



**Manual of Service Law  
Volume 1  
Version 2.0**

**MINISTRY OF DEFENCE**

**31 January 2011**

**Equality and Diversity Impact Assessment Statement**

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

Part 1 screening only completed (no direct discrimination or adverse impact identified / policy is a reflection of statutory requirements and has been cleared by a Legal Adviser). This policy is due for review in Dec 2012.

**Acknowledgement**

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# JSP 830 Manual of Service Law

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Amend No	Date	Details	Source	Inserted by:*	Signature*	Date*
1	14/3/11	1-13-8 – clarify “acting rank” for summary sentencing purposes.	DALS			
2	16/3/11	1-8-45 – particulars of the charge should refer to <b>s5(1)</b> not <b>s5(2)</b>	DALS			
3	01/04/11	Annex A to Chapter 27 removed (surplus to requirements)	DP Pol			
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\* Print versions only.

## Glossary

### Terms used in Volumes 1 and 2

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

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

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

## SUBORDINATE COMMANDER

of the person making the decision  
(compare objective test, above).  
Under the Act an officer to whom powers  
have been delegated by a commanding  
officer.



## Abbreviations

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

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

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

## Equivalent Service ranks/rates

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

<sup>1</sup> Royal Marine rank structure corresponds to Army structure and seniority

<sup>2</sup> Junior to Second Lieutenant

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

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

# Chapter 1

## Introduction

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# Chapter 1

## Introduction

### Background

1. Military tasks and the associated training and administration are increasingly conducted in a joint environment. In recognition of this fact the Armed Forces Act 2006<sup>5</sup> (the Act) completely overhauled the Service Justice System for the first time in fifty years, bringing together and harmonising the single-Service Discipline Acts and modernising elements of the system of Service law<sup>6</sup>.

### The Act

2. The Act was founded on a number of fundamental principles upon which harmonised policies have been developed and thus reflected in the Manual of Service Law (MSL). These principles are that:

- a. The system of discipline that will operate under the Act should be swift, fair and consistent, as well as supporting operational effectiveness.
- b. Commanding officers (COs) of units are at the very heart of the Service Justice System with appropriate disciplinary and administrative powers over all personnel under their command.
- c. COs should deal with one higher authority<sup>7</sup> in the handling of disciplinary cases and therefore each unit should have a higher authority assigned to it.

3. The Act is subject to annual renewal which requires the approval of both Houses of Parliament. In addition, the Act is reviewed every five years by an Act of Parliament. This provides the opportunity for Parliament to review the Act and its associated legislation and to make any adjustments deemed appropriate in order to ensure that the Service Justice System continues to achieve its fundamental aims.

### Governance

4. The introduction of a system of governance for the Service Justice System was established in December 2007. Its purpose is to bring together the various agencies in the Service Justice System to discuss policy issues and standards, to set direction and objectives, to provide oversight and to facilitate joint working and cooperation.

5. This work is undertaken by a Service Justice Board and a supporting Service Justice Executive Group. The Board is chaired by the Armed Forces Minister and has Ministers from the Attorney General's Office and the Ministry of Justice as members, along with the Principal Personnel Officers, the Director of Service Prosecutions and the Judge Advocate General. The Board discusses policy issues and sets the strategic direction, with objectives and targets, for the Service Justice System.

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<sup>5</sup> Full implementation commenced on 31 Oct 09.

<sup>6</sup> The Naval Discipline Act 1957, Army Act 1955 and the Air Force Act 1955.

<sup>7</sup> This higher authority would perform the statutory role within the meaning of the Act as required and would at all other times provide the necessary administrative and specialist support to a CO.

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

## **Purpose of MSL**

7. This MSL is a guide to that system to which all Service personnel can refer. While it will be of particular interest to the chain of command, the explanation and interpretation of the new legislation will be essential for all who are involved with Service discipline, in whatever capacity, in providing the knowledge and understanding necessary to carry out their duties effectively. It will also be an essential point of reference for those with a more general interest in the subject.

## **Structure of MSL**

8. The MSL has been divided into three volumes:

- a. **Volume 1.** This volume covers the Service disciplinary system generally and includes a wide range of matters such as jurisdiction, arrest, custody, investigation, charging and mode of trial, summary hearing, review and appeal. This volume is intended to provide guidance for those involved in decision making and the administration of discipline at unit level. There are other matters provided for in the Act that are closely associated with but not wholly contained within the Service disciplinary system. Areas such as redress of individual grievance, Service inquiries, alcohol and substance misuse and testing, management of personnel within Service custody and the protection of children are therefore provided for in separate Joint Service Publications (JSPs), which provide comprehensive guidance. The main provisions relating to these matters are summarised in the MSL Volume 1 with signposts to the relevant JSP.
- b. **Volume 2.** This volume covers matters pertaining to the Service courts including the Court Martial, the Service Civilian Court and the Summary Appeal Court. It is intended to provide guidance for the staff of the Military Court Service who administer proceedings before these Courts and for legal advisers.
- c. **Volume 3.** This Volume contains the Act and the underpinning secondary legislation, as well as other allied legislation and source material, which will be useful to legal professionals.

9. As any adjustments are made to the Service Justice System this MSL will be amended so that at any particular time it represents a reliable and up to date reference.

## **Service law**

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

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

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

## **Armed forces and employment law**

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



## Chapter 2

### Meaning of commanding officer

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## Chapter 2

### Meaning of commanding officer (CO)

#### General

1. **Introduction.** This chapter explains how a person's CO, for any purpose under the Armed Forces Act 2006 (the Act), is identified. The CO is at the apex of a unit's command and control structure and has disciplinary and other powers under the Act. It is essential therefore that Service personnel and relevant civilians<sup>8</sup> are clear who the person's CO is for disciplinary purposes. Equally, an officer must be sure that he is a person's CO for the purposes of the legislation before he exercises CO's powers. It is also important to remember that a person's CO in the conventional sense may not be the same officer as that person's CO for a particular purpose under the Act. The appointment of a CO also confers duties and responsibilities for administrative action<sup>9</sup> and Service complaints<sup>10</sup>.
2. **The law.** The Act places COs at the centre of the Service Justice System and confers a range of powers on them. The identity of a person's CO is determined under Defence Council regulations<sup>11</sup>. The Act also defines higher authority (HA) as any officer in the CO's disciplinary chain of command who is superior in that chain of command to the CO. The Services' disciplinary chains of command are set out in single-Service guidance<sup>12</sup>.
3. **General principles.** The following general principles apply in relation to a CO:
  - a. Every officer appointed as a CO should be clear for whom he has disciplinary responsibility. This includes sub-units, attached personnel<sup>13</sup> and relevant civilians. These disciplinary relationships should be published routinely in unit orders.
  - b. Every CO should know who is their HA. Likewise, every HA should know who are their COs. Where the situation is unclear, guidance should be sought from Front Line Commands (FLCs).
  - c. A CO should make clear and promulgate any delegation of their powers and functions. A CO should be certain that the person to whom powers are delegated is entitled and qualified to hold and exercise those powers. See [Chapter 6](#) (Investigation, charging and mode of trial).
  - d. Every Service person and relevant civilian should have a CO for disciplinary purposes who, in the case of a Service person, will normally be the CO of the unit of which the Service person is a member. If it would not be appropriate for a CO to discipline a person in their unit<sup>14</sup> another CO for disciplinary purposes will be appointed (see paragraph 7 below) and the person concerned informed.

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<sup>8</sup> See glossary.

<sup>9</sup> JSP 833 and RN PLAGO, FLAGO and QRRN, Army AGAI67 Appendix 1 and Annex D, RAF QR 1028 and AP 3392, Volume 5 leaflet 127.

<sup>10</sup> JSP 831 (Redress of Individual Grievance) and JSP 763 (MOD Harassment Complaints Procedure).

<sup>11</sup> The Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

<sup>12</sup> RN PLAGO/FLAGO, Army LF/Org/1/3/3/2/3 dated 27 Jan 09, RAF QR 56.

<sup>13</sup> Attached personnel are individuals, or groups of individuals, from other units or organisations brought onto the strength of a host unit for a given purpose (see paragraph 19).

<sup>14</sup> For example, if a CO is unable to deal summarily with a Service person because he is a witness for or against that Service person in a particular case, an alternative CO can be appointed in relation to that case only.

4. **Consultation and liaison between COs.** A spirit of cooperation is essential to ensure that any differences in the handling of discipline between units is minimised. COs, particularly in joint environments, should liaise and consult in order that discipline is fairly and evenly administered and that the context in which the offence was alleged to have been committed is understood and taken into account.

## Transitional guidance

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

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

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

## Status of CO – general rules

6. **Unit COs.** In most circumstances a Service person’s CO for all purposes<sup>15</sup> will be the officer in command of the Unit of which he is a member. Normally, this will be the officer appointed to be a CO of a unit by the Naval, Military or Air Secretary or by the chain of command. However, another officer may act as unit CO<sup>16</sup> where a unit CO is due to be, but has not yet been, appointed; has been appointed but has not yet assumed command; or is incapacitated or absent. See single-Service guidance<sup>17</sup> for circumstances in which another officer may assume command, and circumstances in which an officer may be appointed temporarily in command.

7. **Specific appointment of COs.** In some circumstances<sup>18</sup> it may not be appropriate or desirable for a person’s usual CO to deal with them or exercise a particular power (indeed, it is possible that cases will arise where a person has no CO or no clearly identifiable CO). In such circumstances another officer may be specifically appointed their CO for any or all purposes under the Act. Such appointments may be made in relation to all matters or any particular matter. Specific appointments can only be made by or on behalf of the Defence

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<sup>15</sup> This may not apply for Summary Hearing because of the ‘two rank rule’ – see paragraph 25.

<sup>16</sup> This will normally be as the result of a decision made by their chain of command, for example their own CO could appoint him. See the Armed Forces (Meaning of “Commanding Officer”) Regulations 2009, regulation 3.

<sup>17</sup> RN QRRN Chapter 3, Army QR 2.016, RAF QR 56.

<sup>18</sup> Thus it may be possible for a Service person to have more than one CO at any given time eg. one CO in command of him, and another CO to exercise the disciplinary function, or to deal with complaints. Where this is the case the Service person should be informed who their CO is in relation to specific issues.

Council or by an officer authorised by the Defence Council<sup>19</sup>. For this purpose the Defence Council and the single-Service Boards have given authority to a number of officers to make appointments. Officers authorised to make specific appointments for joint units are listed within MSL Volume 3. Those officers authorised to make specific appointments within each of the single-Services are listed in Volume 3. Specific appointments of COs override all other provisions as to the identity of the person's CO.

8. **Definition of a unit.** A unit is defined as<sup>20</sup>:

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

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

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

10. **Joint units and units created for specific circumstances.** Joint units can be created in certain circumstances that may not meet existing single-Service criteria. In deciding<sup>21</sup> whether a formed body of members which does not match the single-Service criteria is to be a unit with its own CO, the key questions are as follows:

- a. **Does the organisation have a specific, and individual, mission?** If the mission is directly linked to another unit it is unlikely that the force element needs to be a unit in its own right. For example, a joint helicopter support element operating in direct support of an RAF station is unlikely to require a CO with the relevant powers of discipline. The officer in command of such an organisation should be subordinate to the station commander. Alternatively, a helicopter flight required to operate in support of another distinct organisation, away from its parent station with a high degree of self sufficiency may need to be a unit with a CO.
- b. **Does the organisation need to have a CO, for discipline, in order to achieve its mission?** Discipline is not an end in itself, it supports operational effectiveness. There may be occasions when it is clear that a force element will be operationally ineffective unless it is a unit with a CO. This may be a result of the span of command, geographical location, force composition, mission type or duration.

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<sup>19</sup> The Armed Forces (Meaning of "Commanding Officer") Regulations 2009, regulation 3.

<sup>20</sup> The Armed Forces (Meaning of "Commanding Officer") Regulations 2009, regulation 2(1).

<sup>21</sup> This decision should be reached by the chain of command and the lead FLC. The decision should be transparent, logical, objective and defensible. Force elements should not be units for administrative convenience.

- c. **Is the organisation capable of deploying as a discrete body in order to achieve operational effect?** Deployability may be an important factor, especially if linked to the delivery of a specific operational effect once deployed. If an organisation's role demands deployment to distant locations, and possibly operating independently with limited access to its headquarters, then it might need to be established as a unit.
- d. **If another CO exercised discipline over the organisation would that decrease operational effectiveness?** In many respects this is the defining question; however, it should be applied objectively and should not be used as an excuse to avoid placing persons from one Service under command of another Service.
- e. **Does the organisation have the training and administrative support needed by a CO who has full disciplinary powers?** Although decisions should be based on operational effectiveness, not administrative convenience, it may be counter productive to impose powers of a CO on an officer if he does not have the support of qualified administrative staff to enable them to exercise their disciplinary powers effectively.
- f. **Is there an appropriate higher authority (HA)?** If an organisation is to be a unit it should have a clear, and appropriate, disciplinary chain of command.

#### 11. Headquarters.

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

### Status of CO – exceptions to general rules

12. **Service custody and Service detention**<sup>22</sup>. When a Service person or relevant civilian is, for the time being, in Service custody or detention at MCTC, the officer in command of MCTC is to be their CO for all purposes under the Act<sup>23</sup>. This is to allow the CO of the MCTC to exercise discipline over all the persons in their unit. However because he may not wish to deal with any other offences committed by Service personnel or relevant civilians prior to their arrival at MCTC those persons can have a bespoke appointment of a CO for a particular case.

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

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<sup>22</sup> See regulation 4(2)(d) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

<sup>23</sup> As with an ordinary unit the officer who is in command at a particular time may not be the formally appointed CO. It may, for example, be an officer acting as CO in their place (see paragraph 6 and 7 of this chapter). This may not apply for Summary Hearing because of the 'two rank rule' – see paragraph 25.

14. Where a person is arrested<sup>24</sup>, the arrest and any grounds on which he is being kept in Service custody without being charged should be reported as soon as practicable to their CO<sup>25</sup>. Until that report is made the person may be kept in Service Custody without being charged if the person who arrested them has reasonable grounds for believing that this is necessary to secure or preserve evidence relating to the offence for which he was arrested or to obtain such evidence by questioning them, see [Chapter 5](#) (Custody). If a person is arrested within their own unit, their CO should be informed as a matter of routine. If, however, the individual was arrested by a member of another unit, and the individual is held in a place away from their own unit, the unit holding them should, as soon as practicable, inform the person's parent unit CO. The CO of the parent unit<sup>26</sup> should then decide whether he wishes to deal with them by having them returned to their unit, or whether it would be more appropriate for the CO of the unit holding the person to be made their CO for the purposes of the Act (this could be achieved by attaching the individual to the unit holding the person, see paragraph 18, or through a bespoke appointment, see paragraph 7).

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

16. **Medical units**<sup>27</sup>. Where a Service person is for the time being in a Service hospital as a patient, the CO of that hospital is their CO for all purposes<sup>28</sup> subject to the 'two rank rule' (see paragraph 25 below). This is also subject to the bespoke appointment of a CO for a particular case. The CO of that Service hospital may relinquish authority over an individual. If he does so the CO of the unit of which he is a member becomes their CO unless he is already attached to another unit. In the latter case the CO of the unit to which he is attached becomes their CO.

## Lodger units, attachments and detachments

17. **Lodger units.** A unit lodged<sup>29</sup> with another unit will retain its own discipline chain and the CO will retain full powers. The status of an organisation does not change administratively simply because it is lodged with other units<sup>30</sup>:

a. **Disciplinary incidents.** Where a person from one unit (A) is alleged to have committed an offence which affects another unit (B) the CO of (A) should discuss the matter with the CO of (B) before deciding what action to take. COs of units in a shared site should ensure that discipline is seen to be fairly and evenly administered across the site. This spirit of cooperation is essential to ensure that any difference between units in the application of discipline is minimised<sup>31</sup>, see [Chapter 6](#) (Investigation, charging and mode of trial).

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<sup>24</sup> See section 99 (1) of the Act, for more detail on this subject and time limits see [Chapter 5](#) (Custody).

<sup>25</sup> See regulation 4(2)(c) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

<sup>26</sup> The needs of the investigation should be considered when making this decision.

<sup>27</sup> A Service hospital means any naval, military, Air Force or Joint Unit, establishment or ship, at or in which medical or surgical treatment is provided for persons subject to Service law.

<sup>28</sup> As with an ordinary unit the officer who is in command at a particular time may not be the formally appointed CO. It may, for example, be an officer acting as CO in their place (see paragraph 6 and 7 of this chapter).

<sup>29</sup> When units or sub-units live and work alongside each other within a military location but where there is no direct command and control relationship between them.

<sup>30</sup> For an exception to this on board a warship see paragraph 22, 23 and 24.

<sup>31</sup> See paragraph 4.

b. **Dealing with co-accused**<sup>32</sup>. An incident involving offenders from more than one unit should normally result in a single investigation and common legal advice issued by the lead Command. The lead Command will normally be the Command of the main protagonist. Where this test does not apply, the lead Command will be the Command of the CO of the unit at which the incident occurred. Advice should be sought from HA and consideration given to whether one CO should be appointed to deal with all offenders. Although each case should be judged on its own merits, COs should consult to ensure fair and even administration of discipline.

18. **Lodger sub-units.** Where a sub-unit is lodged with another unit (host unit) and the parent unit CO of the lodged sub-unit cannot exercise discipline effectively, the host unit CO should be made the CO of the members of the sub-unit for the purposes of discipline. This can be achieved by a bespoke appointment. The test as to whether discipline can be effectively exercised is where the effect of the geographical dislocation causes undue delay or complications in the discipline process. The decision as to whether discipline can be effectively exercised rests with the parent unit CO of the lodged sub-unit, having consulted in accordance with paragraph 4 above. If there are operational or other issues, relating to clearances or qualifications<sup>33</sup>, which indicate that discipline should not be handed over to another unit CO, these will normally override the impact of geographical dislocation.

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

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

19. **Attachments.** Where a Service person is attached to a unit their CO for all purposes<sup>34</sup> is the officer in command of the unit to which he is attached, for the period of the attachment. This information should be covered in the relevant attachment, assignment or operation order.

20. If the CO becomes aware of the need for formal disciplinary action against an attached person but then, after consultation, refers the matter back to the parent unit CO he should then act in support of that CO. For this to happen, the attachment of that person should be ended (as the result of which the CO of their parent unit then becomes their CO). Alternatively, the CO of the unit to which the person is attached may decide to complete disciplinary action and if necessary, seek to retain the offender in situ by having the relevant attachment/assignment order extended. Any decision to retain an offender in situ should be kept under constant review to ensure retention is both necessary and reasonable in the interests of justice and there should be liaison between the COs and the respective HAs<sup>35</sup>.

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

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<sup>32</sup> See [Chapter 5](#) (Custody), [Chapter 6](#) (Investigation, charging and mode of trial), [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) and [Chapter 13](#) (Summary hearing sentencing and punishments).

<sup>33</sup> Such as SF detachments or sub-units which require very specific legal or technical clearance from the qualified CO in their parent unit.

<sup>34</sup> This may not apply for summary hearing because of the 'two rank rule' – see paragraph 25.

<sup>35</sup> This is particularly important where the individual is attached to a unit that is not their own Service.



## Embarked forces in Her Majesty's ships

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

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

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

23. **Exceptions – misconduct affecting the ship.** Where Headquarters Land Forces or Headquarters Air Command has made a notification to Fleet Headquarters (*i.e.* the unit is not attached to the ship), the CO of the embarked force will remain the CO. However, if an alleged misconduct by a member of the Embarked Force directly affects the seagoing or fighting efficiency of the ship or the incident occurs overseas where the sovereign immunity of the ship is an operative factor in determining powers of investigation and jurisdiction<sup>36</sup>, the CO of the ship will be able to take jurisdiction over an accused. In this event, the accused will be temporarily attached to the ship for disciplinary purposes.

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

## Two rank rule

25. For the purposes of summary hearing matters, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention), a person's CO is the same officer as for all other purposes if that officer is their superior by at least two ranks. If that officer is not their superior by at least two ranks, their CO for summary hearing matters is the next officer in the disciplinary chain of command who is their superior by at least two ranks or another officer<sup>37</sup> where a specific appointment is made.<sup>38</sup>

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<sup>36</sup> For example where another state has ceded jurisdiction over a member of an embarked force for an offence committed in its territory solely on the understanding that the ship's CO only would deal with the offence.

<sup>37</sup> This officer should also be superior by at least two ranks see single-Service instructions on disciplinary chains of command. RN PLAGO, Army LF/Org/1/3/3/2/3 27 Jan 09, RAF QR 994.

<sup>38</sup> See paragraph 7 for appointment of a CO for disciplinary matters in specific cases.



## Former Service personnel

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

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

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

29. **Specific appointments.**<sup>39</sup> A CO may be specifically appointed for a Service person (falling under paragraph 26 or 27) by the appropriate authority in each single-Service (where such an appointment is made, it overrides the arrangements described in paragraphs 26, 27 or 28 above).

## Civilians subject to Service discipline<sup>40</sup>

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

31. **Persons in one of Her Majesty's aircraft in flight.** If a person (A), is in one of Her Majesty's aircraft in flight, and a relevant civilian by virtue only of that fact, and a person (B) is in command of the aircraft, B's CO for general purposes is also A's CO<sup>41</sup>.

32. **Persons in one of Her Majesty's ships, afloat**<sup>42</sup>. The CO of a person who is relevant civilian by virtue only of being in one of Her Majesty's ships afloat is the CO of that ship.

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

- a. If the civilian is also subject to Service discipline for some other reason<sup>43</sup> (because, for example, they reside with a Service person stationed in Germany), by

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<sup>39</sup> See paragraph 7.

<sup>40</sup> For Service discipline definitions see Schedule 15 and section 370 of the Act, The Armed Forces (Meaning of "Commanding Officer") Regulations 2009 and [Chapter 3](#) (Jurisdiction and time limits).

<sup>41</sup> The Armed Forces (Meaning of "Commanding Officer") Regulations 2009, regulation 7(4).

<sup>42</sup> As defined in Schedule 15 paragraph 2(3) of the Act 'Afloat' means not on shore.

<sup>43</sup> By virtue of falling within another of the paragraphs in Part 1 of Schedule 15 to the Act.

virtue of which they have a CO, their CO does not change because they have been placed in custody<sup>44</sup>.

b. The CO of a civilian in custody<sup>45</sup> who was but is no longer subject to Service discipline<sup>46</sup> for some other reason, will be the officer who was their CO when he was last subject to Service discipline. For example, a civilian who was in one of Her Majesty's ships and is suspected of having committed an offence whilst in that ship, but has now disembarked. If the civilian is placed in custody for that suspected offence, their CO is the officer who was their CO when he was last subject to Service discipline.

c. A CO should be specifically appointed if a civilian finds himself subject to Service discipline<sup>47</sup> because he has been mistakenly arrested and placed in Service custody (e.g. he may never have been subject to Service discipline), but whilst in custody he commits a Service offence so that he cannot simply be released.

**34. Crown servants in designated areas<sup>48</sup> working in support of Her Majesty's forces.** The CO of a person in this category<sup>49</sup> is, if the person is or was working in support of a particular unit, the CO of that unit. If it is not completely clear that the person is or was working in support of a particular unit, a CO should be specifically appointed.

**35. Persons working for specified military organisations<sup>50</sup>.** If a civilian falls within this category, for example as a member of NATO, a CO should be specifically appointed.

**36. Persons in designated areas who are members or employees of other specified organisations.** If a civilian falls within this category, for example as a member of NAAFI, SCE, the Services Sound and Vision Corporation and SSAFA Forces Help, a CO should be specifically appointed.

**37. Persons designated by or on behalf of the Defence Council<sup>51</sup>.** The CO of a person in this category is, if the civilian is or was working in support of a particular unit, the CO of that unit. If it is not completely clear that the person is or was working in support of a particular unit, a CO should be specifically appointed by the chain of command. If a person is designated for the purposes of this paragraph, he should be informed who their CO is.

**38. Persons residing, or staying with a person who is subject to Service law in a designated area<sup>52</sup>.** The CO of a civilian who is subject to Service discipline by virtue of residing or staying with a Service person in a designated area is the officer in command of the unit of which that Service person is a member. If that Service person is attached to another unit (and therefore now has a new CO) then, unless a bespoke appointment is made for that civilian, the CO of that civilian will remain as the CO of the parent unit of the Service person.

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<sup>44</sup> And therefore falls into paragraph 3 of Part 1 of Schedule 15 to the Act.

<sup>45</sup> And therefore falls into paragraph 3 of Part 1 of Schedule 15 to the Act.

<sup>46</sup> By virtue of falling within one paragraph in Part 1 of Schedule 15 to the Act other than paragraph 3.

<sup>47</sup> By virtue of paragraph 3 of Part 1 of Schedule 15 to the Act.

<sup>48</sup> For a description of designated areas see paragraph 12 of Schedule 15 of the Act and [Chapter 3](#) (Jurisdiction and time limits).

<sup>49</sup> See Paragraph 4 of Schedule 15 to the Act.

<sup>50</sup> See paragraph 5 of Schedule 15 of the Act and for more detail on specified military organisations read [Chapter 3](#) (Jurisdiction and time limits).

<sup>51</sup> See paragraph 7 of Schedule 15 of the Act and for more detail on designated persons read [Chapter 3](#) (Jurisdiction and time limits).

<sup>52</sup> See regulation 7(9) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

39. **Persons residing or staying with persons falling within paragraphs 36 or 37 above in a designated area<sup>53</sup>.** The CO of a person in this category is the CO of the relevant civilian with whom the person is residing or staying.

40. **Persons residing or staying with persons falling within paragraph 35<sup>54</sup>.** The CO of a person in this category is the CO of the relevant civilian with whom the person is residing or staying.

41. **Service custody or detention.** If a civilian subject to Service discipline is for the time being held in Service custody or Service detention at MCTC their CO for all purposes is the officer in command of MCTC (and the paragraphs 31-40 above do not apply).

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<sup>53</sup> See regulation 7(10) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

<sup>54</sup> See regulation 7(11) of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

## Chapter 3

### Jurisdiction and time limits

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## Chapter 3

### Jurisdiction and time limits

#### Introduction

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

#### Persons subject to Service law or Service discipline

2. The Act applies to two categories of persons; persons subject to Service law (both Service personnel<sup>55</sup> and ex-Service personnel) and civilians subject to Service discipline (relevant civilians). Members of the regular forces<sup>56</sup> are persons subject to Service law at all times and anywhere in the world. Reservists are subject to Service law only in the circumstances set out and explained in paragraphs 10 to 13 below. Forces of the British overseas territories are only subject to Service law when they are serving with Her Majesty's forces. Persons will become civilians subject to Service discipline only in certain limited circumstances; see paragraphs 17 to 27 below.

3. Persons who fall into either of the two categories above who are alleged to have committed a Service offence<sup>57</sup> may be investigated. If charged, a person subject to Service law may be brought before their commanding officer (CO) at summary hearing (for certain offences) or before the Court Martial (CM). A CO cannot hear a charge against a civilian subject to Service discipline; relevant civilians may only be brought before the Service Civilian Court (SCC) or be tried before the CM.

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

#### Concurrent jurisdiction

5. In many cases there may be concurrent jurisdiction; this means that cases could be investigated or prosecuted by Service, UK civilian or foreign authorities. Decisions on who exercises jurisdiction will have to take into account the principles contained in relevant protocols, in Status of Forces Agreements (SOFA) or in memoranda of understanding (MOU); decisions involving foreign authorities will require prior consultation with the appropriate Service authorities<sup>58</sup>. Before an allegation or offence can be investigated the

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<sup>55</sup> See Glossary for definition of a Service person.

<sup>56</sup> See definition at section 374 of the Act.

<sup>57</sup> Service offences are those which appear in Sections 1 to 39 and Section 42 of the Act and include both Service disciplinary offences and criminal conduct offences which are charged under section 42 of the Act.

<sup>58</sup> Higher authority (HA) should be consulted and the Director of Service Prosecutions (DSP) for more serious cases.

Service Police will need to consider jurisdiction. In some cases they may (if the necessary requirements are met) exercise some of their powers, such as the power of arrest before jurisdiction is confirmed. For information on arrest see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) and for charging see [Chapter 6](#) (investigation, charging and mode of trial).

6. This chapter is divided into six parts, as follows:

- a. Part 1 - Jurisdiction as to person.
- b. Part 2 - Jurisdiction of Service courts.
- c. Part 3 - Choice of jurisdiction.
- d. Part 4 - Jurisdiction as to time.
- e. Part 5 - Double jeopardy.
- f. Part 6 – Transitional guidance.

## Part 1 – Jurisdiction as to person

### Introduction

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

### Persons subject to Service law

8. **The regular forces**<sup>59</sup>. Every member of the regular forces is subject to Service law at all times. This means that whether on duty or off duty within the UK or abroad, or transiting between countries, every member of the RN, the RM, the regular Army and the RAF is subject to Service law.

9. **Officers**. Any officer who is on the active list<sup>60</sup>, or who has been recalled into permanent Service, is subject to Service law as a member of the regular forces. An officer who has retired from Service nevertheless retains their commission for life. That said, upon retirement they is no longer regarded as a member of the regular forces and will therefore not be subject to Service law<sup>61</sup>. They will only become subject to Service law if they are recalled into permanent Service<sup>62</sup>.

10. **The reserve forces**<sup>63</sup>. The reserve forces are defined as<sup>64</sup> the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve and the Royal Auxiliary Air Force. These are broken down into:

- a. ‘Volunteer reserve forces’ namely the Royal Naval Reserve, the Royal Marines Reserve, the Territorial Army and the Royal Auxiliary Air Force.

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<sup>59</sup> See section 367(1) of the Act.

<sup>60</sup> See section 368(3) of the Act. The active list for each Service is defined by single-Service provisions. RN – Navy List, Army Pay Warrant 1964 Article 11, RAF Order made under section 2(1) of the Air Force (Constitution) Act 1917.

<sup>61</sup> Unless proceedings are taken against them as an ex-Service person in accordance with sections 55, 57 or 61(2) of the Act.

<sup>62</sup> This would not, however, prevent the Services from taking administrative action against the Service person who is no longer subject to Service law.

<sup>63</sup> See section 367(2) of the Act.



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

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

- a. During permanent Service on call-out (either by virtue of the statutory requirement under the Reserve Forces Act 1980 or the Reserve Forces Act 1996 or any other call-out obligation of an officer).
- b. During home defence Service on call-out<sup>65</sup>.
- c. When engaged in a full-time Service commitment<sup>66</sup>.
- d. When undertaking any duty or training (whether or not in pursuance of an obligation). This includes any additional duties commitment undertaken.
- e. When serving on the permanent staff of a reserve force.

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

12. A reservist undertaking service under any of paragraph 11a – c and e above will be subject to Service law during the whole period of that service whether they is travelling, physically working, resting or off duty. This is different in respect of duties undertaken under paragraph 11d above (this is likely to be most relevant to members of volunteer reserve forces attending short periods of training or

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<sup>64</sup> See section 374 of the Act.

<sup>65</sup> See section 22 of the Reserve Forces Act 1980.

duty). Broadly speaking, such a person will be subject to Service law while they are with their reserve force. So, for example, where they attends an 8 hour training period on a Saturday they will be subject to Service law during the time of the training period only and not when they is driving to the period or returning home from it. Staff legal advice should be obtained if there is any doubt as to whether a reservist was subject to Service law at the time they committed the alleged offence.

13. **Recall.** Any person who is recalled for service under the authority of a recall order made under the Reserve Forces Act 1996, or under an officer recall obligation, is for the purposes of the Act, regarded as being a member of the regular forces from the time that they is accepted into permanent service following their recall until they is discharged or released from that service.<sup>67</sup> Accordingly, such persons will be subject to Service law at all times during this period of recall in the same way that Service law applies to the regular forces as described above. In addition, they may be tried by the CM for certain offences under Part X of the Reserve Forces Act 1996 even though not accepted into service at the time of the alleged offence.

14. **British overseas territories' forces**<sup>68</sup>. When any member of a British overseas territory force, i.e. any of Her Majesty's forces raised under the law of a British overseas territory, is undertaking any duty or training with United Kingdom regular or reserve forces, they becomes subject to Service law<sup>69</sup> for the duration of the training or duty. They are treated for the purposes of the Act as having an equivalent rank or rate to a relative member of the force with which they is serving. To this extent, any member of a British overseas territory force who is serving with Her Majesty's forces also has like powers of command over the United Kingdom forces with which they is serving<sup>70</sup>.

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<sup>66</sup> See section 24 of the Reserve Forces Act 1996.

<sup>67</sup> See section 368(2) of the Act.

<sup>68</sup> See section 369 of the Act. For a list of these countries see section 2 of the UK Forces (Jurisdiction of Colonial Courts) Order 1965 (as amended) – SI No 1203 of 1965.

<sup>69</sup> See section 369(1) of the Act.

<sup>70</sup> Under section 369(3) of the Act the Secretary of State has power to modify any provisions of the Act in relation to such persons. To date no such modifications have been made.

15. **Members of foreign forces.** Members of foreign forces apart from those from Commonwealth forces will not be subject to Service law. Members of any foreign force may, however, in certain circumstances be civilians subject to Service discipline. This would be the case if, for example, such persons were on board any of Her Majesty's ships afloat or aircraft in flight or in Service custody<sup>71</sup>. Members of foreign forces are not permitted to exercise any disciplinary functions under the Act.

16. **Members of Commonwealth forces.** Service personnel from Commonwealth countries in a Service exchange or loan Service position in the UK are, for jurisdictional purposes, to be treated as any UK Service person subject to Service law<sup>72</sup>. Similarly, a Commonwealth officer on exchange is permitted to exercise any disciplinary functions under the Act in the same way as a UK officer of equivalent rank<sup>73</sup>. Commonwealth personnel attached to UK forces on operations overseas will usually be subject to their own chain of command. If members of Commonwealth forces are not subject to Service law they will be (in the same way as members of foreign forces, see paragraph 15 above) civilians subject to Service discipline (like any other person who is not at the time subject to Service law) while on board any of Her Majesty's ships afloat or aircraft in flight or in Service custody<sup>74</sup>.

## Civilians subject to Service discipline

17. **Introduction.** Persons will be civilians subject to Service discipline only if they are not subject to Service law and they fall into one of the categories set out in Schedule 15 to the Act. It should be noted that although the Act uses the expression 'civilian subject to Service discipline' this can cover members of the armed forces in certain circumstances, for example, a member of a foreign force or a member of the reserve forces who is not for the time being subject to Service law. Therefore, a member of the Territorial Army who is also an MOD Crown servant would be, when working abroad in support of the armed forces in their civilian capacity<sup>75</sup>, a civilian subject to Service discipline.

18. Where a civilian is subject to Service discipline, a CO must be allocated to them, see [Chapter 2](#) (Meaning of commanding officer). A CO should know the civilians, subject to Service discipline for whom they have responsibility. A civilian subject to Service discipline is only subject to Service jurisdiction for a limited range of offences i.e. section 42 (criminal conduct) offences, those non-criminal conduct (disciplinary) offences at paragraphs 41a - e below and other offences at paragraphs 41f – j below. A CO cannot personally decide to charge a civilian<sup>76</sup> nor can civilians have a charge against them heard summarily by the CO.

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<sup>71</sup> Section 370 (provides the Services with the power to make persons including members of the armed forces (when they are not subject to Service law) civilians subject to Service discipline) and paragraphs 1-3 of Schedule 15 of the Act.

<sup>72</sup> Section 4(4) of the Visiting Forces (British Commonwealth) Act 1933.

<sup>73</sup> Section 4(4) of the Visiting Forces (British Commonwealth) Act 1933.

<sup>74</sup> Section 370 and paragraphs 1-3 of Schedule 15 of the Act.

<sup>75</sup> To see how and when Schedule 15 applies see both section 370 and the provisions of Schedule 15 of the Act.

<sup>76</sup> See section 121(2) and section 52(3) and (4) of the Act.

Where a CO has responsibility for any case against a civilian subject to Service discipline they have the power to refer it to the Director of Service Prosecutions (DSP), to take no action or to refer the matter to the civilian authorities see [Chapter 6](#) (Investigation, charging and mode of trial). If the DSP decides to charge, the case will be heard in either the SCC or the CM see [Chapter 6](#) (Investigation, charging and mode of trial).

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

- a. Civilians in Her Majesty's ships and aircraft, see paragraph 21 below.
- b. Persons in Service custody, see paragraph 22 below.
- c. Crown servants in a designated area<sup>77</sup> working in support of Her Majesty's forces, see paragraph 23 below.
- d. Members of specified military organisations, see paragraph 24 below.
- e. Members of other specified organisations in a designated area<sup>78</sup>, see paragraph 25 below.
- f. Persons residing or staying with certain people in a designated area<sup>79</sup>, see paragraph 26 below.
- g. Persons designated by or on behalf of the Defence Council, see paragraph 27 below.

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

**20. Designated areas.** Civilians falling into categories in paragraph 19 c, e and f above are only subject to Service discipline if they are in a designated area<sup>80</sup> (see [Annex A](#)). A designated area means an area which is outside the British Islands and has been designated as such by an order made by the Secretary of State<sup>81</sup>. Some persons are only civilians subject to Service discipline while they are within a designated area and so can only commit a relevant Service offence while within a designated area. The fact that the civilian has ceased to be subject to Service discipline, for example by leaving the designated area, does not of itself, prevent the Service Police exercising their powers of arrest over that person, wherever they may be. For example, a civilian subject to Service discipline who committed an offence whilst in Germany could still be arrested by the Service Police upon their return to the UK.

**21. Civilians in Her Majesty's ships and aircraft.** A person who is not subject to Service law will be a civilian subject to Service discipline if they are in one of Her Majesty's ships afloat<sup>82</sup> or if they are in one of Her Majesty's aircraft in flight. Under the Act, the period that

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<sup>77</sup> For a definition of a designated area see paragraph 20.

<sup>78</sup> For a definition of a designated area see paragraph 20.

<sup>79</sup> For a definition of a designated area see paragraph 20.

<sup>80</sup> These designated areas are set out in the Armed Forces (Civilians Subject to Service Discipline) Order 2009/836.

<sup>81</sup> See paragraph 12 of Part 2 of Schedule 15 of the Act.

<sup>82</sup> Means not on shore. See Schedule 15 of the Act.

one of Her Majesty's aircraft is in flight includes the period from the moment when power is applied for the purpose of the aircraft taking off on a flight, until the moment when the landing run (if any) at the termination of that flight ends (chock to chock).

**22. Persons in Service custody.** A civilian in Service custody will be subject to Service discipline if their being in Service custody is lawful by virtue of any provision of or made under the Act<sup>83</sup>. This includes where a person is arrested and held in Service custody in the mistaken belief that they was subject to Service discipline. Where such a mistake occurs, legal advice should be obtained as soon as practicable and if appropriate the person released from Service custody. A person will also be subject to Service discipline if they are in the course of being arrested or subject to an attempted arrest by a person who has a duty under Service law to apprehend them.

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

- a. They are employed by or in the service of the Government of the United Kingdom;
- b. Their sole or main role is to work in support of any of Her Majesty's forces; and
- c. They are in a designated area<sup>84</sup>.

**24. Members of specified military organisations.** A person will be a civilian subject to Service discipline if they is employed by or in the service of a specified naval, military or air force organisation<sup>85</sup>. This only applies if they is so employed by reason of the UK's membership of that organisation and they is outside the British Islands. The only organisation so far in this category is NATO. There is no requirement in this category to be in a designated area.

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

- a. The Navy, Army and Air Force Institutes (NAAFI);
- b. Service Children's Education;

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<sup>83</sup> For further detail see The Armed Forces (Custody Without Charge) Regulations 2009/1097 and The Armed Forces (Custody Proceedings) Rules 2009/1098.

<sup>84</sup> For a definition of a designated area see paragraph 20.

<sup>85</sup> See article 2 of the Armed Forces (Civilians Subject to Service Discipline) Order 2009 SI 2009/836.

