] 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

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[519] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulations 3(1) and 3(2).
[520] 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).
[521] The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(1)(b).
[522] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(1)(c).
[523] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(2)(a).
[524] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(2)(b).
[525] See Part V of that Act (sections 38 to 49).

[526] 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 Act[527], 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 Act[528]. 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 27[529] of the Armed Forces Act 2001. The former provision concerns circumstances where a court[530] 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 representatives[531].

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 Force[532]. 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 allowance[533]. 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 civilian[534]. 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 matters[535]:

a. A financial penalty has been awarded against the person named in the order.

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[527] More information on the sentencing powers of Service Courts can be found in Chapter 31 (Sentencing principles, powers and effect).
[528] Section 322(4)(b) of the Act.
[529] Section 342(4)(c) of the Act.
[530] '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).
[531] The Armed Forces Proceedings (Costs) Regulations 2005 (as amended by Schedule 16, paragraphs 192 and 193 of the Act).
[532] See Part V of that Act (sections 38 to 49).
[533] See sections 341 and 342 of the Act and the Armed Forces (Forfeitures and Deductions) Regulations 2009/1109.
[534] 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.
[535] 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 offender[536].

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 SCO[537] 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 are[538]:

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.

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

[536] 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.
[537] 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.
[538] The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 2(1).

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 register[539] the order and proceed to enforce payment of the sum due as if it were a fine imposed by that court.[540] 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 outstanding[541]. 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 sum[542]. In this instance, the Service authorities can recover the sum as if it were a fine imposed by a civil court[543] 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 penalty[544].

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 proved[545]. The relevant court may accept what is certified in such an Order without requiring any further evidence of the matters stated.

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[539] See rule 47 of the Magistrates' Courts Rules 1981 for registration and notification of FPEO.
[540] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(5)(b).
[541] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(5)(a).
[542] See Chapter 20 (Forfeitures and deductions).
[543] 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.
[544] See The Armed Forces (Financial Penalty Enforcement Orders) Regulations 2009/1212, regulation 3(7).

[545] 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 Forces[546]. 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)[547] 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.

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[546] See section 1(2) Reserve Forces Act 1996 for meaning of Reserve Forces

[547] 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.

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 57[548];

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 offence[549]. 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.

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[548] 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.
[549] 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 penalty[550]; 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.

Appendix:

1. FPEO – Transitional arrangement flowchart.

[550] 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.

Appendix 1 to
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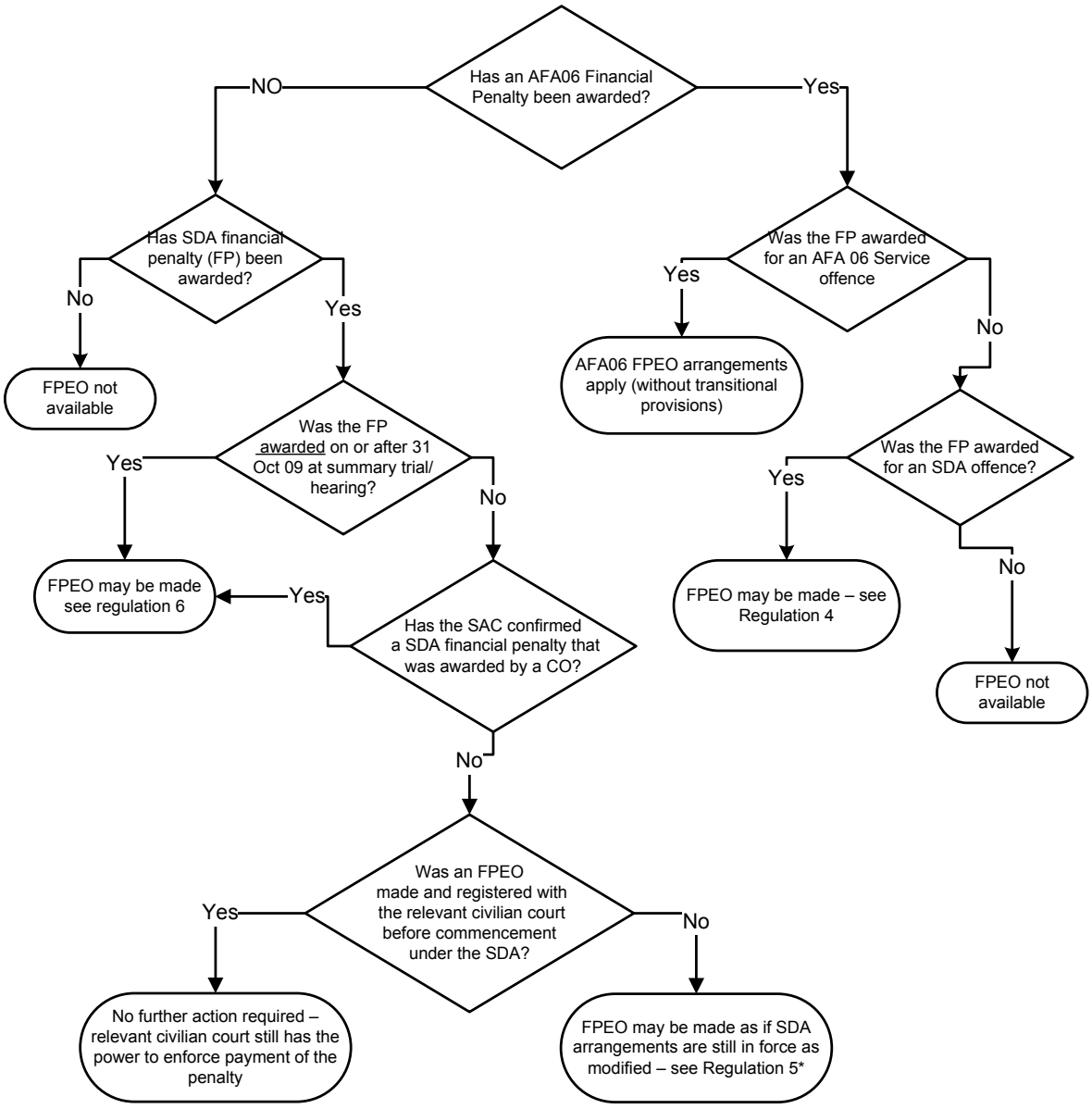
FPEO – Transitional arrangement flowchart



