

## Chapter 9

### Summary hearing and activation of suspended sentences of Service detention

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## Chapter 9

# Summary hearing and activation of suspended sentences of Service detention

## Introduction

1. This chapter provides guidance on summary hearing procedure including activation by COs of suspended sentences of detention. It is aimed at all officers with summary powers of punishment and also those persons who are required to advise them in the performance of this function. It sets out the procedures that are to be followed once a charge has been brought and allocated for summary hearing, see [Chapter 6](#) (Investigation, charging and mode of trial). It also guides COs through the process when an offender is under a suspended sentence of detention, which was imposed by a CO or Summary Appeal Court (SAC) and an activation of that sentence may be necessary. This chapter uses the term 'CO' to include the CO and subordinate commander unless there is a reason to specify one or the other.
2. Summary discipline enables the chain of command to exercise immediate and effective authority in all situations including on operations. It provides procedures under which Service offences, both criminal and non-criminal (disciplinary) conduct offences (see [Chapter 7](#) (Non criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences)) can be dealt with swiftly and fairly in support of operational effectiveness.
3. A summary hearing is an inquisitorial process and differs in this respect from adversarial proceedings in, for example, the Court Martial (CM) and civilian criminal courts. There is no prosecutor and in a contested summary hearing<sup>1</sup> 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<sup>2</sup> 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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<sup>1</sup> A summary hearing in which the accused denies the charge.

<sup>2</sup> 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<sup>3</sup> 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<sup>4</sup>. 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)<sup>5</sup>; 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<sup>6</sup>:

- a. Offences<sup>7</sup> that require HA permission to deal with.
- b. Offences alleged to have been committed during the operational<sup>8</sup> period of a suspended sentence of detention<sup>9</sup>.
- c. Charges brought against a person above the rank or rate of chief petty officer, military or marine colour sergeant or flight sergeant.
- d. Charges brought against a person of or above the rank or rate of petty officer, 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.

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<sup>3</sup> See rule 3(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216

<sup>4</sup> 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.

<sup>5</sup> When considering this course of action the subordinate commander should consult his CO or take legal advice.

<sup>6</sup> 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.

<sup>7</sup> Those within section 54(2), of the Act.

<sup>8</sup> 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.

<sup>9</sup> Rule 3(3)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

Where a delegation is made to a subordinate commander, that officer's powers of punishment are more limited than those of a CO. See [Chapter 13](#) (Summary hearing sentencing and punishments).

10. **Revocation.** A CO may revoke the delegation of his functions in relation to a charge at any time before a decision is made as to whether the charge is proved. Where the CO revokes the delegation after election has been offered, the decision on election stands. Similarly, if the CO revokes the delegation after the accused has been asked to admit or deny the charge, the accused's decision stands. Where a revocation has been made the CO may deal with the matter or allocate the charge to another subordinate commander. They should then proceed from the point in the proceeding at which the CO revoked the delegation, unless the revocation was made after the accused had been asked to admit or deny the charge. In the latter case, all the evidence or the case summary should be heard, as appropriate.

11. Thus, if after the commencement<sup>10</sup> 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<sup>11</sup>, 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<sup>12</sup> criminal conduct offences listed below should be heard summarily<sup>13</sup>, 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:

- a. Assault occasioning actual bodily harm (Section 47 of the Offences against the Person Act 1861);

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<sup>10</sup> 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.

<sup>11</sup> Section 123(2)(e) of the Act.

<sup>12</sup> It is within section 54(2) of the Act.

<sup>13</sup> Such charges can only be heard summarily by the CO in person with HA permission.

- b. Possession in a public place of an offensive weapon (Section 1 of the Prevention of Crime Act 1953);
- c. Abstracting of electricity (Section 13 of the Theft Act 1968);
- d. Possession in public place of point or blade (Section 139 of the Criminal Justice Act 1968);
- e. Dishonestly obtaining electronic communications services; eg using MOD telephones for private calls (Section 125 of the Communications Act 2003);
- f. Possession or supply of apparatus for obtaining electronic communications services (Section 125 of the Communications Act 2003);
- g. Fraud (Section 1 of the Fraud Act 2006);
- h. Dishonestly obtaining services (Section 11 of the Fraud Act 2006); and
- i. Attempting to commit one of the indictable<sup>14</sup> offences above<sup>15</sup>.