- c. The Services Sound and Vision Corporation (SSVC); and
- d. The Soldiers, Sailors, Airmen and Families Association (SSAFA) - Forces Help.

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

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

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

#### **Case Study**

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

27. **Persons designated by or on behalf of the Defence Council.** A person will be within the category referred to at paragraph 19g above if they is designated by or on behalf of the Defence Council or by an officer authorised by the Defence Council (the designating officer)<sup>86</sup> and they is outside the British Islands<sup>87</sup> and within the terms of the designation<sup>88</sup>. Such designations can specify the particular person or description of persons so designated. They can also specify the circumstances in which the designation applies, for example, by reference to presence within an area. In addition, they can specify a period for which the designation applies. Likely examples of persons who will be designated are contractors deployed on operations in support of UK forces sometimes referred to as Contractors on Deployed Operations (CONDO) and civilian visitors to operational areas. An officer who is to be the CO of a designated person will be appointed as such by an officer authorised to do so by the Defence Council. Without such specific appointment an officer does not become a CO of such a person see [Chapter 2](#) (Meaning of commanding officer).

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

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

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<sup>86</sup> See Volume 3 of the MSL for the detail of Defence Council authorisations.

<sup>87</sup> For definition of British Islands see Schedule 1 to section 5 of the Interpretation Act 1978. It means the UK, the Channel Islands and the Isle of Man.

<sup>88</sup> For advice relating to contractors contact Dir Def Log Pol (DE&S) and for those who are not contractors contact SPPol SC.

- a. The decision to designate a civilian as being subject to Service discipline is not one that should be made lightly and therefore the authority ought not normally to be delegated below a CO.
- b. If a civilian, either as an individual, or as part of a class of civilians is designated and therefore becomes subject to Service discipline they must be informed of this fact. They should also be informed of who their CO will be in the event of a problem occurring.
- c. The default level for designating civilians should be at MOD, Front Line Command (FLC) or PJHQ level and wherever possible the designation should be made clear to a civilian before they deploy. All designations made this way must be recorded and reviewed at regular intervals.
- d. In the event that MOD, FLC or PJHQ require to designate a civilian as being subject to Service discipline<sup>89</sup> the officer who makes the designation must have the appropriate authorisation from the Defence Council or single-Service Board acting on its behalf<sup>90</sup>.
- e. In exceptional circumstances<sup>91</sup> where a civilian is not already designated any officer who has been authorised<sup>92</sup>, may designate them. The officer who makes a designation in such circumstances does so on the basis that the need has arisen due to unforeseen circumstances and this should be reported up the chain of command.

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

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

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

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

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<sup>89</sup> It should be noted that not all persons who are visiting or working with the armed forces may require to be designated. The criteria for deciding whether a designation is required is set out in paragraphs 7(2) and (3) of Schedule 15 of the Act and at paragraphs 30 and 31.

<sup>90</sup> See Volume 3 of the MSL for the detail of Defence Council authorisations.

<sup>91</sup> For example if an aircraft carrying civilians was diverted from its planned route and had to land in a country where the Captain of the aircraft believed it was desirable to designate them in case an incident occurs.

<sup>92</sup> This will require the Defence Council or single-Service Boards to consider which people in which area they require to be authorised.

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

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

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

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

## The designation process

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

- a. **Contractors on deployed operations (CONDO<sup>93</sup>)**. Such persons will be designated according to the following process:
  - (1) Once the designating officer has made the necessary designation the contract sponsor will inform the contractor that their personnel<sup>94</sup> will be subject to Service discipline and whether this applies for a specified period or in specified circumstances.
  - (2) It is then the responsibility of the contractor to inform their employees of the circumstances in which they will be subject to Service discipline and to ensure they understand the effect of this designation. This should form part of

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<sup>93</sup> For further detail on CONDO see JSP 567 and DEFCON 697.

<sup>94</sup> Except for Host Nation Nationals and residents of that country.



their pre-deployment briefing.

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

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

c. **Visits**

(1) **By Crown servants and members of other specified organisations to operational areas.** UK Crown servants, i.e. a person employed by or in the service of the Government of the United Kingdom, may wish to visit operational areas for various reasons. Similarly, employees of other specified organisations such as NAAFI or SSVC may wish to make such visits. Where such visits to the Armed Forces in an operational area are necessary, and the visitors are required to be subject to Service discipline<sup>95</sup> then it is the responsibility of PJHQ to inform them that they are to be designated, to brief them on the implications of designation, and allocate them a CO while they are in that theatre of operations. PJHQ will, at the same time, notify the nominated CO of the relevant civilian who will be arriving in Theatre, to ensure that on their arrival they are made aware of relevant standing orders.

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

(a) All correspondents on operational media assignments with UK forces will require accreditation under the provisions of the MOD's Green Book. Correspondents accompanying UK forces during an international armed conflict will need to be accredited to the armed forces if they are to attain the special status provided for them by Article 4A(4) of the Third Geneva Convention. This will mean that they will be accredited as 'War Correspondents'. Further details on all aspects of correspondent accreditation can be found in the MOD Green Book (Practical Arrangements for Enabling Correspondents to Report on Operations).

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

(3) **To non-operational areas.** If persons such as MOD Crown servants, members of other specified organisations or other individuals or

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<sup>95</sup> Using the criteria in paragraphs 30 and 31.

groups<sup>96</sup> who are not already designated<sup>97</sup> wish to visit the armed forces in a non-Operational area<sup>98</sup>, and they are required to be subject to Service discipline<sup>99</sup>, then it is the responsibility of the unit that they intend to visit to inform their higher authority (HA) of the visit. It is then the responsibility of the HA to inform the relevant FLC of the visit. If the decision is made that the visitors should be subject to Service discipline then the FLC should arrange for:

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

**35. Designation in exceptional circumstances.** There may be cases where FLCs or PJHQ believe that they may need to be able to designate civilians as being subject to Service discipline and they cannot ensure that the normal authorising process will be flexible enough to be used. Such circumstances might be when designation has not been done in advance but an unexpected event/diversion may mean that civilians need to be designated in their own interest. They might involve a civilian arriving in a location where for some reason they have slipped through the authorising process without being designated by mistake. Officers such as aircraft captains may be appointed as designating officers in the event such designation may be necessary. The FLCs or PJHQ will need to ensure that an authorisation for individuals in a particular area is made, and that the selected officers are informed, so that they can act.<sup>100</sup> The following procedure is to be followed where there is a requirement to designate civilians in exceptional circumstances.

- a. In the event that a designating officer requires to designate a civilian they should fill in the Form T-SL-DES01 at [Annex B](#)<sup>101</sup> and ensure that the civilian is informed that they have been designated. They should also inform the civilian what the designation means and for how long and where it is to apply.
- b. If the designating officer has not already obtained staff legal advice they should do so as soon as is practicably possible.
- c. The designating officer should inform HA of their actions as soon as is practicable.

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<sup>96</sup> For example politicians.

<sup>97</sup> Under the Armed Forces (Civilians Subject to Service Discipline) Order 2009/836.

<sup>98</sup> For example Belize.

<sup>99</sup> Using the criteria in paragraphs 30 and 31.

<sup>100</sup> For example the RN might decide to authorise all their ships' Captains, the Army might give authorisation to all COs in a particular area and the RAF might authorise the Captains of passenger planes.

<sup>101</sup> If this is not available then he should ensure that the information is recorded and signed.

d. The designating officer should keep the designation under review and if circumstances change such that their reasons for the designation no longer apply, they should terminate the designation and inform the civilian of their actions.

## Part 2 - Jurisdiction of Service courts

### Introduction

36. Not all Service offences<sup>102</sup> can be committed by a person subject to Service law and by a civilian subject to Service discipline. Each section of the Act that creates an offence states to whom it is applicable and whether it can be committed by a person subject to Service law or a civilian subject to Service discipline or both.

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

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

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

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

41. **Civilians subject to Service discipline.** Relevant civilians can commit Service offences under section 42 of the Act. These are offences equivalent to crimes under the law of England and Wales and are referred to in this chapter as 'criminal conduct offences', see [Chapter 8](#) (Criminal conduct offences). In addition, such persons can commit non-criminal conduct (disciplinary) offences under some of sections 1 to 41 of the Act, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences), as well as certain other applicable offences created by armed forces legislation<sup>103</sup>. The non-criminal conduct (disciplinary) offences that can be committed by relevant civilians are as follows:

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

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<sup>102</sup> For Service offences see paragraph 41.

<sup>103</sup> See section 50(2)(b)-(g) of the Act, excluding under (e) offences contrary to section 305 of the Act, and under (f) excluding offences contrary to section 328 of the Act.

- e. An offence in relation to Service custody under section 29 of the Act.

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

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

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

## **The Court Martial (CM)**

42. The CM has jurisdiction to try any Service offence. For the purposes of the Act a Service offence<sup>104</sup> is:

- a. An offence that is a disciplinary offence, such as absence without leave<sup>105</sup> or failure to attend for or perform a duty<sup>106</sup>, under Part 1 of the Act, other than an offence under section 42. Such an offence only exists in Service law and has no exact equivalent offence under the criminal law of England and Wales.
- b. Any criminal conduct offence under section 42 of the Act, which covers two main types of conduct. First, it covers conduct which is punishable under the criminal law of England and Wales (this generally covers conduct taking place in England or Wales). Secondly, it covers conduct outside the UK, which broadly speaking would be punishable under the criminal law of England and Wales had it been committed in England or Wales (but see paragraph 36 above).
- c. An offence (not within a or b above) that is specifically created in the Act, namely:
  - (1) Breach of requirement imposed on release from custody<sup>107</sup>.
  - (2) Breach of Service restraining order<sup>108</sup>.
  - (3) Failure to comply with a financial statement order<sup>109</sup>.

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<sup>104</sup> See section 50 of the Act.

<sup>105</sup> See section 9 of the Act.

<sup>106</sup> See section 15 of the Act.

<sup>107</sup> See section 107 of the Act.

<sup>108</sup> See section 229 of the Act.

<sup>109</sup> See section 266 of the Act.

- (4) An offence in relation to testing for alcohol or drugs<sup>110</sup>.
  - (5) An offence under regulations in relation to giving false answers during enlistment which is specified in the regulations to be a Service offence<sup>111</sup>.
- d. An offence created by armed forces legislation other than the Act:
- (1) An offence under section 18 or 20 of the Armed Forces Act 1991 (orders for the protection of children).
  - (2) An offence under any of the sections 95 – 97 of the Reserve Forces Act 1996 (reserve forces offences).
  - (3) An offence under paragraph 5(1) of Schedule 1 to the Reserve Forces Act 1996 (false answer during enlistment in a reserve force) committed by a person within paragraph 5(3) of that Schedule.

## **The Service Civilian Court (SCC)**

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

- a. An indictable-only offence under section 42 of the Act for which the corresponding offence under the criminal law of England and Wales could only be tried before the civilian Crown Court. Therefore, an adult may not be tried in the SCC for an indictable-only offence under section 42. However, an accused aged under 18 may be tried by the SCC for any such offence, except:
  - (1) Murder.
  - (2) Manslaughter.
  - (3) Causing or allowing the death of a child<sup>112</sup>.
  - (4) A firearms offence<sup>113</sup>. If convicted at a CM trial for this offence, certain requirements as to the minimum sentences for firearms offences would apply.
- b. An offence under section 266 (Financial Statement Order) committed in respect of a financial statement order made by a court other than the SCC.
- c. Any Service offence under regulations made under section 328 (Enlistment) or section 343 (Service Inquiries) of the Act.
- d. An offence within section 50(2)(h) or (i) (Reserve Forces Act 1996 offences)<sup>114</sup>.

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<sup>110</sup> See Chapter 1 of Part 13 of the Act.

<sup>111</sup> See regulation 12 of the Armed Forces (Enlistment) Regulations 2009.

<sup>112</sup> See section 5 of the Domestic Violence, Crime and Victims Act 2004 (c.28)

<sup>113</sup> See section 227 of the Act.

<sup>114</sup> See section 51(3)(d) of the Act.

- e. Any offence if the accused is a member of the regular or reserve forces or liable to recall<sup>115</sup>.

## Summary hearing

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

45. **Commanding officer.** A CO may hear a charge against a person subject to Service law if<sup>116</sup>:

- a. The offence is one that may be dealt with at a summary hearing see [Chapter 6](#) (Investigation, charging and mode of trial);
- b. The accused is of the appropriate rank/rate, i.e. an officer of or below the rank of commander, lieutenant colonel or wing commander, or a person of or below the rank or rate of warrant officer;
- c. The accused is a person who (depending on paragraphs 10 -13 above and 67 to 71 below<sup>117</sup>):
  - (1) From the time the offence was committed to the end of the summary hearing of the charge is subject to Service law;
  - (2) From the time the offence was committed to the end of the summary hearing of the charge is a member of a volunteer force; or
  - (3) Is a member of an ex-regular reserve force (see paragraph 10b) who is subject to an additional duties commitment. A CO has no power to hear a charge summarily once the accused has been discharged as a member of the regular or reserve forces or if they is an ex-regular reservist, once they have completed their recall Service or any additional duties commitment; and
- d. The CO is a minimum of two ranks higher than any commissioned officer who appears before them for summary hearing<sup>118</sup>.

46. **Subordinate commander.** The same principles apply for a subordinate commander as to a CO when powers of punishment have been delegated with respect to hearing a charge summarily. A subordinate commander will have to consider their powers of

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<sup>115</sup> For definition of 'liable for recall' see section 51(7) of the Act.

<sup>116</sup> See section 52 of the Act.

<sup>117</sup> See also section 52(5) and (6) of the Act. Subsection (5) provides that if the offence is under section 96(1) Reserve Forces Act 1996 where the offender is subject to Service law, it is enough if he is 'liable to recall' or 'a member of the regular forces' during the period. Under subsection (6) if there is any other offence under the Reserve Forces Act 1996 he must be a member of a reserve force during this period.

<sup>118</sup> See [Chapter 2](#) (Meaning of commanding officer).

punishment as they will differ from those held by the CO, see paragraph 44 above. They should determine whether they have sufficient power to hear the charge.

47. **Offences that may be heard summarily without permission.** In order for an offence to be capable of being heard by a CO it must be one of the offences specified in section 53 and Part 1 of Schedule 1 of the Act<sup>119</sup>. This list is exhaustive and an offence not within that section is not capable of being heard summarily by the CO, however minor it may appear to be.

48. **Offences requiring the permission of HA for summary hearing.** A CO can deal summarily with certain criminal conduct offences within section 53 and Schedule 1 of the Act<sup>120</sup> only after having obtained permission from HA<sup>121</sup>. These offences are listed in Part 2 of Schedule 1 of the Act and in Annex B of [Chapter 6](#) (Investigation, charging and mode of trial). Where permission is required, it must be obtained **before** the case can be dealt with summarily. However, if the officer who will hear the charge summarily is of, or above, the rank of rear admiral, major general or air vice-marshal, they can deal with these offences without permission. For the procedure on how to apply for permission, see [Chapter 6](#) (Investigation, charging and mode of trial).

## Appellate courts

49. There are three appellate courts:

a. **The Court Martial Appeal Court (CMAC).** For appeals see [Chapter 31](#) (Court Martial appeal).

b. **The Summary Appeal Court (SAC).** The SAC has the jurisdiction to hear an appeal (this is by way of a re-hearing) from a summary hearing. See [Chapter 15](#) (Summary hearing review and appeal) for further details on appeals to the SAC.

c. **The Court Martial (CM).** The CM has jurisdiction to hear appeals made from the SCC. See [Chapter 32](#) (Service Civilian Court).

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<sup>119</sup> See also Annex A to [Chapter 6](#) (Investigation, charging and mode of trial).

<sup>120</sup> See section 54(1)(b) of the Act.

<sup>121</sup> For single-Services this will be their own HA and for joint units this will be their assigned HA.



## Part 3 - Choice of jurisdiction

### Jurisdiction inside the United Kingdom

50. Within the UK, in respect of offences committed by persons subject to Service law, jurisdiction may lie with the Service authorities under the Act or with both the Service authorities and the civilian authorities under the ordinary law of the relevant part of the UK. In the latter circumstance, there are a number of established procedures and protocols that determine the exercise of jurisdiction<sup>122</sup> and COs should liaise with the Service Police and seek staff legal advice on jurisdiction.

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

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

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

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

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

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

a. It is the Procurator Fiscal for the relevant area, under the direction of the Lord Advocate, who prosecutes cases (rather than the Crown Prosecution Service (CPS) who do so in England and Wales). Therefore, in relation to offences in Scotland, 'Procurator Fiscal' should be substituted for the words "Crown Prosecution Service"

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<sup>122</sup> Advice can be obtained from DDefSy-Def Policing at MOD on protocols and generally, from the staff legal adviser.

and “chief officer of Home Office Police” wherever they occur in this chapter. The Procurator Fiscal will usually be the point of contact for consultation.

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

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

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

## **Jurisdiction outside the United Kingdom**

56. **Introduction.** The proper exercise of Service jurisdiction in a foreign country (for example, the arrest of persons subject to Service law or a civilian subject to Service discipline by Service Police) is often regulated by a treaty, MOU or ad hoc agreement<sup>123</sup>. Without such an agreement, while the arrest or other action is still valid under UK domestic, Service and international law, the country in question may complain that its sovereignty has been infringed and may request that jurisdiction be returned (in such circumstances, advice should be sought from HA). Where the British armed forces are in belligerent occupation of the territory of any other State, Service authorities will normally have exclusive jurisdiction in that territory in respect of the investigation and prosecution of offences by persons subject to Service law or attached civilians subject to Service discipline.

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

58. **Countries other than NATO countries.**

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

b. Where UK persons subject to Service law are placed at the disposal of a Commonwealth force under Defence Council Orders, jurisdiction lies with the Commonwealth Service authorities<sup>124</sup>.

59. **NATO and partnership for peace countries.** Jurisdiction in NATO countries and the other states participating in the Partnership for Peace (PfP)<sup>125</sup> is dealt with in Article VII of the

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<sup>123</sup> Whether or not such agreements exist, COs will also be issued with mission directives for exercises or operations and port visit guidance will be provided for ships, which will detail the jurisdictional issues which apply in a particular country.

<sup>124</sup> See section 4(2)(ii) of the Visiting Forces (British Commonwealth) Act 1933 (as amended).

<sup>125</sup> See Partnership for Peace Framework Document dated 10 Jan 94

Agreement Regarding the Status of Forces of Parties to the North Atlantic Treaty (Command 9363) signed in London on 19 June 1951 (the Agreement). The full text of the Agreement is in MSL, Volume 3, but some of the main jurisdictional aspects are set out below:

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

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

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

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

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

60. **Notification.** In cases where the right to exercise jurisdiction lies with both the Service authorities and the receiving state, the state that exercises jurisdiction in a particular case must notify the other of the results of the case<sup>126</sup>.

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

62. **British overseas territories**<sup>127</sup>. In the British overseas territories listed in the UK Forces (Jurisdiction of Colonial Courts) Order 1965 (as amended) – SI No 1203 of 1965<sup>128</sup>,

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<sup>126</sup> Article VII(6)(b) of the NATO SOFA refers.

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

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

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

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

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

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<sup>127</sup> These include (but are not limited to): Anguilla, British Guiana, Cayman Islands, Falkland Islands, Fiji, Gibraltar, Seychelles, Virgin Islands. See section 2 of the UK Forces (Jurisdiction of Colonial Courts) Order 1965 (as amended) – SI No 1203 of 1965 for the full list of countries.

<sup>128</sup> See Volume 3 of the MSL.

## Part 4 - Jurisdiction as to time

### Introduction

64. Generally, a person may be charged with any Service offence which applies to them if they commit that offence when they are subject to Service law<sup>129</sup> or they are a civilian subject to Service discipline. For the most part, the question of any time limits only arises where the individual has **ceased** to be subject to Service law or a civilian subject to Service discipline at the time it is intended to charge them. This will be the case: where a regular Service person has left the Service; where a reservist has ceased to be a member of a reserve force; where a civilian is no longer subject to Service discipline because, for example, they is no longer present in an area that resulted in them becoming subject to Service discipline. However, in relation to a small category of offences there are time limits that apply, which are unrelated to whether or not the individual was or is subject to Service law, or to whether they was a civilian subject to Service discipline, see paragraph 72 below. For the application of Service discipline to civilians generally see [Chapter 6](#) (Investigation, charging and mode of trial).

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

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

### Time limits in relation to categories of personnel

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

68. **Her Majesty's regular forces.** Except with the consent of the Attorney General, once an individual has left the regular forces they cannot be charged with a Service offence that they is alleged to have committed when they was a member, if more than six months have elapsed beginning on their discharge date. This is the case even if they rejoin one of the Services, either as a regular or reservist, within that six month period<sup>130</sup>.

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<sup>129</sup> For additional times in relation to Reserve Force Acts offences see section 107 RFA 96 and section 62 of the Act where these offences prosecuted at the CM.

<sup>130</sup> See section 55 of the Act.

### Case Study

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

69. **Her Majesty's reserve forces.** The same rule as for regular forces applies to reserve forces. Once an individual has left the reserve forces, they cannot be charged with a Service offence that they are alleged to have committed when they were a member, if more than six months have expired from their discharge date. This is the case even if they rejoin one of the Services, either as a regular or reservist, within that six month period<sup>131</sup>. A charge can only arise from an incident that occurred when the reservist was subject to Service law, see paragraphs 10 to 13 above. However, the six month time limit will run from when they cease to be a reservist. It will not run from the end of a period during which they were temporarily subject to Service law, unless that period also happens to end with their ceasing to be a member of the reserve force. The reservist may therefore have periods when they were not subject to Service law between the incident and the charge.

70. **Former regular and reserve forces.** Those personnel who are recalled into Service are to be treated as members of the regular forces and that includes in relation to time limits for charging<sup>132</sup>. Such a person cannot be charged with a Service offence committed during the period of their recall, if more than six months has passed since the end of the period for which they were recalled<sup>133</sup>. Where a person undertakes an additional duties commitment<sup>134</sup> as a member of an ex-regular reserve force and ceases to be subject to the commitment, they may be charged with an offence that is alleged to have occurred during that period if not more than six months have expired from the end of their additional duties commitment. This rule does not apply in the case of a member of the volunteer reserve forces who undertakes an additional duties commitment, because in their case, the six month time limit will only run from the date of their discharge from the reserve force as referred to above at paragraph 69 above.

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

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<sup>131</sup> Except in relation to limited cases involving the Reserve Forces Act 1996 for which see footnote to paragraph 42e.

<sup>132</sup> See section 55 of the Act.

<sup>133</sup> See definition of ex-regular reserve force at section 374 of the Act.

<sup>134</sup> See section 25 of the Reserve Forces Act 1996.

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

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

(1) Expiration of six months beginning with the date of commission of the offence; or

(2) Expiration of two months beginning with the date that the offender is apprehended.

This offence can be committed by a person who is not subject to Service law. For example, if a member of a reserve force who is not for the time being subject to Service law, is released from custody but then fails to attend a hearing in the proceedings against them that they are required to attend, they may have committed the offence under section 107(5) of the Act. The time limits stated above will apply to bringing a charge for that offence<sup>135</sup>.

b. **Failing to comply with a financial statement order.** This offence is contrary to section 266 of the Act and the time limit for charging a person with such an offence<sup>136</sup> is the earlier of:

(1) Expiration of two years beginning with the date of commission of the offence; or

(2) Director of Service Prosecutions or a prosecuting officer of their staff becomes aware of the offence.

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

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<sup>135</sup> See section 59 of the Act.

<sup>136</sup> See section 60 of the Act.

## Part 5 - Double jeopardy

### Introduction

73. The double jeopardy rules protect accused persons from repeated prosecutions for the same offence. Generally, if an accused has already been convicted or acquitted, they can enter a plea before any subsequent court and state that the earlier conviction or acquittal should totally bar any further proceedings<sup>137</sup>. The area is a technical one, with considerable case law. Moreover, it forms part of a wider area of law, together with related common law on abuse of process. The following paragraphs should be seen as no more than an introduction to the particular provisions on double jeopardy in the Act on which staff legal advice should be sought.

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

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

### Statutory regime

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

- a. Sections 63 and 64 of the Act provide that acquittals and convictions of Service offences<sup>138</sup>:
  - (1) Will bar further trial in any other Service court or a hearing by a CO in the circumstances summarised in paragraph 74 above (section 63 of the Act).
  - (2) In relation to criminal conduct offences under section 42 of the Act, will bar further trial in UK (or Isle of Man) civilian courts where trial in those courts would be barred following a conviction or acquittal by a civilian court in England or Wales of the corresponding civilian offence (section 64 of the Act).

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<sup>137</sup> These are known respectively as the principles of *autrefois convict* and *autrefois acquit*. Sections 63-66 of the Act.

<sup>138</sup> That is in the summary hearing as well as in the Service courts.



b. Section 66(1) of the Act, in relation to a conviction or an acquittal by a civilian court, provides that the common law rules which would bar further trial in a civilian court in England or Wales apply to bar trial before the CM or the SCC or a hearing by a CO for a criminal conduct offence (under section 42 of the Act).

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

## **The barring of prosecutions**

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

## **Practical effect**

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

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

## **The effect of administrative action**

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

## Part 6 – Transitional guidance

### Introduction

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

### Jurisdiction

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

82. **The Court Martial.** Jurisdiction of the CM under the 2006 Act is dealt with in Part 2 of this chapter. The CM has jurisdiction to try any SDA offence except an offence within section 70(4) of AA 1955 or AFA 1955 or section 48(2) of NDA 1957 (serious SDA civil offences committed in UK). The CM is not similarly limited in its jurisdiction to try Service offences committed post-commencement.

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

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

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

### Double Jeopardy

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

an SDA offence, the Court Martial, SCC or a CO at a summary hearing are similarly barred from trying the charge<sup>139</sup>.

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<sup>139</sup> See article 25 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

## **LIST OF DESIGNATED AREAS<sup>140</sup>**

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

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

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

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

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<sup>140</sup> These designated areas are contained in the Armed Forces (Civilians Subject to Service Discipline) Order 2009/836.

## Chapter 4

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

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## Chapter 4

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

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

## Part 1 - Arrest and search

### Introduction

2. Part 1 provides guidance on the rules governing arrest and search procedures under the Act. It lays out who can be arrested and by whom, in relation to a Service offence and who may authorise and carry out a search upon arrest providing guidance for the decision makers and for those involved in the process. If there is any doubt in relation to these matters, legal advice should be sought from the Director of Service Prosecutions (DSP) in the case of Service Police and from the relevant staff legal adviser for the CO.

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

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

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

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

### Arrest

7. Arrest involves the restriction of a person's liberty and the powers outlined in this section must only be exercised when it is appropriate and there are grounds for doing so. Those grounds are where a person is reasonably suspected of being engaged in committing, or of having committed a Service offence<sup>141</sup> and where a person is reasonably suspected of being about to commit a Service offence<sup>142</sup>. In rare circumstances, arrest for a Service offence may also be authorised by judicial warrant<sup>143</sup> (see paragraphs 27 – 32).

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

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<sup>141</sup> Section 67(1) of the Act.

<sup>142</sup> Section 69(1) of the Act.

<sup>143</sup> Section 313 of the Act.



law. This period may be exceeded only with the consent of the Attorney General but in such a case, arrest under section 67 of the Act may only be carried out by a Service policeman<sup>144</sup>.

Offender	Power of arrest under section 67
Officer engaged in mutiny, quarrel or disorder. <sup>146</sup>	<p>Only persons who are subject to Service law at the relevant time<sup>145</sup> can make an arrest under section 67 of the Act.</p> <p>a. Service policeman<sup>147</sup>; or</p> <p>b. On the order of another officer, any person legally exercising authority on behalf of a provost officer<sup>148</sup>; or</p> <p>c. Any officer.</p>
Officer (in all other circumstances)	<p>a. Service policeman; or</p> <p>b. On the order of another officer, any person legally exercising authority on behalf of a provost officer; or</p> <p>c. An officer of superior rank (ie not an officer of the same rank, an officer who is of higher rank).</p>
Warrant officer and below.	<p>a. Service policeman; or</p> <p>b. Any person legally exercising authority on behalf of a provost officer; or</p> <p>c. Any officer; or</p> <p>d. Warrant officer or non-commissioned officer of higher rank or rate; or</p> <p>e. A member of the staff of the Officer of the Day<sup>149</sup>.</p>
Relevant civilian	<p>a. Service policeman; or</p> <p>b. Any person legally exercising authority on behalf of a provost officer; or</p> <p>c. Any officer.</p>

<sup>144</sup> Section 68(4), Section 61(2) and section 55-58 of the Act.

<sup>145</sup> Relevant time = time of arrest.

<sup>146</sup> This includes any offence under section 6 of the Act.

<sup>147</sup> Section 375 of the Act.

<sup>148</sup> Section 374 of the Act.

<sup>149</sup> For ship's company or embarked force.

Deserters and absentees (without leave)	<p>a. Service policeman; or</p> <p>b. A Service person of a superior rank or rate who is at least a non-commissioned officer; or</p> <p>c. Civilian policeman.<sup>150</sup></p>
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9. **Arrest of person reasonably suspected of being about to commit a Service offence (arrest under section 69).** Under the powers in section 69, a Service policeman may arrest a person whom they reasonably suspect of being about to commit a Service offence. The power of arrest may be exercised personally or by giving an order to another person or where the person to be arrested is a Service person, by ordering that person into arrest. Where a person is arrested under this section, the arrest must be reported to their CO as soon as practicable and they may be kept in Service custody until such time as a Service policeman is satisfied that the risk of their committing the Service offence concerned has passed.

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

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

## Those who may effect an arrest

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

13. **Service policeman.** A Service policeman may arrest any person<sup>151</sup> whom they reasonably suspect of one of the following:

- a. Committing a Service offence;
- b. Having committed a Service offence<sup>152</sup>;

<sup>150</sup> This includes a member of any UK police force or a British overseas territory police force.

<sup>151</sup> A situation may arise whereby a person who (whilst subject to Service law or Service discipline) is suspected of having committed a Service offence but is no longer so subject (having left the Service or job) and therefore does not fall into sections 67(2), (3) or (4) of the Act, may need to be arrested. Sections 68(2), 68(3) and 68(4) of the Act covers these eventualities.

- c. Being about to commit a Service offence<sup>153</sup>; or
- d. Being unlawfully at large after a sentence of Service detention has been awarded.<sup>154</sup>

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

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

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

17. **Other Service personnel.** The decision to arrest can be made if a person<sup>155</sup> is reasonably suspected of:

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

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

18. **Civilian policeman.** An officer of a UK or Isle of Man police force or British overseas territory police force may arrest, without a warrant, a person who is reasonably suspected of being a Service person and of having deserted or of being absent without leave. This power also applies to a person who, having been sentenced to detention, is unlawfully at large<sup>156</sup>. A civilian policeman can also arrest any Service person committing any civilian offence as they would arrest a civilian.

## The decision to arrest after charge or during proceedings

19. Apart from the categories above (paragraphs 13 – 18), there are other circumstances where the CO or a judge advocate may order or direct an arrest of a person<sup>157</sup>.

20. The CO of a person may give orders for their arrest<sup>158</sup> if:

- a. That person has been charged with or is awaiting sentence for a Service offence;

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<sup>152</sup> For powers of arrest see sections 67-68 of the Act. See section 50 of the Act and [Chapters 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences) for guidance on Service offences, including desertion or absence without leave.

<sup>153</sup> Section 69 of the Act.

<sup>154</sup> Section 303 of the Act. This includes those cases where a person is temporarily released from Service detention and is unlawfully at large under section 301(4).

<sup>155</sup> See table at page 5 above.

<sup>156</sup> Sections 314 and 318 of the Act. This includes those cases where persons temporarily released from Service detention are unlawfully at large under section 301 of the Act.

<sup>157</sup> Those authorised or directed to effect an arrest may be Service policemen or any person directed or ordered by the CO under their command.

<sup>158</sup> Section 110 of the Act.

- b. That person is not in custody, and
  - c. The CO is satisfied that taking that person into Service custody is justified (see paragraph 21 below).
21. Before taking the decision to place a person into custody, the CO must be sure that there are reasonable grounds for suspecting that, if not taken into custody, that person would:
- a. Fail to attend any hearing in the proceedings against them;
  - b. Commit an offence; or
  - c. Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.
22. In addition, taking a person into custody may be justified if:
- a. That person has failed to attend any hearing in the proceedings against them;
  - b. There are reasonable grounds for suspecting that they should be taken into custody for their own protection;
  - c. If under the age of 17, there are reasonable grounds for suspecting that they should be taken into Service custody for their welfare or it is in their own interests; or
  - d. There are reasonable grounds for suspecting that if not taken into Service custody they would fail to adhere to any conditions of their release from custody after charge or that they have already failed to adhere to such a condition.<sup>159</sup>
23. Whenever a person is arrested under the power referred to in paragraph 20 above, consideration must be given to the issue of whether, and if so for how long, that person may be held in custody. If held under this power, a person must be brought before a judge advocate for the purpose of reviewing such custody<sup>160</sup>. Detailed guidance on custody is at [Chapter 5](#) (Custody).

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

24. Apart from the categories above (paragraphs 13 – 18), there are other circumstances where a judge advocate may order or direct an arrest of a person<sup>161</sup>.
25. A judge advocate may direct the arrest of a person<sup>162</sup> if:
- a. That person has been arraigned before the Court Martial (CM) or Service Civilian Court (SCC);
  - b. Proceedings before the court have not concluded; and
  - c. The judge advocate is satisfied that taking them into Service custody is justified.

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<sup>159</sup> Section 107(3) of the Act.

<sup>160</sup> Section 110(4) of the Act.

<sup>161</sup> Those authorised or directed to effect an arrest may be Service policemen or any person directed or ordered by the CO under their command.

<sup>162</sup> Section 111 of the Act.

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

26. Directing that a person be taken into custody is justified when there are reasonable grounds for suspecting that, if not taken into custody, that person would come within one or more of the categories laid out in paragraphs 21 and 22 above. A person arrested and kept in custody<sup>163</sup> must be brought before a judge advocate as soon as practicable for a review of the continued requirement of that custody. Detailed guidance on custody is at [Chapter 5](#) (Custody).

## **The decision to issue a warrant for arrest**

27. After all other avenues have been exhausted, application may be made to a judge advocate to issue a warrant for arrest. A warrant in this context is effectively a specific authorization issued by and on behalf of the State for the arrest of that person. The decision to issue a warrant for arrest may be taken by a judge advocate<sup>164</sup> or, in very limited circumstances, by a civilian court. An application for a warrant for arrest should only be made where alternative attempts to recover the offender have proved fruitless.

28. **Application to a judge advocate for a warrant.** Where a warrant is required, application may be made to a judge advocate. This includes warrants for arrest for individuals who fail to adhere to any conditions<sup>165</sup> of release following arrest for desertion or being absent without leave. Although there are similar powers for civilian courts to issue warrants in relation to absence and desertion, following the breach of a condition, the conduct of the hearing may be different. For guidance on the conduct of hearings at civilian courts reference should be made to the appropriate staff legal advisor.

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

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

The Form at Annex H should be used.

30. During normal working hours (0830 -1700 hrs, Mon – Thu and 0830 – 1630, Fri) and at weekends (weekends 07760 171159) contact should be made with the Military Court Service (MCS) (Tel: 01980 615786/615770) /Naval Courts Administration Office (NCAO) (Tel: 02392 727279) who will be in a position to identify the most suitable judge advocate to hear the application. During silent hours contact should be made with the Operations Room of the Service Police Crime Bureau (Tel: 02392 285170/285180) who will provide the necessary contact procedures for the duty judge advocate to arrange the application. Assistance from the appropriate staff legal adviser will always be available to assist in determining whether a hearing is necessary.

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

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<sup>163</sup> Section 111(4) of the Act.

<sup>164</sup> Section 313 of the Act.

<sup>165</sup> Section 317(1) of the Act & Rule 23(1)(b)(ii) of the Armed Forces (Warrants of Service Arrest for Service Offences) Rules 2009.

- a. The name, rank or rate, appointment and signature of the applicant;
  - b. The name, date of birth and last known location of the person who is the subject of the warrant;
  - c. If applicable, the rank or rate, Service number and unit of the person who is the subject of the warrant;
  - d. Any other known addresses where that person may reside;
  - e. The Service offence that that person is reasonably suspected of having committed; and
  - f. The circumstances which have caused the applicant to consider that there are reasonable grounds for the issue of the warrant.
32. When applying for an arrest warrant to a judge advocate for failing to comply with a condition<sup>166</sup>, the following information is required:
- a. The name, rank or rate and appointment of the applicant;
  - b. The name, date of birth and last known location of the person who is the subject of the warrant;
  - c. If applicable, the rank or rate, Service number and unit of the person who is the subject of the warrant;
  - d. Details of any alleged absence;
  - e. Any other known addresses where that person may reside; and
  - f. The details of the condition(s) imposed and how it/they is/are alleged to have been breached.

## Form of the hearing

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

- a. Out of hours;<sup>167</sup>
- b. By facsimile;
- c. By telephone; or
- d. By other electronic means, including email.

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<sup>166</sup> Condition being a 'bail' condition or a condition under which a person was previously released from custody. See also [Chapter 5](#) (Custody).

<sup>167</sup> 'Out of hours' means any day which is a Saturday, Sunday, Good Friday, Christmas or other Bank Holiday or any time outside of 0830-1700 Monday to Thursday and 0830-1630 on Friday.

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

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

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

36. In addition if a person has previously surrendered or been arrested and then released on a condition that they appear at a specified time and place<sup>168</sup> and then fails to comply with that condition, the court may issue a warrant for their arrest. For example, where a person has been released by the civilian police or a civilian court subject to a condition that he report at a time and place in order for him to be taken into Service custody.

## Conduct of arrest or surrender

37. **Service policeman.** Limitations on custody apply<sup>169</sup> where a person is arrested by a Service policeman under section 67 (arrest of person reasonably suspected of committing or having committed a Service offence) and is kept in Service custody. Additionally, the conditions and review procedures at [Chapter 5](#) (Custody) must be followed<sup>170</sup> where custody is authorised without charge. Where a person is arrested under section 69, (arrest of person reasonably suspected of being about to commit a Service offence) guidance can be found within [Chapter 5](#) (Custody).

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

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

40. **Civilian policeman.** Where a person is arrested or surrenders to a civilian policeman in the UK, the Isle of Man or British Overseas Territory as being a Service person, who has deserted or is absent without leave<sup>171</sup>, that person must be taken to a police station. In the case of an arrest under section 314 (Arrest by civilian police of deserters and absentees without leave) of the Act, the person arrested must be brought before a magistrates court or equivalent jurisdiction. The court has powers to transfer the person to Service custody or to release them<sup>172</sup>. Where a person surrenders under section 315 (deserters and absentees without leave surrendering to civilian police) of the Act, the person in charge of the police station (or someone authorised by them) may arrange for the person to be transferred to Service custody, brought before a court of summary jurisdiction or released. If the person is delivered back to Service custody, certificates either detailing their arrest, their appearance before a court of summary jurisdiction, a certificate of release subject to certain conditions of

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<sup>168</sup> Section 316(3)(a)(ii) of the Act.

<sup>169</sup> Section 98(1) of the Act.

<sup>170</sup> Section 99-103 of the Act.

<sup>171</sup> See [Chapter 10](#) (Absence and desertion).

<sup>172</sup> Section 316 of the Act.

reporting<sup>173</sup> or a combination of all three will be provided to the Service person's unit. Detailed guidance concerning deserters and absentees is contained in [Chapter 10](#) (Absence and desertion).

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

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

## Search upon arrest

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

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

- a. May be a danger to himself or others;
- b. May be concealing something which may assist them to escape; or
- c. May be concealing something which may be evidence relating to a Service offence<sup>174</sup>.

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

45. **A person other than a Service policeman.** A person other than a Service policeman who is exercising the power of arrest over an individual may search them if they have reasonable grounds for believing that person may be a danger to himself or others<sup>175</sup>.