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).

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 chaplains[551]. 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 officer[552] 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 command[553] 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 4[554].

6. For summary discipline[555] purposes naval chaplains are subject to the Act in the same way as a commander RN or equivalent.

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[551] Section 371 of the Act.
[552] The Armed Forces (Naval Chaplains) Regulations 2009 regulation 4.
[553] The Armed Forces (Naval Chaplains) Regulations 2009 regulation 5.
[554] The Armed Forces (Naval Chaplains) Regulations 2009 regulation 4(3).
[555] Section 52 of the Act.

Chapter 18

Terms and conditions of enlistment and service

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 leave[556]; 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 331and 340[557]. The applicable secondary legislation[558] 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 procedures[559]. 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 completed[560]. 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 procedures[561], 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.

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[556] See sections 8 and 9 of the Act and Chapter 7 (Non-criminal conduct (disciplinary) offences) for offences of desertion and absence without leave.
[557] MSL Volume 3.
[558] MSL Volume 3.
[559] RN BR689, Army TA Regulation 1978 chapter 5, RAF AP3391
[560] AFCO Form 4.
[561] 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 regulations[562] 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 attestation[563] 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 captain[564]. 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 enlistment[565] 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 attest[566] 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 they are 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 recorded[567].

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

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[562] The Armed Forces (Enlistment) Regulations 2009, Regulations 2 and 3.

[563] '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.

[564] 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.

[565] "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.

[566] "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.

[567] 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.

duly completed enlistment paper to the approving officer, who is a recruiting officer within the regulations[568], 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 scale[569]. 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 allegiance[570] 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 purposes[571]. Additionally, a person under the age of 18 years can only be enlisted for regular service if written consent[572] is obtained from all appropriate persons (i.e. people with parental responsibility for him[573]), with whom they are living, or if they are 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 Corps[574]. 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

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[568] The Armed Forces (Enlistment) Regulations 2009.
[569] Section 328(4)(b) of the Act.
[570] Those who, for whatever reason, are unable to swear an oath of allegiance may make a solemn affirmation to the same effect.
[571] 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.
[572] 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.
[573] Within the meaning of the Children Act 1989, the Children (Northern Ireland) Order 1995 or the Children (Scotland) Act 1995.
[574] For the Brigade of Gurkhas, a military recruiting team is permanently stationed overseas and enlistment is carried out by an authorised officer in Nepal.

for national danger, etc; call out for warlike operations) is in force[575]. A variation in the 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 they are, show that the enlistment is therefore invalid, the individual will be discharged on application to the Defence Council, without reserve service liability. This provision in 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 forces[576] 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)[577].