14. The application to HA must be made as soon as is reasonably practicable after the charge is brought<sup>16</sup> and must contain<sup>17</sup>:

- 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<sup>18</sup> the accused with a copy of the notification from HA to this effect (see paragraph 26 below).

16. Where an application for permission to hear a serious criminal conduct offence has not been granted the charge may be referred to the DSP, or exceptionally discontinued. The options for substituting, amending or discontinuing charges are set out in Part 4 of [Chapter 6](#) (Investigation charging and mode of trial). In any of these circumstances staff legal advice should be followed.

17. **Application for extended powers in relation to punishment.** If a CO is below the rank of rear admiral, major-general or air vice-marshal and considers that a charge against a

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<sup>14</sup> See glossary.

<sup>15</sup> Section 43 of the Act.

<sup>16</sup> In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

<sup>17</sup> Rule 5(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>18</sup> Rule 5(4) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.



person should be dealt with summarily and that his powers of punishment might be insufficient to deal with the accused if the charge were proved, they must apply to HA for extended powers<sup>19</sup>. 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<sup>20</sup> (which may be after the CO has complied with the preliminary procedures (see part 2 below) and must contain<sup>21</sup>:

- 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<sup>22</sup>. 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.

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)<sup>23</sup>.

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

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<sup>19</sup> For the extended powers that are available see section 133(1) of the Act.

<sup>20</sup> In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

<sup>21</sup> Rule 6 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>22</sup> Rule 6(2)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>23</sup> Rule 6(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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<sup>24</sup>.** 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<sup>25</sup> 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<sup>26</sup>:

- a. The CO's reasons for considering that his basic powers might be insufficient to deal with the offender if the charge were found to be proved;
- b. A copy of the written record of the summary hearing (RSH) ([Annex C](#)) or a copy of any record of proceedings before the SAC at which the suspended sentence of detention was awarded;
- c. Details that are known to the CO of all proved offences<sup>27</sup> committed by the offender during the operational period of the suspended sentence of detention;

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<sup>24</sup> See part 8 on activation hearings.

<sup>25</sup> Rule 7 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>26</sup> Rule 30(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>27</sup> In Service proceedings or civilian court.

d. Copies of the following, at which reasons were given for any decision(s) not to make an order to activate the suspended sentence:

(1) All RSH;

(2) Any written records of activation hearings<sup>28</sup> (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<sup>29</sup> 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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<sup>28</sup> Rule 7(2)(d) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>29</sup> 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<sup>30</sup>:

- 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<sup>31</sup> of his right:
  - (1) To elect CM trial<sup>32</sup>;
  - (2) To be represented by an accused's assisting officer (AAO)<sup>33</sup> (see paragraph 37);
  - (3) To question witnesses whose evidence is requested by the CO<sup>34</sup>;
  - (4) To give evidence<sup>35</sup>;
  - (5) To provide evidence of witnesses<sup>36</sup>; and
  - (6) To appeal to the SAC<sup>37</sup>;
- c. If appropriate, provide the accused with information about the activation of suspended sentences of detention<sup>38</sup> (see Part 8 for further guidance);
- d. Provide the accused with<sup>39</sup>:
  - (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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<sup>30</sup> Rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>31</sup> 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.

<sup>32</sup> Section 129 of the Act.

<sup>33</sup> Rule 10 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>34</sup> Rule 15 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>35</sup> Rule 16 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>36</sup> Rule 17 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>37</sup> Section 141 of the Act.

<sup>38</sup> Section 193 of the Act.

<sup>39</sup> 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<sup>40</sup> 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)<sup>41</sup>:

a. The CO must inform the accused in writing<sup>42</sup> of:

(1) His power to make an order<sup>43</sup> to activate a suspended sentence of detention (an 'activation order');

(2) The accused's right of appeal<sup>44</sup>;

(3) The accused's right to make a submission<sup>45</sup> to the CO either orally or in writing about<sup>46</sup>:

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<sup>40</sup> Rule 8(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>41</sup> 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).

<sup>42</sup> 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

<sup>43</sup> Section 193 of the Act.

<sup>44</sup> Sections 141 and 195 of the Act.

- (a) The appropriateness of making an activation order; and
  - (b) The terms of the order;
- b. The CO must provide the accused with the following documents<sup>47</sup> 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<sup>48</sup> 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<sup>49</sup>.** 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

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<sup>45</sup> Rule 23(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>46</sup> 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).