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

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

47. Moreover, if the CO orders a person to search, the CO must have reasonable grounds for believing that the person is concealing something that would assist with such an escape or be evidence relating to a Service offence. If the CO authorises a person to search, that person must also have reasonable grounds for believing that the person is concealing something that would assist with such an escape or be evidence relating to a Service offence<sup>176</sup>. An example of when this may happen is where the CO authorises before arrest and needs the person carrying out the arrest to consider, on the spot, whether a search is justified.

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<sup>173</sup> Sections 315 and 316 of the Act.

<sup>174</sup> Note that paragraph 41c relates only to an arrest under section 67 and section 69 of the Act. See also section 70 of the Act and the details of seizure at paragraph 79 - 90.

<sup>175</sup> Section 71(1) of the Act.

<sup>176</sup> Section 71(6) of the Act.



48. **The conduct of a search.** Any search must be conducted only in so far as is reasonably required for the purpose of discovering anything that is subject to search and must not go beyond what is reasonably necessary<sup>177</sup>. An arrested person may not be required to remove any clothing in public other than an outer coat, jacket, headgear<sup>178</sup> or gloves. Additionally, if reasonably necessary for the purpose of discovering anything subject to search, an arrested person's mouth may be searched.

49. A person exercising a power of search referred to in paragraphs 44a or 45 may seize and retain anything they find if they have reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person<sup>179</sup>. A person exercising a power of search referred to in paragraphs 44b or c or paragraph 46 may seize and retain anything found if they have reasonable grounds to believe that the item might be used to assist an escape or that the item is evidence of a Service offence or has been obtained as a result of the commission of a Service offence<sup>180</sup>. Guidance on the handling of any item seized can be found in JSP 397 (Service Police Codes of Practice - Code A). If any item is found by persons other than a Service policeman, guidance from the Service Police should be sought as soon as practicable. The general principle to be applied is that the item should be secured in situ until the arrival of Service Police. If this is not practicable then the person recovering the item should retain it in their possession prior to handing it over to the Service Police.

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<sup>177</sup> Section 72(1) of the Act.

<sup>178</sup> Section 72(3) of the Act. except headgear worn for religious reasons.

<sup>179</sup> Section 73(1) of the Act.

<sup>180</sup> Section 73(2) of the Act. Any item subject to legal privilege may not be retained - section 73(2) of the Act.

## Part 2 - Stop and search

### The decision to stop and search a person or vehicle

50. **Service Police.** A Service policeman has the power to stop and search the following, if they have reasonable grounds to suspect that they will find stolen or prohibited articles<sup>181</sup> or unlawfully obtained stores or controlled drugs<sup>182</sup>. These provisions apply to ships and aircraft in the same way as to vehicles<sup>183</sup>:

- a. A person who is, or whom they reasonably believe to be a Service person or relevant civilian;
- b. Any vehicle in the charge of ('in the charge of' is not restricted to being 'driven by') a person who is, or whom they reasonably believe to be a Service person or relevant civilian; or
- c. Any Service vehicle<sup>184</sup> in the charge of any person (whether a Service person/relevant civilian or not)<sup>185</sup>.

51. However, these powers may only be exercised:

- a. In a place<sup>186</sup> to which the public or section of the public has access to, on payment, as of right or implied permission;
- b. In any other place to which people have ready access but is not a dwelling or Service living accommodation;<sup>187</sup> or
- c. In any premises which are permanently or temporarily occupied or controlled by Her Majesty's forces, but are not Service living accommodation.

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

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

53. COs may order or authorise a Service person, other than a Service policeman, to stop and search an individual or vehicle<sup>188</sup>. A CO is able to use the power to stop and search only if they have reasonable grounds to believe that they will find stolen or prohibited items, unlawfully obtained stores or controlled drugs<sup>189</sup>. Such an order can be given only in relation

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<sup>181</sup> See section 77(4) of the Act for definition of a 'prohibited article'. This includes offensive weapons or articles made, adapted or intended for use in connection with an offence (e.g. theft, burglary, criminal damage or fraud).

<sup>182</sup> Constituting an offence of possession under section 42 of the Act.

<sup>183</sup> Section 82 of the Act.

<sup>184</sup> Section 77(5) of the Act for the definition of 'Service vehicle'. This means any vehicle owned by Her Majesty's forces or in use for the purposes of those forces. This includes hire cars being used for those purposes.

<sup>185</sup> Section 75 of the Act - Power for stop and search by Service policeman.

<sup>186</sup> 'Place' means any place.

<sup>187</sup> 'Place' means any place.

<sup>188</sup> See section 76 of the Act. This includes detaining a person for the purposes of a search of that person or a vehicle.

<sup>189</sup> Section 76(4) of the Act.

to a particular person or vehicle<sup>190</sup>. If they authorise a person to stop and search, that person may exercise the power only if they have reasonable grounds to believe that they will find such items, stores or drugs. This power of stop and search may be used only in relation to:

- a. A person under the CO's command<sup>191</sup> or whom the CO has reasonable grounds to believe is under their command;
- b. A person who, a person ordered or authorised to stop and search has reasonable grounds to believe, is under the CO's command; and
- c. A vehicle in the charge of a person within a or b<sup>192</sup>.

## The conduct of a stop and search

54. **Service policeman.** When contemplating a search of a vehicle (other than an unattended vehicle) a Service policeman must take reasonable steps before they commence the search to inform the person in charge of the vehicle of their name, rank or rate. If not in uniform, they must also take reasonable steps to provide the person with evidence that they are a Service policeman<sup>193</sup>. Any other Service policeman who is not in uniform and is assisting with the search of the vehicle is not required to do so. JSP 397 (Service Police Code of Practice – Code A) provides the blueprint for the conduct of a Stop and Search.

55. The power to exercise the stop and search of persons or vehicles may be undertaken in a number of places<sup>194</sup> and broadly speaking are those places listed at paragraph 51. Any search is subject to the restriction that a person searched cannot be required to remove in public, clothing other than an outer coat, jacket, headgear or gloves<sup>195</sup>. The search may also be carried out near the place where the person or vehicle was first detained<sup>196</sup> and the person or vehicle may be detained for such time as is reasonably needed for this.

56. There are restrictions on the powers above where a person is in a garden, yard or on other land occupied with a dwelling or with Service living accommodation used exclusively for a member of the armed forces (or such person and their family). If the land comes within a place to which the public has access, or to other places to which people have ready access (other than a dwelling or Service living accommodation), the person found on the land may only be stopped and searched if the person with the power of search has reasonable grounds to believe that the person does not live in the dwelling/accommodation and does not have the resident's express or implied permission to be there<sup>197</sup>.

57. Similarly, if a vehicle is on land that comes within the parameters outlined in paragraph 56, the vehicle may only be searched if the person with the power of search has reasonable grounds to believe that the person in charge of the vehicle does not live in the dwelling/accommodation and does not have the resident's permission to be there<sup>198</sup>.

58. A Service policeman is entitled to detain an individual or vehicle in order to carry out the search and should they discover any articles during any search which they have reasonable grounds to suspect are stolen or prohibited, unlawfully obtained stores or controlled drugs, they may seize and retain them<sup>199</sup>. A person or vehicle may only be

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<sup>190</sup> Section 76(3) of the Act.

<sup>191</sup> Including a civilian subject to Service discipline who is under that CO's command. Section 76(2)(b) of the Act.

<sup>192</sup> Section 76(2) of the Act.

<sup>193</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 3(2) and (3).

<sup>194</sup> Section 78 of the Act.

<sup>195</sup> Section 80(2) of the Act. Except headgear worn for religious reasons section 80(3) of the Act.

<sup>196</sup> Section 80(1) of the Act.

<sup>197</sup> Section 79(1) of the Act.

<sup>198</sup> Section 79(3) and (4) of the Act.

<sup>199</sup> Section 75 of the Act.

detained for the purposes of a search for such time as is reasonably necessary to undertake the search. The search is limited in the same way as search upon arrest (see paragraph 44 above).

59. When contemplating a search of a vehicle (other than an unattended vehicle) a Service policeman must take reasonable steps before they commence the search to inform the person in charge of the vehicle of their name, rank or rate and unit, the object of the search, the grounds for the search and that, upon application within 12 months, the owner or person in charge of the vehicle at the time is entitled to a copy of any record made of the search. If not in uniform, they must also take reasonable steps to provide the person with evidence that they are a Service policeman<sup>200</sup>.

60. On completing a search of an unattended vehicle, a Service policeman must leave a notice<sup>201</sup> stating that they have searched the vehicle, their name, rank or rate, the name, address and telephone number of their unit and that an application for compensation for any damage caused to the vehicle by the search may be made to that unit. Unless it appears to the Service policeman that it will not be practicable to make a record at that time, the notice must also state that, upon application within 12 months, the owner or person in charge of the vehicle at the time is entitled to a copy of any record made of the search.

61. The notice should be left inside the vehicle unless it is not reasonably practicable to do so without damaging the vehicle. If this is the case, then the notice should be attached to the outside of the vehicle<sup>202</sup>.

62. A Service policeman who has carried out a search under section 75 of the Act (power of Service policeman to stop and search persons, vehicles etc) must immediately, or as soon thereafter as is practicable, make a record of the search. This record will consist of the elements described in JSP 397 (Service Police Codes of Practice - Code A) and in the regulations made under the Act<sup>203</sup>.

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

64. **Other Service personnel.** An officer may order or authorise a Service person (other than a Service policeman) to conduct a stop and search under section 76 of the Act (stop and search by persons other than Service policemen) with certain provisions<sup>204</sup>, broadly in line with paragraphs 65 – 70 below. Provisions equivalent to those summarised in paragraph 56 above also apply to stop and search by Service personnel under these powers<sup>205</sup>.

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

66. When ordered or authorised to search a person or vehicle (other than an unattended vehicle) the person undertaking the search must take reasonable steps beforehand to inform the person to be searched of their name, rank or rate and unit, their authority for making the search, the object of the search, the grounds for the search and that, upon application within 12 months, the owner or person in charge of the vehicle at the time is entitled to a copy of any record made of the search, see paragraph 70 below.

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<sup>200</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 3(2) and (3).

<sup>201</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 3(5).

<sup>202</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 3(5).

<sup>203</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 4.

<sup>204</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 5.

<sup>205</sup> Section 78 and section 79 of the Act for where stop and search powers may be exercised.

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

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

69. Where the person ordered or authorised under section 76 of the Act carries out a search, they must make a record of the search. Where it is not practicable to make a record immediately, they must do so as soon thereafter as is practicable.<sup>206</sup> A record of a search must contain the following:

- a. The person's name to whom the search relates (if known to the ordered or authorised person) or (if their name is not known to the person ordered or authorised) a description of them;
- b. In the case of a search of a vehicle, a description of the vehicle;
- c. In the case of a search of a person or a vehicle, the object of the search;
- d. The date and time when the search was conducted;
- e. The place where the search was conducted;
- f. Whether anything was found during the search, and if so, what, was found;
- g. Whether any injury to a person or damage to property appears to have resulted from the search<sup>207</sup>; and
- h. The name of the person ordered or authorised to make the search.

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

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<sup>206</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 6 and 7.

<sup>207</sup> The Armed Forces (powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 5.

## Part 3 - Entry, search and seizure

### Introduction

71. Part 3 provides guidance on circumstances when premises may be entered and searched and when property may be seized. It also deals with entry for certain other purposes, in particular for purposes of arrest<sup>208</sup>. The area is a technical one and important because it affects the human rights of individuals. It will generally be important to ensure that legal advice is sought from the relevant staff legal advisor before any action is taken under the powers referred to below.

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

### Powers of entry, search and seizure

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

- a. When investigating a Service offence a Service policeman has an inherent power to order or conduct the entry and search of Service premises which are not Service living accommodation without a warrant<sup>209</sup>;
- b. Entry to premises for the purpose of arrest (paragraph 74 below);
- c. Entry to premises to save life or prevent serious damage to property (paragraph 77 below);
- d. Entry, search and seizure where a person is arrested (paragraph 79 below);
- e. Entry search and seizure after arrest (paragraph 80 below);
- f. Entry and search by a Service policeman with a warrant (paragraph 96 below); or
- g. With the authorisation of the CO (paragraphs 91 – 103 below).

74. **Entry to premises for the purposes of arrest.** A UK civilian policeman has statutory authority to enter any premises to carry out certain arrests. A Service policeman does not have such wide powers. However, they do not need any specific legal powers to enter non-residential Service premises for this purpose. In addition a Service policeman has the power to enter and search certain premises for the purposes of arresting a person if they have reasonable grounds to believe that person is on the premises<sup>210</sup>. The premises they may enter and search under this power are slightly wider than 'relevant residential premises' (RRP)<sup>211</sup> as it also covers premises which the Service policeman has reasonable grounds to believe are RRP. If premises contain two or more separate dwellings then the power of entry is to that person's part of the premises and to any common areas or any other dwelling (within the premises) that the Service policeman reasonably believes that person to be in.

75. **Relevant residential premises (RRP).** RRP<sup>212</sup> means Service living accommodation and premises which are the residence of any Service person, or relevant civilian. It does not

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<sup>208</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009. See also Chapter 3 of Part 3 of the Act.

<sup>209</sup> Section 95 of the Act.

<sup>210</sup> Section 90 of the Act.

<sup>211</sup> Section 90(2) of the Act.

<sup>212</sup> Section 84(3) of the Act.

matter if the residence is shared with other people including civilians not subject to Service law.

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

77. **Entry to premises to save life or prevent serious damage to property.** A Service policeman is entitled to enter and search certain premises for the purposes of saving life or limb or to prevent serious damage to property. The premises are Service living accommodation and premises which are or which the Service policeman has reasonable grounds to believe are, the residence of any Service person or relevant civilian. As with the power of entry to arrest, it does not matter if the residence is shared with other people<sup>213</sup>.

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

79. **Powers of entry search and seizure where person arrested.** The following powers apply<sup>214</sup> where a person has been arrested under section 67 of the Act for a serious Service offence. A serious Service offence is:

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

In such cases a Service policeman has the power to enter and search any relevant residential premises<sup>215</sup> or vehicle in which the arrested person was when arrested or immediately before their arrest. The Service Police also have the power to open and search any locker within section 96(1)(c) of the Act if the locker was open at the time or immediately before arrest. The power of search is limited to seeking evidence of the offence for which the person was arrested, and the search itself must be limited to what is reasonably necessary for the purpose of discovering such evidence. Before any of these powers is exercised, the Service policeman must have reasonable grounds for believing that there is on the premises evidence which relates to the offence for which a person was arrested. If premises to which the power applies contain two or more dwellings then the power of entry applies to any common areas and to any dwelling that the Service policeman has reasonable grounds for believing that the person to be arrested is in.

80. **Powers of entry search and seizure after arrest.** Where a person has been arrested under section 67 of the Act for a serious Service offence (see paragraph 79 above) and is being held in Service custody without being charged, a Service policeman also has powers of entry, search and seizure in relation to premises occupied or controlled by that person<sup>216</sup>. The Service policeman must have reasonable grounds for suspecting that there is, on the premises, relevant evidence. Relevant evidence here means evidence which is not subject

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<sup>213</sup> Section 90(4) of the Act.

<sup>214</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 12.

<sup>215</sup> Service living accommodation or premises occupied as a residence by a Service person or a relevant civilian or a person who is suspected of having committed a relevant offence.

<sup>216</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 13.

to legal privilege see [Chapter 11](#) (Summary hearing – dealing with evidence) and which relates to the offence for which the person has been arrested or to another connected or similar serious Service offence. The search itself must be limited to what is reasonably necessary for the purpose of discovering such evidence. The Service policeman may seize any evidence for which they have power to search. An important restriction on these powers is that the Service policeman who conducts the search must have the authority of an authorising Service policeman (paragraph 81 below), but they may conduct a search without obtaining this permission if:

- a. They have reasonable grounds to believe that it is likely that, if no search could be carried out before the earliest time authorisation can be obtained, the purpose of the search will be frustrated or seriously prejudiced; and
- b. As soon as practicable after making the search, they inform an authorising Service policeman that they have done so<sup>217</sup>.

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

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

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

**82. General powers of seizure.** If a Service policeman in connection with the investigation of a Service offence is lawfully on premises searchable under paragraph 73a-g, they have the power to seize anything<sup>218</sup> on the premises which they have reasonable grounds to believe:

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

**83.** A Service policeman may require that any information or evidence stored in electronic form and accessible from the premises be produced in a form in which it can be taken away and in which it is in a visible or legible form (printed) or in a form whereby it can easily be produced in a visible or legible form (stored on a disk or data storage device)<sup>219</sup>. This power

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<sup>217</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 13.

<sup>218</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 14.

<sup>219</sup> Such copies (or printouts) should be, for the purposes of seizure and retention, dealt with as if they were originals.



arises if a Service policeman has reasonable grounds to believe either that it is evidence in relation to an offence or other Service offence which they are investigating, or that it has been obtained as a result of the commission of a Service offence and (in either case) that it is necessary to do so in order to prevent it from being lost, tampered with or destroyed.

84. Generally there is no power to seize an item if a Service policeman has reasonable grounds to believe that an item is subject to legal privilege<sup>220</sup>. However, there are exceptions (see paragraphs 104, 105 and 109).

85. **Additional powers of seizure from premises.** There are two additional situations in which a power to seize may arise<sup>221</sup>. First, a Service policeman who is lawfully searching premises (except on authorisation from a CO) may find something they have reasonable grounds to believe may be or may contain something they could search for but it is not reasonably practicable on the premises to determine whether what they have found contains something they are entitled to seize (see footnote 76 Art 19(1)). For example, data contained within a computer. The key element here is that it is not clear whether the Service policeman would be able to seize any of what they have found. In this situation, the Service policeman may remove from the premises as much of what they have found to allow it to be determined whether and how far material may be seized.

86. Second, such a Service policeman may find something on the premises which they would be entitled to seize but for the fact that it is contained in something else which they have no power to seize, and it is not reasonably practicable on the premises to separate it from the non-seizable. The key point here is that it is clear that the Service policeman would not be able to seize part of what they have found. In this situation, the Service policeman may seize both the seizable property and the thing in which it is contained. Moreover, in this second situation, the restriction on seizure related to legal privilege and referred to in paragraph 84 above does not apply<sup>222</sup>.

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

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

- a. How long it would take to determine whether an article is seizable or separable;
- b. The number of people required to conduct the determination or separate the articles within a reasonable period;
- c. Whether the determination or separation would involve damage to the property;
- d. The equipment necessary or appropriate to determine or separate; or

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<sup>220</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 14(6).

<sup>221</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 19(1), (2) and (3).

<sup>222</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 19(5).

- e. Whether any determination or any separation carried out by the only means reasonably practicable on the premises would be likely to prejudice the use of some or all of the property.

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

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

Secondly, such a Service policeman may find something which they would be entitled to seize but for the fact that it is contained in something else which they have no power to seize, and it is not reasonably practicable at the time and place of the search to separate the seizable item from the non-seizable. In this situation, the Service policeman may seize both the seizable property and the thing it is contained in. Moreover, in this second situation, the restriction on seizure related to legal privilege and explained in paragraph 84 above, does not apply<sup>223</sup>.

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

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

Where a person exercises a power of seizure a notice shall be given to the occupier of the premises or the person being searched<sup>224</sup>. For additional detail see JSP 397 (Service Police Codes of Practice - Code B).

## COs' powers

91. Nothing in the Act precludes a CO from entering and searching any buildings for which they are responsible, including office and living accommodation, to carry out inspections for the purposes of ensuring for example, security, health & safety and hygiene<sup>225</sup>.

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<sup>223</sup> The Armed Forces (powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 20(5).

<sup>224</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 21.

92. **Authorised entry to premises for the purpose of arrest.** A CO does not need any specific legal powers to enter, or to order entry, to non-residential Service premises for the purpose of arrest. As to residential Service accommodation, entry for the purposes of arrest by a Service policeman is dealt with in paragraph 74 above. Whilst such entry and search will almost always be carried out by a Service policeman, a CO may authorise a Service person (other than a Service policeman) to enter certain Service residential premises for the purpose of arrest, but only where certain conditions are satisfied<sup>226</sup>.

93. The power relates to Service living accommodation of persons under the CO's command and premises which are, or which the CO has reasonable grounds to believe are, the residence (whether alone or with others) of a Service person or any relevant civilian of whom they are the CO<sup>227</sup>.

94. Additional conditions include that the CO has reasonable grounds to believe that before the assistance of a Service policeman (or where applicable a civilian policeman) is available, the person to be arrested might evade arrest, conceal, damage, alter or destroy evidence, or present a danger to himself or others or that discipline or morale among members of any of Her Majesty's forces might be undermined. The CO must have reasonable grounds to suspect that a person has committed or is committing a Service offence<sup>228</sup>, and that the offence is a relevant offence<sup>229</sup>. A relevant offence is:

- a. Any section 42 offence corresponding to an indictable criminal offence;
- b. Any Schedule 2 offence listed within Schedule 3 of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 see Annex A; or
- c. Any other Service offence if intended or likely to have the serious consequences expressed within section 84(5) of the Act, see Annex A.

95. A CO may also authorise a Service person (other than a Service policeman) to enter to save life or prevent serious damage to property<sup>230</sup>. But in relation to premises which are, or which the CO has reasonable grounds to believe are the residence (whether alone or with others) of any Service person or relevant civilian, they may only do so if it is not practicable to obtain the assistance of a Service policeman in time to take the necessary action to save life or limb or prevent serious damage to property.

96. **Authorised entry for a Service policeman to search premises with a warrant.** In relation to relevant residential premises, a Service policeman will usually require a warrant from a judge advocate before searching premises unless their powers of search after arrest are applicable (see paragraph 80 above). In making an application to a judge advocate under section 83 of the Act, the Service policeman must specify the premises for which they are seeking authority to search. The application must also take account of the need to satisfy the judge advocate that certain criteria (set out in paragraph 98 below) are met. A judge advocate may issue a warrant authorising a Service policeman to enter and search premises if they are satisfied that certain criteria are met. These relate to relevant premises, relevant offences (see paragraph 94 above), valuable investigative material not subject to legal privilege or excluded material and that other conditions relating to effecting physical entry to a premises<sup>231</sup> are satisfied. It is via this route that the vast majority of entry and search procedures will be conducted.

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<sup>225</sup> Section 95 of the Act.

<sup>226</sup> Sections 91(1), (2) and (3) of the Act.

<sup>227</sup> Section 91(2) of the Act.

<sup>228</sup> Section 50 of the Act.

<sup>229</sup> Section 84(2) of the Act.

<sup>230</sup> Section 91(6) of the Act.

<sup>231</sup> Section 83 and section 84 of the Act (for definitions).

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

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

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

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

(1) An offence under section 42<sup>232</sup> of the Act of which the corresponding offence under the law of England and Wales is an indictable offence<sup>233</sup>;

(2) Certain Service offences specified in an order made by the Secretary of State<sup>234</sup>, see Annex A; or

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

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

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

(c) The death of any person;

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

(e) Substantial financial gain to any person;

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

(g) The undermining of discipline or morale among members of any of Her Majesty's forces;

b. There is material on the premises likely to be of substantial value to the investigation; and

(1) That material is likely to be admissible evidence in a trial for the offence; and

(2) That material does not consist of or include items subject to legal privilege, excluded material or special procedure material<sup>235</sup>.

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<sup>232</sup> Section 42 of the Act.

<sup>233</sup> Indictable offences can be offences triable either way.

<sup>234</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 Schedule 3.

- c. It is not practicable to communicate with any person entitled to grant access to the premises or (though practicable to communicate with a person able to grant access to the premises) it is not practicable to communicate with a person entitled to give access to the evidence; and
- d. Entry will not be granted without a warrant; and
- e. In the case of Service living accommodation within section 96(1)(b) or (c) of the Act, either it is not practicable to communicate with anyone for whom the accommodation is provided or no-one with whom it is practicable to communicate will agree to grant access to the accommodation without a warrant; and
- f. That the purpose of the search may be frustrated or seriously prejudiced unless immediate entry can be secured.

99. Although a judge advocate may give a warrant to search “relevant residential accommodation”, there are limitations on a CO in authorising a Service policeman to search. The two main differences<sup>236</sup> are: first, a CO may only authorise a Service policeman to search premises occupied by persons under their command; second, the premises do not include those premises occupied as a residence by a person who is suspected of having committed an offence in relation to which a warrant is sought, for example the private residence of a suspect who is a reservist not for the time being subject to Service law, or of a person who was, but is no longer, a member of Her Majesty’s forces.

100. A Service policeman may seize and retain any articles for which the search was authorised by a CO<sup>237</sup>, but any seizure is subject to review by a judge advocate<sup>238</sup>.

**101. Authorised entry for a person other than a Service policeman to premises without a search warrant.** This power only applies if a CO has reasonable grounds to believe that it is likely that the purpose of a search would be frustrated or prejudiced<sup>239</sup>. Where a CO decides that the purpose of the search would be frustrated or seriously prejudiced if the search does not take place before attendance of a Service policeman or civilian police officer can be obtained, they may authorise another Service person to conduct entry and search. The premises in this case are more limited than for a Service policeman. For example, they exclude Service families accommodation. Other considerations remain the same and are outlined in full at paragraphs 97 - 100 above.

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

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

103. These powers do not permit the search of accommodation of relevant civilians of whom they are the CO and they do not cover exclusive Service families’ accommodation. The

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<sup>235</sup> See section 84(4) of the Act. For example communications between a professional legal advisor and their client, confidential business records or journalistic material. For full details see PACE 1984 section 10, section 11, and section 14 (which are applied by section 84(4) of the Act).

<sup>236</sup> Section 87(3) of the Act.

<sup>237</sup> But for items subject to legal privilege or excluded and special procedure items. See paragraphs 132 and 133 below.

<sup>238</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009.

<sup>239</sup> Section 88(1)(b) of the Act.

authorised Service person may seize and retain any articles for which the search was authorised, but any seizure is subject to review by a judge advocate.

## Judge advocate

104. **Review of entry and search authorised by CO.** Where a CO has authorised entry and search, undertaken either by a Service policeman or other Service person and this has resulted in anything being seized, they must as soon as practicable, request a judge advocate to undertake a review of the search and of the seizure and retention of anything seized and retained during the search<sup>240</sup>. This review may be arranged through the MCS. The judge advocate has various powers and duties relating to the return or disposal of material seized. For example, they must order the return or disposal of anything which they are satisfied is legally privileged, and they must (unless they are satisfied that it would be in the interests of justice to permit retention) order the return or disposal, which they are satisfied is, or includes, excluded or special procedure material subject to them being satisfied that certain conditions<sup>241</sup> are met. Material seized under CO's powers is subject to fewer exceptions with regard to retention than seizures made under other powers (see paragraph 105 below).

105. **Power to grant access to excluded and certain other material.** As indicated in paragraph 98d above, a CO can never authorise a search for material which they consider will include material subject to legal privilege, excluded or special procedure material. The Service police may apply to a judge advocate for access to two of these categories of material: excluded material and special procedure material<sup>242</sup>. The judge advocate may make an order if they are satisfied that one or other of the sets of access conditions laid down is established<sup>243</sup>. In relation to these conditions it is particularly important to note that the judge advocate will have to be satisfied that there are reasonable grounds for believing that the premises to be searched are "relevant residential premises"<sup>244</sup> and that the suspected offence is a "relevant offence" (see paragraph 98a above).

106. If one or other of the two sets of conditions is fulfilled then a judge advocate may order that the person who appears to be in possession of the material either produces it to the Service policeman for them to take away or allows them access to it<sup>245</sup> within 7 days of the date of the order, or within such longer period as the order may specify<sup>246</sup>.

## The conduct of entry, search, seizure and retention

107. **Application for a search warrant.** Where a search warrant is required, if it is not reasonably practicable for a Service policeman to make a search warrant application to a judge advocate in person, then it may be conducted over live link or by telephone<sup>247</sup>.

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

- a. The name, rank or rate and unit of the person applying;

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<sup>240</sup> Section 89 of the Act. The full range of powers and procedures is laid out in The Armed Forces (Powers of Stop, Search, Seizure and Retention) Order 2009 article 34.

<sup>241</sup> Section 87(3) of the Act.

<sup>242</sup> Section 84(4) of the Act. E.g. Confidential business records or journalistic material. See PACE 1984 section 11, section 14.

<sup>243</sup> Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009.

<sup>244</sup> Section 86(3) of the Act.

<sup>245</sup> If the information is stored electronically, the data must be provided in a visible and legible form.

<sup>246</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 Schedule 1, paragraph 5.

<sup>247</sup> This includes normal section 83 search warrants and applications for access to excluded or special procedure materials under Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 7.

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

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

**109. Access to excluded material etc.** As explained more fully in paragraph 105 above, a Service policeman may apply to a judge advocate for permission to obtain access to excluded material or special procedure material. Notice of an application must usually be served on the subject person who appears to be in possession of the material. If the service of a notice will seriously prejudice the investigation, in very limited circumstances an application may be made for a warrant without a notice being required<sup>248</sup>.

**110.** Notice of an application for access to special or excluded material may be served by delivering it to the subject person or by sending it by registered or recorded delivery to their address. In the case of a Service person, their address is that of the unit to which they belong or (if they are on attachment) the unit to which they are attached<sup>249</sup>. Where a notice has been served<sup>250</sup>, the person must not conceal, destroy, alter or dispose of the material without permission from a judge advocate or the written permission of a Service policeman until the application has been dismissed or abandoned or until they have complied with an order to produce or grant access to the material<sup>251</sup>.

**111. Execution of warrants.** A warrant<sup>252</sup> may be executed by any Service policeman. A warrant may authorise the Service policeman to be accompanied by other persons and those persons, whilst in the company and under the supervision of a Service policeman, will have the same powers as the Service policeman in relation to the execution of the warrant and the seizure of any articles to which the warrant relates<sup>253</sup>.

**112.** Entry and search under a warrant must be executed within 3 months of its issue and the time of the entry must be at a reasonable hour unless the Service policeman executing the warrant believes that the search may be frustrated on entry at a reasonable hour. No premises may be entered or searched for the second or any subsequent time under a warrant which provides for multiple entries unless an authorising Service policeman (see paragraph 81) has in writing, authorised that entry to those premises<sup>254</sup>.

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<sup>248</sup> The Armed Forces (Powers of Stop, Search, Seizure and Retention) Order 2009 Schedule 1 paragraphs 12(a) and 14.

<sup>249</sup> In cases of person's with no unit for any reason the proper address is the usual or last known place of residence.

<sup>250</sup> Service on a person can be by delivering the notice of application to them, leaving it at their proper address or by sending it by post in a registered letter or by recorded delivery.

<sup>251</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 Schedule 1 paragraph 11.

<sup>252</sup> Under section 83 of the Act and Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009.

<sup>253</sup> (see also Article 9 of Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009.

<sup>254</sup> The Armed Forces (Stop and Search, Search, Seizure and Retention) Order 2009 article 9(5).

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

- a. Identify himself as a Service policeman and if not in uniform, produce documentary evidence that they are a Service policeman;
- b. Produce the warrant<sup>255</sup>; and
- c. Provide a copy of the warrant.

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

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

**116. Entry and search where person arrested.** As explained in paragraph 79 above, where a person has been arrested under section 67 of the Act for a serious Service offence a Service policeman has power to enter and search certain premises and vehicles<sup>256</sup>.

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

**118. Entry and search after arrest.** As explained in paragraphs 79 and 80 above, where a person has been arrested under section 67 for a serious Service offence and is being held in Service custody without being charged, a Service policeman also has, subject to authorisation where required, powers of entry, search and seizure in relation to premises occupied or controlled by that person<sup>257</sup>. The Service policeman must limit their search to the extent reasonably necessary to discover evidence of the sort described in paragraph 80 above. He may seize and retain any evidence for which they are empowered to search.

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

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

- a. Address and location of the search;

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<sup>255</sup> Unless the Service policeman has reasonable grounds for believing that the search would be frustrated if they waited to have physical possession of the warrant itself. In these circumstances a fax or emailed copy of the warrant should be used and a certified true copy provided as soon as is practicable.

<sup>256</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 12.

<sup>257</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 13.



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

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

122. If, on completion of a search of premises, a Service policeman has seized any article(s) under the powers referred to in paragraph 80, they must give the occupier of the premises (or person in charge of them at the time) a written notice<sup>258</sup> detailing the following<sup>259</sup>:

- a. What has been seized;
- b. The grounds for seizure;
- c. Their right to apply to a judge advocate for return of the articles, the grounds for the application and the effects of such application<sup>260</sup>;
- d. The name and address of the person to whom a notice of intention to apply for return can be given; and
- e. The name and address of the person to whom an application to attend the initial examination of the articles can be made.

123. **Action after search of a person.** If, on completion of a search under a power referred to in paragraph 89 above, a Service policeman has seized any article(s), they must give a written notice to the person detailing the same information as is referred to in paragraph 120 above.

124. In relation to anything seized under any power of seizure dealt with in this chapter, upon the request by the occupier of the premises or the person who is in charge of the premises immediately prior to the search, the person (not limited to searches by Service Police) conducting the search shall, within a reasonable time, provide a record of what was seized<sup>261</sup>.

125. **Access and copying.** A person who had custody or control of anything seized (or someone acting on their behalf), shall upon request to the person in charge of the investigation, be allowed supervised access to it or the opportunity to copy or photocopy it or be provided with a copy or photocopy of it<sup>262</sup>, unless that person has reasonable grounds to

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<sup>258</sup> If there is no-one at the premises then the notice must be left in a prominent place.

<sup>259</sup> The Armed Forces (Stop and Search, Search, Seizure and Retention) Order 2009 article 21.

<sup>260</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 28 to 30.

<sup>261</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 28 to 30.

<sup>262</sup> Copies or photocopies must be provided within a reasonable time.

suspect that to do so would prejudice the investigation of any offence or prejudice any criminal or Service proceedings which may be brought as a result of the investigation<sup>263</sup>.

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<sup>263</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 16.

## Part 4 – Retention

### Dealing with seized items

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

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

**127. Retention of seized items.** The powers relating to retention are contained within the relevant order<sup>264</sup>. This relates to the retention of anything which has been seized or taken away by a person under the powers in or under Part 3 of the Act. Very broadly, these powers relate to powers under the Police and Criminal Evidence Act 1984. Retention may generally be for so long as is necessary in all the circumstances<sup>265</sup>. Without prejudice to this, things seized for the investigation of an offence may generally be retained for use as evidence in Service proceedings or a trial or for forensic examination or for investigation in connection with the offence. Anything may be retained to establish its lawful owner, where there are reasonable grounds to believe that it has been obtained in consequence of the commission of a Service offence. However, where material is seized on the grounds that a person may have used it to cause injury or to assist in an escape from Service custody, it may be retained when the person from whom it was seized is no longer in Service custody<sup>266</sup>.

**128.** These provisions are extended<sup>267</sup> to property seized under the powers<sup>268</sup> which permit retention of property to be taken away for the purpose of determining whether seizable property can be separated from the rest of the material seized (so-called search and sift provisions, as to which see paragraphs 85 - 87). It is important to note that none of the powers under article 19 of the order can apply to seizures ordered or authorised by a CO. Article 20 of the order relates to lawful searches of a person by a Service policeman.

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

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<sup>264</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 17.

<sup>265</sup> Copies or photocopies must be provided within a reasonable time.

<sup>266</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 17(3) and (4).

<sup>267</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 26.

<sup>268</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 19 and 20.

130. Provision is made for the retention of seized items in a number of special situations<sup>269</sup>. These are:

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

131. The effect of each of the articles in paragraph 130 above is referred to further at paragraphs 132 to 134 below. However, it should be noted that:

- a. Nothing in articles 22 to 25 authorise retention if retention would not be authorised under article 17; and
- b. Where anything in Part 3 of The Armed Forces (Stop and Search, Search, Seizure and Retention) Order 2009 requires something to be returned, article 17 does not permit retention<sup>270</sup>.

132. **Application to a judge advocate for return of property.** Where material is seized under a relevant power certain people may make an application to a judge advocate<sup>271</sup> for the return of the whole or part of the seized property. The relevant powers are those dealt with in Part 3 of this chapter, except the powers of seizure where a CO authorises the search of premises. That is because, where the search is authorised by the CO, there is instead a review of the seizure by a judge advocate as described in paragraph 104. Those who may apply for the return of items are the persons from whom the material was seized, anyone with an interest in what was seized and anyone else who had custody or control of the property immediately before it was seized. The following are, broadly speaking, the grounds upon which such an application may be made:

- a. There was no power to make the seizure;
- b. The property is or contains an item subject to legal privilege which can be separated from the whole without prejudicing the lawful use of the remainder of the property;
- c. That the seized property is or contains excluded or special procedure material which can be separated from the whole without prejudicing the lawful use of the remainder of the property; and
- d. That the seized property comprises excluded or special procedure material which was seized under the 'seize and sift' powers (paragraphs 128 and 129 above) and it is reasonably practicable to separate it from property for which there was a power to search or the retention of which is authorised.

133. If the judge advocate is satisfied as to any of the grounds stated above in relation to any of the property received, they must generally order its return. Otherwise they must dismiss the application. There are exceptions to the requirement to return, broadly speaking

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<sup>269</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 22, 23 and 24.

<sup>270</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 articles 17(2) and (3.)

<sup>271</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 28.

where, if the property were returned, it would immediately be appropriate to give a warrant allowing its seizure or an order requiring it to be produced<sup>272</sup>. Where an application referred to in paragraph 132 above is made, a judge advocate may also make such directions as they think fit as to the examination, retention, separation or return of the whole or any part of the property<sup>273</sup>.

**134. Obligation to return items subject to legal privilege.** Where, after seizure, it appears to the person in possession that the property seized is or contains an item to which legal privilege extends,<sup>274</sup> the item must be returned as soon as reasonably practicable unless<sup>275</sup>:

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

**135. Obligation to return excluded or special procedure material.** Where a seizure has been made in execution of a search warrant and it appears to the person in possession of a seized item that it is or contains excluded or special procedure material then it must be returned<sup>276</sup> as soon as is reasonably practicable unless:

- a. It is not reasonably practicable to separate the excluded or special procedure parts from the whole without prejudicing the use of the property which may be retained;
- b. There are reasonable grounds for believing that the property has been obtained in consequence of the commission of a Service offence and its retention is necessary to prevent its being concealed, lost, damaged, altered or destroyed; and
- c. There are reasonable grounds for believing that the property is evidence in relation to a Service offence and its retention is necessary to prevent its being concealed, lost, damaged, altered or destroyed.

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

**136. Persons to whom seized property is returned.** If an item has been seized and should not be retained there is an obligation to return it to the person from whom it was seized unless the person obliged to return it is satisfied that someone else has a better right to that property. Where different persons claim to be entitled to the return of the property, the property may be kept for as long as is reasonably necessary for a determination to be made as to who has a better, or best, right to the property<sup>277</sup>.

**137. Duty to secure items.** This duty only arises where the power of seizure was made under Article 19 or 20 of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009. Where items have been seized under these articles, and they are subject to an ongoing application to a judge advocate under the power referred to in paragraph 100 above (for example in relation to return as wrongly seized) a duty to secure

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<sup>272</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 28(7).

<sup>273</sup> Art 28 (5) The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 28(7).

<sup>274</sup> Even if the item or information is only partly that to which legal privilege extends.

<sup>275</sup> The Armed Forces(Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 23.

<sup>276</sup> The Armed Forces(Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 24.

<sup>277</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 27.

that item arises. This power requires an application under articles 28 and 29 of the order; therefore, the duty to secure does not relate to property seized under a power of the CO to authorise a search of premises (which will be subject to review by a judge advocate referred to at paragraph 104 above). The duty only arises in certain circumstances which include requirements that the application is brought on grounds which include that property is or contains legally privileged, special procedure or excluded material<sup>278</sup>. The duty to secure includes ensuring that, except with the permission of the judge advocate or the applicant:

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

**138. Use of inextricably linked property.** Inextricably linked property is seized property which could not, under the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009, be retained but for the fact that it is not reasonably practicable to separate it from property which can be retained<sup>279</sup>.