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:

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[575] In peace time, a soldier can be transferred compulsorily from one corps to another only by order of a member of the Army Board.

[576] That is to say the Royal Navy, the Royal Marines, the regular army or the Royal Air Force (see section 374 of the Act).

[577] 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).

a. A British citizen.

b. A Commonwealth citizen.

c. A British protected person.

d. A citizen of the Republic of Ireland.

conditions.

14. Prescribed 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 aliens[578] 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 Act[579]. 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 territory[580].

Terms and conditions of service

15. Although pre-existing primary legislation[581] has been repealed because the provisions in the Act that replace it are almost identical in scope, the existing single-Service secondary legislation[582] 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.

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[579] See Section 340(2), (3) and (5) of the Act.
[580] 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.
[581] AA and AFA 55 and AFA 66.
[582] 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.

17. **Right of warrant officers to discharge after reduction in rank.** A warrant officer who has been reduced to the lowest rank or rate[583] 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 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 certificate[584] to show prospective employers that they have been legally discharged. The discharge certificate must contain the following information[585]:

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 liability[586]. 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 52[587]. 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

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[583] 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.
[584] The JPA-generated discharge certificate may be accompanied by a 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.
[585] The Armed Forces (Discharge and Transfer to the Reserve Forces) (No.2) Regulations 2009, regulation 6.
[586] 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.
[587] In accordance with the powers under RFA 96, section 17(2).

CO[588], (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. They are 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 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 absence[589] 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. They aresue 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 desertion[590], 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 policeman[591] during an interview conducted in accordance with the Service Police Code of Practice for the Treatment and Questioning of Persons by the Service Police[592]. 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 desertion[593].** If a Service person is convicted of desertion, the period of service for which they were 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 they were convicted of desertion.

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[588] The Armed Forces (Discharge and Transfer to the Reserve Forces) (No.2) Regulations 2009/1091, regulation 8.
[589] Section 330(4) of the Act and The Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108, regulation 3.
[590] A confession to being guilty of an offence of desertion under Section 8 of the Act.
[591] 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.
[592] Code C made under section 113(3) and (4) of the Police and Criminal Evidence Act 1984, 1984 c.60. See JSP 397.
[593] The Armed Forces (Forfeiture of Service) (No.2) Regulations 2009/1090, regulation 4(2).

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 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 they are 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[594].** 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.

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[594] The Armed Forces (Forfeiture of Service) (No.2) Regulations 2009/1090, regulation 4(3).

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.

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 CM	CO
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 Reason or Grounds for Discharge	Column 2 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	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
	Service pension, 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	(i) The Deputy CINC Air			

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 List 1 medical trainee or a directly 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.	Command (ii) Air Sec			
	(e) in the case of an airman who is withdrawn from, or fails, trade training and cannot be offered training in another trade because they are unsuitable for trades in which there are vacancies or there are no vacancies in trades for which they are 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	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
	For his present trade and has declined an offer of employment in a suitable 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	Invalided				
	(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	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
	Disabilities are discovered on medical examination within 21 days of enlistment.				
	(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	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
	An airman who cannot be allowed to remain in the Service because they are unable to meet Service obligations 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		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
	non-commissioned aircrew who fail OCU training prior to giving productive aircrew service.				
18	In the case of a Warrant Officer/MACR who is reduced to the ranks and claims discharge.			Air Sec	Air Sec
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 rate[595] 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.

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[595] 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.

Chapter 19

Service of process

Chapter 19

Service of process

Introduction

1 This chapter provides guidance to the commanding officer (CO) and those advising them on procedures when the CO is served with any process (see paragraph 2 below) in relation to maintenance proceedings against a Service person[596] 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 court[597] 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 authorities[598] are not generally responsible for the service of court documentation[599] on Service personnel who, in their private affairs, are party to legal proceedings in the civil courts in the UK or abroad. However, regulations[600] 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), they must as soon as reasonably practicable hand the documentation to the Service person who is party to the proceedings and inform them that they are to report to the CO the conclusion of the court proceedings.

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[596] See section 367(1) and (2)(a), (b), (c) or (e) of the Act for the definition of a person subject to Service law.
[597] 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.
[598] 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.
[599] Court documentation which includes summons, writs, judgements, applications and directions.
[600] The Armed Forces (Service of Process in Maintenance Proceedings) Regulations 2009/1093.

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:

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 they are 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 them 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 Act[601]. Under the Act[602], 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 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.

[601] Section 355 of the Act.
[602] Section 355(2)(b) of the Act.