<sup>47</sup> Rule 8(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>48</sup> Part 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>49</sup> Rule 9, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

minimum of 24 hours notice. If the CO has applied to HA for the following, they must not fix a time for a new hearing until they have received the result of the application:

- a. Permission to hear a charge summarily<sup>50</sup>, see paragraph 13;
- b. Permission to use extended powers of punishment<sup>51</sup>, see paragraph 17; or
- c. Permission to use extended powers for the purposes of activating a suspended sentence of detention<sup>52</sup>, 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<sup>53</sup>). 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<sup>54</sup> 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

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<sup>50</sup> Rule 5 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>51</sup> Rule 6 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>52</sup> Rule 30 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>53</sup> Section 42 of the Act.

<sup>54</sup> Subject to Service law.

- 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 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<sup>55</sup>. 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

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<sup>55</sup> Rule 11(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.



charge is amended in the preceding paragraph should be followed. The CO should adjourn to take staff legal advice on this issue if 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 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<sup>56</sup>, 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<sup>57</sup>.

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<sup>58</sup>. 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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<sup>56</sup> Rule 24 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>57</sup> Rule 3(7) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>58</sup> 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<sup>59</sup> 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<sup>60</sup> a charge which has been allocated<sup>61</sup> 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.

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<sup>59</sup> Section 131(2) of the Act.

<sup>60</sup> The effect of doing so is that the matter remains unresolved. The CO should only use this power with staff legal advice.

<sup>61</sup> Section 120(4) of the Act.

The accused is to be notified that a charge is being discontinued. A CO has a power to refer a charge to the DSP at any time up to the start of summary hearing and during the course of the summary hearing itself up to the point of the decision on whether the charge has been proved, see [Chapter 6](#) (Investigation, charging and mode of trial).

## Witnesses

51. **Oaths and affirmations.** No witness may give evidence orally unless the CO has administered to him one of the oaths, the promise or the affirmation in the form and manner set out at [Annex H](#).

52. **Attendance of witnesses.** If witnesses are to be called, they are to be given advance warning so that they are available should they be required; this also applies when witnesses for the accused are providing written evidence because the CO may call such witnesses in order to question them.

53. **Civilian witnesses.** Civilian witnesses cannot be compelled to attend a summary hearing. If the accused or the CO requires the attendance of a civilian witness, who is not prepared to attend voluntarily, the CO should consider referring the case to the DSP.

54. **Recall of witnesses.** Where the CO considers that it would be in the interests of fairness to the accused, 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<sup>62</sup>:

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

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<sup>62</sup> Rule 27 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009.

- b. The date and time of the hearing;
- c. The charge heard;
- d. Whether the accused admitted or denied the charge;
- e. Any determination that a charge is proved;
- f. Any dismissal of a charge;
- g. Discontinuance of any charge;
- h. The referral of a charge to the DSP;
- i. Details of all punishments awarded, whether suspended and the reasons for sentence<sup>63</sup>;
- 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.<sup>64</sup> 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<sup>65</sup> by making an order ([Annex I](#) - Record of Activation Hearing) if, during the operational period<sup>66</sup> 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.

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<sup>63</sup> Section 252(1)(a) of the Act.

<sup>64</sup> See [Chapter 14](#) (The summary hearing sentencing guide)

<sup>65</sup> 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.

<sup>66</sup> A period of between 3 – 12 months specified on the order suspending the sentence. If the offender commits a further offence during this period the suspended sentence may be activated.

60. The CO is not permitted to delegate a charge to a subordinate commander if that charge is in respect of an offence alleged to have been committed during the operational period of a suspended sentence<sup>67</sup>. Therefore, a subordinate commander should not find himself having to deal with activation of suspended sentences.

## **Preliminary questions for the accused**

61. Before commencing the hearing, the CO should confirm the Service number, rank/rate and name of the accused. 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<sup>68</sup> 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<sup>69</sup>.

## **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.<sup>70</sup> 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.

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<sup>67</sup> Rule 3(3)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>68</sup> Rule 12(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>69</sup> 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.

<sup>70</sup> 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<sup>71</sup>:

- a. Evidence given by the CO's witnesses<sup>72</sup>;
- 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<sup>73</sup> (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<sup>74</sup> and those statements have been provided to the accused<sup>75</sup> 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<sup>76</sup> 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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<sup>71</sup> Rule 13 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>72</sup> Rule 15(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>73</sup> 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.