139. Inextricably linked property cannot be put to any use (including examination and copy) except where it is necessary for facilitating the use in any investigation or proceedings of property within which the inextricably linked property is comprised<sup>280</sup>. However, property seized under section 87 or section 88 of the Act (COs powers to authorise search of premises) cannot comprise such property. Further, property seized under section 76(1)(c) of the Act (CO authorisation of stop and search) cannot be inextricably linked property.

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<sup>278</sup> For full details of when the duty arises see articles 28 and 29 of The Armed Forces (Powers of Stop, Search, Seizure and Retention) Order 2009.

<sup>279</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 31.

<sup>280</sup> The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 article 31.

## Part 5 – Transitional arrangements

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

### 141. Transitional provision under the section 380 Order

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

**Example:** section 70 of the Act give a service policeman power to search “an arrested person” following their arrest. Under section 70 “an arrested person” means a person arrested under specified provisions of the Act. The section 380 Order extends this so that section 70 also applies to a person who has been arrested before commencement under the related provisions of the SDAs.

### 142. The transitional provisions in the Stop and Search etc Order

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

- (1) To operate after commencement with respect to events occurring before commencement, and
- (2) To operate after commencement with respect to the incomplete exercise before commencement of the related powers and duties under the AFA01.

143. The transitional arrangements in Schedule 4 to the Stop and Search etc Order are summarised below<sup>281</sup>:

### 144. Part 2 – Stop and search. The conduct of a stop and search

- a. In paragraph 60 a search is deemed to have been completed when it is conducted under the 2003 Order if a notice has not been previously been left (see Schedule 4 paragraph 2(3)).
- b. In paragraph 62 a search is deemed to have been carried out when it is conducted under the 2003 Order if a record of the search has not previously been made (see Schedule. 4 paragraph 3(3)).

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<sup>281</sup> Paragraph 143 summarises some of the principal provisions but Schedule. 4 to the Stop and Search etc Order should be referred to for full details of the transitional arrangements.

- c. In paragraph 64 an order given by an officer under section 4(1)(a) of the 2001 Act is deemed to have been given under section 76(1) of the Act (see Schedule 4 paragraph 4(2)).
- d. In paragraph 67 a search carried out under articles 4 and 5 of the 2003 Order is deemed to have been carried out under section 76 of the Act if a notice has not previously been left (see Schedule 4 paragraph 4(3)).
- e. In paragraph 69 a search carried out under section 4(1)(a) of the 2001 Act is deemed to have been carried out under section 76(1) of the Act if a record of the search has not previously been made ( see Sch. 4 paragraph 4(4) ).

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

- a. **Entry to premises for the purposes of arrest.** In paragraph 74 an arrest made under section 74 of the 1955 Acts or section 45 of the 1957 Act is deemed to have been made under section 67 of the Act (see Schedule. 4 paragraph 8(1)(a)).
- b. **Powers of entry search and seizure where person arrested.** In paragraph 79 a ‘serious service offence’ includes a serious SDA offence, and an arrest made under section 74 of the 1955 Acts or section 45 of the 1957 Act is deemed to have been made under section 67 of the Act (see Schedule. 4 paragraph 8(1)).
- c. **Powers of entry search and seizure after arrest.** In paragraph 80 a ‘serious service offence’ includes a serious SDA offence, and an arrest made under section 74 of the 1955 Acts or section 45 of the 1957 Act is deemed to have been made under section 67 of the Act. An authorisation in writing given by an authorising officer under article 13 of the 2003 Order will be valid in order to enter and carry out a search under section 90(1) of the Act (see Schedule 4 paragraph 8(1) and (2)).
- d. **General Powers of Seizure.** In paragraph 82 ( and paragraphs 125 and 127) the references to a service offence include an SDA offence ( see Schedule 4, paragraph 9)
- e. **Additional powers of seizure from premises.** In paragraph 85 property seized from premises under article 19 of the 2009 Order includes property found on premises before commencement other than by someone authorised under section 7 of the 2001 Act, and the powers of seizure to which article 19 applies includes powers conferred by or under Part 2 of the 2001 Act, except section 2, 4 and 7 of that Act (see Schedule 4 paragraph 12(2)(3)).
- f. In paragraph 90 a power of seizure includes a power of seizure conferred by article 4 of the 2006 Order if article 5(4) of that Order has not been complied with respect to the seizure (see Schedule 4 paragraph 13(3)).
- g. **Review of entry and search authorised by CO.** In paragraph 104 a review by a judge advocate of searches and seizure includes a request made to a judicial officer to undertake a review under section 8 of the 2001 Act if the judicial officer has not yet determined whether to make an order for the return or disposal of any of the property to which the review relates (see Schedule. 4 paragraph 25(2)).

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

- a. **Execution of warrants.** In paragraph 111 a warrant which authorises a Service policeman to be accompanied by other persons includes a pre-commencement



warrant which authorises a person to accompany a service policeman executing the warrant (see Schedule 4 paragraph 6(3)).

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

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

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

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

## **Retention of Seized items**

### **147. Part 4 – Retention**

a. In paragraph 127 anything seized under Part 3 of the Act includes anything seized under Part 2 of the 2001 Act, and the power to retain seized items under section 54(4)(a) of PACE, as applied by section 113(1) of that Act, includes items seized (a) under section 54(4)(a) as applied to the 1955 Acts or the 1957 Act, and (b) under section 10(10) or (11) of the 2001 Act ( see Schedule 4 paragraph 11 (3)(4)).

b. In paragraph 128 the power to retain property seized from premises or persons includes property seized from premises or persons under article 3 or 4 of the 2006 Order (see Sch. 4 paragraph 18). An authorisation under section 87 or 88 of the Act includes an authorisation given under section 7 of the 2001 Act, and the additional powers of seizure apply to anything found before commencement. The powers of seizure under Chapter 1 or 3 of Part 3 of the Act include the powers of seizure conferred under Part 2 of the 2001 Act, except sections 2, 4 and 7 of that Act (see Schedule 4 paragraph 12(2)(3) ).

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

d. In paragraph 130 the obligation to return items subject to legal privilege does not apply to property seized under section 2(7) of the 2001 Act, exercised under section 4 of that Act by a person other than a service policeman. The powers of seizure in Part 3 of the Act include the powers of seizure in (a) articles 3 and 4 of the 2006 Order; (b) Part 2 of the 2001 Act, and (c) the 2003 Order (see Schedule 4 paragraph 15(2) (3)).

e. In paragraph 130 the obligation to return excluded and special procedure material which has been seized pursuant to a warrant granted under section 83 of the Act includes material seized under section 5 of the 2001 Act (see Schedule 4 paragraph 16).

f. In paragraph 131 property which cannot be retained under article 17 includes property which has been seized under Part 2 of the 2001 Act (see Schedule 4 paragraph 11(2)).

**148. Application to a judge advocate for return of property**

a. In paragraph 132 an application to a judge advocate includes an application made to a judicial officer (as defined in Part 2 of the 2001 Act) before commencement (see Schedule 4 paragraph 20(2)).

b. In paragraph 133 a judge advocate may also make directions in relation to property seized under articles 3 or 4 of the 2006 Order, and the relevant powers of seizure include powers conferred under (a) articles 3 and 4 of the 2006 Order; (b) Part 2 of the 2001 Act (except the power in section 7 of that Act); and (c) the 2003 Order, except the power under its article 15 to the extent that it relates to section 7 of the 2001 Act (see Sch. 4 paragraph 20(5)(6)).

**149. Obligation to return items subject to legal privilege**

a. In paragraph 134 the obligation to return items subject to legal privilege includes property which has been seized under articles 3 and 4 of the 2006 Order or Part 2 of the 2001 Act (except property which has been seized under (a) section 2(7) of the 2001 Act by someone other than a service policeman acting under section 4 of that Act, or (b) section 7(3) of the 2001 Act (see Schedule 4 paragraph 15(2)(3)).

**150. Obligation to return excluded or special procedure material**

b. In paragraph 135 seized property includes property seized under a search warrant granted under section 5 of the 2001 Act (see Schedule 4 paragraph 16).

**151. Property to whom seized property is returned**

a. In paragraph 136 property which has been seized includes property seized under (a) article 3 or 4 of the 2006 Order; (b) Part 2 of the 2001 Act; or (c) the 2003 Order (see Schedule 4 paragraph 19).

**152. Duty to secure items**

a. In paragraph 137 the duty to secure items seized under article 19 of the 2009 Order does not apply to anything found on premises by someone authorised under section 7 of the 2001 Act but does include anything otherwise found before commencement. The powers of seizure conferred by or under Chapter 1 or 3 of Part 3 of the Act includes the powers of seizure conferred by or under Part 2 of the 2001 Act, except sections 2, 4 and 7 of that Act (see Schedule. 4 paragraph 12(2)(3)).

b. In paragraph 137 an application under article 28 includes an application made under article 12(2) of the 2006 Order (see Schedule 4 paragraph 20(3)(a)).

**153. Use of inextricably linked property**

a. In paragraph 138 property seized under the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 includes property seized under

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

b. In paragraph 139 inextricably linked property includes property seized under (a) article 3 or 4 of the 2006 Order, (b) Part 2 of the 2001 Act, except the power under its article 15 in so far as it relates to section 7 of the 2001 Act, or (c) the 2003 Order, except the power under its article 15 in so far as it relates to section 7 of the 2001 Act (see Schedule 4 paragraph 23(2)).

## RELEVANT OFFENCES

1. Any section 42 offence corresponding to an indictable criminal offence<sup>282</sup>
2. Schedule 2 offences which are listed as relevant offences (below):<sup>283</sup>
  - a. Section 1 of the Act - assisting an enemy
  - b. Section 2(1) of the Act - misconduct on operations
  - c. Section 3(1) of the Act - obstructing operations
  - d. Section 4(1) or (2) of the Act - looting
  - e. Section 6 of the Act - mutiny
  - f. Section 7 of the Act - failure to suppress mutiny
  - g. Section 8 of the Act - desertion (with intention of avoiding a period of active service)
  - h. Section 31(1) of the Act - hazarding a ship
  - i. Section 33(1) of the Act - dangerous flying
  - j. Section 39 of the Act - attempts to commit any of the above offences
  - k. Section 40 of the Act - encouraging or assisting any of the above offences other than attempts
3. Any other Service offence if intended or likely to have serious consequences<sup>284</sup>. The consequences referred to are:
  - a. Serious harm to the security of the State or to public order;
  - b. Serious interference with the administration of justice or with the investigation of offences or of a particular offence;
  - c. The death of any person
  - d. Serious injury to any person;
  - e. Substantial financial loss to any person;
  - f. Serious financial loss to any person; or
  - g. The undermining of discipline or moral among members of any of Her Majesty's forces.

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<sup>282</sup> Section 84(2)a of the Act

<sup>283</sup> Schedule 3 of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009

<sup>284</sup> Section 84(5) of the Act.

## Chapter 5

### Custody

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# Chapter 5

## Custody

### Part 1 - Introduction

#### General principles

1. This chapter provides guidance on the rules governing Service custody under the relevant provisions of the Act. These rules concern both custody without charge (pre-charge custody) and custody after charge (post-charge custody). They do not relate to an offender serving a custodial sentence at MCTC Colchester<sup>285</sup> (or other Service detention facility) or a sentence of imprisonment in one of Her Majesty's prisons having been convicted of a Service offence. Also included is an overview of the transitional arrangements regarding the authorisation of pre-charge custody and custody without charge without charge applying to circumstances which occur wholly or partly before the commencement of the Regulations (31 October 2009).
2. Service custody in this context means the physical deprivation of a person's liberty either following arrest on suspicion of having committed a Service offence see [Chapter 6](#) (Investigation, charging and mode of trial) or following charge. This chapter does not deal with the arrest of a person by a Service policeman in anticipation of the commission of a Service offence under section 69 of the Armed Forces Act 2006 (the Act), which is covered in [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention). In those circumstances, the arrest must be reported as soon as practicable to the arrested person's commanding officer (CO), but the CO and their staffs have no role in determining the arrest or custody. It is, however, perfectly proper for a CO to satisfy himself that the arrested person is being dealt with correctly and to raise any concerns with the arresting officer or their superiors.
3. This chapter is principally aimed at the CO and their administrative staff in order to provide them with guidance as to the principles and processes that they need to follow in the event that they need to deprive someone of their liberty.
4. As custody represents a deprivation of a person's liberty, it must be for the minimum period necessary and must not exceed the given time limits. Accordingly, it is essential that there is a close examination of the need for any period of custody and any sensible and practical alternatives must be considered during such an examination. As can be seen below there are very strict criteria which must be applied in each case. Custody is not a punishment and is never to be used as such. In addition, it is essential that the relevant time (the time of arrest or surrender - see footnote 2 and paragraph 79) is properly recorded, as this information will be required by the person in custody's CO or a judge advocate should they be required to review custody at any stage. Legal advice should always be sought if, having read this guidance, a unit is in any doubt as to what action to take in respect of Service custody, especially at the 12 hour review point (see paragraph 21).
5. In broad terms, a CO may authorise custody without charge up to a maximum of 48 hours after the arrest or surrender of the person in custody (referred to in accordance with

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<sup>285</sup> With the exception of the isolated circumstances set out in section 98(4) of the Act, persons unlawfully at large.

the legislation as the 'relevant time'<sup>286</sup>, see also paragraph 79), subject to a regime of periodic reviews which must be conducted at no more than 12 hourly intervals. Thereafter, an application must be made to a judge advocate who may authorise custody without charge up to a maximum of 96 hours after the relevant time. Following charge, only a judge advocate may authorise custody and this is also subject to periodic review. These general principles, and any exceptions to them, are explained in detail in the remainder of this chapter.

## **Pay and allowances**

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

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<sup>286</sup> Time begins to run from the 'relevant time', defined in the Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 2.



## Part 2 – Custody without charge

### The arresting officer's decision and reporting action

7. ***Grounds for keeping a person in custody.*** A person who has been arrested on reasonable suspicion of being engaged in committing or having committed a Service offence<sup>287</sup>, or in anticipation of committing a Service offence (see paragraph 40 below) may be kept in Service custody without charge but only if it is reasonable to do so and strict criteria are met. (The following provisions also apply in most other circumstances in which a person is in custody without charge, for which see paragraph 39 below.) A person may be kept in custody only if the person who made the arrest has reasonable grounds for believing that keeping the person in custody without being charged is necessary<sup>288</sup>:

- a. To secure or preserve evidence relating to a Service offence for which the suspect is under arrest; or
- b. To obtain such evidence by questioning the suspect (in accordance with JSP 397 (The Service Police Codes of Practice)).

The decision as to whether either of these conditions exists lies with the arresting officer who should complete the Record of arrest by Service Police under Section 99(2) AFA06 (T-SL-CUS03) at [Annex A](#).

8. Once the arresting officer has decided that keeping the person in custody is necessary for the reasons in paragraph 7 above, authorisation to keep the person in Service custody without charge lies with the CO. The arresting officer must therefore report the matter of the arrest and any grounds on which the person is being kept in Service custody to the CO in accordance with the following paragraphs as soon as practicable<sup>289</sup> (see [Chapter 2](#) (Meaning of commanding officer) for the meaning of CO in relation to Service custody).

9. 'As soon as practicable' is not defined in the Act. It will depend upon all the circumstances prevailing at the time but will generally mean at the first reasonable opportunity. Until the report is made to the CO the arresting officer may keep the person in Service custody<sup>290</sup>. The Record of arrest and custody decision/review (T-SL-CUS03(1)) ([Appendix 1 to Annex A](#)) form should be used for reporting the fact of a person's arrest and any grounds on which they are being kept in Service custody. It is the responsibility of the authorising officer to ensure the accuracy and completeness of the Record of arrest and custody decision/review (T-SL-CUS03) ([Annex A](#)) and to ensure that any paper copy is signed and dated accordingly.

10. There may be other circumstances when a suspect may need to be kept in custody (see paragraph 39 below).

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<sup>287</sup> Section 67 of the Act also see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

<sup>288</sup> Section 99(2) of the Act.

<sup>289</sup> Section 99(1) of the Act.

<sup>290</sup> Section 99(2) of the Act.

11. The report that a person is being held in Service custody may be made to and received by a CO or the officer to whom the CO's functions have been delegated in respect of custody without charge (see paragraphs 28 to 31 below).

## **The rights of a person placed in Service custody**

12. Where the intention is to retain the person in Service custody, the arresting officer should as soon as practicable notify the person in custody of the following matters:

- a. The offence (or anticipated offence if arrested under section 69 of the Act) for which they were arrested;
- b. The date, location of the arrest and relevant time of arrest;
- c. That the person is to be retained in custody; and
- d. His rights, by giving them the 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#) (Investigation, charging and mode of trial) or by informing them verbally that they :

(1) May nominate an officer, warrant officer or senior non-commissioned officer of their choice to assist them (the assisting officer) and that, in the event that nobody of their choice is available, they may request the assistance of the CO in finding an assisting officer, who will provide them with the names of at least two people available to be nominated (see [Annex B](#) – Guidance on the role of the assisting officer);

(2) Has the right to make representations, orally or in writing, to the arresting officer or to the CO, requesting their release and giving reasons why they should be released; or making any other representations regarding their confinement in custody; and where such representation is made orally or in writing a CO or arresting officer must make a detailed record of the reasons given. Where practicable that record will be read and signed by the person in custody to confirm its accuracy.

## **Commanding officer's decision**

13. Following the receipt of a report that a person is being held in Service custody, the CO (or their delegated representative (see paragraph 28 below)) is responsible for determining, as soon as is practicable, whether to authorise that custody<sup>291</sup>. In making this decision the CO (or their delegated representative) must satisfy himself that there are reasonable grounds for believing that the following two conditions have been met<sup>292</sup>:

- a. The keeping of the person in Service custody without being charged is necessary to:

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<sup>291</sup> Section 99(3) of the Act.

<sup>292</sup> Section 99(4) of the Act.

(1) Secure or preserve evidence relating to the offence for which they are under arrest; or

(2) Obtain such evidence by questioning them; and

b. The investigation is being conducted diligently and expeditiously.

14. Only if both criteria at sub-paragraphs 13a and 13b above are met may the CO exercise their discretion and authorise custody. Therefore, if the CO is not satisfied that the investigation is being conducted diligently and expeditiously, the person in custody must be either charged or released. In making their decision, the CO must consider carefully whether the investigation could be carried out just as effectively without the person being held in custody. It is permissible for the person to be kept in custody whilst the CO gathers sufficient information to make their decision<sup>293</sup>.

15. Where a CO decides to authorise custody, that authorisation may not be for any longer than 12 hours at a time, subject to the maximum of 48 hours custody<sup>294</sup>. However, a CO should not authorise the maximum period of 12 hours unless there is good reason to do so. Twelve hours is an absolute limit and a CO should not routinely authorise such a period of custody. When considering an application, a CO should be prepared to question the reasons given for custody and authorise only such period as appears to them to be reasonable and necessary in all the circumstances. Service policemen or others holding persons in Service custody should be fully prepared in all respects to present sound argument and sufficient reasons justifying the retention of an individual in custody (and any subsequent extensions of that custody on review). This does not require the CO to make a detailed examination of the evidence gathered thus far or of the direction of the investigation, but the arresting officer should be able to explain the relevance of the evidence that may be obtained if custody is authorised.

16. The CO's discretion means that, even if grounds for custody do exist, the CO does not have to place the person in custody. The CO may wish to put in place administrative measures as an alternative to imposing custody without charge. Examples might be ordering a suspect not to return to the scene of the alleged offence or to speak with the alleged victim. There is always a strong presumption that a person will be allowed their liberty and only where custody is necessary should it be authorised. Therefore, when a person is being kept in custody without charge, a CO must<sup>295</sup> order their immediate release from custody if, at any time, they :

a. Becomes aware that the grounds for keeping the person in Service custody no longer apply; and

b. Is not aware of any other grounds which could justify keeping the person in Service custody.

However, a CO does not have to exercise this power where the person was unlawfully at large at the time of their arrest<sup>296</sup>. In such circumstances they should review the matter in

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<sup>293</sup> Section 99(3) of the Act.

<sup>294</sup> Section 99(5) of the Act.

<sup>295</sup> Section 98(2) of the Act.

<sup>296</sup> Section 98(3) of the Act.

light of all the available information. For example, if the person in custody had been apprehended after escaping from custody it may be unwise to release them even if other circumstances relating to their continuing custody have changed.

### **Notification, representation and nomination of an assisting officer following the decision by the CO**

17. Notwithstanding that some of the information contained below may have already been given to the person in custody (see paragraph 12 above) where the intention is to keep the person in custody, the officer authorising custody must as soon as practicable notify the person of the following matters, in writing, and should sign and date the documents<sup>297</sup>:

- a. The name and rank or rate of the authorising officer;
- b. The reason why the person was arrested (the offence or anticipated offence if arrested under section 69 of the Act for which they were arrested);
- c. The date and location of the arrest and relevant time of arrest;
- d. That the person is to be retained in custody;
- e. The grounds for keeping the person in custody under section 99(4)(a) of the Act;
- f. The period of custody authorised;
- g. That they may nominate an officer, warrant officer or senior non-commissioned officer of their choice to assist them (the assisting officer) and that, in the event that nobody of their choice is available, they may request the assistance of the CO in finding an assisting officer, who will provide them with the names of at least two people available to be nominated<sup>298</sup>; and
- h. That they have a right to make representations, orally or in writing, to the arresting officer or to their CO, requesting their release and giving reasons why they should be released; or making any other representations regarding their confinement in custody; and where such representation is made orally or in writing a CO or arresting officer must make a detailed record of the reasons given. Where practicable that record will be read and signed by the person in custody to confirm its accuracy.

18. For this purpose, Custody information for person held in custody without charge (T-SL-CUS01) ([Annex C](#)) form should be completed and a copy handed to the person in custody. A copy of this record must be retained by the arresting officer or CO who created it, noting the requirement to retain the records for at least 6 years after the person's release from custody<sup>299</sup>. The person in custody is also to be handed a copy of 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#)

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<sup>297</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 6(1).

<sup>298</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 7(4)(a).

<sup>299</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(5).

(Investigation, charging and mode of trial)<sup>300</sup>. Sub-paragraph 17g above sets out the right of the person in custody to appoint an assisting officer who will, amongst other things, assist them in preparing any representations they wish to make about their continuing custody. [Annex B](#) sets out guidance for individuals appointed to perform the role of assisting officer for a person held in custody.

19. The person in custody must be invited to sign to acknowledge receipt of the notices in paragraph 17 above and any refusal to do so is to be noted<sup>301</sup>. In addition the CO or person authorising custody must make a note of anything the person in custody says about their arrest or the alleged offence and any comment made in respect of the decision to keep them in custody<sup>302</sup>, but must not invite that person to make any such comment.

## Review

20. Where Service custody has been authorised, the CO (or their delegated representative) must review that custody no later than the end of the period for which it has been authorised<sup>303</sup>. However, the person in custody must be afforded the means and opportunity to make any representations<sup>304</sup> and where a person in custody makes representations to an arresting officer, the arresting officer must immediately forward those representations to the CO. In these circumstances the CO may decide to conduct an early review of custody. In any event, the review must be conducted before the expiry of the period of custody already authorised. When conducting a review of whether a person is to remain in Service custody without charge, the same test as that set out in paragraph 13 above is to be applied<sup>305</sup> and any representations of the person in custody should be taken into consideration. The person in custody is to be notified of the CO's decision about any representations made to them and the Arresting officer's or CO's decision on representations. T-SL-CAO01 ([Annex D](#)) form should be used for this purpose.

21. At each review, a CO may authorise only up to a maximum of 12 hours' further custody<sup>306</sup>. Furthermore, a CO must bear in mind that the maximum period for which a person may be kept in custody without charge on their authorisation is 48 hours from the time of arrest<sup>307</sup>. The Record of arrest and custody decision/review (T-SL-CUS03(2)) ([Appendix 2 to Annex A](#)) form should be completed for each review.

22. To accommodate the exigencies of Service life, and also the requirements of the investigative process, there are certain limited circumstances<sup>308</sup> in which the review may be temporarily delayed. A review may be postponed at the expiry of an authorised period of Service custody if:

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<sup>300</sup> This can be found at Annex F to [Chapter 6](#) (Investigation, charging and mode of trial).

<sup>301</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 6(4).

<sup>302</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(2)(k).

<sup>303</sup> Section 100(1) of the Act.

<sup>304</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 8.

<sup>305</sup> Section 100(2) of the Act.

<sup>306</sup> Section 100(2) of the Act.

<sup>307</sup> Section 99(6) of the Act.

<sup>308</sup> Sections 100(3) and (4) of the Act.

- a. In all the circumstances prevailing at that time, it is not practicable to conduct a review at that time;
- b. The person in custody is being questioned, and the CO is satisfied that an interruption of questioning in order to carry out a review would prejudice the investigation; or
- c. The CO is not readily available.

23. However, whilst recognising that there are circumstances where it may not be practicable to carry out the review at the nominated time, the review must be carried out as soon as practicable thereafter<sup>309</sup>. It is permissible for the person to be held in custody until such time as the postponed review is conducted<sup>310</sup>.

24. Where a person, whilst being kept in Service custody without charge for a Service offence (offence A), is arrested<sup>311</sup> for another Service offence (offence B), the process described at paragraphs 7 to 11 above must be followed afresh in relation to offence B<sup>312</sup>. That said, in applying to offence B the test laid down at paragraph 13, the CO is also entitled to take into account any continuing need to secure or preserve evidence, or to question the person, in relation to offence A<sup>313</sup>. Where a person is arrested for offence B whilst in custody without charge for offence A, the original time limit of 48 hours in respect of offence A will stand<sup>314</sup>. This means that, on the CO's authorisation, a person may be held in custody without charge for offence B only within the 48 hour maximum permitted from the time of arrest for offence A.

25. The CO's authorisation of custody without charge in respect of offence B does not trigger a new 48 hour cycle of custody without charge. Where a CO decides to authorise custody without charge in respect of offence B, any previous authorisations in respect of offence A cease to have effect<sup>315</sup>. Thus, the next review of the person's custody will fall due at a time not later than 12 hours after custody without charge for offence B has been authorised, depending on the period of custody without charge which has been authorised. When the 48 hour point is reached after the person's arrest for offence A, the person must be released unless their continued custody, either without charge or after charge, is authorised by a judge advocate.

26. To illustrate the way in which these rules operate, the following example is given. A person is arrested for offence A at 0830 hrs on 12 January. The maximum period for which they may be held in custody without charge, on the authority of their CO, is 48 hours and they must therefore be released by 0830 hrs on 14 January at the latest unless their continued custody, either without charge or after charge, is authorised by a judge advocate. If, following the person's arrest for offence A, the CO authorises custody without charge at 0900 hrs on 12 January, the CO must review that custody no later than 2100 hrs on 12

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<sup>309</sup> Section 100(6)(a) of the Act.

<sup>310</sup> Section 100(6)(b) of the Act.

<sup>311</sup> In accordance with section 67 of the Act.

<sup>312</sup> Section 99(7)(a) of the Act.

<sup>313</sup> Section 99(7)(b) of the Act.

<sup>314</sup> Section 99(7)(c) of the Act.

<sup>315</sup> Section 99(7)(d) of the Act.

January, assuming they have authorised the maximum of 12 hours' custody. Where the person held in custody without charge for offence A is subsequently arrested for offence B at, say, 1900 hrs on 12 January, their CO may authorise their custody without charge in respect of offence B. If that authorisation takes place at 1930 hrs, there is no requirement for the CO to carry out the review of custody for offence A at 2100 hrs on 12 January. Assuming the CO had authorised the full period of 12 hours in relation to offence B, the next occasion on which a review of custody without charge will fall due is 0730 hrs on 13 January.

27. Subsequent reviews of custody without charge will fall due at intervals of no more than 12 hours in respect of both offences A and B. Unless the CO applies to a judge advocate for an extension of custody without charge (see paragraph 32 below) or the person is charged and held in custody after charge (see paragraph 42 to 59 below), the person must be released by 0830 hrs on 14 January at the latest, which is 48 hours after their arrest for offence A.

## **Delegation of commanding officer's function**

28. The CO may delegate their functions in relation to custody without charge, but there are limits on such delegation<sup>316</sup>:

- a. The delegation (including any variation or revocation) must, wherever practicable, be in writing, such as unit routine orders, or on the Delegation of custody powers (T-SL-CUS02) ([Annex E](#)) form designed for this purpose;
- b. The delegate must be:
  - (1) An officer under the CO's command and who is not below the rank of naval lieutenant, military or marine captain or flight lieutenant who is not the arresting officer;
  - (2) A Service policeman of no lower rank than naval lieutenant, military or marine captain or flight lieutenant who is not the arresting officer; or
  - (3) If an officer at (1) or (2) is not reasonably available, a Service policeman of any rank/rate who is not the arresting officer.

29. To whom delegation under paragraph 28b(1) may be appropriate will vary from unit to unit and is entirely at the discretion of the CO. Subject to the rank restriction it would, for example, be appropriate for a delegation to be made to a person exercising a command function on behalf of the CO: in Royal Navy units delegation may be to the Executive Officer, Duty CO or Officer of the Day; in Army units delegation may be to the 2IC, sub-unit commanders and duty field officers; and in RAF units delegation may be to the Orderly Officer or one of the station executives.

30. In addition to the general restrictions on delegation at paragraph 28 above as to person, the CO may impose further restrictions as to the limits of delegation having regard to the rank or rate and experience of the person to whom the power has been delegated<sup>317</sup>. For example, a CO may limit a delegated officer's power to authorise custody without charge

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<sup>316</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 3.

<sup>317</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 4.



to, say, 12 hours and state that retention in custody beyond this period must be authorised by the CO personally.

31. Where a person with delegated powers exercises any of those powers they must follow the same procedure as for a CO acting in person. On completion they must as soon as practicable and after each exercise of a delegated power, provide a written report to their CO detailing how the powers have been exercised and ensuring that their name, rank or rate are noted on all the records made with regard to custody without charge<sup>318</sup>. This report should be made on the Commanding officer's decision on custody without charge (T-SL-CUS03(2)), [Appendix 2 to Annex A](#).

## Extension by judge advocate of custody without charge

32. A person should not be kept in Service custody for a period over 48 hours unless they have been charged (in which case see paragraphs 42 to 59 below) or the CO has first obtained the authorisation of a judge advocate for extension of Service custody without charge using (T-SL-CAO02) ([Annex F](#)) and with the aid of the form Information to assist commanding officer's application for custody after charge (T-SL-CUS03(3)) At [Appendix 3 to Annex A](#). The CO's application for the extension of Service custody without charge may be made<sup>319</sup>:

- a. At any time before the end of 48 hours after arrest; or
- b. If not practicable before the end of the 48 hour period, as soon as practicable thereafter but not more than 96 hours after arrest.

33. In those rare circumstances in which sub-paragraph 32b above applies (eg. it is not practicable for an application to be heard by a judge advocate because of the unit's involvement in operations), a CO may authorise continued custody himself<sup>320</sup>. However, they are under a continuing obligation to review the need for custody and, in this situation, is placed under a more stringent requirement that authorisations may not be for any longer than 6 hours at a time<sup>321</sup>. In any event, custody without charge cannot be authorised for a period in excess of 96 hours from the time of arrest<sup>322</sup>. Should the 96-hour mark be reached, a person in custody must either be charged or released.

34. The ability of the CO to exceptionally authorise continued custody himself does not relieve them of the requirement to seek an extension of custody without charge from a judge advocate. Moreover, where an application is made for an extension of custody without charge after the 48 hours limit has been passed and it appears to the judge advocate that it would have been reasonable for the CO to make the application before the end of that period, the judge advocate *must* refuse the application<sup>323</sup>. It is therefore particularly important for Service Police investigating offences to keep the timelines for custody under review.

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<sup>318</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 5.

<sup>319</sup> Section 102(1) of the Act.

<sup>320</sup> Section 102(2) of the Act .

<sup>321</sup> Section 102(2)(a) of the Act.

<sup>322</sup> Section 102(2)(b) of the Act.

<sup>323</sup> Section102(3) of the Act.



35. Under normal circumstances, where an application can be made within the timescale prescribed and a CO considers that further custody is required, they should make an application to a judge advocate using the Application for a custody hearing – person arrested and in custody without charge form (T-SL-CAO02) ([Annex F](#)), see also paragraph 67. The judge advocate may grant the application if they believe that there are reasonable grounds to justify continued Service custody without charge. In considering whether to authorise continued Service custody, the judge advocate will apply the same test as that set out in paragraph 13 above<sup>324</sup>. See also paragraphs 67 to 95 below for procedural matters for hearings before a judge advocate.

36. A judge advocate may either refuse custody or authorise custody up to a maximum period of 96 hours after the time of arrest<sup>325</sup>. Where a person is kept in custody without charge for a Service offence (offence A) and is then arrested for another offence (offence B), the original custody without charge time limit of 96 hours running from the time of arrest for offence A will stand<sup>326</sup>. This means that a person may be held in custody without charge for offence B only within the 96 hour maximum permitted from the time of arrest for offence A.

37. A judge advocate is not permitted to hear an application for continued custody without charge unless the person in custody has been informed in writing of the grounds of the application<sup>327</sup>. The person in custody must also be brought before the judge advocate<sup>328</sup>. This need not be in person; it may be by means of live link. The person in custody is also entitled to legal representation (see sub-paragraph 75a) and to an adjournment to seek such representation<sup>329</sup>. During such an adjournment, they may continue to be kept in Service custody<sup>330</sup>. The CO is also entitled to legal representation (see paragraph 75b). It is the responsibility of the CO, or their representative, to ensure that they have gathered the relevant information to support the representations which they wish to make to the judge advocate demonstrating that the test at paragraph 9 above has been met.

38. Where a judge advocate does not authorise continued custody without charge they have no power to impose conditions related to the release of the person in custody.

## **Custody without charge - other cases**

39. The guidance set out in the preceding paragraphs on the procedures to be followed in cases of custody without charge also applies in the following circumstances<sup>331</sup>:

a. Where a person is transferred to or taken into Service custody:

(1) Having been arrested by the civilian police under a warrant issued by a judge advocate<sup>332</sup>;

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<sup>324</sup> Section 101(6) of the Act.

<sup>325</sup> Section 101(4) of the Act.

<sup>326</sup> Section 101(5) of the Act.

<sup>327</sup> Section 101(2)(a) of the Act.

<sup>328</sup> Section 101(2)(b) of the Act.

<sup>329</sup> Section 101(3) and the Armed Forces (Custody Proceedings) Rules 2009/1098, regulations 18 and 36(1).

<sup>330</sup> Section 101(3)(b) of the Act.

<sup>331</sup> Section 103 of the Act.

- (2) Having surrendered himself to the civilian police as a deserter or absentee without leave<sup>333</sup>;
- (3) Having appeared in proceedings before a civilian court where they are suspected of illegal absence<sup>334</sup>; or
- (4) Having been arrested under a warrant because of a failure to comply with the conditions of their release imposed by the police or civilian court before which they appeared<sup>335</sup>; or

b. In any other case where a person arrested by a member of a UK police force or overseas police force is transferred into Service custody<sup>336</sup>.

c. Where a judge advocate issues a warrant for the arrest of a witness, where a witness summons would probably not procure witness attendance or the witness has failed to comply with a witness summons. See [Chapters 29](#) (Court Martial proceedings) and [32](#) (Service Civilian Court).

40. There is, however, one exception where the CO takes no part in the authorisation of custody without charge. This concerns section 69 of the Act; arrest in anticipation of a commission of a Service offence. In these circumstances the test that needs to be applied by the Service Police is that the person in Service custody can be kept in custody until such time as the policeman is satisfied that the risk of them committing the offence has passed. It is the arresting Service policeman's responsibility at all times to keep under review the need and if necessary, the continuing need, to hold a person arrested under section 69, in custody. Detailed guidance on the responsibilities and procedures are contained in [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention). The role of the CO in these circumstances is different in that they play no part in determining whether the person should be held in custody. However, the CO should satisfy himself that JSP 837 (Service Code of Practice for the Management of Personnel in Service Custody and Committal to Service Custody Premises and Civil Prisons) is being observed at all times (see paragraph 96 below).

## Records

41. A written record must be made and signed on every occasion that custody or continuation of custody without charge is authorised and when the person is released from custody<sup>337</sup>. The commanding officer's decision on custody without charge (T-SL-CUS03(2)) at Appendix 2 to [Annex A](#) should be used for this purpose where authorisation for custody is given by the CO or someone acting on their delegated authority. A judge advocate authorising custody should record this decision in writing and provide a copy to the CO. The record must be retained for at least 6 years after release<sup>338</sup> and a copy must be given to the

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<sup>332</sup> Section 313 of the Act.

<sup>333</sup> Section 315 of the Act.

<sup>334</sup> Section 316 of the Act.

<sup>335</sup> Section 317 of the Act.

<sup>336</sup> Section 103(b) of the Act.

<sup>337</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(2)(l).

<sup>338</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(5).

person or their legal representative on request as soon as practicable when the person leaves custody or is taken before a judge advocate or a court<sup>339</sup>.

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<sup>339</sup> The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(4).

### Part 3 - Custody after charge

42. Once a person has been charged the CO may decide that they should be released from Service custody and impose administrative conditions on the Service person (see paragraph 57) (using T-SL-CAO04 [Annex G](#)). Where, however, a person (the accused) is kept in Service custody after being charged<sup>340</sup> with a Service offence, the CO is to ensure that the accused is brought before a judge advocate as soon as practicable<sup>341</sup> for authorisation (Using T-SL-CAO03 [Annex I](#)).

43. Where the accused is brought before a judge advocate they may order that the accused is kept in Service custody, but only if the judge advocate is satisfied that one or more of the following three conditions are met<sup>342</sup>:

a. There are substantial grounds for believing that the accused, if released from Service custody, would:

- (1) Fail to attend any hearing in the proceedings against them; or
- (2) Commit an offence while released; or
- (3) Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or

b. The accused should be kept in Service custody for their own protection or, if they are under 17 years of age, for their own welfare or in their own interests; or

c. Because of lack of time since the accused was charged, it has not been practicable to obtain sufficient information for the purpose of deciding whether condition a. or b. above is met.

44. It follows that in deciding whether to apply for custody after charge a CO must be satisfied that there is sufficient evidence to support at least one of these conditions, having regard also to the matters in paragraph 46 below. It is the responsibility of the CO, or their representative, to ensure that they have gathered the relevant information to support the representations which they wish to make to the judge advocate that any of the conditions at paragraph 43 above have been met. See also paragraph 56 below in relation to a CO needing to consider the requirements which should be imposed by a judge advocate on an accused's release where a judge advocate decides not to authorise that person's custody after charge.

45. It should be noted that the requirement to show 'substantial grounds' for holding an accused in custody after charge is a heavier burden to satisfy than the requirement to demonstrate 'reasonable grounds' for holding a person in custody without charge. There is therefore a presumption that an accused will be released unless there are good reasons, supported by a properly argued case, for keeping them in custody.

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<sup>340</sup> For these purposes a person is to be treated as charged with an offence when a charge is brought by the CO in accordance with section 120(2) of the Act (at his own discretion) or section 122(1) (on the direction of the DSP). See the Armed Forces (Custody Proceedings) Rules 2009/1098, rule 25(3). For conditions required in order to bring a charge see [Chapter 6](#) (Investigation, charging and mode of trial).

<sup>341</sup> Section 105(1) of the Act.

<sup>342</sup> Section 106 of the Act.

46. When deciding whether or not any of the conditions set out at sub-paragraph 43a are met, the judge advocate is required<sup>343</sup> to take into account any of the following conditions which appear to be relevant:

- a. The nature and seriousness of the offence with which the accused is charged (and the probable method of dealing with them for it);
- b. The character, antecedents, associations and social ties of the accused;
- c. The accused's behaviour on previous occasions while charged with a Service offence and released from Service custody or while on bail in criminal proceedings; and
- d. The strength of the evidence that the accused committed the offence.

The judge advocate is also required to take into account any other considerations which appear to be relevant.