Chapter 20

Forfeitures and deductions

Chapter 20

Forfeitures and deductions

Introduction

1. **General.** Any Service person[603] may be liable to have his pay[604] 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)[605]. 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 charges[606]), 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 Regulations[607]. However, it is important to note that JSP 754 does not and must not authorise the forfeiture of pay[608] 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 deductions[609] to which they 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 officer[610], 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:

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[603] See glossary for definition of a Service person and Chapter 3 (Jurisdiction and time limits).
[604] 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).
[605] Sections 341 and 342 of the Act.
[606] Schedule to the Royal Warrant made under section 333 of the Act.
[607] Sections 333(3) and (4) of the Act.
[608] Section 333(5) of the Act.
[609] 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.
[610] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 3(1). Authorised officers are listed in MSL Vol 3.

a. Any day during which they were 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 leave[611]; or

b. Any day during which they were 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 commitment[612].

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 they are 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 evidence[613].

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 them[614]. 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 hearing[615]. It should be noted, however, that where a Service person is held in either pre-charge or post-charge custody, they will remain in receipt of his pay as normal[616] 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 imposed[617]; or

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[611] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 3(1)(a) and 3(3).
[612] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(a) and 3(3).
[613] In cases where there has been a finding of guilt reference to the memorandum of conviction or record of summary hearing should suffice.
[614] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(b) and (c).
[615] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(2).
[616] JSP 754 (Tri-Service regulations for pay and charges).
[617] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(b).

b. Any day of absence from duty by reason of imprisonment or detention to which they are liable in consequence of an order or sentence of a civilian court anywhere[618]. It should be noted that where a Service person is held remanded in custody before or during trial, they will remain in receipt of his pay as normal[619] on the 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 they have been assisting the enemy, as outlined below:

a. **Intentional breach of duty[620].** 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 escape[621].** 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 enemy**[622]. 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 they 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 following[623]:

a. There was a period of absence due to sickness or injury[624]; and

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[618] 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.

[619] JSP 754 (Tri-Service regulations for pay and allowances).
[620] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(g).
[621] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(h).
[622] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(i).
[623] The Armed Forces (Forfeitures and Deductions) Regulations 2009, regulation 3(1)(f).
[624] This should be established by clear evidence, including witness, documentary and real evidence.

b. That sickness or injury was contributed to or caused by the Service person's own conduct[625]; and

c. The Service person has been found guilty of an offence under the Act in respect of that conduct[626].

11. The offences to which this guidance is most applicable are those of malingering under section 16(1) of the Act[627]. 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)[628]. 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 SSPO[629] 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 pay[630] for the duration[631] 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)[632] has been ordered by a civilian[633] (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).

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[625] This should be established by clear evidence, including witness, documentary and real evidence.

[626] This may be established by reference to the memorandum of conviction or record of summary hearing.

[627] That is to say, by any act or omission, caused, aggravated or prolonged any injury they 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).

[628] Section 342(3) of the Act.

[629] Sections 173 and 174 of the Act and Chapter 13 (Summary Hearing Punishments).

[630] i.e. full pay (excluding allowances) before deduction of income tax and earnings related National Insurance contributions.

[631] 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).

[632] 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*.

[633] Reference to a civilian court is to a court of ordinary criminal jurisdiction – Section 374 of the Act.

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 authority[634]. 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 when they are 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 court[635]. 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 below[636].

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, they have 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 they are 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 person[637] 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 investigate the matter and may wish to adopt a similar formal approach to the evidence as they would at a summary hearing. However, this is not a disciplinary investigation and charges should not be brought. They should be satisfied that the person was responsible for the loss or damage in a way that would have amounted to an offence under section 24, i.e. was deliberate, reckless

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[634] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 4(1).

[635] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 4(2).
[636] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 5(2).
[637] A service person other than a member of the reserve forces undertaking any training or duty - Section 342(4) of the Act.

or negligent (Chapter 7). In satisfying themselves as to the relevant person's conduct, the Defence Council or authorised officer do not need to be sure beyond reasonable doubt, i.e. not to the standard required had the individual been formally charged and was being dealt with by a summary hearing. . Before an order is made, the relevant person should be given an opportunity to make representations, and these may be done orally or in writing. After an order is made the relevant person should be informed of his right to make a service complaint.

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 £1000[638].