<sup>74</sup> Rule 15(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>75</sup> Rule 8(1)(c)(iii) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>76</sup> 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<sup>77</sup>**. 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<sup>78</sup>**. 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<sup>79</sup>. 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<sup>80</sup> 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

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<sup>77</sup> Rule 16, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>78</sup> Rule 17 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>79</sup> Rule 17(2)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>80</sup> Rule 15(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.



witnesses called in these circumstances either orally or in writing. Oral evidence may be more suitable where the new issue that has been raised in evidence is straightforward. Where the evidence is more complex or lengthy, it may be more appropriate for the CO to arrange for the provision of a written statement during a short adjournment and then proceed with the hearing as soon as it is convenient to do so. There is no requirement to allow 24 hours for disclosure to the accused for his consideration of this evidence. However, as a matter of good practice the statement should be disclosed to the accused and the accused given a reasonable period of time to consider it before the hearing is resumed. Where such a witness gives oral evidence, the CO has the opportunity of questioning the witness before 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<sup>81</sup>. 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<sup>82</sup> 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<sup>83</sup>:

- 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

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<sup>81</sup> Rule 18 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>82</sup> Rule 20(1) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>83</sup> Rule 22(1)(a) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

orally or in writing. If such evidence is given in writing, the evidence must be read to the CO by the accused or the AAO and a copy of it must be given to the CO. If the witness is present at the hearing, the CO will give the accused an opportunity to question the witness before asking any questions himself. The CO may control the questioning of the witness to ensure that it is done in an orderly fashion, i.e. one question at a time ensuring that an answer is given before the next question is posed. The CO may only re-phrase a question in order to clarify it. 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<sup>84</sup> 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<sup>85</sup>. 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.<sup>86</sup> 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<sup>87</sup>. They must include in his reasons, the following:

a. Any credit given for admitting the offence (if applicable)<sup>88</sup>;

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<sup>84</sup> 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.

<sup>85</sup> Section 131(4) of the Act.

<sup>86</sup> Section 132 of the Act.

<sup>87</sup> Section 252 of the Act.

<sup>88</sup> 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<sup>89</sup> 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<sup>90</sup> 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<sup>91</sup>;
- 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<sup>92</sup> (see Part 6, Post hearing action, paragraph 106).

81. Most punishments awarded at summary hearing take effect immediately<sup>93</sup>. 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

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<sup>89</sup> E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO order, suspended sentence order etc.

<sup>90</sup> Section 252 of the Act.

<sup>91</sup> Section 141 of the Act.

<sup>92</sup> Section 290 of the Act.

<sup>93</sup> The CO may delay the date on which some punishments will take effect, see [Chapter 13](#) (Summary hearing - sentencing and punishments).

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 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<sup>94</sup> of the order;
- b. Remind the accused of his right of appeal<sup>95</sup>; and
- c. Remind the accused that they may choose to commence the sentence of detention immediately<sup>96</sup> (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<sup>97</sup> 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<sup>98</sup> 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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<sup>94</sup> How much of the suspended sentence will be activated and for how long.

<sup>95</sup> Section 141 of the Act.

<sup>96</sup> Section 290 of the Act.

<sup>97</sup> See [Annex G](#) (Brief for an accused assisting officer)

<sup>98</sup> 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**<sup>99</sup>. 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<sup>100</sup>.

### 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<sup>101</sup> (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.

### Sentencing

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<sup>99</sup> Rule 21 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>100</sup> Rule 21(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>101</sup> Rule 21(3)-(6) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.



93. When the CO has determined the facts of the case 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<sup>102</sup>:

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<sup>103</sup> 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<sup>104</sup>. 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<sup>105</sup> (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<sup>106</sup>. 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 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

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<sup>102</sup> Rule 22(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>103</sup> 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.

<sup>104</sup> 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).

<sup>105</sup> Rule 19 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>106</sup> Section 131(4) of the Act.

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<sup>107</sup>. 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<sup>108</sup>.

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<sup>109</sup> 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<sup>110</sup> (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<sup>111</sup>;
- 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

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<sup>107</sup> Section 132 of the Act.

<sup>108</sup> Section 252 of the Act.

<sup>109</sup> E.g. a Service compensation order, order imposing a fine by deductions/instalments, SSPO, suspended sentence order etc.

<sup>110</sup> Section 252 of the Act.

<sup>111</sup> Section 141 of the Act.