47. Having considered the evidence placed before them and applied the criteria set out at paragraph 43 above, a judge advocate may authorise custody for a period not exceeding 8 days after the day on which the order was made<sup>344</sup>. Whilst 8 days is set as the maximum, the judge advocate will order only such period of custody as seems to them to be merited in all the circumstances.

48. Special rules apply where an accused has been charged with murder, rape or manslaughter, or with an attempt to commit either of the first two offences. In these cases, where representations have been made concerning the conditions at sub-paragraph 43a above and the judge advocate decides not to authorise Service custody, they must state the reasons for their decision and have them included in the record of proceedings<sup>345</sup>.

49. An order made by a judge advocate authorising the keeping of the accused in Service custody will cease to have effect<sup>346</sup>:

- a. If the accused is subsequently released from Service custody; or
- b. Once the accused has been sentenced in respect of the offence with which they are charged.

## Review

50. A judge advocate must review an order authorising an accused to be kept in Service custody before the end of the period for which custody has been authorised<sup>347</sup>. However, at all times, including between reviews by a judge advocate, it is incumbent upon the accused's CO to consider whether the continuation of custody is necessary. If at any time it appears to

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<sup>343</sup> Section 105(4) of the Act.

<sup>344</sup> Section 105(3) of the Act.

<sup>345</sup> Section 105(5) of the Act.

<sup>346</sup> Section 105(6) of the Act.

<sup>347</sup> Section 108(1) of the Act.

the accused's CO that the grounds on which an order authorising custody was made no longer exist, they must either release the accused from Service custody or request a review<sup>348</sup>. An accused may at any time communicate to their CO any change in circumstances which may render their continuing custody unnecessary, and the person in charge of the custody facility in which the accused is held must report to the CO as soon as possible any such circumstances when they become aware of them. Where the change of circumstances is absolutely clear, such that continued retention in custody is not required, the CO shall release the accused. However, if in any doubt and in the normal course, the CO should request a review by a judge advocate using the Request for a review of Service custody after charge (T-SL-CAO04) ([Annex G](#)) form. The CO should make any representations about the review hearing on the Representations to judge advocate about the requirement for a review of custody after charge by way of a hearing (T-SL-CAO05) ([Annex H](#)) form. If a CO makes such a request the review must be carried out as soon as practicable<sup>349</sup>. In reviewing the continuing need for custody, the judge advocate is required to apply the same test as that set out at paragraph 43 above<sup>350</sup>.

51. At the first review in front of a judge advocate following the authorisation of custody after charge, the accused or their legal representative may advance any argument of fact or law against their continuing custody, whether or not that argument has been advanced previously<sup>351</sup>. At the second and subsequent reviews, the judge advocate need not hear arguments as to fact or law which have been heard previously<sup>352</sup>.

52. When conducting a review of custody after charge, a judge advocate will normally be able to authorise a period not exceeding 8 days after the day on which the order is made<sup>353</sup>. However, at a review conducted as a hearing, the judge advocate may authorise the keeping of the accused in Service custody for a period not exceeding 28 days<sup>354</sup>, but only if:

- a. The accused consents; and
- b. The accused is legally represented.

## **Release from custody after charge**

53. If at an initial hearing of an application for custody after charge (see paragraph 43 above), or at a subsequent review, a judge advocate does not authorise the keeping of the accused in Service custody, the accused must be released from Service custody without delay<sup>355</sup>. This release may be unconditional or subject to requirements (see paragraph 54 below).

## **Release from custody subject to requirements**

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<sup>348</sup> Section 108(2) of the Act.

<sup>349</sup> Section 108(3) of the Act.

<sup>350</sup> Section 108(4) of the Act.

<sup>351</sup> Section 108(5) of the Act.

<sup>352</sup> Section 108(6) of the Act.

<sup>353</sup> Section 108(4) of the Act.

<sup>354</sup> Section 108(7) of the Act.

<sup>355</sup> Section 107(2) of the Act.

54. In the civilian courts where a defendant is not remanded in custody they will be released on bail. This bail may be unconditional or subject to certain bail conditions ordered by the court. These bail provisions are mirrored in the Act. Where the judge advocate releases an accused from Service custody after charge or decides not to place them in custody after charge they may, nevertheless, require the accused to comply with such requirements as they consider necessary<sup>356</sup>:

- a. to secure the attendance of the accused at any hearing in the proceedings against them;
- b. to secure that they do not commit an offence while released from custody;
- c. to secure that they do not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; or
- d. for their own protection or, if they are under the age of 17, for their own welfare or in their own interests.

55. When a judge advocate imposes requirements on releasing a person from custody after charge the unit which made the application is to report those requirements to the Service Police Crime Bureau.

56. When a CO is to make an application for an accused to be held or kept in custody after charge they will need to take into account that a judge advocate has the power to release an accused from custody subject to their compliance with certain requirements. A CO should therefore consider what conditions they would wish to be applied to the accused's release in the event that the judge advocate is minded not to authorise custody after charge. It may, for example, be appropriate to invite the judge advocate to impose a requirement that the accused does not go within a specified distance of the home address or the unit of a witness where the CO considers that there is a substantial risk of the accused interfering with that witness. Similarly, if the CO considers that there is a substantial risk of a person charged with AWOL offences failing to attend future hearings they may wish to invite the judge advocate to impose a requirement that the accused does not leave their unit and/or surrenders their ID card or passport.

57. If a person is to be released from custody there is nothing to prevent the CO imposing conditions on an administrative basis by ordering that the accused complies with certain requirements or refrains from particular activities. However, a CO may wish a judge advocate to impose the sort of conditions set out at paragraph 56 above where they do not consider that ordering an accused to do, or not do, something would achieve the desired effect or where the accused is a relevant civilian and the CO has no power to give such an order. Where the accused fails to attend a hearing to which the requirement relates they will commit an offence and where an accused may fail or has failed to comply with a requirement imposed by a judge advocate, the CO may order their arrest<sup>357</sup> (see paragraph 61 below).

58. There is no equivalent provision for the imposition of conditions where a person is released from custody without charge.

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<sup>356</sup> Section 107(3) of the Act.

<sup>357</sup> Section 110(3)(c) of the Act.

59. An accused, anyone acting on their behalf or their CO may make an application for any requirement of the type set out at paragraph 54 above to be varied or discharged by a judge advocate<sup>358</sup> using the Request for judge advocate to review release conditions (T-SL-CA007) at [Annex K](#). An accused who is the subject of such a requirement commits an offence if, without reasonable excuse, they fail to attend any hearing to which the requirement relates<sup>359</sup>. In the event the accused commits one of these offences the advice of a staff legal adviser is to be sought, both as to charge and procedure.

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<sup>358</sup> Section 107(4) of the Act.

<sup>359</sup> Section 107(5) of the Act.



## Part 4 - Custody during proceedings of Court Martial or Service Civilian Court

60. During the proceedings of the Court Martial (CM) or the Service Civilian Court (SCC), the grounds for custody and method of review are, in essence, unchanged from the pre-trial procedures which are applicable to an accused considered for custody after charge<sup>360</sup>. However, the judge advocate has an additional power in these circumstances. As well as the grounds on which they may authorise custody at paragraph 43 above, the judge advocate is also entitled to make an order for custody if it appears to them that, where a case has been adjourned for inquiries or a report, it would be impracticable to complete the inquiries or make the report without keeping the accused in Service custody<sup>361</sup>.

### Arrest after charge or during proceedings

61. ***By order of commanding officer.*** The CO of an accused who has been charged with, or is awaiting sentence for, a Service offence and is not in Service custody, may order the arrest of that accused if they are satisfied that taking the accused into custody is justified<sup>362</sup>. Taking an accused into custody is justified<sup>363</sup> if there are reasonable grounds for suspecting that, if not taken into Service custody, they would:

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

What constitutes reasonable grounds for suspecting the accused will do one or more of these things will vary from case to case and person to person. An accused who has cooperated with an investigation and attended all hearings to date, but has threatened not to turn up for a further hearing may well have been speaking under emotional strain. The CO should consider whether there is a real danger that they will not appear at the hearing. Conversely, an uncooperative repeat offender on a charge of violence who has expressed dissatisfaction with the disciplinary process and already threatened a witness is more likely to interfere with that witness again or otherwise obstruct the course of justice. These are matters for the CO's judgement.

62. Taking a person into Service custody is also justified, under the power set out at paragraph 61 above, if<sup>364</sup>:

- a. The accused has failed to attend any hearing in the proceedings against them (but see below); or

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<sup>360</sup> Section 109(1) of the Act.

<sup>361</sup> Section 109(2) and section 106(4) of the Act.

<sup>362</sup> Section 110(1) of the Act.

<sup>363</sup> Section 110(2) of the Act.

<sup>364</sup> Section 110(3) of the Act.

b. There are reasonable grounds for suspecting that they should be taken into Service custody:

(1) For their own protection; or

(2) Where the accused is under the age of 17, for their own welfare or in their own interests; or

c. There are reasonable grounds for suspecting that:

(1) If not taken into Service custody, they would fail to comply with a requirement imposed by a judge advocate in accordance with paragraph 54 above; or

(2) He has failed to comply with such a requirement.

63. The condition at sub-paragraph 62a above should only be used as justification to take an accused into custody in limited circumstances. The accused may have a good reason for having failed to attend a hearing. That a person has failed to attend a hearing is not usually sufficient on its own to justify orders for their arrest. Such failure may, however, result in a CO having reasonable grounds to suspect that, if not taken into custody, they will fail to attend another hearing in the proceedings, or satisfy one or more of the other criteria at sub-paragraphs 61 a to c above. The condition at sub-paragraph 62b(1) above will require a clear threat to the person, and should usually be tackled by removing the threat, if possible, rather than by taking the person into custody. A threat that the accused may commit suicide or other self-harm may be sufficient if the threat is reasonably believed to be genuine. The condition at sub-paragraph 62b(2) above may exist, for example, where a person under 17 is known not to have a home to return to and there is a real danger that they may run away to avoid disciplinary action.

64. An accused who is arrested and kept in custody under the power outlined at paragraph 61 above must be brought before a judge advocate as soon as practicable for a review of whether they should remain in Service custody<sup>365</sup>. The review in these circumstances should be carried out in accordance with the procedure for reviewing custody after charge (see paragraph 43 above)<sup>366</sup>. Application for the review should be made using the Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form.

65. ***At the direction of a court.*** If a judge advocate is satisfied that taking an accused into custody is justified, they may direct the arrest of the accused at any time between the accused being arraigned before the CM or the SCC and the conclusion of proceedings before that court<sup>367</sup>. Any person with the power to arrest the accused for a Service offence may also arrest an accused in pursuance of such a direction from a judge advocate<sup>368</sup>.

66. Where a judge advocate exercises the power described at paragraph 65 above, they must apply the same test as that which a CO is required to apply at paragraphs 61 and 62

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<sup>365</sup> Section 110(4)(a) of the Act.

<sup>366</sup> Section 110(4)(b) of the Act.

<sup>367</sup> Section 111(1) of the Act.

<sup>368</sup> Section 111(2) of the Act.

above<sup>369</sup>. An accused who is arrested and kept in custody under the power outlined at paragraph 65 above must be brought before a judge advocate as soon as is practicable for a review of whether they should remain in Service custody<sup>370</sup>. The review in these circumstances should be carried out<sup>371</sup> in accordance with the procedure for reviewing custody after charge (see paragraph 43 above).

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<sup>369</sup> Section 111(3) of the Act.

<sup>370</sup> Section 111(4)(a) of the Act.

<sup>371</sup> Section 111(4)(b) of the Act.

## **Part 5 - Custody hearings before judge advocates**

### **Matters applying to all custody hearings**

67. There are broadly six situations in which a custody hearing before a judge advocate is required:

- a. On application of the CO for an extension of custody without charge;
- b. On application for authorisation of custody after charge;
- c. Where an accused has been arrested and taken into custody after charge;
- d. Where an accused has been arrested and taken into custody during proceedings;
- e. On request by the CO for a review of custody after charge; and
- f. On an application for variation of the 'release' conditions (see paragraph 59).

68. Each separate situation attracts varying notification and request requirements to the court administration officer (CAO), person in custody (or their legal representative) or CO as appropriate, as outlined below.

69. In all situations, a notification or request for a review may initially be made orally. This enables a CO to request the CAO to make arrangements for a custody hearing before raising the necessary paperwork, and therefore may expedite the process. Staff administering custody arrangements are encouraged to contact the CAO by telephone in the first instance (up to date telephone numbers, addresses and contact details are included on the relevant forms). When doing so, care must be taken to provide accurate information as to the reason why a hearing is required (custody without or after charge) and the timescale in which the hearing must take place.

70. Where written notification is also required, this may be effected by<sup>372</sup>:

- a. Sending it to that person's CO;
- b. Delivering it to them personally;
- c. If the person is a Service person or relevant civilian, leaving it at their usual place of abode;
- d. By post in a letter addressed to their unit;
- e. By post to a person's legal representative; or
- f. By Document Exchange (DX), fax or email to the person's legal representative, where a DX box, fax number or email address has been provided and the legal representative has not refused service by that means.

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<sup>372</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rules 4 to 7.

71. On receipt of the relevant notification the CAO will arrange a custody hearing<sup>373</sup> before a judge advocate, appointing a court recorder and interpreter (if required) for the hearing and notifying the CO and the person to whom the proceedings relate. If a court reporter is not appointed the judge advocate will keep a written record of the proceedings<sup>374</sup>. The time and place of the hearing will be determined after consultation with the Office of the Judge Advocate General.

## Live link

72. Custody hearings may be conducted by live link<sup>375</sup>. Such a live link will usually be a television link, but may be by telephone or similar e.g. IP, as long as the judge advocate, the accused and the CO (or their legal representatives), any interpreter and any witness giving evidence can both hear and be heard by one another.

73. In addition to this general ability to conduct custody hearings by live link, witnesses may with the permission of the judge advocate give evidence through a live link where it is not reasonably practicable for the witness to attend the hearing or if it is in the interests of justice<sup>376</sup>. An application for permission for a witness to give evidence by live link must be made by the person wishing to call them as soon as they believe that the person is likely to be able to give material evidence and it is not reasonably practicable for the witness to attend the hearing<sup>377</sup>. The application must be made in writing, copied to the CO or the person to whom the proceedings relate<sup>378</sup>. The application must be served on the CAO and state:

- a. The grounds of the application;
- b. The name and, where applicable, the Service number, rank or rate and unit of the witness;
- c. Where the witness is under 18, the date of birth of the witness;
- d. The country and place from where the witness will be giving evidence; and
- e. The name, occupation and relationship to the witness of any person proposed to accompany the witness and the grounds for believing that person should accompany the witness whilst giving evidence.

74. The judge advocate must not decide whether the application should be granted without first giving the opposing party (CO or accused as the case may be) an opportunity to make representations about the application<sup>379</sup>, and may give permission for the live link subject to conditions such as to place of giving evidence and presence of anyone with the witness when giving evidence<sup>380</sup>.

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<sup>373</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 14.

<sup>374</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(5).

<sup>375</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 16.

<sup>376</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 16(1).

<sup>377</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

<sup>378</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

<sup>379</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

<sup>380</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

## Legal representation

75. Both the accused and the CO have the right to be legally represented at a custody hearing<sup>381</sup>. Broadly speaking 'legal representative' means a practising barrister or solicitor<sup>382</sup>.

a. **Legal representation of person held in custody.** The person may wish to be represented by a civilian lawyer and legal aid or the duty solicitor scheme may be available to the accused for this purpose. Alternatively the accused may choose to be represented by a Service lawyer where one is available. For legal aid, see JSP 838 (Armed Forces Legal Aid Scheme). The right to be legally represented imposes no obligation on the accused to instruct a lawyer and an accused may represent himself.

b. **Legal representation of the commanding officer.** It will be normal for the CO to be represented at a custody hearing by a Service lawyer.

## Procedure

76. The strict rules of evidence do not apply to custody hearings<sup>383</sup>. Both the CO and the accused (or their legal representatives) must be heard, but otherwise the judge advocate can use any procedure that appears to them best to serve the interests of justice<sup>384</sup>. Where oral evidence is given it must be given on oath or affirmation<sup>385</sup>. Proceedings may be adjourned in order for an unrepresented accused to seek legal representation<sup>386</sup>.

## Witnesses and summonses<sup>387</sup>

77. A judge advocate may issue a witness summons requiring the witness to attend before a judge advocate and give evidence or produce a document or thing, the Summons to witness (T-SL-CUS06) ([Annex J](#)) form is to be used for this purpose. Any party may apply for a witness summons and must do so as soon as practicable after becoming aware of the grounds for doing so. Judge advocates may also issue witness summonses of their own motion. Special rules apply to applications for a witness to produce a document or give evidence about information apparently held in confidence where the document or information relates to another person. Such applications must be in writing and contain the same declaration of truth as a witness statement. In such circumstances all parties must have at least 7 days to make representations as to whether the issue of the summons is appropriate, and a hearing to determine the application may be ordered<sup>388</sup>.

## Application for an extension of custody without charge

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<sup>381</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 18(1).

<sup>382</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 2(1).

<sup>383</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(1).

<sup>384</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(2).

<sup>385</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 21.

<sup>386</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 36(1).

<sup>387</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, Schedule 1.

<sup>388</sup> Detailed provisions are in the Armed Forces (Custody Proceedings) Rules 2009/1098, Schedule 1.

78. An application for an extension of custody without charge may be made by the CO<sup>389</sup> or someone acting on their behalf using the Application for a custody hearing – person arrested and in custody after charge (T-SL-CAO02) ([Annex E](#)) form. This form is to be sent to the CAO as soon as possible and this may be carried out by fax or e-mail, or by delivering it to them, leaving it at their address or by post. A copy of the form at [Annex F](#) is to be sent to the accused or their legal representative, and this may be done by:

- a. Delivering it to the person under arrest, their legal representative or CO;
  - b. Leaving it at or posting it to the notified address of the legal representative<sup>390</sup>;
- or
- c. Fax or e-mail unless the accused or their legal representative as appropriate has indicated, in writing, that they are not willing to regard a document as duly served on them if transmitted by fax or e-mail as appropriate<sup>391</sup>.

79. The information to be provided to the CAO is<sup>392</sup>:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the person arrested and, where applicable, their rank/rate, Service number and ship/unit/establishment;
- c. The name and address of the legal representative of the person arrested, if known;
- d. The nature of the offence(s) for which the person arrested has been arrested;
- e. The relevant time (see note below);
- f. The general nature of the evidence on which the person arrested has been arrested;
- g. What inquiries relating to the offence have been made and what further inquiries are proposed; and
- h. The CO's reasons for believing the continued keeping of the person arrested in custody is justified.

Note: 'relevant time' means; in relation to a person arrested under section 67 (the general power of arrest) or section 69(1) of the Act or arrested by a civilian policeman and subsequently transferred into custody under sections 313(4), 316(3) or 317(4) of the Act, the time of the arrest; or in relation to a person delivered into custody following surrender under section 315 of the Act, the time of the surrender.

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<sup>389</sup> CO for this purpose includes a person with delegated authority to authorise custody in accordance with paragraphs 27 to 30.

<sup>390</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 4(1).

<sup>391</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 4(1).

<sup>392</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 24(2).

80. On receipt of this notification the CAO will arrange a custody hearing in accordance with the Armed Forces (Custody Proceedings) Rules 2009, rule 19.

### **Notification to the person arrested**

81. The person arrested must be notified<sup>393</sup>:

- a. That an application for an extension of custody without charge<sup>394</sup> is to be made;
- b. Of the matters at sub-paragraphs 79 f to h above; and
- c. If the person arrested has not appointed a legal representative, of the entitlement to legal representation at the hearing of the application.

The Application for a custody hearing – person arrested and in custody without charge (T-SL-CAO02) ([Annex F](#)) form should be used for this purpose.

### **Notification to CAO of custody after charge**

82. Where an accused is being kept in custody after charge the CO or someone acting on their behalf must as soon as practicable notify the CAO of that fact and inform the accused in writing that they is to be brought (this term includes by live link) before a judge advocate as soon as practicable. The Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form should be used for this purpose. The information required by the CAO and the accused is the same, namely:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, their rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date and time that the accused was charged; and
- f. The CO's reasons for believing that the continued keeping of the accused in custody is justified.

Documents can be served on a person's legal representative by document exchange (DX), fax or email, if that legal representative has given a DX or fax number or email address and has not refused to accept service by that means. If a document is served electronically, a hard copy need not be sent.

83. On receipt of this notification the CAO will arrange a custody hearing before a judge advocate<sup>395</sup>.

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<sup>393</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 24(1)(b).

<sup>394</sup> Section 101(1) of the Act.

<sup>395</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 25(4).



## **Notification that the accused has been arrested and taken into custody after charge or during proceedings**

84. Where an accused has been arrested on the orders of the CO<sup>396</sup> or on the order of the judge advocate during proceedings,<sup>397</sup> the CO or someone acting on their behalf must as soon as practicable notify the CAO of that fact. He must also notify the accused, in writing, that, as soon as practicable, they are to be brought before a judge advocate. In each case the information to be provided, ideally using the Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form, is as follows<sup>398</sup>:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, their rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date, time and place that the accused was arrested pursuant to the order or direction; and
- f. If the arrest was made<sup>399</sup>, the CO's reasons for believing that the keeping of the accused in custody is justified.

This provision as to notification does not apply where the accused is arrested in the presence of a judge advocate<sup>400</sup>.

85. On receipt of this notification the CAO will arrange a custody hearing before a judge advocate<sup>401</sup>. If the accused is already before a judge advocate when arrested, the judge advocate will usually immediately carry out a review of the necessity for custody.

## **Request by CO for a review of custody after charge**

86. Where a CO considers that the grounds for keeping an accused in custody after charge have ceased to apply, and they decide to seek a review by a judge advocate rather than immediately releasing the accused<sup>402</sup>, the CO should request for such a review to the CAO. Where such a request for review is made, the CO or someone acting on their behalf must inform the accused in writing that the review has been requested, and of the matters at sub-paragraphs f and g below. For these purposes, the Request for a review of Service custody

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<sup>396</sup> Section 110(1) of the Act (Arrest on the orders of the CO).

<sup>397</sup> Section 111(1) of the Act (arrest on the order of the judge advocate during proceedings).

<sup>398</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(2).

<sup>399</sup> Section 110(1) of the Act.

<sup>400</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(3).

<sup>401</sup> In accordance with the Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(4).

<sup>402</sup> Section 108(2) of the Act.

after charge (T-SL-CAO04) ([Annex G](#)) form should be used. The information to be supplied with the application for review is as follows<sup>403</sup>:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, their rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date on which the extant order under section 105(2) of the Act was made and the period of custody authorised by it;
- f. The circumstances which have caused the CO to consider that the grounds on which that order was made have ceased to apply; and
- g. If it appears to the CO that release conditions should be imposed by the judge advocate<sup>404</sup>.

87. If such a situation arises during the accused's trial by the court and on a day when the court is sitting, the request must be made to the judge advocate at the trial. The application should be made in writing (but may be done initially orally) and this will be done by the DSP, at the request of the CO.

## **Application for variation of release conditions**

88. Where the accused or a CO wishes to apply to vary the requirements placed upon the accused when released from custody after charge (see paragraph 59 above), the person applying for a variation must make an application to the CAO, supported by the following information<sup>405</sup>:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, their rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;
- d. The charge(s);
- e. The date of the hearing<sup>406</sup>;
- f. The circumstances which have caused the applicant to consider that any such requirement should be varied or discharged; and

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<sup>403</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 27(1).

<sup>404</sup> Section 107(3) of the Act.

<sup>405</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(1).

<sup>406</sup> Section 105(1) and any requirements imposed under Section 107(3) of the Act (including any such requirement as previously varied or discharged under s 107(4)).

- g. The variation or discharge sought.

89. Where the application is made by the CO, they or someone acting on their behalf must inform the accused that the application is being made and of the information at paragraphs 88 f and g above<sup>407</sup>. Likewise, if the accused is the applicant then they or someone acting on their behalf (usually their legal representative) must inform the CO<sup>408</sup>. If the application for review is made orally (eg. over the telephone in order to expedite a hearing) written notification must follow<sup>409</sup> using the Request to judge advocate to review release conditions (T-SL-CUS07) ([Annex K](#)) form.

90. If such a situation arises during the accused's trial by a court and at a time when the court is sitting, the request must be made to the judge advocate at the trial. The application should be made in writing (but the initial request may made orally) and this will be done by the Director of Service Prosecutions (DSP), at the request of the CO.

## Reviews

91. Where a judge advocate makes an order for custody after charge<sup>410</sup> reviews of custody by a judge advocate are required<sup>411</sup>. The judge advocate when making the initial order for custody will specify the date for review, but may decide to carry out a review on a different date when requested to do so by the CO<sup>412</sup> (in which case, if it is reasonably practicable to do so, the review will take place before the previously determined date) or it is not practicable or in the interests of justice for the review to take place on the previously determined date<sup>413</sup>.

92. A judge advocate may dispense with the requirement for a hearing to review custody, but the review must take place at a hearing if:

- a. It is the first review in relation to the accused;
- b. It has been requested by the CO because it appears to the CO that the grounds on which the order for custody was made have ceased to exist<sup>414</sup>; or
- c. The review takes place at any time whilst the accused is before the CM (i.e. during the trial)<sup>415</sup>.

93. Other than the mandatory requirements for a hearing in paragraph 92 above, reviews may be conducted on the basis of written representations by the CO or the accused where<sup>416</sup>:

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<sup>407</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(2).

<sup>408</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(3).

<sup>409</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(4).

<sup>410</sup> Section 105(2) of the Act.

<sup>411</sup> Under sections 108(1), 110(4), 111(4) and 171(2) of the Act.

<sup>412</sup> Under section 108(2) of the Act.

<sup>413</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 30(2).

<sup>414</sup> Section 108(2)(b) of the Act.

<sup>415</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(2).

<sup>416</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(3).

- a. The judge advocate is satisfied on the basis of representations made by the CO that the grounds on which the order for custody after charge was made continue to exist;
- b. Any representations by the accused do not advance any arguments of fact or law on their behalf which have not been heard previously; and
- c. The judge advocate is satisfied that there is no other cause for carrying out a review at a hearing.

94. The judge advocate cannot make this determination unless the CO makes the representation required by paragraph 93a above. It is therefore essential if an accused is to be kept in custody that the CO make appropriate representations. Both the accused and the CO are entitled to make written representations, and such representations may be with respect to<sup>417</sup>:

- a. The need for a hearing to carry out the review; and
- b. Whether the judge advocate should make an order authorising the continued keeping of the accused in custody.

Where the CO and/or accused makes representations as to review they must serve a copy on the other party and on the CAO. When the judge advocate reviews custody without a hearing they will notify the CAO of their decision, who will in turn notify the CO and the accused<sup>418</sup>.

95. A judge advocate may not on a review impose any 'release conditions'<sup>419</sup> (see paragraph 54 above) other than at an oral hearing<sup>420</sup>.

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<sup>417</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 32(2).

<sup>418</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 34(2).

<sup>419</sup> Section 107(3) of the Act.

<sup>420</sup> The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(4).

## **Part 6 - Custody - Miscellaneous matters**

### **General procedures**

96. Persons authorised to be held in Service custody should normally be kept in licensed custodial facilities where the provisions of JSP 837 (Code of Practice for the Management of Personnel in Service Custody) apply and, where applicable, the Service Custody and Service of Relevant Sentences Rules 2009 are observed. Where, due to the exigencies of Service life, such custodial facilities are not available (for example, onboard Her Majesty's ship/submarine away from base port) other secure accommodation may be used, preferably in Service premises. In these circumstances, close supervision will be required to reduce the risk of self-harm and escape, and JSP 837 (Service Code of Practice for the Management of Personnel in Service Custody and Committal to Service Custody Premises and Civil Prisons) is to be followed as far as practicable. Where licensed Service custody facilities are not used, it is advisable to keep a record of what efforts were made to secure such facilities and why they were not available.

### **Personnel taken into Service custody abroad**

97. Reference should be made to JSP 837 (Code of Practice for the Management of Personnel in Service Custody) in all situations in which personnel are held in custody abroad.

### **Individuals under medical care**

98. When an individual who it is necessary to retain in custody is sent to a Service hospital or other establishment within the Defence Secondary Care Agency as a patient, their CO is to ensure that the grounds for retention in custody are stated in writing to the CO of the facility under whose command the individual may now lie. The hospital is to be given as much advance warning of the arrival of such a patient as is practicable.

99. Where a Service person is admitted to a Service hospital whilst in custody or undergoing a sentence of detention, it is the responsibility of the unit sending the person in custody to the hospital to provide guards throughout the full period of hospitalisation. Where a person is held in Service custody or detention at MCTC and requires to be sent to a Service medical facility for treatment, MCTC will request guarding assistance from their parent unit.

100. Where it is necessary to retain someone in custody while undergoing treatment at a civil hospital, their CO is to make the arrangements necessary for their custody in liaison with the hospital management. Where a person is held in Service custody or detention at MCTC and requires to be sent to a civil hospital MCTC will request guarding assistance from their parent unit.

### **Escorts**

101. Escorts provided for persons held in Service custody are to be given written orders setting out their duties in accordance with JSP 837 (Code of Practice for the Management of Personnel in Service Custody).

## **Transport of persons in Service custody**

102 Transport of persons in Service custody is to be carried out in accordance with the details contained in JSP 837 (Code of Practice for the Management of Personnel in Service Custody).

## **Part 7 - Transitional guidance**

103. This part outlines the main transitional provisions related to Part 3 of the Act contained in the section 380 Order the Armed Forces (Custody Proceedings) Rules 2009 and the Armed Forces (Custody Without Charge) Regulations 2009. The basic aim of the transitional arrangements for Part 3 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie before 31 October 2009).

### **Authorisation of pre-charge custody and custody without charge**

104. Where pre-charge custody had been authorised before commencement in accordance with sections 74 of AA 1955 or AFA 1955 or section 45 of NDA 1957 and that person is in custody on commencement, the custody remains valid and shall be treated as if the person was arrested under section 67 of AFA 2006 and was custody authorised under section 98(1) of that Act<sup>421</sup> (custody without charge).

105. Where authorisation of custody has been made under the Custody and Summary Dealing (Army) Regulations 2006, the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000 or Naval Custody Regulations 2000, that authorisation remains valid on commencement<sup>422</sup> and a delegation of a CO's powers and functions under the previous regulations will be treated as a valid delegation under the 2009 Regulations<sup>423</sup>.

106. Any further periods of custody without charge must be granted in accordance with the 2009 Regulations and care should be taken to ensure that a person who was a delegated officer under the old regulations remains so under the new. It should also be noted that the coming into force of the Armed Forces (Meaning of Commanding Officer) Regulations 2009 may, in certain very limited circumstances, mean that the CO has changed on commencement.

107. The maximum periods of custody without charge that may be authorised remain the same. A judge advocate has the power under section 101(1) of the 2006 Act to extend custody without charge of a person arrested under the SDAs in the same way that they can for a person arrested after commencement<sup>424</sup>.

108. The flow diagram below should provide assistance and in cases of doubt, staff legal advice should be sought.

### **Applications to a judge advocate**

109. Where, after commencement, it is necessary to apply to a judge advocate (previously a judicial officer) for an extension of custody without charge or for post charge custody, this should be done in accordance with the Armed Forces (Custody Proceedings) Rules 2009 (SI 2009/1098), irrespective of whether the individual was arrested under the 2006 Act or the SDAs.

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<sup>421</sup> Article 35 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>422</sup> Article 36(2) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>423</sup> Paragraph 3 to the Schedule to the Armed Forces (Custody Without Charge) Regulations 2009/1097.

<sup>424</sup> Article 37 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

## **Authorisation of post charge custody and custody after charge**

110. Any order by a judicial officer under sections 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957 authorising post charge custody remains valid on commencement and will be treated as an order under section 105(2) of the 2006 Act<sup>425</sup> (custody after charge).

## **Certificates of transfer from civilian authorities**

111. A certificate issued under section 187(4A) of the Army Act 1955 or the Air Force Act 1955 or section 109(4) of the Naval Discipline Act 1957([3]) will be valid as if made under the 2009 Regulations<sup>426</sup>.

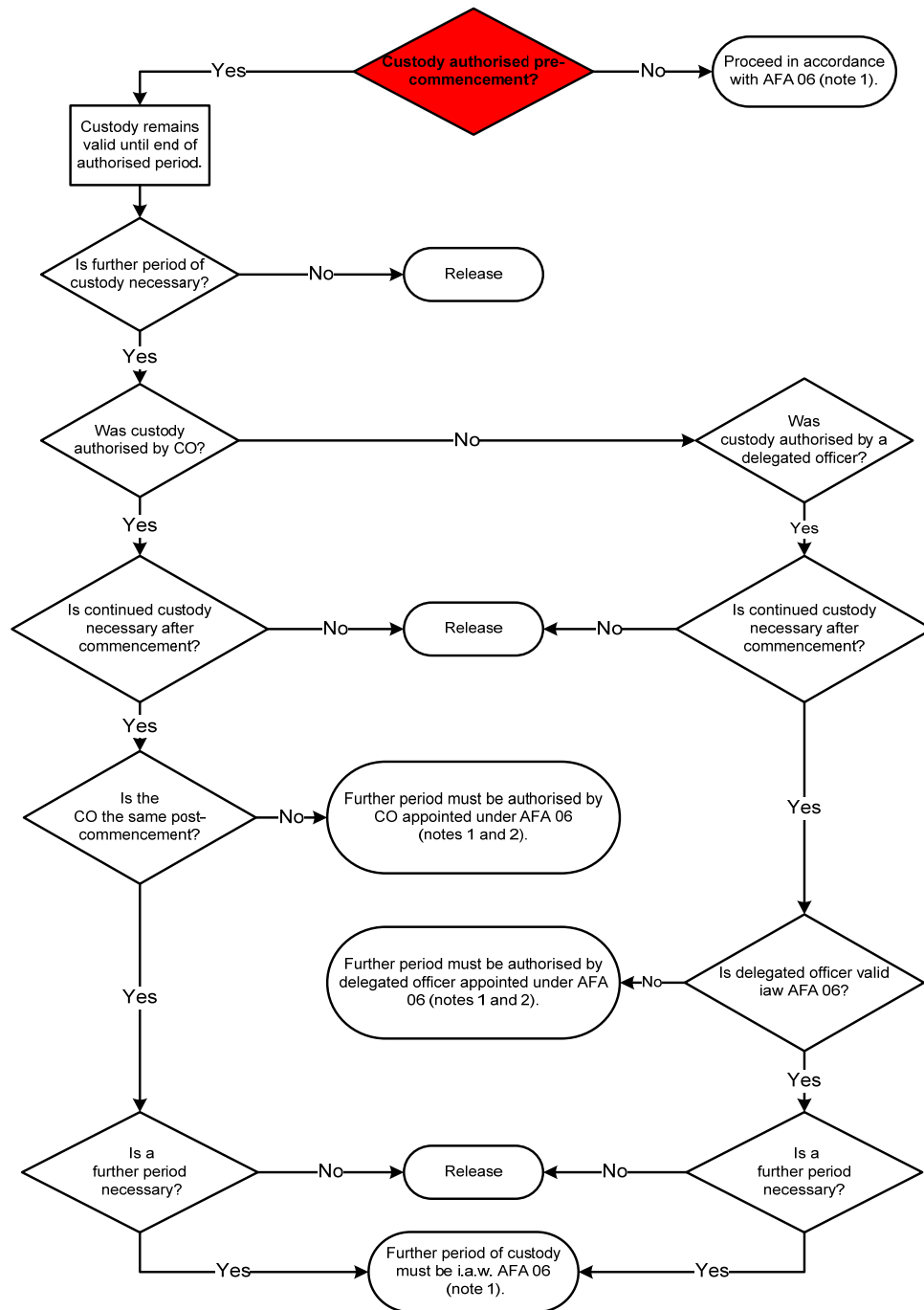
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<sup>425</sup> Article 40(2) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>426</sup> Regulation 4 of the Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.



## Transitional guidance - authorisation of pre-charge custody and custody without charge



### Notes:

1. The Armed Forces (Custody Without Charge) Regulations 2009 SI 2009/1097.
2. The Armed Forces (Meaning of Commanding Officer) Regulations 2009 SI 2009.

## GUIDANCE ON THE ROLE OF THE ASSISTING OFFICER

1. An 'assisting officer' will be appointed to assist an individual held in custody without or after charge.

### Role

2. ***Custody without charge.*** An assisting officer is appointed to assist a person who is retained in custody without charge in all matters relating to that custody. His duty is to represent the best interests of the person held in custody and they should not be influenced by the chain of command. In particular, they are to ensure that the person in custody is aware of their rights as outlined in 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#) (Investigation, charging and mode of trial). While in custody without charge, a person in custody may make representations to the arresting officer (before they report the arrest to the CO) and later to the CO (where the report has been made) to request their release and state the reasons for believing they should be released. He may also make any other representations regarding their confinement in custody. These representations will be in writing and it is an important role of the assisting officer to help the person in custody to prepare these representations. The person in custody may request that they be permitted to make oral representations to the CO, the CO may refuse the request. A CO may also require a person in custody to make any representations in person even though the person in custody has not requested to do so. It is for the assisting officer to help the person in custody in these matters and safeguard their interests. Where a person in custody is required to appear before a judge advocate, it is very likely that the suspect will have appointed a legal representative to advise them and represent them at a hearing in front of the judge advocate. Where a person appoints a legal representative the assisting officer may, if required, act as a liaison between that representative and the Service. He should secure any publications or regulations required by the representative with prior reference to the relevant unit staff. With the permission of the judge advocate, the assisting officer may attend a hearing in front of that judge advocate; however, they are not to take part in any proceedings unless directed to by the judge advocate.

3. ***Custody after charge.*** If an assisting officer has not already been appointed then they could be appointed to assist a person in custody who is retained in custody after charge or at the time of charge. The judge advocate may authorise further custody for periods no longer than eight days between reviews, however if the person in custody is legally represented and consents the judge advocate may authorise a person to be kept in custody for up to twenty-eight days between reviews. Where a hearing to consider a review of custody is not required (the person in custody does not have to appear in person in front of the judge advocate) written representation will be required and it is for the assisting officer to aid the person in custody in preparing the representations. Where a person in custody is required to appear before a judge advocate, it is very likely that they will have appointed a legal representative to advise them and represent them at a hearing in front of the judge advocate. Where a person in custody appoints a legal representative, the assisting officer may act as a liaison between that representative and the Service. He should secure any publications or regulations required by the representative with prior reference to the relevant unit staff. With the permission of the judge advocate, the assisting officer may attend a hearing in front of that judge advocate; however, they are not to take part in any proceedings.

## **Appointment of an assisting officer**

4. In accordance the Armed Forces (Custody without Charge) Regulations 2009 a person in custody is entitled to the appointment of an assisting officer to advise them and to represent them at a custody hearing. The assisting officer is an important role and can provide valuable assistance to the person in custody. He is to perform their duties entirely independently of the CO. The unit is to do everything it can reasonably do to facilitate the assisting officer's functions.

5. Subject to the exclusions outlined in paragraph 7 below, the person in custody may ask for any suitable person to assist them (see paragraph 4). However, that person is under no obligation to help if they do not wish to do so. Where the person in custody has difficulty in finding a suitable person to represent them, they may request the assistance of the CO. In this event, the CO is to provide a pool of at least 2 potential nominees for this purpose and allow the person in custody a free choice from the pool. The person in custody is under no obligation to nominate an individual from the pool. It will be the duty of the CO to arrange for the release of the requested individual from their normal duties unless there are operational reasons not to do so.

6. A person may not be an assisting officer unless they:

- a. Are a Service person;
- 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.

7. It would be inappropriate for people in the following categories to consent to be nominated as assisting officers:

- a. Subordinate commanders who have previously heard the evidence against the accused.
- b. Members of the Unit's administrative staff who have been personally involved in advising the CO or Subordinate commander about the case.
- c. A person who has participated in the investigation and is likely to be called as a witness for the CO or for the accused.
- d. Lawyers. The only circumstances in which a lawyer would appear at a summary hearing is a RN lawyer in their capacity of a Divisional Officer.