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 deductions made in respect of compensation for loss or damage[639]. The Defence Council or authorised officer may also, by further order, revoke an order for deductions made in respect of compensation for loss or damage[640]. 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 them, the Defence Council, or authorised officer, may make an order authorising deductions from pay in or towards satisfaction of that financial penalty[641]. 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 or forfeitures and deductions, a financial penalty refers to any of the following:

a. Any fine or SCO imposed under the Act[642]. 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 guardian[643] 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 compensation[644]); or

b. Any sum which is ordered to be paid as a result of a declaration by the court[645] that a recognizance is to be forfeited under section 236(3) of the Act[646]. 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

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[638] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 5(4).
[639] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 5(5).
[640] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 5(6).
[641] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 6(1).
[642] Section 342(4)(a) of the Act.
[643] i.e. a person who is subject to Service law or Service discipline – see section 268(8) of the Act.
[644] See section 268 of the Act and Chapter 13 (Summary hearing sentencing and punishment) and Chapter 16 (Financial penalty enforcement orders).
[645] 'Court' in this context means the CM or the Service Civilian Court.
[646] Section 342(4)(b) of the Act.

to the full amount of that recognizance, as a result of the offender being convicted of a new offence[647]; 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 Act[648]. The former provision concerns circumstances where the court[649] 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.

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 court[650] or officer[651]. Under the Act, a court or officer may direct payment of a fine or SCO by instalments[652]. 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 penalties[653]. 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 person[654] is required to pay by virtue of any judgment or order enforceable by a UK court[655]. This applies to judgments in civil[656] (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.

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[647] 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.

[648] Section 342(4)(c) of the Act.

[649] '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)).

[650] 'Court' in this context means the CM or the Service Civilian Court.

[651] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 6(2).

[652] Section 251 of the Act. See also Chapters 9, 12 and 13, all of which have parts explaining instalments.

[653] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 6(3) and 6(4).

[654] 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.

[655] 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)).

[656] For criminal cases see the Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 4 and paragraphs 15 and 17 of this chapter.

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 court[657]. 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 court[658]. 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 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 suspense[659]. 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 employment[660]. 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 person[661] 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 of[662]:

a. The maintenance of his spouse or civil partner; or

b. The maintenance of any child of his, his spouse[663] or his civil partner[664]; or

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[657] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 11(3).

[658] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 11(4) and 11(5).

[659] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 11(6).

[660] 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.

[661] A Service person other than a member of the reserve forces undertaking any training or duty – section 342(4) of the Act.

[662] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 9(1).

[663] 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).

[664] 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).

c. The maintenance of any other child who has been treated by them and his spouse or them 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 order[665]. Further, such an order for deductions must not authorise a deduction to be made before the date that payment of the amount is required by the court[666].

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 above[667]. 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 order[668]. 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).

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[665] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 7(1).
[666] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 7(2).
[667] See JSP 754 for further guidance (Tri-Service regulations for pay and charges).
[668] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 7(3) and 7(4).

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 suspense[669]. 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 court[670]; or

b. The Defence Council or authorised officer is satisfied that the maintenance order is capable of being registered in a United Kingdom court[671]; 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 court[672].

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. 44/2001[673]. 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 they are

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[669] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 7(5).

[670] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(2).
[671] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(3)(a).
[672] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(3)(b).
[673] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(10).

required to make under the maintenance order as so registered, confirmed or varied)[674]. 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)[675].

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 above[676]. 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 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 order[677]. 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[678].

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 order[679]. 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 them 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 calculation[680]. 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 payment[681].

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

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[674] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(2).
[675] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(3) and 8(4).
[676] See JSP 754 for further guidance (Tri-Service regulations for pay and charges).
[677] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 8(2) and (3).
[678] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 8(1).
[679] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulations 8(7) and 8(8).
[680] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(1).
[681] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(2).

deductions in respect of a deduction for pay for child maintenance[682]. The Defence Council or authorised officer may also revoke an order for deductions in respect of a deduction for pay for child maintenance[683]. 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 authority[684].

Remission of deductions

48. Under the Act, the Defence Council (or an authorised officer) has a statutory power enabling it to remit the following deductions[685]:

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).

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[682] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(3).
[683] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(4).

[684] The Armed Forces (Forfeitures and Deductions) Regulations 2009/1109, regulation 10(1).
[685] See section 342(3) of the Act.

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.