- c. That where an award of detention is made, the offender may choose to commence the sentence immediately<sup>112</sup>.

101. Most punishments awarded at summary hearing take effect immediately<sup>113</sup>. 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 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);

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<sup>112</sup> Section 290 of the Act.

<sup>113</sup> The CO may delay the date on which some punishments will take effect, see [Chapter 13](#) (Summary hearing sentencing and punishments).

- (3) Any reasons given for sentencing by the CO or the SAC when awarding the earlier sentence;
- (4) The details of the subsequent offence(s), including its seriousness; and
- (5) The degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed. The later into the operational period the subsequent offence is committed, the less appropriate it may be to activate.

103. The CO must look at the totality of all the above factors in relation to the subsequent offence and the original offence to determine whether to activate the sentence and if so, how long the activation period should be. If 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<sup>114</sup> of the order.
- b. Remind the accused of his right of appeal<sup>115</sup>.
- c. Remind the accused that they may choose to commence the sentence of detention immediately<sup>116</sup> (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<sup>117</sup> 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).

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

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<sup>114</sup> How much of the suspended sentence will be activated and for how long.

<sup>115</sup> Section 141 of the Act.

<sup>116</sup> Section 290 of the Act.

<sup>117</sup> See [Annex G](#) (Brief for an accused's assisting officer)

immediately they will commence the sentence on expiration of the initial period<sup>118</sup> 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.

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<sup>118</sup> 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<sup>119</sup>. 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<sup>120</sup>.

108. Thus a sentence of detention will normally start on the 15<sup>th</sup> 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<sup>121</sup>.

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<sup>122</sup> 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).

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<sup>119</sup> Section 290(2) of the Act.

<sup>120</sup> Section 290(5) of the Act.

<sup>121</sup> Rule 27(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>122</sup> RN PLAGOS, Army AGAI 62 Annex G, RAF QR 1057

## Legal aid for appeal

114. In the interests of the accused and avoidance of delay, if the individual wishes to apply for legal aid for an appeal, 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<sup>123</sup> 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<sup>124</sup> 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<sup>125</sup>. 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.

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<sup>123</sup> In full immediately or by instalments or by deductions made for the offender's pay in full on one occasion or by instalments

<sup>124</sup> Section 251 of the Act.

<sup>125</sup> Section 177 of the Act

## Part 7 - Election for CM trial

119. **Election.** If the accused elects CM trial<sup>126</sup>, 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<sup>127</sup> 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<sup>128</sup>, 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).

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<sup>126</sup> Section 129 of the Act.

<sup>127</sup> See Section 130A of the Act.

<sup>128</sup> Particular care should be taken with regard to extended powers; legal advice must be sought.

## Part 8 – Activation hearing - activation by CO of suspended sentences of detention where offender is subsequently convicted of an offence in the British Islands<sup>129</sup> by a civilian court<sup>130</sup>

### 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<sup>131</sup>.

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<sup>132</sup>. The application must contain<sup>133</sup>:

- 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<sup>134</sup> at which the suspended sentence of detention was awarded;
- c. Such details as are known to the CO of all proven offences committed by the offender during the operational period of the suspended sentence of detention. This includes the conviction that has triggered the power to activate. Such details would ordinarily be supplied by an officer who attended the court on behalf of the Unit. However, where there is any dispute as to the details of the conviction, a court record should be obtained;

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<sup>129</sup> See glossary.

<sup>130</sup> 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.

<sup>131</sup> Rule 3 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>132</sup> 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.

<sup>133</sup> Rule 30(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>134</sup> These records may be obtained from the MCS.



d. Copies of<sup>135</sup>:

- (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<sup>136</sup>**

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<sup>137</sup> to activate a suspended sentence of detention (an activation order);
- b. His right to representation<sup>138</sup> (see paragraph 131 below);
- c. His right of appeal to the SAC<sup>139</sup>; and
- d. His right to make a submission<sup>140</sup> (see paragraph 137 below).

128. The CO is to use form T-SL-SH03 at [Annex N](#) (Activation hearing – check sheet of mandatory information provided to the offender) to confirm that the following mandatory information has been passed to the offender:

- a. A copy of the written RSH, or a copy of any record of the proceedings before the SAC, at which the suspended sentence of detention was awarded;
- b. Details known to the CO of all proved offences committed by the offender during the operational period of the suspended sentence of detention. This includes

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<sup>135</sup> Rule 31(1)(b) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>136</sup> Rule 31 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>137</sup> Under section 193 of the Act.