Note: Professionally qualified officers such as doctors, padres and chaplains are not automatically excluded from acting as assisting officers. It is for them to decide whether to do so would compromise their professional duties. Service Police may act as an assisting officer with the same proviso.

## **Brief for an assisting officer**

8. You have been asked to act as an assisting officer for a person in custody. In accepting the responsibility of becoming the assisting officer, your task is to advise and assist the person in custody in preparing. You may seek advice from any source. However, you will not be given access to any privileged correspondence in relation to the case between the

unit and HA, or the DSP or staff legal advisers. The conversations you have with the person in custody and/or their legal adviser are confidential and you should normally not disclose any of the information to the chain of command or anyone else without the person in custody's permission. If in doubt seek legal advice.

9. Your individual tasks and responsibilities are as follows:

- a. ***Understand the charge.*** You should identify the offence under investigation or the charge(s) that is being brought against the person in custody and read about it in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) or [Chapter 8](#) (Criminal conduct offences).
- b. ***Understand the procedures.*** You will need to be sufficiently aware of the hearing procedures in order that you can concentrate on what is being said rather than the mechanics of the hearing. You will need to read Part 5 of [Chapter 5](#) (Custody).
- c. ***Before the hearing.***
  - (1) **Procedure.** Ensure the person in custody understands the procedure. Advise the person in custody that they may seek legal advice before the hearing. Details of the duty solicitors' scheme should be available from unit staffs. Legal advice from Service lawyers may also be available. The assisting officer is to advise the person in custody whether they are able to get free legal advice by contacting a staff lawyer if they themselves require guidance in this respect. A legal adviser may be present during the hearing itself.
  - (2) **Grounds for custody.** Ensure that the person in custody understands on what basis an application for custody is being made.
  - (3) **Grounds for opposing application.** Ask the person in custody if they oppose the application and what reasons they have for doing so, ensure that where the person in custody believes that the proper grounds for custody do not exist that these reasons are brought to the attention of the judge advocate (via their legal representative if they have one).
- d. ***After the hearing.*** After the hearing, ensure that the person in custody understands the outcome and in particular any conditions of their release.

## Chapter 6

### Investigation, charging & mode of trial

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## Chapter 6

### Investigation, charging and mode of trial

#### Introduction

1. The purpose of this chapter is to provide those responsible for administering discipline with guidance on the investigation of Service offences, the selection, drafting and bringing of a charge and deciding on the appropriate forum for trial.
2. The disciplinary system in the Armed Forces Act 2006 (the Act), creates a two tier procedure, the aim of which is to support the chain of command and retain the role of the Commanding Officer (CO) at the centre of Service discipline. There are two ways in which a Service offence can be dealt with in the first instance; either summarily or by a Service court (the Court Martial (CM) or Service Civilian Court (SCC)). How a charge is dealt with will depend upon the nature of the offence and also whether the accused is a Service person (i.e. a person subject to Service law<sup>427</sup>) or a relevant civilian (i.e. a civilian subject to Service discipline)<sup>428</sup>.
3. Disciplinary action<sup>429</sup> is action taken by the chain of command using statutory powers. It may be taken where criminal or non-criminal conduct offences are alleged and where it is considered to be in the Service interest to proceed with disciplinary action, for the purpose of maintaining Service discipline.
4. In the interest of brevity, the term CO will be used throughout this chapter to include the CO and subordinate commander, unless there is a reason to specify one or the other. In rare instances, there may be a need to make a bespoke appointment of a CO for a particular case, see [Chapter 2](#) (Meaning of a commanding officer). This will need to happen, for example, if the CO is a witness or there is not the necessary two rank separation between the CO and the accused. If a bespoke appointment is made then everyone connected to the case should be made aware of whom the relevant CO is.
5. ***The use of the term Service person for this chapter only.*** The term Service person is used in this chapter to cover a reference to both:
  - a. A member of the regular forces at all times or reserve forces<sup>430</sup> who falls into the categories described in the glossary and therefore is subject to Service Law; and
  - b. A member of the reserve forces who does not fall into the categories described in the glossary (for example the person is not training or on operations).
6. When considering a reference in this chapter to a Service person, it will be necessary to check the related provisions of the legislation as to whether that reference applies to a member of a regular and reserve force (see paragraph 5a above) or whether it applies to a member of the reserve forces, for example who is not training or on operations, see

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<sup>427</sup> Section 367, 368 & 369 of the Act.

<sup>428</sup> See [Chapter 3](#) (Jurisdiction and time limits).

<sup>429</sup> Major and minor administrative action may be considered instead of disciplinary action. Minor administrative action is dealt with under JSP 833. You should refer to single-Service guidance for major administrative action.

<sup>430</sup> Section 367 of the Act.

paragraph 5b above. If in doubt, staff legal advice should be sought. Also see [Chapter 3](#) (Jurisdiction and time limits).

7. **Chapter structure.** This chapter is divided into 7 Parts as follows:

- a. **Part 1 – General principles.** Provides general guidance to all users of this chapter.
- b. **Part 2 – Offences overview.** Provides an overview of the categories of Service offences to help the CO correctly identify the category of offence and decide on the appropriate method of investigation.
- c. **Part 3 – Investigation.** *Provides guidance on how an investigation should be conducted.* This will depend upon whether the investigation is undertaken by the Service Police or a CO.
- d. **Part 4 - Offences capable of being heard summarily.** Provides guidance in relation to offences that may be heard summarily, which are listed in Annexes [B](#) and [C](#).
- e. **Part 5 - Offences triable by CM or SCC.** Provides guidance in relation to the procedure which should be followed when a charge is to be tried at CM. This might be because:
  - (1) The offence is not one which can be tried summarily (in other words, it is not an offence listed in Annexes [B](#) and [C](#));
  - (2) The accused is a relevant civilian and so cannot be tried by a CO;
  - (3) The accused elects trial by CM;
  - (4) The CO refers the charge to the DSP; or
  - (5) The accused is of or above the rank of commander, lieutenant-colonel or wing commander.
- f. **Part 6 - Offences listed in Schedule 2 or committed in prescribed circumstances.** Provides guidance in relation to offences listed in Schedule 2 of the Act (see [Annex D](#)) or committed in prescribed circumstances<sup>431</sup> (see [Annex E](#)).
- g. **Part 7 - Administrative and welfare responsibilities.** Provides general guidance on administrative and welfare responsibilities for victims and the accused.

8. **Statutory provisions.** The statutory provisions relating to investigation and charging can be found at sections 113 -128 of the Act, which are supplemented by the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. These can be found with the Act in [Volume 3](#) of the MSL.

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<sup>431</sup> Regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

## Part 1 - General principles

### Investigation

9. The purpose of an investigation is to establish the facts and gather all available evidence in order to determine whether and by whom an offence may have been committed. In all circumstances, a CO must investigate the incident appropriately<sup>432</sup> (see paragraph 30). An investigation should be conducted diligently and without undue delay.

10. Where an allegation is made or an incident comes to light, a CO, at the outset, is to consider whether they are under a legal obligation to ensure that the Service Police are made aware of the matter<sup>433</sup>. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that an offence listed in Schedule 2 to the Act ([Annex D](#) and paragraph 23d) has or may have been committed by a person under his command, or that prescribed circumstances exist (see Annex E and paragraph 23e), the CO must ensure that the Service Police are made aware as soon as reasonably practicable.

11. A CO has a duty to ensure that all offences are investigated appropriately. The CO will have to decide what investigation is appropriate. Whether there should be an investigation and (if so) whether it should be by the Service Police or by means of a CO's investigation depends on a number of factors, including (in addition to those mentioned in paragraph 10 above):

- a. The possible seriousness of the matter investigated.
- b. The possible complexity of the facts.
- c. Whether an offence, which may have been committed, may be heard summarily or tried by a Service court<sup>434</sup>.

The CO's responsibility can always be satisfied by ensuring that the Service Police are aware. This list is not exhaustive and paragraph 30 provides more detail.

12. On conclusion of an investigation by the Service Police, a report will be provided. If a charge or charges are recommended they will be contained in a Service Police report. The Service Police report will be sent to the CO and/or the Director of Service Prosecutions (DSP) depending on the offence(s) for which there is evidence to bring a charge. Any case in which there is enough evidence to charge an offence, and that offence is either listed in Schedule 2 to the Act or is one in relation to which prescribed circumstances exist, must be sent directly to the DSP. Other offences will be sent to the CO of the suspect or suspect(s). Service Police reports, other than those where there is enough evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances, should be sent to the CO.

13. On conclusion of a CO's investigation the officer conducting the investigation may suggest a charge. The CO will then decide whether he should bring a charge, involve the Service Police in the case, refer the case to the DSP, deal with the matter administratively or take no action.

### Representation

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<sup>432</sup> Section 115 of the Act.

<sup>433</sup> Section 113 and 114 of the Act.

<sup>434</sup> See paragraph 2.

14. The accused is entitled to the appointment of an accused's assisting officer (AAO) to advise and represent them at a summary hearing. The AAO fulfils 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 reasonably possible to facilitate the AAO's functions. The accused may nominate an AAO see Annexes F and G to [Chapter 9](#) (summary hearing and activation of suspended sentences of Service detention). An individual may only be nominated as an AAO if:

- a. They are a Service person<sup>435</sup> and remains 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.
- c. He consents to the nomination.

### ***Service victims' code of practice***

15. The CO, DSP and Service Police need to be aware of, and comply with, the policy requirements contained within the Code of Practice on Services to be provided by the Armed Forces to Victims of Crime (see DIN 200801-212) which is modelled on the equivalent Home Office code. The Services' code is tailored to meet the requirements of the armed forces (for further detail see paragraph 200).

### **Mode of trial**

16. Where a CO has received an investigation report and a charge is likely, the CO should consider the most appropriate forum for the case to be heard. This will either be a summary hearing or CM trial<sup>436</sup>. This forms part of the process of deciding the mode of trial.

17. A number of factors may be relevant in reaching such a decision, but broadly speaking, the CO will usually need to consider:

- a. The adequacy of his powers of punishment;
- b. The seriousness of the alleged offence; and
- c. The complexity of the case.
- d. If it is part of an incident where some other offences have been referred to the DSP

18. If he decides to hear the case summarily, the CO will go on to complete the charging procedure. Once a charge has been brought by the CO, he should bear in mind that he has the power to refer any charge to the DSP at any time before a finding has been recorded at summary hearing. For example, during the course of the hearing, the CO may decide that he has insufficient powers to deal with the charge, or unforeseen legal complexities may arise.

### **Charging**

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<sup>435</sup> Subject to Service law.

<sup>436</sup> For relevant civilians see Part 5 of this chapter.

19. A charge is brought when a charge sheet has been signed by the CO of the accused and a copy of the signed charge sheet handed to the accused. The charge should reflect the seriousness of the conduct alleged and be accurately stated in the charge sheet (see paragraphs 100 and 101).

### **Local acting ranks or rates (RN), local ranks (Army and RAF) and acting ranks or rates**

20. When an offender who holds a local acting or acting rate or rank is to be charged he must be treated as holding the substantive rate or rank as that acting rate or rank which he holds at the time of the summary hearing. Local ranks simply hold the next higher rank but are not paid at that rank. Therefore for disciplinary purposes they will be treated as holding their substantive rank<sup>437</sup>.

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<sup>437</sup> See RN BR 1066, Army QR (1975) paragraph 6.151 and RAF AP 3392 Volume 2.

## Part 2 - Offences overview

21. For the purposes of this chapter, offences are divided into several categories and depending on the category, the investigation and the subsequent actions to be taken may differ. The category of the possible offence affects who will investigate<sup>438</sup> it and also whether it can be dealt with summarily or whether it has to be tried by CM<sup>439</sup> or SCC<sup>440</sup>. Further explanatory notes on individual offences, including sample charges are to be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

22. It is important that a CO considers the possible offence and the category into which it falls at the outset, so that the appropriate investigation can be initiated. The CO must ensure that the Service Police are made aware as soon as reasonably practicable of a potential Schedule 2 offence and of the existence of prescribed circumstances. In other cases, the CO may choose to initiate an investigation into the matter or refer it to the Service Police. Where a CO's investigation has been initiated, if new evidence comes to light that indicates a more serious offence may be involved than first thought, the CO should reconsider whether to make the Service Police aware. When he does so, the Service Police have control of the case until the investigation is completed.

23. **Categories of offences.** The following categories will affect the decision on charge and the mode of trial:

a. **Offences that can be heard summarily**<sup>441</sup>. Offences that may always be heard summarily by the CO are listed at [Annex B](#). There are a small number of more serious offences which can be heard summarily by a CO, if he has permission from HA. These offences are listed at [Annex C](#) (see Part 4).

b. **Offences (other than those at sub-paragraphs d and e) that cannot be heard summarily.** Any offence can be tried by CM<sup>442</sup>. Offences that cannot be heard summarily must be tried at CM. There are criminal conduct offences which cannot be heard summarily but which do not fall within the list contained in Schedule 2 of the Act ([Annex D](#)) or offences committed in prescribed circumstances ([Annex E](#)), for example; burglary or section 20 wounding (see Part 5).

c. **Offences committed by relevant civilians.** Offences committed by a relevant civilian can only be tried by the SCC or, if an 'indictable-only' offence<sup>443</sup>, by CM. The procedure for dealing with a relevant civilian is the same as for a CM only offence (see (b) above and Part 5).

d. **Schedule 2 offences.** These offences are inherently serious disciplinary offences and are listed at [Annex D](#) and can only be tried by CM (see Part 6); for example, mutiny and desertion, and serious criminal offences, such as murder, manslaughter and certain sexual offences.

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<sup>438</sup> Schedule 2 offences and offences which fall within prescribed circumstances must be referred to the Service Police.

<sup>439</sup> The CM has jurisdiction to try any Service offence see section 50(1) of the Act.

<sup>440</sup> The SCC has jurisdiction to try any service offence committed outside the British Islands by a civilian unless it is an indictable only offence which can only be dealt with by CM. See section 51 of the Act and [Chapter 3](#) (Jurisdiction and time limits).

<sup>441</sup> Where it is alleged that the accused attempted to commit an offence listed in Annex B, the CO may hear the case summarily, provided it is not an attempt to commit a criminal conduct matter. Any attempt to commit an offence listed in Annex C may be dealt with summarily with permission.

<sup>442</sup> Section 50(1) of the Act.

<sup>443</sup> Within the special meaning under section 51(4) of the Act.

e. **Offences committed in prescribed circumstances.** The prescribed circumstances in which offences may be committed are detailed in [Annex E](#). Broadly speaking this includes death in custody, bullying or abuse of position. The individual incidents may themselves only amount to an offence capable of ordinarily being heard summarily, but the circumstances in which it was committed mean that the case must be referred to the DSP for a decision on the charge and the mode of trial (see Part 6).



## Part 3 – Investigation

### Introduction

24. The starting point of any investigation is the point at which an allegation or incident comes to light. Preliminary enquiries will assist the CO in considering whether an offence may have been committed which may warrant disciplinary action, whether the Service Police should be informed or whether the matter would be more suitably dealt with by his own investigation. In less serious cases, the CO may decide that administrative action is appropriate or that the matter requires no action.

25. The CO is under a legal duty to ensure that the Service Police, as soon as is reasonably practicable, are aware of an offence or a suspected offence under Schedule 2 or of the existence<sup>444</sup> of prescribed circumstances<sup>445</sup>. In all other cases, the CO is under a duty to ensure that the matter is investigated appropriately<sup>446</sup>, whether by the Service Police, by a CO's investigation or by a referral to the civil authorities. The latter will depend upon the issue of jurisdiction see [Chapter 3](#) (Jurisdiction and time limits). In relation to relevant civilians it is recommended that the Service Police conduct the investigation.

26. If the CO has to or wishes to contact the Service Police, a person may be authorised to contact the Service Police on his behalf for this purpose, but responsibility for ensuring that the Service Police are made aware remains with the CO<sup>447</sup>. It is then a matter for the Service Police as to whether they investigate the allegation or circumstances and what form the investigation should take.

27. Once the Service Police, civilian police or MOD police are investigating any allegation or incident, the CO has no power to dispose<sup>448</sup> of the case. This will include those circumstances where the Service Police are investigating because the CO chose to refer the case to the Service Police or because they were under a duty to ensure that they were aware of it. In such cases, a CO cannot require the Service Police to stop or suspend the investigation and he cannot at this stage bring a charge or refer the case to the DSP.

### Jurisdiction

28. Within the United Kingdom jurisdiction in respect of offences committed by Service persons may lie with the Service authorities under the Act or with both the Service authorities and the civilian authorities under the ordinary law of the relevant part of the United Kingdom. In the second case, there are a number of established procedures that apply<sup>449</sup>. In cases where such issues arise, COs should liaise with the Service Police and seek staff legal advice.

29. **Concurrent jurisdiction.** In many cases there may be concurrent jurisdiction; this means that cases could be investigated or prosecuted by Service, UK civilian or foreign authorities. Decisions on who exercises jurisdiction will have to take into account the principles contained in relevant protocols, in Status of Forces Agreements (SOFA) or in

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<sup>444</sup> Which does not all depend on whether it is likely that an offence has been committed

<sup>445</sup> Sections 113 and 114 of the Act.

<sup>446</sup> Section 115(4) of the Act.

<sup>447</sup> A CO is able to delegate any of his functions under Part 5 of the Act to a subordinate commander see regulation 16 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

<sup>448</sup> See paragraph 76 for the meaning of dispose.

<sup>449</sup> Copies of the extant protocols can be obtained from DDefSy-Def Policing at MOD.

memoranda of understanding (MOU). Decisions involving foreign authorities will require prior consultation with the appropriate Service authorities<sup>450</sup>. The Service Police will need to consider jurisdiction before an allegation or offence can be investigated. In some cases they may (if the necessary requirements are met) exercise some of their powers, such as the power of arrest, before jurisdiction is confirmed. For information on arrest see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) and for detailed guidance on jurisdiction see [Chapter 3](#) (Jurisdiction and time limits).

## Deciding who should investigate

30. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that a Schedule 2 offence may have been committed by someone whose CO they are, or if he becomes aware of any of the prescribed circumstances referred to in [Annex E](#), he must ensure that the Service Police are made aware as soon as is reasonably practicable. Once the Service Police have been notified in these circumstances, the CO may take no further disciplinary action<sup>451</sup> in relation to the allegation or circumstances unless it is referred back to them by the Service Police or the DSP. In all other cases, the CO may conduct his own investigation, see paragraph 32 below, or ensure that the Service Police are made aware of the matter as soon as is reasonably practicable<sup>452</sup> so that they can investigate, see paragraph 40 below. In relation to those other cases, when reaching his decision as to what would be an appropriate investigation, the CO should take into account a number of factors including:

- a. The apparent seriousness of the matter investigated; for example, whether a criminal conduct offence may be appropriate see [Chapter 8](#) (Criminal conduct offences). If so, consideration should be given to referring the matter to the Service Police for investigation, as soon as reasonably practicable;
- b. The complexity of the alleged conduct; for example, whether it is a simple and straight-forward case, as is likely in cases of AWOL or conduct to the prejudice of good order and discipline. If so, the CO may wish to direct the investigation. If, however, identification is an issue, the investigation is likely to involve a search for evidence, or the investigation may require a multi-agency approach such as is necessary in cases involving children, the SP should investigate if at all possible;
- c. Whether it is likely that any offence which may be charged can be tried only by CM/SCC; for example, where the suspect is a relevant civilian, or it involves an allegation of burglary (section 9 of the Theft Act 1968) or an offence contrary to the Air Navigation Order (section 49 of the Act), which are triable at CM only. As the rules of evidence apply in any Service court, the Service Police should investigate the matter; and
- d. The complexity of investigating two or more incidents or the alleged conduct of two or more suspects, each person's conduct in relation to each incident is to be regarded as giving rise to a separate case<sup>453</sup>.

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<sup>450</sup> HA should be consulted and the Director of Service Prosecutions (DSP) for more serious cases.

<sup>451</sup> He may however feel it appropriate to take some form of administrative action or posting if appropriate. If he does so he should be careful to ensure that he does not prejudice any disciplinary action in relation to that offence. If in doubt advice should be sought.

<sup>452</sup> Section 115(4) of the Act.

<sup>453</sup> Section 117(2) of the Act.

31. It may be necessary, in exceptional circumstances, to conduct initial investigations in those cases where normally the Service Police should carry out the investigation. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and investigate, for example, an SSBN on patrol. If this situation arises, the CO should be aware that he has departed from the normal procedure and should bring the Service Police into the investigation as soon as is reasonably practicable.

## CO's investigation

32. A CO may direct anyone under his command to investigate a matter on his behalf, subject to the limits at [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) on powers of investigation which apply in the absence of the Service Police. There will be occasions when it would be essential or at least preferable for the matter to be investigated by those who have specific training; however, there may be occasions when it may be sufficient to rely on other trained personnel, especially RN coxswains. Guidance on the conduct of a CO's investigation is contained at [Annex F](#). If the investigation reveals a potential Schedule 2 offence or the existence of prescribed circumstances then the CO must ensure that the Service Police are made aware. If the suspected offence is triable only at CM or SCC then subject to operational constraints, consideration should be given to referring the investigation to the Service Police. They should take over the investigation as soon as is reasonably practicable.

33. ***Rights of the suspect.*** These are outlined in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to a suspect's attention as soon as reasonably practicable at the commencement of the investigation, to ensure that they are aware of his rights.

34. ***Dealing with evidence.*** If evidence comes to light that suggests that an offence under Schedule 2 may be involved or that prescribed circumstances exist, the Service Police must be notified as soon as is reasonably practicable. Once the Service Police have been notified in these circumstances, the CO may take no further disciplinary action<sup>454</sup> in relation to the allegation unless it is referred back to them by the Service Police or the DSP (see paragraph 87). A CO may authorise any other person to notify the Service Police where an investigation is required<sup>455</sup>. If during the course of a CO's investigation the Service Police inform the CO that they are investigating the matter, the CO has no further power to investigate the matter or take any further action, unless and until the case is referred to them<sup>456</sup>.

35. ***Advice during investigation.*** Personnel conducting CO's investigations may consult the Service Police and may seek advice from the relevant staff legal adviser or HA staffs. RN coxswains should, however, seek advice from the relevant Naval Provost Marshal in the first instance.

36. ***Findings of a CO's investigation.*** The findings of the investigation are to be provided to the CO and should normally contain:

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<sup>454</sup> He may however feel it appropriate to take some form of administrative action or posting if appropriate. If he does so he should be careful to ensure that he does not prejudice any disciplinary action in relation to that offence. If in doubt advice should be sought.

<sup>455</sup> Section 113 of the Act.

<sup>456</sup> Section 119 of the Act.

- (i) a. All witness statements;
- (ii) b. All other records of evidence;
- (iv) c. A list of all exhibits and details as to where these exhibits are held and can be inspected;
- (vi) d. All documentary exhibits;
- (viii) e. The suspect's disciplinary records; and
- (x) f. A suggested charge<sup>457</sup>, if appropriate.

(b)

**(c) 37. *Action by CO after CO's investigation.*** Where the findings of an investigation indicate that an identified person in his command may have committed a Service offence, the CO will decide whether to charge, refer the case to the DSP, or to make the Service Police aware:

(d)

a. If the CO proposes to bring a charge and it is capable of being dealt with summarily, and c. below does not apply the CO should follow the procedure at Part 4 (Offences capable of being heard summarily) of this chapter;

(e)

b. If the CO considers that an appropriate charge may be one that is triable only at CM/SCC and c. below does not apply, the CO should follow the procedure at Part 5 (Offences triable by CM or SCC) of this chapter; or

(f)

c. If the result of the investigation is that the CO has a duty in respect of a Schedule 2 offence or prescribed circumstances, the CO must inform the Service Police and then follow the procedure at Part 6 (Offences listed in Schedule 2 or committed in prescribed circumstance) of this chapter.

38. Where the result of the investigation is that there is insufficient evidence or no evidence to charge a Service offence and the CO does not propose to involve the Service Police, the CO should notify the former suspect of the outcome of the investigation. When doing so, the CO should, if appropriate, take care not to preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Having taken appropriate advice, the CO may wish to consider administrative action.

39. Whether disciplinary action is to be taken or not, the Victims Code should be complied with, as appropriate (see paragraph 200).

## Investigation by Service Police

40. When conducting an investigation the Service Police act independently of the chain of command. At the conclusion of the investigation, the Service Police report to the DSP or a CO. The Service Police may consult the DSP on any case and they should consult with the DSP when investigating possible Schedule 2 offences and offences committed in prescribed circumstances.

41. An investigation by the Service Police can be initiated:

- a. Having independently received a complaint or information;

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<sup>457</sup> This is not binding on the CO. The CO makes the final decision on what summary charge, if any, should be brought.

- b. On receiving information from a CO;
- c. Having been notified by a CO of under his duties relating to a Schedule 2 offence or the existence of prescribed circumstances;
- d. Having witnessed an offence being committed;
- e. On receipt of any report made by the civil police. Such reports should be forwarded to the Service Police, who will prepare a Service Police report.

42. **Conduct of the investigation.** Investigations by the Service Police must comply with the relevant provisions of the Act, subordinate legislation under the Act and other applicable legislation (such as the Police and Criminal Evidence Act 1984 (Application to the Armed Forces) Order 2009). In addition, the Service Police should also comply with the JSP 397 (Codes of Practice for the Service Police), governing, among other things, the manner in which investigations are conducted. The codes deal with the exercise by the Service Police of their powers to stop and search, to arrest and to search premises and with the treatment, questioning, and identification of suspects and the recording of interviews. Detailed guidance on arrest, stop and search is contained in [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention).

43. **Advice during investigation.** Whether the relevant advice should be sought from the DSP or the staff legal adviser depends on the subject matter of the advice. On matters which may be referred to the DSP by the Service Police, they should normally obtain legal advice from the DSP.

44. **Rights of accused.** The rights of a person arrested or charged with an offence are outlined in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to the attention of a person arrested or charged as soon as reasonably practicable. If a person is being held in custody<sup>458</sup>, or is to be interviewed under caution, free legal advice<sup>459</sup> may be available under the legal advice scheme or from Service lawyers (see JSP 838 Armed Forces Legal Aid Scheme).

45. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of questions put to them or of his replies, an appropriate adult should be present during questioning. This may be:

- a. A relative, guardian or other person responsible for his care or custody;
- b. Someone who has experience of dealing with mentally disordered or mentally incapable persons (such as an approved social worker as defined by the Mental Health Act 1983 or a specialist social worker), but is not a Service policeman or employed by the Service Police; or
- c. Failing either of the above, some other responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

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<sup>458</sup> See [Chapter 5](#) (Custody).

<sup>459</sup> The suspect is handed MOD form 811A entitled 'Notice to suspect', which sets out his right to legal advice and how it is obtained. Further guidance is also contained in JSP 838 (Armed Forces Legal Aid Scheme).

46. **Suspect 16 years old or of a lower age.** Where a suspect is less than 17 years old or appears to be under the age of 17), they are to be treated as a juvenile for the purposes of investigation. An appropriate adult should be notified of the investigation and accompany the juvenile when being questioned or interviewed. Appropriate adult<sup>460</sup>, in the case of a juvenile means:

- a. A parent or guardian (or, if they are in care, the care authority or voluntary organisation);
- b. A social worker; or
- c. Failing either of the above, another responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

(g)

(h) 47. A person, including a parent or guardian, is not an appropriate adult if they are suspected of involvement in the offence in question, if they are the victim or a witness, if they are involved in the investigation or if they are a person to whom the suspect has admitted the offence prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.

48. **Multiple suspects/incidents.** When investigating two or more incidents or the alleged conduct of two or more suspects, each person's conduct in relation to each incident is to be regarded as giving rise to a separate case<sup>461</sup>. Where there are two related cases against an accused where one requires referral to the DSP and the other is referred to the CO, the CO should refer the lesser case to the DSP as well.

49. **Evidence given at a Service Inquiry.** For guidance on evidence given, see [Chapter 11](#) (Summary hearing – dealing with evidence).

50. **Criminal Procedure and Investigations Act 1996 and disclosure.** Provision equivalent (subject to modifications) to Parts 1 and 2 of the Criminal Procedure and Investigations Act 1996 (CPIA) is applied to the armed forces<sup>462</sup>. Part 1 applies after charge to all cases dealt with by the CM, the SCC or the SAC, and Part 2 applies to all Service Police investigations. The CPIA (Codes of Practice) (Armed Forces) place a duty on the Service Police to record and retain relevant material recovered during the course of an investigation. The evidence gathered during the investigation is to be held by the Service Police. Further guidance on CPIA 96 is contained in JSP 890 (Service Codes of Practice for Disclosure).

51. **Sufficient evidence to charge an offence.** On completion of an investigation, the Service Police must consider whether there is sufficient evidence to charge a person with an offence. The evidential test to be applied by the Service Police is as follows:

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<sup>460</sup> The meaning is taken from the JSP 397 (Service Police Codes of Practice).

<sup>461</sup> Section 117(2) of the Act.

<sup>462</sup> The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009 and the Criminal Procedure and Investigations Act 1996 (Code of Practice)(Armed Forces) Order 2009.

‘There is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted’<sup>463</sup>.

52. If there is sufficient evidence to charge an offence but it is not listed in Schedule 2 and the Service Police are not aware of prescribed circumstances in relation to the offence, the Service Police must refer the case to the CO and must<sup>464</sup> state the service offence(s) they consider there is sufficient evidence to charge. (Where the matter investigated had given rise to a duty on the CO in relation to Schedule 2 offences or prescribed circumstances, the Service Police must consult the DSP before referring the case to the CO<sup>465</sup>.)

- (i)
- (ii) 53. If there is sufficient evidence to charge an offence listed in Schedule 2 or, an offence committed in prescribed circumstances, the Service Police must refer the results of the investigation to the DSP, recommend a charge and inform the CO.

**2.**

3.54. The following is a summary<sup>466</sup> of the prescribed circumstances which require the Service Police to refer a case to the DSP:

- (1)
- (2) a. the evidence of a Service offence is that a Service person has been the victim of:
  - (i)
    - (ii) (1) A course of conduct by a Service person, involving on at least two occasions an assault; or
    - (iii)
    - (iv) (2) A Service offence corresponding to an offence under section 4 of the Protection from Harassment Act 1997<sup>467</sup>.
  - (b)
    - (c) b. The evidence of a Service offence is that a Service person has been the victim of an assault causing serious injury<sup>468</sup>, inflicted by a Service person of superior rank or rate while the assailant was otherwise carrying out his duties.
- (i)
  - (ii) c. The evidence of a Service offence is that a person:
    - (iii)
      - (iv) (1) Inflicted (or participated in inflicting) serious injury on a relevant person<sup>469</sup> in a relevant place<sup>470</sup>;

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<sup>463</sup> Section 116(5) of the Act.

<sup>464</sup> See regulation 7(2)(a) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>465</sup> In other words the Service Police investigation has not found evidence of either a Schedule 2 offence or an offence committed in prescribed circumstances.

<sup>466</sup> These prescribed circumstances are set out in full in regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>467</sup> A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions (s.4 Protection from Harassment Act 1997). Legal advice should be sought whenever it is believed that this offence might apply.

<sup>468</sup> ‘Serious injury’ is defined in regulation 2(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. Serious injury means ‘a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of a bodily function’.

<sup>469</sup> See regulation 6(1) Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009: ‘relevant person’ means – (a) a person who is not a member of the regular or reserve forces; or (b) a person who is a member of the regular or reserve forces and (i) is under 18 yrs old (ii) has enlisted in the regular or reserve forces and has not completed Phase 1 and Phase 2 Training, (iii) is an officer or officer cadet and has not completed Phase 1 Training, or (iv) is in service custody within the meaning of the Act.

<sup>470</sup> See regulation 6(2) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009: ‘relevant place’ means – (a) any premises or other place which at the time of the death or serious injury was in use for the purposes of Her Majesty’s



- (v)
  - (vi) (2) Was under a duty to safeguard a relevant person in a relevant place and failed to prevent an assault inflicting serious injury on that person; or
  - (vii)
  - (viii) (3) Failed to prevent the death being caused of any person whom they were under a duty to safeguard while that person was in a relevant place.
- (ix)
- (x) d. The evidence of a Service offence is evidence that the death of a person was caused (directly or indirectly), or contributed to, by the misconduct of a Service person or a relevant civilian and the misconduct occurred while the deceased was in a relevant place<sup>471</sup> in Service custody.
- In the above circumstances, the Service Police must refer<sup>472</sup> the case to the DSP.
55. **Referral of a case by Service Police.** When referring a matter either to the CO or the DSP, the Service Police must provide a written statement<sup>473</sup> or an oral statement, specifying the Service offence which the Service Police consider there is sufficient evidence to charge and why the Service Police consider that there is sufficient evidence to charge an offence. While the regulations are permissive as to making oral statements when referring the matter, reports should be in writing except in the most exceptional circumstances.
- 4.
- 5.56. **Case papers.** If there is sufficient evidence to charge a person the Service Police must compile the case papers<sup>474</sup>, which consist of:
- (1)
    - (i) a. All reports prepared by the Service Police (which will usually contain a written recommended charge for the CO to consider);
    - (ii)
    - (iii) b. All witness statements;
    - (iv) c. All other records of evidence, including a summary or transcript of all tape-recorded interviews;
  - (v)
    - (vi)d. A list of all exhibits and a statement of where any that are not documentary exhibits are held;
  - (vii)
    - (viii) e. All documentary exhibits;
  - (ix)
    - (x) f. All formal disciplinary records of the suspect; or
    - (xi)
    - (xii) g. In the case of relevant civilians if no formal disciplinary record of the suspect is maintained and held by any of Her Majesty's forces, a list of his convictions (if any) for a Service offence or an offence under any of the Service Discipline Acts and of his convictions (if any) by a civilian court;
    - (xiii)

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forces, and (b) any vehicle, aircraft or vessel which at the time of the death or serious injury was in use for the purposes of Her Majesty's forces.

<sup>471</sup> A 'relevant place' means any premises or other place which at the time of the suspected misconduct was permanently or temporarily occupied by Her Majesty's forces, or any vehicle, aircraft or vessel used for the purposes of Her Majesty's forces. See regulation 6(3) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>472</sup> Section 116(2)(b) of the Act.

<sup>473</sup> Regulation 7 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>474</sup> Regulation 2(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.



- (xiv) h. All documents to be provided to a person involved in the prosecution of Service offences<sup>475</sup>; and
- (xv) (b) i. All equivalent papers prepared by a UK police force or an overseas police force and provided by that force to a Service Police force.
- (c)
- (d) 57. The case papers are to be provided to the CO or the DSP, as appropriate. If the case papers<sup>476</sup> cannot be provided to the CO or the DSP (as appropriate) at the time of referral, the Service Police must provide them as soon as reasonably practicable after referring the case. If the referral is direct to the DSP, the CO must<sup>477</sup> be notified of the referral and provided with a copy the Service Police report<sup>478</sup>.
- (e)
- (f) 58. Once the case has been referred to the CO or the DSP as applicable, if the recommended charge is:
- (g)
  - (h) a. Capable of being dealt with summarily, the procedure at Part 4 is to be followed;
- (i)
  - (j) b. Triable only at CM/SCC, the procedure at Part 5 is to be followed; or
- (k)
  - (l) c. For an offence under Schedule 2 or an offence committed in prescribed circumstances, the procedure at Part 6 is to be followed.

59. ***Situations in which the Service Police should not refer a case to the DSP following an investigation.*** It is important to note that the Service Police cannot refer all of the matters they have investigated to the DSP. Where the Service Police consider there is sufficient evidence to charge a person with a Service offence but it is not a Schedule 2 offence or an offence which has been committed in prescribed circumstances they must refer the case to the CO of the person whom it is believed has committed a Service offence.

60. If the Service Police have carried out an investigation and:

- a. The allegation or circumstances which were the subject of the investigation gave rise to a duty to ensure that the Service Police were aware (because of a possible Schedule 2 offence or prescribed circumstances); and
- b. The Service Police propose not to refer the case to the DSP,

the Service Police must consult the DSP as soon as reasonably practicable and before referring the case to a person's CO<sup>479</sup>. This is to ensure that the DSP is satisfied that there is insufficient evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances. In deciding whether there is sufficient evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances, the Service Police should give weight to the DSP's view. In some cases the DSP will need to consider a report from the Service Police and any evidence which has been gathered before giving its view. In such cases the Service Police should provide a report and any other documents and information requested by the DSP.

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<sup>475</sup> In accordance with a code of practice made under section 78(2)(b) of the Criminal Procedure and Investigations Act 1996.

<sup>476</sup> Regulation 7 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>477</sup> Section 118 (2) of the Act

<sup>478</sup> Regulation 8(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>479</sup> See Section 116(4) of the Act.

**61. Insufficient evidence to charge any Service offence.** If there is insufficient evidence to charge any Service offence, the Service Police should provide the CO with a written summary of the investigation and the reason why they consider that there is insufficient evidence to charge. When notifying the former suspect of the outcome of the investigation, the CO should take care not to preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Having taken appropriate advice the CO may wish to consider administrative action. The Victim's Code should be complied with, if appropriate (see paragraph 200).

## Part 4 - Offences capable of being heard summarily

### Jurisdiction to hear charges

62. Before taking any action to bring a charge the CO must first be satisfied he has jurisdiction to bring a charge in accordance with [Chapter 2](#) (Meaning of a commanding officer) and [Chapter 3](#) (Jurisdiction and time limits)

63. The offences that may be dealt with summarily by a CO are set out in [Annex B](#)<sup>480</sup>. Offences that may be heard summarily only with permission of HA or by a CO if they are of or above the rank of rear admiral, major-general or air vice-marshal<sup>481</sup> are listed at [Annex C](#). Further details and specimen charges for these offences are contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

64. A flow chart of the procedure to be followed is at [Annex A](#).

### Legal advice

65. Where a CO is considering whether to hear a criminal conduct offence<sup>482</sup> summarily, he should be aware that staff legal advice will be necessary in all but the simplest and most straightforward cases. Offences, the complexity of which necessitate that staff legal advice should be sought before proceeding summarily, are:

- a. All those offences listed at [Annex C](#);
- b. Low flying (section 34 of the Act);
- c. Annoyance by flying (section 35 of the Act); and
- d. Possession of a controlled drug (contrary to section 5(2) of the Misuse of Drugs Act 1971).

### Delegation of a CO's powers

66. A CO, see [Chapter 2](#) (Meaning of commanding officer), may delegate to a subordinate commander not below the rank of naval lieutenant, military or marine captain or flight lieutenant<sup>483</sup> any or all of his functions<sup>484</sup> listed below, subject to such conditions as he considers appropriate<sup>485</sup>:

6.

7.a. The referral of a case<sup>486</sup> to the DSP;

(a)

(b) b. Bringing a charge (including bringing a charge as a result of a direction from the DSP);

(c)

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<sup>480</sup> Section 53 of the Act.

<sup>481</sup> Section 54 and Schedule 1 Part 2 of the Act.

<sup>482</sup> Section 42 of the Act.

<sup>483</sup> This applies to acting and substantive rank only.

<sup>484</sup> See Part 5 of the Act and regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>485</sup> See regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>486</sup> Cases are referred where an allegation has been made but no suspect has been charged.