Figure 1

Forfeiture of pay - absence from duty

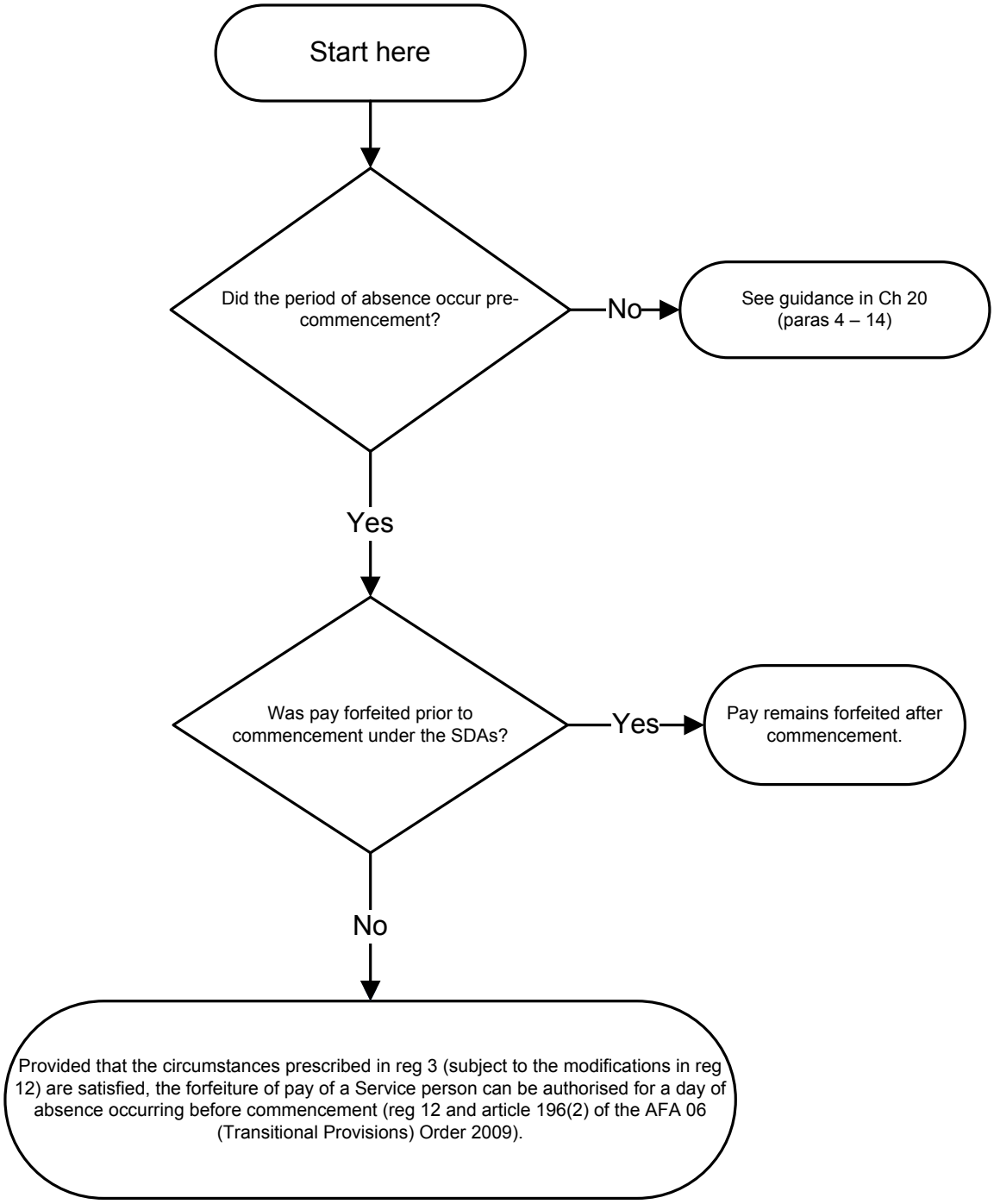
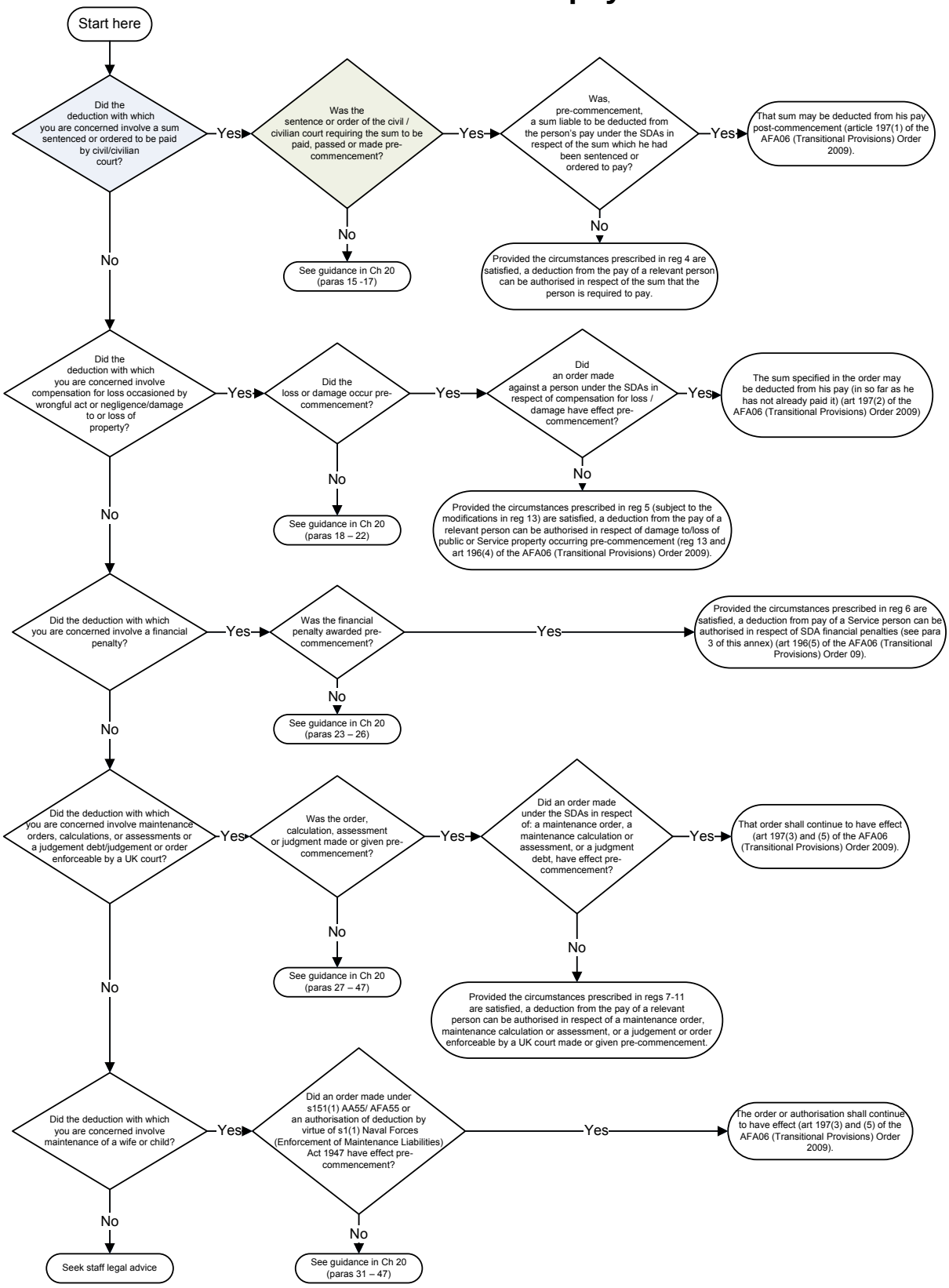