<sup>138</sup> Rule 33, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>139</sup> Section 141 of the Act.

<sup>140</sup> Rule 34(1)(c) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

the report of the officer who attended the civil court on behalf of the unit that gives details of the offence committed;

c. Copies of:

- (1) The written records of all summary hearings;
- (2) The written records of any activation hearings (see Part 6 of this Chapter) held as a consequence of the accused having been convicted in a civil court; and
- (3) Any records of proceedings before any of the SAC, the CM and the Court Martial Appeal Court,

at which reasons were given for any decision(s) not to make an order to activate the suspended sentence;

d. A copy of the disciplinary record of the offender;

e. A copy of any notification from HA that the CO has been granted extended powers<sup>141</sup>; 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<sup>142</sup>.** 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<sup>143</sup> 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)).

**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

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<sup>141</sup> For the purposes of Section 194, of the Act.

<sup>142</sup> Rule 32, of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>143</sup> Rule 32(1)(b), of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

to represent him at an activation hearing. The brief for an offender's assisting officer at an activation hearing can be found at [Annex O](#). Where the offender has difficulty in finding a suitable person to represent him, they may request the assistance of the CO<sup>144</sup>. 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<sup>145</sup> 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 over the details of the conviction, the CO may wish to adjourn in order to obtain a memorandum of conviction from the court; and

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<sup>144</sup> Rule 33(5), of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>145</sup> Subject to Service law.

- 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<sup>146</sup>:

- 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<sup>147</sup> 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;
- e. Any submission made by the offender about the appropriateness of making an

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<sup>146</sup> Rule 34(2) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>147</sup> 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.

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<sup>148</sup> of the order;

b. Remind the accused of his right of appeal<sup>149</sup>; and

c. Remind the accused that they may choose to commence the sentence of detention immediately<sup>150</sup> (see post hearing action Part 6).

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<sup>148</sup> How much of the suspended sentence will be activated and for how long.

<sup>149</sup> Section 141 of the Act.

<sup>150</sup> 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<sup>151</sup> 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<sup>152</sup>.

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)<sup>153</sup> for the purposes of review, normally not later than 24 hours after the activation hearing. The RAH should be retained under single-Service<sup>154</sup> 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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<sup>151</sup> [Annex O](#) (Brief for offender's assisting officer at an activation hearing).

<sup>152</sup> Rule 27(3) of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>153</sup> [Chapter 15](#) (Summary hearing review and appeal)

<sup>154</sup> 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,<sup>155</sup> 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)<sup>156</sup>. 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;<sup>157</sup>
  - (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).

150. If an officer other than the accused's CO<sup>158</sup> 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

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<sup>155</sup> 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.

<sup>156</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 54(3).

<sup>157</sup> 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.

<sup>158</sup> This includes an appropriate superior authority.



[Chapter 6](#) (Investigation, charging and mode of trial) - provided that (unless that officer is himself the accused's CO after commencement) the officer who is now the accused's CO has delegated to him the CO's relevant functions in respect of the charge<sup>159</sup>. 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<sup>160</sup>. 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<sup>161</sup>.

153. If the accused elected court-martial trial under AA 1955 or AFA 1955 but withdraws<sup>162</sup> the election after commencement, any summary hearing will be held under AFA06. The CO may not apply for extended powers<sup>163</sup>. The accused has no right to elect Court Martial trial unless the charge is amended after it is referred back<sup>164</sup>.

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<sup>165</sup>. If extended powers are not sought, or are sought but not granted, the accused has no right to elect unless the charge is amended.

## Delegation

155. A CO may not delegate his functions under the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 in relation to a charge if the accused is subject to a suspended sentence of imprisonment or detention imposed under the SDAs<sup>166</sup>. 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.

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<sup>159</sup> Such a delegation may have been made before commencement, and will take effect from commencement.

<sup>160</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 54(2).

<sup>161</sup> 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.

<sup>162</sup> "Withdraws" is shorthand: more accurately, the DSP refers the charge back to the CO with the accused's consent.

<sup>163</sup> 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.

<sup>164</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 61(2).

<sup>165</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 61(3).

<sup>166</sup> Schedule 2 paragraph 5(1) Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216. This includes a sentence of detention passed and suspended under NDA 1957 after commencement, because the finding of guilt was recorded before commencement.