- (d) c. Amending or substituting a charge, or bringing an additional charge;
- 8.
  - 9.d. The referral of a charge<sup>487</sup> to the DSP; and
  - (1)
  - (2) e. Discontinuing proceedings on a charge.
  - (3)
  - 67. **Notifying the Service Police.** Although the functions of the CO that can be delegated include ensuring that the Service Police are aware of a matter where an offence under Schedule 2 may have been committed or where there are prescribed circumstances, as a matter of policy, it is a function that should not be delegated. This does not mean that the CO cannot instruct someone else to notify on his behalf, however, the obligation to ensure the Service Police are aware remains with the CO. When the notification is given by someone other than the CO, the authority under which this has taken place is to be recorded, for example as the duty officer.
  - (4)
  - (5) 68. **Delegations to more than one person.** The CO can delegate to more than one subordinate commander at the same time the functions of:
  - (6)
    - (7) a. Referral of a case to the DSP; and
    - (8)
    - (9) b. Bringing a charge (including bringing a charge as a result of a direction from the DSP) in respect of the same case.
    - (10)
  - (11) However, once a subordinate commander exercises either of these delegated functions, in relation to a particular case<sup>488</sup>, no other subordinate commander can exercise either of these functions in relation to that particular case.
  - (12)
  - (13) 69. **Delegations after a charge has been brought.** After a charge has been brought any or all of the following functions can only be delegated to one subordinate commander at a time:
  - (14)
    - (a) a. Amending or substituting the charge, or bringing an additional charge;
- 10.
  - 11.b. The referral of the charge to the DSP; and
  - (1)
  - (2) c. Discontinuing proceedings on the charge.
  - (3)
  - (4) For example, where in relation to a charge a CO has delegated any of these functions to a subordinate commander (A), the CO cannot exercise those functions themselves unless he revokes the delegation. Similarly, if a CO wants a different subordinate commander (B) to exercise any of the above functions in relation to a particular charge, he should revoke the delegation to subordinate commander (A) and delegate the function(s) to subordinate commander (B).
  - (5)
  - (6) 70. **Delegation to hear a charge.** Delegations to hear a charge<sup>489</sup> are dealt with in [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). However, when a subordinate commander is given powers to hear a charge, he must also be given the powers to:
    - (a)
    - (b) a. Amend or substitute the charge, or bring an additional charge;

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<sup>487</sup> Charges are referred where a suspect has been charged.

<sup>488</sup> Section 120 of the Act sets out the initial powers referred to in paragraph 68 a. and b.

<sup>489</sup> Part 6 of the Act.

12.

13.b. Refer the charge to the DSP; and

(1)

(2) c. Discontinuing proceedings on the charge.

(3)

71. **Limitation to CO's delegation.** Because a subordinate commander does not have power to exercise the relevant function, the CO cannot<sup>490</sup> delegate to a subordinate commander the authority to:

a. Apply for extended powers of punishment including those in relation to activation orders, see the preliminary procedures section of [Chapter 9](#) (Summary hearing and activation of suspended sentences of service detention);

b. Apply for permission from HA to hear a charge relating to an offence outlined in [Annex C](#)<sup>491</sup>;

c. Hear a charge relating to an offence that requires HA permission (see paragraph 71b above); or

(4) d. Hear a charge relating to an offence alleged to have been committed during the operational period of a suspended sentence of detention.

(5)

(6) 72. In addition the following limitations on delegation apply:

14.

15.a. A subordinate commander of or above the rank of lieutenant commander, major and squadron leader can only hear a charge brought against a person of or below the rank or rate of chief petty officer, marine colour sergeant, military staff sergeant, or flight sergeant; and

(1)

(2) b. A subordinate commander of the rank of naval lieutenant, military or marine captain or flight lieutenant can only hear a charge brought against a person of or below the rank or rate of leading rate, military or marine corporal or air force corporal<sup>492</sup>.

73. **Conditions for CO's delegation.** When delegating any relevant disciplinary functions to subordinate commanders, a CO may make conditions on such delegations. For example, the CO may limit the type of charge that the subordinate commander can bring by excluding any offences of criminal conduct, or charges that relate to particular offences. Wherever possible, notice of officers who have disciplinary functions delegated to them, and any limitations on those delegations, should be promulgated in the ship, unit or establishment.

74. **Revocation of delegation.** The delegation will endure until it ends in accordance with its terms or when the CO expressly revokes it. A CO should revoke a delegation orally or in writing.

## Procedure for offences capable of being heard summarily

(a)

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<sup>490</sup> As set out at rule 3 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>491</sup> Section 54 of the Act.

<sup>492</sup> Rule 3(4) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

(b) 75. The procedure for offences capable of being heard summarily is outlined in the 6 steps below.

(c)

### **Step 1 – Deciding whether CO has initial powers to dispose of a case**

76. Where a Service policeman has referred a case to the CO (following investigation by Service or civilian police), where a CO's investigation has been completed or where a case has been referred to them by the DSP<sup>493</sup>, the CO will need to satisfy themselves that he has initial powers<sup>494</sup>. If the CO does have initial powers he may dispose of the case in one of the following ways:

- a. Bringing a charge which can be heard summarily;
- b. Referring a case to the DSP;
- c. Taking no disciplinary action (the CO may decide that administrative action should be taken instead); or
- d. Referring a case to civilian authorities.

77. If a CO decides to take action to hear the case summarily or refer the case to the DSP the procedure to be followed is set out at Step 2 below. For factors relevant to the CO bringing a charge and to referring a case to the DSP, the CO should consider especially paragraphs 82 and 83.

78. If the CO decides not to bring a charge or refer the case to the DSP, he may wish to consider administrative action (see paragraphs 215 - 221). However, where the Service Police have investigated and found there is sufficient evidence to charge, the CO should not take this course of action without first obtaining appropriate advice, which may include staff legal advice. For factors relevant to the CO bringing a charge and to referring a case to the DSP, the CO should consider especially paragraphs 82 to 83.

79. If the CO considers that it would be appropriate to refer the matter to the civilian authorities he should first obtain advice from the staff legal adviser/HA. In the case of a relevant civilian where a decision is made not to take action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

### **Step 2 – Deciding mode of trial before charge**

80. A CO with initial powers with respect to a case may only bring a charge which is capable of being heard summarily, which means:

- a. It is an offence listed in [Annex B](#), or [Annex C](#) where permission has been given, unless permission is not required because the CO is a 2\* CO<sup>495</sup>.
- b. The accused is a Service person of or below the rank or rate of warrant officer, or the accused is an officer of or below the rank of commander, lieutenant colonel or wing commander (see paragraph 4 above regarding two rank rule).

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<sup>493</sup> Section 121(4) of the Act.

<sup>494</sup> The initial powers referred to are those of bringing a charge or referring a case to the DSP (section 120 of the Act).

<sup>495</sup> A 2\* CO is of, or above, the rank of rear admiral, major-general or air vice-marshal.

81. All cases must be considered for suitability for summary hearing or for trial by CM before any charge is brought. This is part of the process referred to as deciding the mode of trial.

82. A CO should consider the seriousness and the complexity of the case and whether, if he brings a charge and hears it, his powers of punishment are likely to be adequate, see [Chapter 13](#) (Summary hearing sentencing and punishments). For example, if a weapon is used in an assault, the CO may decide that this is an aggravating feature, for which his powers of punishment are likely to be insufficient. In serious or complex cases, it is most likely to be appropriate for the CO to refer the case to the DSP. A complex case may be one in which, for example, there are legal or evidential issues, more than one accused or where witnesses may have to give evidence in foreign languages. If in doubt staff legal advice should be sought.

83. Additional factors which the CO should consider and may be relevant in particular cases are:

- a. Whether vulnerable victims or vulnerable witnesses are involved, who would be better examined and cross examined by professional advocates;
- b. Whether his powers of compensation are sufficient see [Chapter 13](#) (Summary hearing sentencing and punishments);
- c. Whether a civilian witness<sup>496</sup> is involved;
- d. The effect of delay if the case is referred to the DSP and dealt with by the CM;
- e. Whether the offence is alleged to have been committed during the operational period of a suspended sentence imposed by a CM. A CO cannot activate a suspended sentence imposed by a CM. It may be preferable that the CM considers the activation<sup>497</sup> of the suspended sentence, and for this purpose that the CM should also deal with the new offence, indicating that the charge ought to be referred for CM. Staff legal advice should be sought in these circumstances;
- f. Whether the offence is alleged to have been committed during the operational period of a suspended sentence imposed by a CO or Summary Appeal Court (SAC). If so, when hearing the new offence and activating the suspended sentence the CO<sup>498</sup> is limited in his powers of punishment. For example, if the suspended sentence is for 60 days detention, provided the CO has obtained permission to use extended powers of punishment in relation to the new offence he may award up to a maximum punishment of 30<sup>499</sup> days detention for the new offence, (the total period of detention would be 90 days including the 60 days of the suspended sentence). If the CO is not satisfied that his powers of punishment are sufficient, then he may decide to refer the case to the DSP.
- g. Whether the victim is not a member of the UK armed forces.

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<sup>496</sup> Civilian witnesses cannot be compelled to attend a summary hearing to give evidence.

<sup>497</sup> The CO may proceed to hear the charge and subsequently notify the CAO of the finding so that the CM can consider whether to activate the suspended sentence. See [Chapter 13](#) (Summary hearing sentencing and punishments).

<sup>498</sup> A subordinate commander may not activate a suspended sentence of detention, this may only be done by the CO. For detailed guidance see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention).

<sup>499</sup> Only if permission to use extended powers of punishment has been granted by HA.

- h. Whether the victim was being held in any form of service custody

This list is not exhaustive. If in doubt seek staff legal advice. As to factors g and h above, any form of violence or abuse against the victim should be recognised as having important disciplinary implications. In such cases the CO should refer the matter to the DSP, unless the CO is completely satisfied (with legal advice) that he should bring the charge himself.

### **Referral of case to the DSP before charge**

84. When referring a case to the DSP following a CO's investigation, the CO should send all relevant material (see paragraph 36 above) and his reasons as to why they are referring the case. The Service person who is the subject of the referral should be notified of such a referral.

85. When a case investigated by the Service Police is referred to the DSP by the CO:

- a. If the Service Police provided the CO with a written statement the CO must provide a copy of it to the DSP;
- b. If the Service Police made an oral statement to the CO, the CO should ensure that as soon as practicable the Service Police provide the DSP with a written statement or make an oral statement to the DSP, specifying the Service offence with which the Service Police considers there is sufficient evidence to charge and why he considers there is sufficient evidence;
- c. When the CO refers the case to the DSP or as soon as reasonably practicable afterwards, he must provide the DSP with a copy of the case papers (see paragraph 56 above)<sup>500</sup>;
- d. The CO should provide a brief statement of his reasons for the referral; and
- e. The CO should notify the Service person who is the subject of the referral.

86. Once the case has been referred, the CO has no powers in relation to the case unless the case is referred back to the CO by the DSP.

87. ***Referral of a case by the DSP back to the CO.*** Where the DSP refers the case back to the CO, the DSP cannot direct the CO to bring a charge but may advise the CO of a suitable summary charge.

88. Where a case is referred to a CO, he will have initial powers in relation to the case<sup>501</sup>. As a result, the CO should reassess the evidence in the case and decide on the appropriate way to dispose of the case (see step 1). If the CO considers that there is sufficient evidence (see paragraph 93 below) to charge a Service offence which is capable of summary disposal, he may bring a charge. When the DSP refers a case back to the CO, the DSP may (although they are not required to) advise the CO of a suitable (summary) charge that may be brought. Where this occurs the CO is not compelled to follow the DSP's advice. However, a CO should take this advice into account when deciding on the appropriate method of disposal or appropriate charge. When selecting a charge in these circumstances a CO may wish to obtain staff legal advice.

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<sup>500</sup> See regulation 9 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>501</sup> Section 119(5) of the Act.



89. If after reviewing the case, the CO does not consider that a charge should be brought, the person who was investigated should be advised that disciplinary action will not be taken. Care should be taken when notifying the former suspect that the notification does not preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Further, it should not preclude any administrative action that may be taken against the former suspect.

90. Having taken staff legal advice, the CO may wish to consider whether administrative action should be taken.

### Step 3 - Decision whether to charge

91. Having decided that the case can be heard summarily, the CO should go on to consider whether:

- a. To charge;
- b. Not to charge but to take administrative action; or
- c. Not to charge and not to take any administrative action.

92. If the CO decides to charge he should also consider the appropriate level at which the charge should be heard taking into account:

- a. The type of charge;
- b. The seriousness of the offence;
- c. Powers of punishment of subordinate commanders (for example a subordinate commander cannot award a Service compensation order<sup>502</sup> for personal injury therefore charges relating to offences of violence should be given careful consideration);
- d. Delegations;
- e. The accused's disciplinary record and in particular whether they are under a suspended sentence of Service detention<sup>503</sup>;
- f. The factors stated in paragraphs 82 and 83; and
- g. Any other factors he considers relevant.

93. **The evidential test.** Generally a CO should not charge a person with a service offence if it is plain that either there is no basic evidence against the suspect or the evidence is clearly outweighed by evidence in the suspect's favour.

94. **The Service interest test.** Where there is evidence to support the bringing of a charge, a CO should also consider whether there are any factors that would make disciplinary action inappropriate. He should, however, be careful to ensure that any exercise

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<sup>502</sup> See Armed forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) rules 2009 and [Chapter 13](#) (Summary hearing sentencing and punishments).

<sup>503</sup> Subordinate commanders cannot hear a charge relating to an offence alleged to have been committed during the operational period of a suspended sentence of detention.

of his discretion not to take disciplinary action is consistent with justice and with the fair and efficient maintenance of discipline and operational effectiveness.

95. A CO should also note that there are Service policies that provide for administrative action being used as an alternative to discipline (see paragraphs 215 - 221 as to where administrative action may be appropriate). If the offence appears complex or serious or if the CO is in doubt, he should seek staff legal advice.

## Charging

96. Having decided to charge, the CO should bring an appropriate charge.

97. **Selecting a charge.** A charge should be selected which is appropriate taking into account the circumstances, particularly the seriousness of the offence.

98. When an investigation<sup>504</sup> has taken place and a charge is recommended/suggested, if the CO decides to deal with the matter summarily, it is for them to decide the most appropriate charge.

99. Where a CO wishes to charge an offence, the charge(s) should be prepared using the specimen charges contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences). Where no such specimen charges are provided, staff legal advice should be sought on the correct wording and any other advice on the law relating to the offences.

100. **Contents of a charge.** The charge is to be set out in a charge sheet (see [Annex H](#)) and must contain<sup>505</sup>:

- (d) a. Full name of the accused;
- (e)
- (f) b. Service number, rank or rate;
- (g)
- (h) c. The name of the ship, establishment or unit of which they are a member<sup>506</sup>;
- (i) d. A statement in ordinary language of the offence charged, identifying the precise statutory provision creating the offence<sup>507</sup>. When a person is charged with a criminal conduct offence, the charge must specify the offence under the law of England and Wales as well as that it is an offence contrary to section 42 of the Act<sup>508</sup>. A charge of assault occasioning actual bodily harm will therefore include in the statement that the offence is one under section 42 of the Act and under section 47 of the Offences Against the Person Act 1861 (see [Chapter 8](#) (Criminal Conduct Offences)); and
- e. Such particulars of the conduct constituting the commission of the offence as are necessary to make clear what is alleged against the accused.

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<sup>504</sup> Service Police or CO's investigation.

<sup>505</sup> Full details as to what should be contained in a charge can be found in the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>506</sup> This includes his parent unit and attached unit.

<sup>507</sup> Unless it is an offence contrary to common law, see [Chapter 8](#) (Criminal conduct offences).

<sup>508</sup> See para 5(a) in the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

101. Care must be taken to ensure that each charge does in fact disclose enough information to establish an offence under the Act and for offences charged under section 42 of the Act the corresponding offence under the law of England and Wales is specified. Each separate charge must allege only a single offence. For example, if a Service person misses a number of duties, each duty missed must be subject to a separate charge. It is important not to overload a charge sheet. Additionally where there are serious offences it may not be appropriate to charge additional minor offences. If in doubt, seek staff legal advice.

102. **Multiple accused.** Where there is more than one accused each individual should be charged on a separate charge sheet. More than one charge can be set out on each individual's charge sheet<sup>509</sup>. The cases of multiple accused can be heard at the same summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). If one of the accused elects CM trial then the CO must decide whether or not to refer the charges or charges against the non-electing offender to the DSP.

103. **Charging of accomplices and accessories.** This is a complex area of the law and in such cases staff legal advice should be sought. A person who aids, abets, counsels or procures<sup>510</sup> the commission by another of any Service offence may be convicted of that offence. For example, A searches and removes a watch from a soldier detained in the course of an operation. If A does not have a reasonable excuse for his actions, he may have committed an offence of looting contrary to section 4 of the Act. If B agrees to keep a look out for A whilst they are committing the act, B may be charged under section 4 of the Act.

104. The same applies when a Service person or relevant civilian aids, abets, counsels or procures the commission of a criminal offence by another person; Section 42<sup>511</sup> applies to those who aid, abet, counsel or procure the commission of a criminal offence in the same way as to the principal offender. Whilst it is proper to charge an accessory as if he were a principal offender, it may sometimes be more appropriate to charge them as an accessory (e.g. when it is clear at the outset that he did not actually commit the offence themselves). The words aid, abet counsel and procure may all be used together to charge a person who is alleged to have participated in the offence in some way, but not as the principal offender.

105. By contrast, if a Service person encourages or assists another person to commit any offence, they are guilty not of the main offence, but of the separate offence of encouraging or assisting. If the encouraging or assisting is to commit criminal conduct which would be an offence under the law of England and Wales, the encouraging or assisting will be an offence under section 42 of the Act. If the encouraging or assisting is to commit an offence under the Act (other than a criminal conduct offence)<sup>512</sup>, the relevant offence will be under section 40 of the Act. For example, if A encourages or assists B to make a false record (contrary to section 18 of the Act), B should be charged with an offence under section 40, as A did not themselves make the false record.

106. Specimen charges for involvement as a secondary party under section 41 of the Act are set out in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and specimen charges for aiding, abetting, counselling or procuring are set out in [Chapter 8](#) (Criminal conduct offences).

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<sup>509</sup> See paragraph 48 for guidance on multiple suspects/incidents. Also see the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 for contents of a charge and Annex H on the format of a charge sheet.

<sup>510</sup> In accordance with section 41 of the Act.

<sup>511</sup> Section 42 of the Act.

<sup>512</sup> Section 40 of the Act.

107. ***Charging procedure.*** Once the charge sheet has been raised, the CO should proceed to charge the suspect. The procedure set out below must be followed:

- a. The CO (or a subordinate commander) must sign<sup>513</sup> the charge sheet (ie. the person who it is intended is to hear the charge); and
- b. A copy of the signed charge sheet must be served by hand<sup>514</sup> on the accused. Service of a charge can be carried out by the CO, or by anyone authorised<sup>515</sup> by the CO. The charge sheet should also be signed and dated when service is carried out.

108. The charge is brought once a copy of the charge has been served on (handed to) the accused. The original charge sheet must be retained on file<sup>516</sup>. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits might apply.

109. Once a charge is brought, the charge is allocated for summary hearing<sup>517</sup>. A summary hearing<sup>518</sup> cannot take place before at least 24 hours have elapsed from the time all the case papers<sup>519</sup> were served. The time of service should be recorded.

### ***Amending, substituting or bringing an additional charge***

110. A CO may amend, substitute or bring an additional<sup>520</sup> charge at any time before the summary hearing or during the course of the summary hearing prior to the finding being recorded, provided the amended, substituted or additional charge is capable<sup>521</sup> of being heard summarily. The hearing will need to be adjourned in order for the preliminary procedures to be carried out in relation to that charge see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). If the CO decides to refer a charge to the DSP, that charge and any other charge brought in respect of the same case are to be regarded as allocated for CM trial. A CO may not amend, substitute or bring an additional charge, where the case has been allocated for CM trial. A CO should refer all related charges to the DSP.

111. **Amending a charge before summary hearing.** If the CO amends<sup>522</sup> a charge before the summary hearing, the following process must be followed:

- a. The CO should sign the charge sheet as amended;
- b. The amended charge sheet should then be personally served by hand on the accused together with a notification of amendment, by the officer who signed the amended charge sheet or by a person authorised by them;

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<sup>513</sup> Regulation 11(1)(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>514</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>515</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>516</sup> This is necessary in the event that the charge, and therefore the original charge sheet, is subsequently needed to be sent to the DSP.

<sup>517</sup> Section 120(4) of the Act.

<sup>518</sup> See [Chapter 9](#) (Summary Hearing and Activation of Suspended Sentences of Service detention).

<sup>519</sup> See paragraphs 56 for a list of case papers.

<sup>520</sup> Section 123 (2) of the Act.

<sup>521</sup> Section 123 (4) of the Act.

<sup>522</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

- c. A written record should be kept of the time and date of service of the amended charge; and
- d. The accused must be given a minimum of a further 24 hours from the time of service before the summary hearing can commence.

112. **Amending a charge during a summary hearing.** Where a charge is amended after the start of a summary hearing, the hearing will need to be adjourned in order for the preliminary procedures paragraph 107 above to be carried out in relation to that charge. The CO shall immediately serve a copy of the amended charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given a further 24 hours and the option to elect CM trial on the amended charge.

113. **Correcting a charge sheet.** The CO may, at any time, correct a minor typographical error in the charge sheet that has no bearing on the case, such as a mistake in the accused's Service number. However, if the CO corrects an error of substance or fact, e.g. the date of the offence, that correction would amount to an amendment and guidance at paragraph 111 above should be followed. The CO is to adjourn to take legal advice on this issue if they are in any doubt as to the status of the correction.

114. **Substituting a charge before summary hearing.** A charge is substituted<sup>523</sup> when an existing charge is replaced with another charge that alleges a different Service offence. For example, a charge of assault might be substituted for a charge of assault occasioning actual bodily harm. Where a charge is substituted before the hearing the following process must be followed:

- a. The CO should sign the charge sheet containing the substituted charge;
- b. The original charge should be discontinued, see paragraph 118 below;
- c. The new charge sheet (containing the substituted charge) should then be served by hand on the accused together with a notice to that effect. Service of these papers may be carried out by the officer who signed the charge sheet or a person authorised by them;
- d. As is the case with bringing a charge, a written record should be kept of the time and date of service. For this purpose the person serving the charge should sign and date the charge sheet accordingly; and
- e. The accused must be given a minimum of a further 24 hours from the time of service before the summary hearing can commence.

115. **Substituting a charge during a summary hearing.** If the CO substitutes a charge after the summary hearing has commenced<sup>524</sup>, the CO must immediately serve a copy of the substituted charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given 24 hours and he must also be given the option to elect for CM trial on the substituted charge.

116. **Bringing an additional charge before summary hearing.** This occurs where an additional charge<sup>525</sup> is added to a charge or charges that have already been

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<sup>523</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>524</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>525</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

brought against the accused. Where an additional charge is brought before the hearing, the following process must be followed:

- a. The CO should sign the new charge sheet that will contain the original charge and the additional charge that is to be brought. It is important to ensure that it is clear what charges have been brought against the accused and what charges are being heard by a CO at a summary hearing, especially when additional charges are brought or a charge is discontinued. All of the charges brought against an accused should therefore be set out on one charge sheet; and
- b. The new charge sheet should then be served by hand on the accused. Service of these papers may be carried out by the officer who signed the charge sheet or a person authorised by them.

117. ***Bringing an additional charge during a summary hearing.*** If the CO brings an additional charge after the summary hearing has commenced<sup>526</sup>, the CO must immediately serve a copy of the additional charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given 24 hours and he must also be given the option to elect for CM trial on the additional charge.

### ***Discontinuing a charge***

118. A CO has a power to discontinue<sup>527</sup> a charge which has been allocated<sup>528</sup> for summary hearing at any time up to the start of summary hearing and during the course of the summary hearing itself. A charge may be discontinued where:

- a. It is no longer appropriate to take disciplinary action against the accused;
- b. A more appropriate charge has been substituted;
- c. The case is to be handed over to the civilian authorities;
- d. A fresh charge is to be brought in order to rectify an error in the conduct of the hearing; or
- e. A witness cannot be located but it is possible that he will be in future.

The accused is to be notified that a charge is being discontinued using the form of notice at [Annex I](#).

### ***Dismissal of a charge***

119. The CO may dismiss<sup>529</sup> the charge at any stage of the hearing, unless he determines that the charge has been proved. He may not determine that the charge has been proved unless, on the basis of all the evidence heard, they are sure that the accused committed the offence charged. For the CO to be sure, he must believe that the charge is proved beyond reasonable doubt; this is the criminal standard of proof, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

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<sup>526</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>527</sup> The effect of doing so is that the matter remains unresolved. The CO should only use this power with staff legal advice.

<sup>528</sup> Section 120(4) of the Act.

<sup>529</sup> Section 131(2), of the Act.

## ***Action to be taken when a charge is brought***

120. As soon as practicable after the charge has been brought, the CO or a person authorised by them must<sup>530</sup>:

- a. Prepare a summary of the evidence (the case summary) relevant to the charge, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention);
- b. Inform the accused in writing<sup>531</sup> of his right to:
  - (1) Elect CM trial<sup>532</sup>;
  - (2) Be represented by an AAO<sup>533</sup>;
  - (3) Question witnesses whose evidence is requested by the CO<sup>534</sup>;
  - (4) Give evidence<sup>535</sup>;
  - (5) Provide evidence of witnesses<sup>536</sup>; and
  - (6) Appeal to the Summary Appeal Court (SAC)<sup>537</sup>;
- c. If appropriate, provide the accused with information about the activation of suspended sentences of detention<sup>538</sup>, see [Chapter 9](#) (summary hearing and activation of suspended sentences of Service detention) and Part 4 below;
- d. Provide the accused with<sup>539</sup>:
  - (1) A copy of the charge sheet;
  - (2) A copy of the Case Summary<sup>540</sup>;
  - (3) A copy of the written evidence relevant to the charge;
  - (4) Details of exhibits that form part of the evidence relevant to the charge and where and when they may be inspected;

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<sup>530</sup> Rule 8 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>531</sup> All of the information in this paragraph will be contained within the booklet 'Your rights if you are accused of an offence under the Service justice system' (Annex G), therefore providing the accused with a copy of this booklet will discharge the CO's duty under this paragraph.

<sup>532</sup> Section 129, of the Act.

<sup>533</sup> Rule 10 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>534</sup> Rule 15 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>535</sup> Rule 16 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>536</sup> Rule 17 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>537</sup> Section 141, of the Act.

<sup>538</sup> Section 193 of the Act.

<sup>539</sup> Rule 8(1)(c) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>540</sup> Rule 8(1)(c)(ii) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.



- (5) A copy of unused material gathered as part of the investigation of the charge;
  - (6) Written details of any unused exhibits gathered as part of the investigation and where and when unused exhibits may be inspected; and
  - (7) A copy of any disciplinary record of the accused; and
- e. Fix a time for the hearing and notify the accused.

121. In addition, the CO or a person authorised by them should inform the accused that he may consider seeking legal advice and that this may be a matter that he discusses with his AAO, if he has nominated one (see paragraphs 206 - 208 on availability of legal advice within the Services).

122. If the CO is satisfied that the accused already has a copy of a document listed in paragraph 120 above, he need not provide a further copy<sup>541</sup>, for example, where the charge has been amended but the evidence in support of that charge remains the same.

123. Where the CO does not require permission from HA to hear the charge or does not consider that he might require extended powers of punishment, he should proceed to hear the charge, see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention). If an application to HA is required, proceed to step 5 below.

## Step 4 - Applications to HA

124. If the charge brought is one of those listed in [Annex C](#), the CO must seek permission from HA to hear the charge summarily (see paragraph 126 below). If the CO considers he requires extended powers of punishment, he must make an application to HA (see paragraph 129 below). The application for permission to hear a charge may be made in conjunction with an application for extended powers of punishment. Neither of these functions can be delegated to a subordinate commander, see paragraph 71.

125. In either circumstance the CO should consult staff legal/HA advice before bringing a charge. This consultation does not negate the requirement to submit an application to hear a charge, but may assist in preventing nugatory staff work.

126. ***Application to hear certain charges summarily.*** A CO below the rank of rear admiral, major-general or air vice-marshal who considers that any of the serious criminal conduct offences<sup>542</sup> listed below should be heard summarily<sup>543</sup>, must apply to HA for permission to do so. A template of a letter of application for this purpose is at [Annex A](#) of [Chapter 9](#) (Summary Hearing and activation of suspended sentences of Service detention):

- a. Assault occasioning actual bodily harm (Section 47 of the Offences against the Person Act 1861);
- b. Possession in a public place of an offensive weapon (Section 1 of the Prevention of Crime Act 1953);

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<sup>541</sup> Rule 8(2) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>542</sup> Section 54(2) of the Act.

<sup>543</sup> This cannot be delegated.



- c. Abstracting of electricity (Section 13 of the Theft Act 1968);
- d. Possession in public place of point or blade (Section 139 of the Criminal Justice Act 1968);
- e. Dishonestly obtaining electronic communications services, e.g. using MOD telephones for private calls (Section 125 of the Communications Act 2003);
- f. Possession or supply of apparatus for obtaining electronic communications services (Section 125 of the Communications Act 2003);
- g. Fraud (Section 1 of the Fraud Act 2006);
- h. Dishonestly obtaining services (Section 11 of the Fraud Act 2006); or
- i. Attempting to commit one of the indictable<sup>544</sup> offences above<sup>545</sup>.

127. The application to HA must be made as soon as is reasonably practicable after the charge is brought<sup>546</sup> and must contain<sup>547</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; and
- f. Any other material that may, in the opinion of the CO, be relevant to the application.

The obligation to disclose unused material does not include any requirement to disclose sensitive material. The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009 does not apply to a charge allocated for summary hearing (it only applies to charges allocated for trial by the Court Martial or the Service Civilian Court or the Summary Appeal Court). In this context, "unused material" means simply the relevant material obtained during the investigation which is not sensitive.

128. Whether or not the application to hear the charge is granted the CO must provide<sup>548</sup> the accused with a copy of the notification from HA and proceed to Step 5.

129. ***Application for extended powers in relation to punishment.*** If the CO is below the rank of rear admiral, major-general or air vice-marshal and considers that a charge against a person should be dealt with summarily and that his powers of

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<sup>544</sup> See glossary of terms.

<sup>545</sup> Section 43 of the Act.

<sup>546</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>547</sup> Rule 5(3) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>548</sup> Rule 5(4) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

punishment might be insufficient to deal with the accused if the charge were proved, he must apply to HA for extended powers<sup>549</sup>. A template letter of application for this purpose is at [Annex B](#) of [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). In order to make the decision to apply for extended powers, the CO should consider a number of factors including:

- a. The nature of the charge;
- b. The CO's basic powers of punishment (i.e. without extended powers);
- c. The sentencing guidelines for such an offence see [Chapter 13](#) (Summary hearing sentencing and punishments);
- d. The accused's disciplinary record; and
- e. All the evidence presented in the case papers.

130. The application must be made as soon as is reasonably practicable after the charge is brought<sup>550</sup> (which may be after the CO has complied with the preliminary procedures) and must contain<sup>551</sup>:

- a. The CO's reasons for considering his powers of punishment might be insufficient should the charge be found proved unless he has extended powers;
- b. A copy of the charge sheet;
- c. A copy of the written evidence relevant to the charge;
- d. A copy of any unused written evidence gathered as part of the investigation of the charge;
- e. A copy of any disciplinary record of the accused;
- f. Specific details of all provisions for the purpose of which the CO considers he needs extended powers<sup>552</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 [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention)); and
- g. Any other material that may, in the opinion of the CO, be relevant to the application.

Where the CO's application to HA for extended powers has been granted, the CO must provide the accused with a copy of the notification from HA, see paragraph 132 below<sup>553</sup>.

131. In the exceptional event that the CO considers it necessary to apply for extended powers after he has complied with the preliminary procedures, but before he proceeds to

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<sup>549</sup> Section 133(1) of the Act for the extended powers that are available.

<sup>550</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>551</sup> Rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>552</sup> Rule 6(2)(a) of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009.

<sup>553</sup> Rule 6(3) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

hear the charge summarily (ie. before he has offered the accused the right to elect CM trial), the CO must notify the accused if the application has been granted and provide the offender with a copy of the notification from HA to this effect. Further, if an application is made after a time is fixed for the hearing, a new time must be fixed. If the application is granted, the new time must be fixed at not less than 24 hours after a copy of the notification is given to the accused. This situation should arise only rarely, for example, when new information (that could not have been known beforehand) emerges that makes such an application for extended powers necessary. Whether the application for extended powers is granted or not, the CO should proceed to Step 5.

## **Step 5 – Action by CO following HA decision**

### **132. *CO application to hear a charge and/or extended powers***

***granted.*** When permission has been granted, and if the CO decides to proceed to hear the charge, then he should ensure that the actions detailed at paragraph 120 above have been carried out. In addition the accused is to be provided with:

- a. A copy of any permission from HA to deal with the matter summarily<sup>554</sup>; and
- b. A copy of any authority to use extended powers<sup>555</sup>.

Exceptionally the CO may decide that the charge should no longer be proceeded with (if, for example, further evidence/information came to light).

133. The CO or a person authorised by them should inform the accused that he may consider seeking legal advice and that this may be a matter that he discusses with his AAO. If the CO is satisfied that the accused already has a copy of a document mentioned in paragraph 120d, he need not provide a further copy<sup>556</sup> e.g. where the charge has been amended but the evidence in support of that charge remains the same. Once these actions have been carried out the CO should proceed to summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention).

134. **CO's application to hear the charge denied.** If a charge has been brought and the HA decides against the CO's application for permission to hear the charge, the charge must either be referred to the DSP (see paragraph 137) or (exceptionally) discontinued if the CO considers that the charge should no longer be proceeded with (if, for example, further evidence/information comes to light). Following discontinuance it is open to the CO to review the case and where necessary bring a fresh charge against the accused.

135. **CO's application for extended powers denied.** If a charge has been brought and the HA decides against the CO's application for extended powers, the CO should review the decision to hear a charge in the light of the HA's decision. The CO can either:

- a. Hear the charge without extended powers; or
- b. Refer the charge to the DSP (see paragraph 137).

136. In addition, the CO may, between bringing the charge and the hearing itself, review his decisions in the light of changes in other relevant circumstances, for example:

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<sup>554</sup> See rule 5 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>555</sup> See rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>556</sup> Rule 8(2) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

- a. The accused has committed further offences whilst waiting to be dealt with;
- b. New information comes to light which suggests that the offence with which the accused is charged needs to be changed to a more serious offence, which cannot or ought not to be dealt with summarily;
- c. New information comes to light, which indicates that the powers of punishment available to the CO are likely to be inadequate (for example, because the circumstances are more aggravating than they were originally viewed to be); or
- d. The CO may need to review previous decisions if, during the hearing<sup>557</sup> and before a finding has been reached, there has been a failure to comply with any part of the summary hearing procedure. This may involve adjourning the procedure and considering whether it is possible or necessary to start the procedure again.

137. ***Referring a charge to the DSP.*** When referring a charge to the DSP following the HA decision on an application to hear/for extended powers, the CO should send all relevant material (see paragraph 175) to the DSP. The Service person who is the subject of the referral should be notified of such a referral. Once the charge has been referred, the CO has no powers in relation to the charge. Charges referred to the CO by the DSP are dealt with in paragraphs 174 to 176.

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<sup>557</sup> See [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) for action to be taken during a summary hearing.

## Part 5 - Offences triable by CM or SCC

### Introduction

138. This Part deals with offences that can be tried at CM or SCC. A Service person committing any Service offence that is not listed at Annexes [B](#) and [C](#) can only be tried by CM. Part 6 (below) deals with charges in respect of a Schedule 2 offence or an offence in relation to prescribed circumstances. Additionally Part 5 deals with cases referred to the DSP and charges referred to the DSP where the accused elects for CM trial or the CO chooses to refer a charge to the DSP.

139. Relevant civilians can only be tried by SCC or CM. However, the jurisdiction of the SCC to deal with Service offences is limited, see [Chapter 3](#) (Jurisdiction and time limits). For example, a SCC cannot deal with indictable-only<sup>558</sup> offences. A CO<sup>559</sup> will be appointed for disciplinary purposes in respect of all relevant civilians, for example, to bring a charge on the direction of the DSP. For further guidance refer to [Chapter 2](#) (Meaning of commanding officer).

140. The procedure to be followed for an offence which may be tried by CM or before the SCC is set out below. A flow chart of the procedure to be followed is at [Annex A](#).

141. The procedure for referring a case to the DSP is at paragraphs 142 - 173. The procedure for referring a charge to the DSP is at paragraphs 174 - 176.

### Procedure for referring a case to the DSP

142. **Preliminary considerations.** Before a CO takes any action to refer a case to the DSP he should consider the matters at Part 4 steps 1 and 2 (whether he has initial powers to dispose of the case and deciding the mode of trial.) The CO should also ensure he has jurisdiction to bring a charge in accordance with [Chapter 2](#) (Meaning of commanding officer). The CO's attention is drawn particularly to the importance of considering the factors mentioned and guidance given in paragraphs 82 and 83.

143. **Time limits.** Time limits may apply in certain situations (for example former members of the regular or reserve forces or civilians formerly subject to Service discipline). Detailed guidance can be found in [Chapter 3](#) (Jurisdiction and time limits) and COs should seek staff legal advice.

144. **Criminal Procedure and Investigations Act 1996 and disclosure.** All charges allocated for CM or SCC trial are governed by the *Criminal Procedure and Investigations Act (CPIA) 1996 (Application to the Armed Forces) Order 2009*, which make provision equivalent (with modifications) to provisions of Part 1 of the CPIA. They include provision which places a duty: on the DSP to disclose certain documents and material to the accused; on the Service Police to record the details of the officer in charge of the investigation (OCI) and the disclosure officer (DO); and requiring the accused to provide a defence statement to the CAO and the prosecutor. The Service Police are required, under the CPIA code of practice for the armed forces to record and retain material which may be relevant to an investigation<sup>560</sup>.

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<sup>558</sup> These offences may only be tried by CM and have a special meaning under section 53 of the Act.

<sup>559</sup> See [Chapter 2](#) (Meaning of a CO) and regulation 6 of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

<sup>560</sup> The Code of Practice set out in the Schedule to the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009.

145. The DSP may disclose by sending material to an accused's CO. Where he does so, the CO will be required by the DSP to serve the accused with any material or written statements or documents, as soon as practicable. Once the information has been served, the CO must notify the DSP in writing of the date on which the accused received it. Further guidance on CPIA is contained in JSP 890 (Armed Forces Code of Practice for Disclosure).

(j) 146. Where the findings of an investigation indicate that an offence triable only at CM/SCC should be charged (and the requirements relating to possible Schedule 2 offences or to offences committed in prescribed circumstances do not apply) the procedures below should be followed.

## **Step 1 – Decision to refer to the DSP**

147. A CO should take legal advice before deciding not to refer a case to the DSP.

148. If after taking legal advice the CO considers that an offence capable of being dealt with summarily may be brought, he should follow the procedure at Part 4, paying particular attention to the factors mentioned and guidance given in paragraphs 82 and 83.

149. If the CO decides not to take disciplinary action he may wish to consider administrative action (see paragraphs 215 - 221); however, where the Service Police have investigated and found there is sufficient evidence to charge, the CO should not take this course of action without obtaining staff legal advice.

150. In the case of a relevant civilian where a decision is made not to take disciplinary action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

## **Step 2 - Referring a case<sup>561</sup> to the DSP**

151. In some instances where a CO has undertaken an investigation he may decide to refer the case to the DSP. In this unlikely event, when referring a case to the DSP following a CO's investigation, the CO should send all relevant material (see paragraph 36 above) and his reasons as to why they are referring the case. The Service person who is the subject of the referral should be notified of such a referral.

152. When a case investigated by the Service Police is referred to the DSP:

- a. If the Service Police provided the CO with a written statement the CO must provide a copy of it to the DSP;
- b. If the Service Police made an oral statement to the CO, the CO should ensure that as soon as practicable the Service Police provide the DSP with a written statement or make an oral statement to the DSP, specifying the Service offence with which the Service Police considers there is sufficient evidence to charge and why he considers there is sufficient evidence;
- c. When the CO refers the case to the DSP or as soon as reasonably practicable afterwards, he must provide the DSP with a copy of the case papers (see paragraph 56 above)<sup>562</sup>; and

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<sup>561</sup> This is where a suspect has not yet been charged.

<sup>562</sup> See regulation 9 of the Armed Forces (Part 5 to the Armed Forces Act 2006) Regulations 2009.

- d. The CO should provide a brief statement of his reasons for the referral.