Figure 2

Deduction from pay



Chapter 21

Compulsory drug testing (CDT) and post incident drug and alcohol testing (PIDAT)

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 it[686] 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 admissible[687] 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 1988[688]; nor do they affect the admissibility of evidence obtained under those statutes in any proceedings[689].

Definitions

5. For CDT purposes drug[690] means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971 whilst for PIDAT it means either a controlled[691] 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 sample[692]. 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 offence[693].

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 Volume 3. 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.

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[686] Sections 305-308 of the Act, the Armed Forces (Drug Testing) Regulations 2009, the Armed Forces (Post Incident and Alcohol Testing) Regulations 2009.
[687] Section 308(3) of the Act.
[688] Section 308(4) of the Act.
[689] Section 308(4) of the Act.
[690] Sections 305(4) and 307(2) of the Act.
[691] Within the meaning of the Misuse of Drugs Act 1971 for example: cannabis, cocaine and ecstasy.
[692] Sections 307(3), (4). and (5) of the Act.
[693] 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 law[694] 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 Service[695]. 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 Authority[696] in accordance with single-Service practice.

The law

694 Including members of the Reserve Forces see section 367 of the Act.

695 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.

696 RN: Nav Sec/Army: DMA/ RAF: Higher Authority or CO.

11. A drug testing officer[697] may require a person subject to Service law to provide a sample of urine to test for drugs[698]. 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 justified[699] and capable of withstanding legal scrutiny. The power[700] to drug test randomly may not be exercised in connection with the investigation of an offence or of a serious incident[701], or where the drug testing officer (or his CO) is the CO of the person to be tested[702].