## Proven offences

157. Where the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 require details of “proven offences” to be provided, this includes offences found proved (by court-martial or at summary dealing or trial) before commencement<sup>167</sup>.

## 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<sup>168</sup>. Higher authority may give permission before or after commencement<sup>169</sup>.

b. An application for extended powers for the purposes of AFA06 section 133(1) or (2), 134, 135(1) or 136(1)(b)<sup>170</sup> may be made before commencement.<sup>171</sup> Higher authority may grant such an application before or after commencement.<sup>172</sup>

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<sup>173</sup>.

d. The time for the hearing may be fixed under rule 8 of the Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009 before commencement, and the time so fixed may be changed under rule 9 before commencement.

e. The accused’s assisting officer may be nominated before commencement. A person is deemed to be subject to service law for this purpose (and thus eligible for nomination as an accused’s assisting officer, if of sufficient rank or rate) where 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<sup>174</sup>. 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

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<sup>167</sup> Schedule 2, paragraph 2, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>168</sup> 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.

<sup>169</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 59(2).

<sup>170</sup> 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.

<sup>171</sup> 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.

<sup>172</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 59(2).

<sup>173</sup> Schedule 2, paragraph 6, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>174</sup> Schedule 2, paragraph 5(2), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

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'<sup>175</sup>. 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'<sup>176</sup>.

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<sup>177</sup>. This means they may award up to 90 days' detention, even though they could not have awarded more than 60 days if the charge had been dealt with before commencement. Higher authority may treat an application for permission to award extended detention as an application for extended powers for the purposes of section 133(1), and may grant such an application before or after commencement<sup>178</sup>. 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.

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<sup>175</sup> For SDA offences which are "capable of being heard summarily", see Annex B to [Chapter 6](#) (Investigation, charging and mode of trial).

<sup>176</sup> See Annex C to [Chapter 6](#) (Investigation, charging and mode of trial).

<sup>177</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 60.

<sup>178</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059 article 59(4).

## **Activation of suspended NDA57 sentence**

### **Finding of guilt before commencement**

161. If a person is subject to a suspended sentence of detention passed under NDA57 and is found guilty of another offence at a summary trial before commencement, but punishment is not awarded until after commencement, the CO may activate the sentence under NDA57 section 91B at the same time as awarding punishment under NDA57. See annex E to [Chapter 13](#) (Summary hearing sentencing and punishments).

### **Civilian conviction: application for approval made before commencement**

162. If, before commencement, approval was given under NSDR regulation 49A for a proposed activation order under NDA57 section 91B on the basis that the offender had been convicted of a civilian offence, the proposed order may be made under NDA57 section 91B after commencement. If the CO applied for approval before commencement, approval may be granted after commencement, and the proposed order may then be made<sup>179</sup>.

### **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<sup>180</sup>, the CO may activate the sentence under AFA06 section 193<sup>181</sup>. 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);
- 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<sup>182</sup>.

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

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<sup>179</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 62.

<sup>180</sup> That is it is not more than one year since the sentence was suspended.

<sup>181</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 97(1).

<sup>182</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009, Schedule 2, paragraph 8.

suspended sentences of Service detention) Rules 2009 is modified to take account of the fact that the CO cannot activate the sentence without the approval of higher authority. In deciding whether to seek approval, the CO must take into account the matters which (if no approval were required) 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<sup>183</sup>.

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<sup>184</sup>. 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<sup>185</sup>. In each case the written record of the hearing must contain the reasons that the CO is required to give<sup>186</sup>.

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 CMAA) 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<sup>187</sup>.

## 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 to the suspended sentence<sup>188</sup>, 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<sup>189</sup>. 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<sup>190</sup>. The matters that the CO must take into account in deciding

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<sup>183</sup> Schedule 2, paragraphs 10(2) to (5), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>184</sup> That is, higher authority need not give reasons, but the offender must be informed of any reasons that higher authority does give.

<sup>185</sup> Schedule 2, paragraph 10(6), Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>186</sup> Schedule 2, paragraph 11, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>187</sup> Schedule 2, paragraph 12, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

<sup>188</sup> i.e. it is not more than one year since the sentence was suspended.

<sup>189</sup> The Armed Forces Act 2006 (Transitional Provision etc) Order 2009/1059, article 97(2).

<sup>190</sup> Schedule 2, paragraph 14, Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

whether to seek approval for an activation order, and the reasons 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<sup>191</sup>.

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<sup>191</sup> Schedule 2 paragraphs 15 and 16 Armed Forces (Summary hearing and activation of suspended sentences of Service detention) Rules 2009/1216.

**APPLICATION BY THE CO TO HEAR A CHARGE SUMMARILY**

Higher Authority  
Address

HMS WALES  
BFPO 000

26 Oct 09

**APPLICATION BY COMMANDING OFFICER FOR PERMISSION TO HEAR A CHARGE SUMMARILY – B123456 PETTY OFFICER R PERRIN**

1. Application is made under Rule 5 of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009 to hear summarily the charge detailed on the enclosed charge sheet.

**2. Case against the accused**

Insert a summary of the alleged facts of the offence; include brief details of the evidence of key witnesses; details of injuries given by medical professional; whether alcohol was involved; brief details of accused's evidence if an interview was conducted.

**3. Service history**

Include: length of Service; disciplinary record<sup>192</sup>; any recent commendations.

**4. Reasons for considering that the charge should be heard summarily:**

Include for example: uncomplicated charge; first offence; no previous disciplinary record; impending operational tour.

R Jones  
Captain Royal Navy  
HMS WALES  
Commanding Officer

**Enclosures:**

1. A copy of the charge sheet.
2. A copy of the written evidence relevant to the charge.
3. A copy of any unused material gathered as part of the investigation of the charge.
4. A copy of any disciplinary record of the accused.
5. Other material that may, in the opinion of the CO, be relevant to the application

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<sup>192</sup> Not to include any record of Administrative Action

**APPLICATION BY A CO TO HA FOR EXTENDED POWERS**

Higher Authority  
Address

HMS WALES  
BFPO 000

26 Oct 09

**APPLICATION BY COMMANDING OFFICER FOR EXTENDED POWERS IN RELATION TO PUNISHMENT – B123456 PETTY OFFICER R PERRIN**

1. Application is made under Rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009 for extended powers of punishment for the purposes of section 133 (detention), section 134 (forfeiture of seniority), section 135 (reduction in rank/distrating), or section 136 (fine)\* of the Armed Forces Act 2006 in relation to the charge(s) detailed in the enclosed charge sheet.

**2. Case against the accused**

Insert a summary of the alleged facts of the offence; include brief details of the evidence of key witnesses; details of injuries given by medical professional; whether alcohol was involved; brief details of accused's evidence if an interview was conducted.

**3. Reasons for considering that the CO's powers of punishment might be insufficient**

Include your consideration of: the nature of the charge; the maximum penalty for the charge; the sentencing guidelines for the offence; the accused's previous disciplinary record; the accused's position of responsibility (where appropriate) and appropriateness of an alternative punishment.

**4. Service history**

Include: length of Service; recent professional performance; any recent commendations; family circumstances.

R Jones  
Captain Royal Navy  
HMS WALES  
Commanding Officer

\* Delete as appropriate

**Enclosures:**

1. A copy of the charge sheet.

**PROTECT – PERSONAL DATA (WHEN COMPLETED)**

2. A copy of the written evidence relevant to the charge.
3. A copy of any unused material gathered as part of the investigation of the charge.
4. A copy of any disciplinary record of the accused.
5. Other material that may, in the opinion of the CO, be relevant to the application.



## **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

**PROTECT – PERSONAL DATA (WHEN COMPLETED)**

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 ensure 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<sup>193</sup>. 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

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<sup>193</sup> Section 54(2) of the Act.

that this is announced correctly in the hearing. If it is not then you may request an adjournment to verify the details. You should familiarise yourself with the matters that the CO will take into account when deciding whether to activate the suspended sentence and if so, whether in part or in full. You are to be aware that, where they decide it appropriate, the CO will activate the suspended sentence by way of a separate order after they have sentenced 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**<sup>194</sup>. 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

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<sup>194</sup> See the 'Your rights if you are accused of an offence under the Service justice system' booklet at Annex G to [Chapter 6](#) (Investigation, charging and mode of trial).

which has now been activated will run consecutively (one after the other) or concurrently (at the same time).

g. **At the end of the hearing.**

(1) If the charge is found to be proved, the offender has been awarded detention ensure that 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 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"<sup>195</sup>

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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<sup>195</sup> 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**<sup>196</sup>. 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).

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<sup>196</sup> 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.