12. **Consequence of failure to provide a sample.** A person commits an offence[703] 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 officer[704]. On conviction at Court Martial (CM) trail an offender will be liable to any of the punishments available to the CM[705], but any sentence of imprisonment or detention imposed may not exceed 51 weeks. Administrative discharge from the armed forces[706] 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.

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697 See section 305(4) of the Act and the Armed Forces (Drug Testing) Regulations 2009, regulation 2.

698 Section 305(1) of the Act.

699 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.

700 Section 305(2) of the Act.

701 Section 305(2) of the Act.

702 Section 305(2) (a) of the Act.

703 Section 305(3) of the Act.

704 Such an offence may be dealt with summarily-see section 53(1)(i) of the Act.

705 Section 164 of the Act.

706 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**[707]**.** Service personnel and relevant civilians[708] 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 officers[709].

The law

17. **Authority for sample collection/testing.** A CO may order PIDAT but may delegate the authority to his immediate subordinate[710] 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.

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707 Section 306(3) of the Act.

708 In reality as the regime is limited to the UK, relevant civilians are unlikely to be tested.

709 Officers subject to the Visiting Forces Act – Australia, Canada, New Zealand and ROI.

710 This will usually be an OF3.

18. **Consequences of failure to provide a sample.** It is an offence[711] for an individual to refuse without reasonable excuse to give a sample[712] when required to do so[713]. On conviction at CM an offender will be liable to any of the punishments available to the CM[714], but any sentence of imprisonment or service detention imposed may not exceed 51 weeks. Administrative discharge from the armed forces[715] 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.

711 Section 306(4) of the Act.

712 A sample of breath and/or urine.

713 Such an offence may be dealt with summarily.

714 Section 164 of the Act.

715 Under QR$_{RN}$ 3626, Army QR Chapter 9 Section 3, and RAF QR 1028.

Chapter 22

Powers of officers to take affidavits and declarations

Chapter 22

Powers of officers to take affidavits and declarations

Introduction

1. The Armed Forces Act 2006[716] (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 rules[717]. 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 deponent[718] 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 jurat[719] (see paragraph 6 below).

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[716] Section 352 of the Act.
[717] Section 352(4)(b)(iv) and (5) of the Act.
[718] The deponent is someone who signs an affidavit or testifies under oath.
[719] 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

(signature of deponent)

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

F J BLOGGS (signature and rank)

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

F J BLOGGS (signature and rank)

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] compeared [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 sworn[720], 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:

[720] 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 SDAs[721] 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.

[721] Section 204(2) of Army A ct 1955 or Air Force Act 1955.

Chapter 23

Exemption from tolls and charges

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 fleet[722] 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 fleet[723] 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 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

[722] '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.
[723] '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.

the Act [724]. 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 JSP[725].

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.

[724] For example, a charge under section 25 of the Act – misapplying public or service property.
[725] See JSP 800, volume 5 Chapter 3.

Chapter 24

Redress of individual grievance: Service complaints

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 2007[726]. 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 law[727] who thinks he has been wronged in any matter relating to his Service[728], 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.

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[726] 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.

[727] This includes both regular and reserve service.

[728] 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 level[729], 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

[729] At the Defence Council level a Service complaint may be resolved by a single Service Board or a SCP.

person dealing with the case considers that a wrong probably occurred (balance of 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 faith[730] 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.

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[730] 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]. 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. Below, for ease of reference, the contents index of JSP 832 is listed.

Chapter 26

Safeguarding children: Armed forces child protection powers

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 Instrument[731]. 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 authorities[732]. 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 though 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 legislation[733] 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).

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[731] The Armed Forces (Protection of Children of Service Families) Regulations 2009/1107.
[732] In England and Wales, Local Authorities; in Scotland, Social Work Departments; in NI, Health and Social Services Trusts.
[733] 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 18th birthday. This includes members of the Armed Forces, whose status or entitlement to services or protection under the Children Act 1989 does not change[734].
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[735].
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

[734] See also 2009DIN01-024 Policy on the care of Service personnel under the age of 18.
[735] See also Children Act 1989 section 47.

distress to a family by the unnecessary disclosure of case details. Most practitioners will also 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 policy[736] 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.

[736] RN: NPFS/RM policy documents, Army: LFSO 3351 and AGAI 83, RAF: AP3392 Volume 2 Chapter 24.