153. The Service person or relevant civilian against whom an allegation has been made should be notified of such a referral as soon as reasonably practicable. The CO should comply with the Victim's Code<sup>563</sup> where that applies, see paragraph 200 below.

154. Once the case has been referred, the CO has no powers in relation to it. (Cases referred to a CO by the DSP in respect of Service personnel are dealt with at paragraphs 87 - 90 above). In the case of a relevant civilian where a case has been referred, the CO may consider whether to inform that person's employer (if applicable). In these circumstances, staff legal advice should be sought.

### Step 3 - DSP powers in respect of cases referred to the DSP

155. The DSP may take one of the following courses of action in relation to a case referred to the DSP:

- a. **Direction to bring a charge.** The DSP may direct that the CO bring a specified charge(s) for CM trial or SCC trial (if the DSP has allocated the charge for trial by SCC) (see [Annex K](#));
- b. **Service personnel only.** The DSP may refer the case to the accused's CO without giving a direction as to which charge or charges should be brought<sup>564</sup> (see [Annex L](#)). It is then for the CO to decide whether any charges capable of being dealt with summarily should be brought against the accused. In these circumstances, as no charge has been brought as yet, the CO will regain his initial powers<sup>565</sup> in relation to the case and follow the procedure set out in Part 4 (step 3), offences capable of being heard summarily;
- c. **Relevant civilians only.** The DSP may allocate the charge for SCC trial once the DSP has made a direction to the CO to bring a charge against a relevant civilian (see [Annex K](#)). If a civilian is jointly charged with a Service person both will be tried by the CM. Relevant civilians cannot be dealt with summarily;
- d. **Direction barring further proceedings.** The DSP may issue a direction barring<sup>566</sup> either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offence (see Annexes [M](#) and [N](#) for specimen directions). The DSP may make such a direction<sup>567</sup> in respect of any Service offence as to which he could make a direction under paragraph 155a above. A direction barring<sup>568</sup> further proceedings is a direction that the person specified is to be treated as acquitted of the offence specified<sup>569</sup>. This means that the CO may not take any further disciplinary action in the case. The CO must notify<sup>570</sup> the accused as

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<sup>563</sup> See paragraph 201 on the Victim's Code.

<sup>564</sup> Section 121(4) of the Act.

<sup>565</sup> Initial powers are defined in section 120 of the Act.

<sup>566</sup> Sections 121(5) and 127 of the Act and note regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

<sup>567</sup> Sections 121(5) and 127 of the Act.

<sup>568</sup> Section 63 relates to service proceedings; section 64 relates to civilian proceedings for a criminal conduct offence under section 42 of the Act.

<sup>569</sup> For the purposes of sections 63 and 64 of the Act .

soon as reasonably practicable of the direction barring further proceedings. The CO may, however, consider whether administrative action is appropriate; or

e. **Take no action.** This may arise if the DSP considers that the case would be better dealt with by the civilian authorities.

156. If it is decided to prosecute, that decision will be kept under review. If subsequently there is reason to change that decision, for example, through the receipt of fresh evidence which means that the case no longer meets the evidential test, those proceedings will be discontinued (see Annexes [Q](#) and [P](#)).

## Step 4 - Charging

157. **Action by CO on a DSP charge.** If the DSP has directed a CO to bring a charge, the DSP will provide the CO with a charge sheet specifying the charges (see Annexes [K](#) and [Q](#)). The CO must bring the charge(s) specified in the charge sheet as directed<sup>571</sup>. In these circumstances, the case is not referred back to the CO and a CO does not therefore have initial powers<sup>572</sup>. The DSP remains responsible for those cases in which he has directed a CO to bring a charge.

(k)

(l) 158. **Charging procedure.** The charging procedure is as follows:

- a. The CO<sup>573</sup> of the accused must sign<sup>574</sup> the charge sheet; and
- b. A copy of the signed charge sheet ([Annex Q](#)) and a copy of the DSP's direction to bring the charge ([Annex K](#)) must be served by hand<sup>575</sup> on the accused. Service of a charge sheet can be carried out by the CO, or by anyone authorised<sup>576</sup> by the CO.

159. When the accused is served with the charge sheet, the name of the person serving it should be recorded in addition to the date and time of service. A copy of the charge sheet should be retained on file. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits may apply.

160. Once a copy of the charge has been served on the accused the charging procedure is complete<sup>577</sup>. The original charge sheet (signed by the CO) must be returned to the DSP as soon as reasonably practicable<sup>578</sup>.

161. **Appointment of a defendant's assisting officer.** As soon as reasonably practicable after a charge is brought, a defendant's assisting officer (DAO) may

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<sup>570</sup> Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>571</sup> Section 122(1) of the Act.

<sup>572</sup> Section 119(5) of the Act.

<sup>573</sup> Guidance on delegation of the COs powers under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 is dealt with in paragraphs 66 to 74.

<sup>574</sup> Regulation 11(1) (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>575</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>576</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>577</sup> For the circumstances when the accused can be interviewed about an offence after he has been charged see the Code of Practice for the Treatment and Questioning of Persons by the Service Police (Code C).

<sup>578</sup> Regulation 12(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.



be appointed to assist the defendant with the preparations for and during the trial. A defendant may ask for any suitable person to assist them subject to certain restrictions. Further details in relation to a DAO are set out in [Chapter 29](#) (Court Martial proceedings). A brief for the DAO is also contained in [Chapter 29](#) (Court Martial proceedings).

162. ***Mentally disordered/incapable suspects.*** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of the charging procedure, an appropriate adult should be present. This may be:

- a. A relative, guardian or other person responsible for his care or custody;
- b. Someone who has experience of dealing with mentally disordered or mentally incapable persons (such as an approved social worker as defined by the Mental Health Act 1983 or a specialist social worker), but is not a Service policeman or employed by the Service Police; or
- c. Failing either of the above, some other responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

163. ***Suspects 16 years old or of a lower age.*** Where a suspect is less than 17 years old (or appears to be under 17), they are to be treated as a juvenile for the purposes of charging. An appropriate adult should be notified of the intention to charge and accompany the juvenile when being handed the charge sheet and the booklet entitled 'Your rights if you are accused of an offence under the Service justice system (T-SL-accused)' see [Annex G](#). Appropriate adult<sup>579</sup>, in the case of a juvenile, means:

- a. His parent or guardian (or, if they are in care, the care authority or voluntary organisation);
- b. A social worker; or
- c. Failing either of the above, another responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

(m)

(n) 164. A person, including a parent or guardian, should not be an appropriate adult if they are suspected of involvement in the offence in question, the victim, a witness, or is involved in the investigation or has received admissions prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.

165. ***Charging and custody.*** The issue of custody after charge is dealt with in detail in [Chapter 5](#) (Custody). The CO does not have the power to bring a charge that can only be tried by the CM or to charge a relevant civilian; only the DSP<sup>580</sup> has the power to direct the CO to bring such a charge.

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<sup>579</sup> The meaning is taken from the JSP 397 (Service Police Codes of Practice Part 2 paragraph 1.4(c)).

<sup>580</sup> A duty prosecutor will be available to direct a charge in such circumstances. See [Chapter 5](#) (Custody) for further information and guidance on how and when to consult the Duty Prosecutor.

## DSP powers after charge<sup>581</sup>

166. ***Charges allocated for CM trial.*** Once the CO has brought a charge in accordance with a direction from the DSP, that charge is allocated for CM trial unless the DSP has allocated it for SCC trial. The DSP may, prior to arraignment at trial:

- a. Amend the charge;
- b. Substitute for the charge another charge against the accused;
- c. Bring an additional charge against the accused;
- d. Discontinue the charge. In these circumstances the CO must as soon as reasonably practicable, give written notification of the discontinuance to the accused, see [Annex O](#);
- e. Refer the charge to the accused's CO<sup>582</sup> (if the accused is a Service person), but only if the charge is capable of being heard summarily (see [Annex L](#));
- f. Allocate<sup>583</sup> the charge for trial by the SCC, but only if the charge is one that the SCC has jurisdiction to try; or
- g. Make a direction barring further proceedings in respect of the offence charged or any offence that could be charged under paragraph 166c above<sup>584</sup> (see [Annex N](#)). If a direction is made, the accused's CO must be notified as soon as reasonably practicable and the CO must write to the accused without delay notifying them of the direction.

167. In order to carry out the actions at paragraphs 166a, b or c above<sup>585</sup>, the DSP must prepare and sign the charge sheet and ensure that a copy of the signed charge sheet is served by hand on the accused<sup>586</sup>. The DSP must also provide a copy of the charge sheet to the CAO.

168. If the amended substituted or additional charge is brought less than 24 hours before the hearing, the DSP must provide a copy of the charge sheet to the judge advocate.

169. CM rules<sup>587</sup> may restrict the exercise of powers under paragraphs 166a - g above after arraignment by the CM or after referral of the charge to the CM<sup>588</sup> or where the accused has elected CM trial. See [Chapter 29](#) (Court Martial proceedings).

170. ***Charges allocated for SCC trial.*** The DSP may prior to SCC trial<sup>589</sup> :

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<sup>581</sup> Section 125 of the Act.

<sup>582</sup> Section 125 of the Act: these powers are available after arraignment subject to restrictions in Court Martial rules.

<sup>583</sup> Section 125(2)(f) of the Act.

<sup>584</sup> Section 121(5) of the Act.

<sup>585</sup> See the requirements of regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>586</sup> This is not required to be done by a CO. Amended, substituted or additional charges will be served by a Service Prosecutor or by someone authorised by him.

<sup>587</sup> See the Armed Forces (Court Martial Rules) 2009 Rule 60.

<sup>588</sup> See section 279(4) or 280(3) (referral by the SCC) of the Act.

<sup>589</sup> Section 126 of the Act.

- a. Amend the charge;
- b. Substitute for the charge another charge against the accused;
- c. Bring an additional charge against the accused;
- d. Discontinue proceedings on the charge (see [Annex P](#)). In these circumstances the CO must, as soon as reasonably practicable, give written notification of the discontinuance to the accused;
- e. Allocate the charge for trial by the CM; or
- f. Make a direction barring further proceedings (see [Annex N](#)) in respect of the offence charged or any offence that could be charged under paragraph 170c above (If a direction is made the accused's CO must be notified as soon as reasonably practicable and the CO must write to the accused without delay notifying them of the direction)<sup>590</sup>.

171. In order to carry out the actions at paragraphs 170a, b or c above<sup>591</sup>, the DSP must prepare and sign the charge sheet and ensure that a copy of the signed charge sheet is served by hand on the accused<sup>592</sup>. The DSP must also provide a copy of the charge sheet to the CAO.

172. If the amended, substituted or additional charge is brought less than 24 hours before the hearing, the DSP must provide a copy of the charge sheet to the judge advocate.

173. SCC rules<sup>593</sup> may restrict the exercise of powers under paragraphs 170a - f above after a decision by the SCC<sup>594</sup> as to whether it should try the charge see [Chapter 32](#) (Service Civilian Court).

## Procedure for referring a charge to the DSP

174. A CO will refer a charge to the DSP in two situations:

- a. Where the accused has elected CM trial the CO must refer the charge to the DSP; and
- b. Where the CO has decided that it would be more appropriate that the matter be dealt with by CM trial; see Part 4 and [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

175. When referring a charge to the DSP, the CO should forward:

- a. The original charge sheet;
- b. The case summary<sup>595</sup>;

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<sup>590</sup> Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>591</sup> See the requirements of regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>592</sup> Regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>593</sup> Armed Forces (Service Civilian Court) Rules 2009.

<sup>594</sup> See section 279 of the Act.

<sup>595</sup> Rule 8(1)(c)(ii) Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) 2009.

- c. All papers relating to that charge prepared by the Service Police or during a CO's investigation including: all reports prepared by the Service Police; all witness statements; all other written records of evidence including a summary or transcript of all tape recorded interviews; a list of all exhibits and a statement of where any which are not documentary exhibits are held; all documentary exhibits; all disciplinary records of the suspect; if no formal disciplinary record of the suspect is maintained and held a list of his convictions for a Service offence or an offence under any of the SDAs and all equivalent papers prepared by a UK police force or an overseas police force and provided by that force to the Service Police; all documents to be provided, in accordance with the CPIA 1996 (Application to the Armed Forces) Order 2009, to a person involved in the prosecution of Service offences (the case papers<sup>596</sup>);
- d. Any notification from HA that permission to hear the charge has been granted;
- e. Any notification from HA that extended powers have been granted; and
- f. A covering letter explaining why they are referring the charge to the DSP including whether the accused elected CM trial.

176. When the CO refers any charge to the DSP that charge is regarded as allocated for CM trial, including where the accused elects CM trial<sup>597</sup>. The DSP will then consider whether the matter should proceed to CM trial or whether he should exercise any of his powers to amend, substitute, bring additional charges or discontinue the charge or to refer a charge back to the CO. Some of these powers would require the accused's consent where he has elected CM trial. The DSP will provide directions as to any action the CO may take in relation to these matters.

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<sup>596</sup> Regulation 2(1)(a) and (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>597</sup> Section 129(2)(b) of the Act.

## Part 6 - Offences listed in Schedule 2 or committed in prescribed circumstances

### Introduction

177. Schedule 2 offences and circumstances of a prescribed description are listed in Annexes [D](#) and [E](#) respectively. Further details and specimen charges are contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

178. Once a case has been referred to the DSP following a Service Police investigation (see paragraph 55 above), the procedure to be followed is set out below. See Appendix 2 to Annex A.

### Preliminary considerations

179. When, or as soon as reasonably practicable after, making the referral, the Service Police must provide the DSP with a copy of the case papers<sup>598</sup> and must provide the CO with a copy of all reports relating to the case<sup>599</sup>. This is necessary to ensure that the CO is made aware of matters relating to personnel under his command. This will also allow the CO to bring to the attention of the DSP<sup>600</sup> any other information that he considers relevant to the case, for example, matters relating to the operational context within which the offence is alleged to have been committed.

180. If a CO considers that there is information relevant<sup>601</sup> to the case which ought to be drawn to the attention of the DSP, he must bring it to the attention of the DSP as soon as reasonably practicable. COs should confine themselves to providing factual information relevant to any potential charge and should not express any opinion on whether anyone under command should be charged with a Service offence. A CO should bear in mind that any information he provides to the DSP will be, in most cases, disclosed to an accused as unused material in the event that the DSP decides to direct the bringing of a charge.

181. **Delegation of a CO's powers.** A CO, see [Chapter 2](#) (Meaning of a commanding officer), may delegate to a subordinate commander not below the rank of naval lieutenant, military or marine captain or flight lieutenant any or all of his functions<sup>602</sup>, subject to such conditions as he considers appropriate<sup>603</sup>. For the purpose of this Part, his functions are:

- (o)
- (p) a. The requirement to notify the Service Police of an offence under Schedule 2 or an offence committed in prescribed circumstances; and
- (q)
- (r) b. The bringing of one or more charges specified in a direction from the DSP.

(3)

182. **Time limits.** Time limits may apply in certain situations (for example former members of the regular or reserve forces or civilians formerly subject to Service discipline).

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<sup>598</sup> Regulation 7(1) (b) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009 see paragraph 56 above.

<sup>599</sup> Regulation 8(1) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

<sup>600</sup> "Relevant information" is information that the CO believes the DSP should be aware of including any health problems, whether property has been recovered, or a civilian has returned to the UK and the time limits for dealing with the matter have changed.

<sup>601</sup> Regulation 8(2) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

<sup>602</sup> See Part 5 of the Act and regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>603</sup> See regulation 16 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

Detailed guidance can be found in [Chapter 3](#) (Jurisdiction and time limits) and COs should seek staff legal advice.

183. **Criminal Procedure and Investigations Act 1996 and disclosure.** All charges allocated for CM trial are governed by the *Criminal Procedure and Investigations Act (CPIA) 1996 (Application to the Armed Forces) Order 2009* which make provision equivalent (with modifications) to provisions of Part 1 of the CPIA. They include provision which places a duty: on the DSP to disclose certain documents and material to the accused; on the Service Police to record the details of the officer in charge of the investigation (OCI) and the disclosure officer (DO); and requiring the accused to provide a defence statement to the CAO and the prosecutor. The CPIA code of practice for the Armed Forces includes a requirement on the Service Police to record and retain material which may be relevant to an investigation<sup>604</sup>.

184. The DSP may disclose by sending material to an accused's CO. Where he does so, the CO will be required by the DSP to serve the accused with any material or written statements or documents, as soon as practicable. Once the information has been served, the CO must notify the DSP in writing of the date on which the accused received it. Further guidance on CPIA is contained in JSP 890 (Armed Forces Code of Practice for Disclosure).

### DSP powers

185. Once a case has been referred by the Service Police to the DSP, the DSP will decide whether or not to allocate the case for CM/SCC trial, whichever is appropriate. In making that decision the DSP will apply the principles laid out in the Code for Service Prosecutors<sup>605</sup>.

186. The DSP may take one of the following courses of action:

a. **Direction to bring a charge.** The DSP may direct that the CO bring a specified charge(s) for CM trial or SCC trial (if the DSP has allocated the charge for trial by SCC) (see [Annex K](#));

b. **Service personnel only.** The DSP may refer the case to the accused's CO without giving a direction as to which charge or charges should be brought<sup>606</sup> (see [Annex L](#)). It is then for the CO to decide whether any charges capable of being dealt with summarily should be brought against the accused. In these circumstances, as no charge has been brought as yet, the CO will regain his initial powers<sup>607</sup> in relation to the case and follow the procedure set out in Part 4 (step 3), offences capable of being heard summarily;

c. **Relevant civilians only.** The DSP may allocate the charge for SCC trial once the DSP has made a direction to the CO to bring a charge against a relevant civilian (see [Annex K](#)). If a civilian is jointly charged with a Service person both will be tried by the CM. Relevant civilians cannot be dealt with summarily;

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<sup>604</sup> In accordance with the Code of Practice set out in the Schedule to the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2008.

<sup>605</sup> This can be found in Volume 3 of the MSL

<sup>606</sup> Section 121(4) of the Act.

<sup>607</sup> Initial powers are defined in section 120 of the Act.

d. **Direction barring further proceedings.** The DSP may issue a direction barring<sup>608</sup> either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offence (see Annexes [M](#) and [N](#) for specimen directions). The DSP may make such a direction<sup>609</sup> in respect of any Service offence as to which he could make a direction under paragraph 186a above. A direction barring<sup>610</sup> further proceedings is a direction that the person specified is to be treated as acquitted of the offence specified<sup>611</sup>. This means that the CO may not take any further disciplinary action in the case. The CO must notify<sup>612</sup> the accused as soon as reasonably practicable of the direction barring further proceedings. The CO may, however, consider whether administrative action is appropriate; or

e. **Take no action.** The DSP may decide to take no action under his statutory powers in relation to a Service person or a relevant civilian. This is most likely to occur where the DSP decides to refer the case to the civilian authorities in the UK or abroad. In such circumstances the DSP will notify the CO of his decision (eg to refer the case to the specified civilian authorities).

187. If it is decided to prosecute, that decision will be kept under review. If there is reason subsequently to change that decision, for example, through the receipt of fresh evidence which means that the case no longer meets the evidential test, those proceedings will be discontinued, see Annexes [O](#) and [P](#).

## Charging

188. **Action by CO on a DSP charge.** If the DSP has directed a CO to bring a charge, the DSP will provide the CO with a charge sheet specifying the charges. The CO must bring the charge(s) in the charge sheet as directed<sup>613</sup>. In these circumstances, the case is not referred back to the CO and a CO does not therefore have initial powers<sup>614</sup>. The DSP remains responsible for those cases in which he has directed a CO to bring a charge.

189. **Charging procedure.** The charging procedure<sup>615</sup> is as follows:

- a. The CO<sup>616</sup> of the accused must sign the charge sheet; and
- b. A copy of the signed charge sheet ([Annex Q](#)) and a copy of the DSP's direction to bring the charge ([Annex K](#)) must be served by hand on the accused. Service of a charge sheet can be carried out by the CO, or by anyone authorised by the CO.

190. When the accused is served with the charge sheet, the name of the person serving it should be recorded in addition to the date and time of service. A copy of the charge sheet

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<sup>608</sup> Sections 121(5) and 127 of the Act and note regulation 15(5) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

<sup>609</sup> Sections 121(5) and 127 of the Act.

<sup>610</sup> Section 63 relates to service proceedings; section 64 relates to civilian proceedings for a criminal conduct offence under section 42 of the Act.

<sup>611</sup> For the purposes of sections 63 and 64 of the Act.

<sup>612</sup> Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>613</sup> Section 122(1) of the Act.

<sup>614</sup> Section 119(5) of the Act.

<sup>615</sup> Regulation 11(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>616</sup> Guidance on delegation of the COs powers under Part 5 of the Act are dealt with in paragraphs 66 – 74.



should be retained on file. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits may apply.

191. Once a copy of the charge has been served on the accused, the charging procedure will be complete<sup>617</sup>. The original charge sheet (signed by the CO) must be returned to the DSP as soon as reasonably practicable<sup>618</sup>.

192. ***Appointment of a defendant's assisting officer.*** As soon as reasonably practicable after a charge is brought, a defendant's assisting officer (DAO) may be appointed to assist the defendant with the preparations for and during the trial. A defendant may ask for any suitable person to assist them subject to certain restrictions. Further details in relation to a DAO are set out in [Chapter 29](#) (Court Martial proceedings). A brief for the DAO is also contained in [Chapter 29](#) (Court Martial proceedings). A copy of the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#), should be provided (if it has not already been done).

193. ***Mentally disordered/incapable suspects.*** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of the charging procedure, then an appropriate adult should be present. An appropriate adult is defined at 162 above.

194. ***Suspects 17 years old or of a lower age.*** Where a suspect is 17 years old or of a lower age, they are to be treated as a juvenile for the purposes of charging. An appropriate adult should be notified of the intention to charge and should accompany the juvenile when being handed the charge sheet and the copy of the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). Appropriate adult<sup>619</sup>, in the case of a juvenile is given the same meaning as in paragraphs 163 and 164 above.

195. ***Charging and custody.*** The issue of custody after charge is dealt with in detail at [Chapter 5](#) (Custody). The CO does not have the power to bring a charge in relation to a Schedule 2 offence or offence committed in prescribed circumstances, only the DSP<sup>620</sup> has the power to direct the CO to bring a specified charge.

196. In those cases where an application for custody after charge is likely to be made, the CO should be aware that he has no power to charge a Schedule 2 offence or an offence committed in prescribed circumstances, unless directed by the DSP.

197. In these circumstances, the DSP should be asked without delay to consider directing an appropriate charge. The DSP will consider the available evidence and apply the realistic prospect of conviction test<sup>621</sup>. If the DSP directs the CO to bring a charge, the normal charging procedure should then be followed<sup>622</sup>. If the matter arises outside normal working hours, the Duty Prosecutor must be contacted<sup>623</sup>.

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<sup>617</sup> For the circumstances when the accused can be interviewed about an offence after he has been charged see the Code of Practice for the Treatment and Questioning of Persons by the Service Police (Code C).

<sup>618</sup> Regulation 12(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>619</sup> The meaning is taken from the Service Police Codes of Practice.

<sup>620</sup> A duty prosecutor will be available to direct a charge in such circumstances. See [Chapter 5](#) (Custody) for further information and guidance on how and when to consult the duty prosecutor.

<sup>621</sup> Code for Service Prosecutors found on the SPA website.

<sup>622</sup> Where custody after charge is applied for out of normal duty hours the duty/orderly officer must be a subordinate commander with delegated authority to refer a case to the DSP.

<sup>623</sup> Duty Prosecutor contact telephone number 07554 114229.



198. The CO should obtain staff legal advice in respect of the application for custody.

## Part 7 - Administrative and welfare responsibilities

### Introduction

199. In disciplinary matters, it is essential in the interests of fairness and justice that matters are dealt with diligently and without undue delay. Delay can be particularly stressful to both victims and the accused and such pressure can cause difficulty in their personal lives as well as an inability to focus on routine work, decision making, key career courses and decisions. Delay can also impact on an investigation and fairness of the proceedings because over time, witnesses' recollections of an event may be affected or evidence may be lost. Once an investigation has been completed, the resulting report should be acted upon as soon as reasonably practicable. Discipline case files should be carefully maintained, with accurate record keeping and file management.

### Code of practice on services to be provided by the armed forces to victims of crime

200. The code of practice set out in JSP 389 lists specific duties for the CO, DSP, MCS, CAO and Service Police in respect of a victim of a Service offence. This is a tri-Service policy on the treatment of victims, which should be brought to the attention of any victim of crime within the Service, including relevant civilians. The requirements contained within the code are mandatory and govern the minimum level of service to be provided to:

- a. Victims of relevant criminal conduct which occurred in the United Kingdom; and
- b. Victims of relevant criminal conduct which occurred outside the United Kingdom when those victims were Service personnel or relevant civilians.

201. A person entitled to receive support under the code is a person who has made a complaint to the ship/unit/establishment or Service Police in relation to an allegation of violence, interference with property (including theft and criminal damage), an offence of a sexual nature, ill treatment, conduct of a cruel kind and any other matter the CO decides requires support. The DIN must be consulted as the authoritative document.

### Publications

202. Information on the disciplinary system is to be found in a number of publications, which should be brought to the attention of the suspect/accused at the appropriate stage of proceedings. These are:

- a. Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#)<sup>624</sup>;
- b. Brief for accused's assisting officer<sup>625</sup>;
- c. Defendant's assisting officer guide<sup>626</sup>; and
- d. JSP 838 (Armed Forces Legal Aid Scheme) and see Form JPA T002.

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<sup>624</sup> This publication provides information to a Service personnel or relevant civilians on their rights whilst being investigated, charged heard summarily or by Service court.

<sup>625</sup> See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) which contains instructions to the AAO.

<sup>626</sup> See [Chapter 29](#) (Court Martial proceedings) which contains the DAO instructions.

203. There is a well established system under which Service personnel who are under investigation or charged with an offence are supported. This may include:

- a. Comprehensive information and guidance on the disciplinary system<sup>627</sup>;
- b. Access to legal advice and assistance, see paragraphs 206 - 208 below and JSP 838 (Armed Forces Legal Aid Scheme);
- c. Continuing employment and sensitive career management while the case progresses<sup>628</sup>;
- d. The appointment of assisting officers from the individual's ship/unit/establishment<sup>629</sup>;
- e. The normal range of welfare support (welfare officers, padre, medical, family support); and
- f. Protection from media attention where appropriate<sup>630</sup>.

## Direct welfare support

204. In all cases, welfare support should be provided. An accused and their family have access to the full range of welfare support, including pastoral and medical care that is tailored to meet the needs of the individual.

205. It is important that welfare support is open to all on an equal basis. The Services have issued specific guidance covering support to accused personnel<sup>631</sup>. COs and line management have ready access to welfare expertise and subject matter experts to call upon if required, especially if the accused has just landed from a ship or been transferred from his unit for disciplinary reasons.

## Legal aid

206. **Interview.** A suspect who is being interviewed by the Service Police is entitled to free legal advice during the interview in accordance with JSP 397 (Service Police Codes of Practice). This may be provided under the duty solicitor legal aid scheme or from a Service lawyer if overseas.

207. **The Criminal Legal Aid Scheme.** The primary function of the Armed Forces Criminal Legal Aid Authority is to provide legal aid case management and funding for defendants or appellants who:

- a. Appeal against findings and/or awards following summary dealings, including applications for extension of the appeal period by the Summary Appeal Court, for leave to appeal out of time (Service personnel only);

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<sup>627</sup> Your rights if you are accused of an offence under the Service justice system (Annex G).

<sup>628</sup> Removal from post or suspension considered under QRs or single-Service administrative instructions, RN: PLAGO 0803 and FLAGO Chapter 16, Army: AGAI 67 and QRs Chapter 6, RAF: QRs 1027 and AP 3392 Vol 5 Leaflet 127.

<sup>629</sup> See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) for a full brief to the Accused Assisting Officer.

<sup>630</sup> See Tri-Service Guidance on contact with the media (DIN 2007 03-006).

<sup>631</sup> RN: PLAGO article 0101; Army: AGAI 81 paragraph 081.035 and RAF: AP3392 Vol 4.

- b. Have a case referred to the DSP, for a decision on prosecution; this includes schedule 2 offences which are referred directly to the DSP by the Service Police as well as matters referred to the DSP by the Commanding Officer;
- c. Are to be tried in the Court Martial (CM) or the Service Civilian Court (SCC);
- d. Wish to apply for leave to appeal to the Court Martial Appeal Court (CMAC);
- e. Wish to appeal in the CM, against the finding and/or sentence after trial in the SCC (relevant civilians only); or
- f. Are to be tried by a criminal court outside the UK

For more detail reference should be made to JSP 838 (Armed Forces Legal Aid Scheme). See also [Annex R](#) for a quick reference flow chart on applying for legal aid..

208. **Summary hearing.** Legal advice to the accused is ordinarily at the accused's expense, but there are many potential sources of free legal advice from firms of solicitors who offer a free initial consultation. Advice may be available from a Service lawyer. The AAO may be in a position to advise the accused whether they are able to get free legal advice contacting a staff lawyer if he themselves requires guidance in this respect. A legal adviser is not allowed to be present during the summary hearing. Legal aid is not available for summary hearings by the CO; however, an individual is entitled to obtain legal advice prior to a summary hearing at his own expense, or from a Service lawyer if available.

## Legal advice to the CO and the Service Police

209. **During investigation.** The DSP and staff legal advisers can provide legal advice to the Service Police during the course of an investigation. Once an investigation report has been submitted by the Service Police to the CO, the CO should obtain legal advice from a staff legal adviser; this will include any application for Service custody, whether before charge or after charge.

210. RN coxswains should seek advice during the course of an investigation from the relevant Naval Provost Marshal in the first instance. In the other Services, personnel conducting CO's investigations should seek advice from a staff legal adviser or HA.

211. **Following investigation.** The CO should seek legal advice from a staff legal adviser in relation to charging, referral to the DSP, custody matters, extended powers, and applications to hear any of the offences listed in [Annex C](#). This list is not exhaustive.

212. General guidance on disciplinary action may be also sought from HA.

## Employment during an investigation and/or while awaiting trial

213. A CO may suspend a suspect/accused from duty during the investigation of an alleged offence or any matter, if he considers that such action is necessary in the interests of the Service or individual. Full guidance on suspension<sup>632</sup> and removal from post<sup>633</sup> is contained in single-Service instructions. Staff legal advice should be taken.

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<sup>632</sup> Suspension from duty pending investigation is dealt with under single-Service policy. RN: PLAGO 0803; Army: QRs paragraph 6.015; and RAF: AP 3392 Volume 5 leaflets 127 to 130.

214. The potential impact on the accused of an investigation and charge should be addressed during the disciplinary process. Consideration should be given to whether a specialised medical assessment is required (particularly psychiatric) for those employed in a safety critical area or who have access to firearms.

## **Administrative action**

215. There may be times when administrative action should be considered instead of, or in addition to, formal disciplinary action. The distinction between disciplinary action and administrative action is important. As a general rule, disciplinary action should be used where there is evidence that an offence has been committed, where the application of Service law is appropriate and where an individual should, if convicted, be punished. Minor administrative action is intended to correct professional and personal shortcomings. It should not be used as a substitute for disciplinary action in clearly criminal matters (unless it is following a criminal conviction). When minor administrative action is taken, the sanction should fit the professional failing, and be clearly designed to correct it, not to punish the individual. Major administrative action, which includes discharge from the Service, may be taken in conjunction with or following disciplinary action.

216. Guidance on major administrative action is set out in the single-Service publications<sup>634</sup>. JSP 833 (Minor Administrative Action) addresses minor administrative action. In addition, legal advice may be sought from a staff legal adviser.

217. Where harassment or bullying is alleged, reference should be made to JSP 831 (Redress of individual grievance: Service complaints) and if necessary, JSP 763 (The MOD Harassment Complaints Procedure), when considering how to proceed.

218. A CO should be aware that an allegation of harassment or bullying may amount to a prescribed circumstance<sup>635</sup>. It may not be immediately apparent whether a disciplinary offence has been committed and whilst proceeding with his preliminary enquiries a CO<sup>636</sup> should be aware of the possibility.

219. If at any point during his enquiries, it appears that prescribed circumstances do or may exist, the CO is under a duty to immediately inform the Service Police. If the matter is reported to the Service Police, the CO may not take any further action to investigate the allegation under JSP 831 or JSP 763, until the Service Police either refer the matter back to them or inform them that there is insufficient evidence to charge an offence. If the CO is unsure whether prescribed circumstances exist he should seek staff legal advice.

220. Although relevant civilians are not subject to the Services' provisions on administrative action, civilians are allowed certain privileges such as bringing a vehicle onto camp or are entitled under a licence to occupy a married quarter. Accordingly such privileges or licences may be revoked if the misconduct warrants it. For example, where a civilian is found to have

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<sup>633</sup> See single-Service guidance on removal from post RN: PLAGO 0803; Army: AGAI 67; and RAF AP 3392 Volume 5 leaflet 127 to 130.

<sup>634</sup> Single-Service guidance on major administrative action can be found in PLAGO for the RN, AGAI 67 for the Army and QRs paragraph 1028 for the RAF.

<sup>635</sup> Under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (see Annex E).

<sup>636</sup> The CO does not have discretion to investigate circumstances of a prescribed description (see section 114 of the Act), even if the complainant does not wish to make a formal complaint to the Service Police. In such cases the matter must be referred to the Service Police. If the case has been investigated and referred back to the CO, then administrative action may be taken, if appropriate. This will also apply to any allegation made in the form of a redress of grievance, in which prescribed circumstances arise.

contravened standing orders by driving without insurance, the CO may wish to consider revoking the civilian's vehicle pass to enter the unit/establishment. Staff legal advice should be sought in these cases.

221. In the case of a relevant civilian where a decision is made not to take disciplinary action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

## **Administrative considerations**

222. When despatching case papers, the normal postal system can incur protracted delays. Case papers should be unclassified unless they contain classified information, but must have the appropriate privacy marking<sup>637</sup>. They are to be passed by the fastest possible means and optimum use should be made of e-mail, fax and couriers. Service duty vehicles and existing contracted courier services are to be used and all packages clearly marked with a label containing the following text:

### **PRIORITY - DISCIPLINE CASE PAPERS**

This package contains papers relating to a discipline case. Service policy requires that on the day of receipt an authorised person opens it and takes the necessary action.

Note: this label is to be retained with the case papers for future audit purposes.

Date of Despatch:

Date of Receipt:

From:

Name (BLOCKS):

To:

Rank:

Signature:

## **Reporting of deaths to Service Police (where no Service offence is suspected)**

223. Where a death occurs overseas of a Service person or a relevant civilian, the Service Police should be notified, even when no Service offence is suspected. The Service Police have certain obligations when an unexpected death occurs, even though no offence is suspected.

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<sup>637</sup> See JSP 440 (The Defence Manual of Security).

## Part 8 – Transitional guidance

224. This Part outlines the main transitional provisions related to Part 5 of the Act contained in the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. The basic aim of the transitional arrangements for Part 5 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie before 31 October 2009).

### Application of AFA06 to SDA offences

225. Paragraphs 227 to 233 set out how, for the purposes of transitional arrangements, AFA 06 will apply to SDA offences. This annex specifically identifies those SDA offences which may be dealt with at a summary hearing and those SDA offences which will count as 'Schedule 2' offences for the purposes of AFA 06.

226. Offences committed before commencement must be charged as offences under AA55, AFA55 or NDA57 as the case may be, *not* as the corresponding offence under AFA06. This annex explains:

- a. Which offences under AA55, AFA55 and NDA57 may be dealt with at a summary hearing under AFA06; and
- b. Which offences under AA55, AFA55 and NDA57 count as Schedule 2 offences for the purposes of Part 5 of AFA06.

This annex is 'transitional' only in a technical sense. It will continue to be relevant whenever offences committed before commencement come to light after commencement.

### Offences which may be dealt with at a summary hearing<sup>638</sup>

227. In addition to the offences listed at Annexes [B](#) and [C](#), a number of offences under AA55, AFA55 and NDA57 may be dealt with at a summary hearing under AFA06.

228. **AA/AFA55 offences.** Offences under the following sections of AA/AFA55 may be dealt with at a summary hearing under AFA06:

- a. Section 29 (offences by or in relation to sentries, persons on watch etc);
- b. Section 29A (failure to attend for duty, neglect of duty etc);
- c. Section 30(c) (taking vehicle, equipment or stores abandoned by the enemy);
- d. Section 33 (insubordinate behaviour);
- e. Section 34 (disobedience to lawful commands);
- f. Section 34A (failure to provide a sample for drug testing);
- g. Section 34B (failure to provide sample after serious incident);
- h. Section 35 (obstruction of provost officer);

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<sup>638</sup> See article 15 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

- i. Section 36 (disobedience to standing orders);
- j. Section 38 (absence without leave);
- k. Section 39 (failure to report or apprehend deserters or absentees);
- l. Section 42(1)(a) (falsely pretending to be suffering from sickness or disability);
- m. Section 43 (drunkenness);
- n. Section 43A (fighting, threatening words etc);
- o. Section 44 (damage to, or loss of, public or Service property etc);
- p. Section 44A(1)(c), (d) or (e) (damage to, and loss of, HM aircraft or aircraft material);
- q. Section 44B(2) (conduct likely to impair efficiency or effectiveness of public or Service equipment etc);
- r. Section 45 (misapplication and waste of public or Service property);
- s. Section 46 (offences relating to issues and decorations);
- t. Section 50 (inaccurate certification);
- u. Section 51 (low flying);
- v. Section 52 (annoyance by flying);
- w. Section 54(2) (releasing prisoner or allowing escape);
- x. Section 55 (resisting arrest);
- y. Section 56 (escape);
- z. Section 60 (unauthorized disclosure of information);
- aa. Section 61 (false statements on enlistment);
- ab. Section 62 (false documents);
- ac. Section 65 (ill-treatment);
- ad. Section 66 (disgraceful conduct of a cruel, indecent or unnatural kind);
- ae. Section 68 (attempt, where the offence attempted is one of those above);
- af. Section 69 (conduct to prejudice of military or air-force discipline);
- ag. Section 75J (failure to attend hearing after release from custody).

This includes an offence under one of the above sections which was committed because AA/AFA55 section 68A (aiding and abetting, and inciting) applied.



229. An offence under AA/AFA55 section 70 (criminal conduct) may be dealt with at a summary hearing if the corresponding civil offence is one of those listed at Schedule 1 to AFA06. However if the corresponding civil offence is listed at Part 2 of Schedule 1 to AFA06 it may not be heard summarily without the permission of higher authority, unless the CO hearing the charge is a 2\* or above.

230. **NDA offences.** Offences under the following sections of NDA57 may be dealt with at a summary hearing under AFA06:

- a. Section 5(c) (taking vehicle, equipment or stores abandoned by the enemy);
- b. Section 6 (offences by or in relation to sentries, persons on watch etc);
- c. Section 7 (failure to attend for duty, neglect of duty etc);
- d. Section 11 (insubordinate behaviour);
- e. Section 12 (disobedience to lawful commands);
- f. Section 12A (failure to provide a sample for drug testing);
- g. Section 12B (failure to provide sample after serious incident);
- h. Section 13 (fighting, threatening words etc);
- i. Section 14 (obstruction of provost officer);
- j. Section 14A (disobedience to standing orders);
- k. Section 17 (absence without leave);
- l. Section 18 (failure to report or apprehend deserters or absentees);
- m. Section 21 (low flying);
- n. Section 22 (annoyance by flying);
- o. Section 25 (inaccurate certification);
- p. Section 27 (malingering), but only if the offence is one of falsely pretending to be suffering from sickness or disability, or failing to do anything whereby any sickness or disability is prolonged or aggravated;
- q. Section 28 (drunkenness);
- r. Section 29 (damage to, or loss of, public or Service property etc);
- s. Section 29A(1)(c), (d) or (e) (damage to, and loss of, HM aircraft or aircraft material);
- t. Section 29B(2) (conduct likely to impair efficiency or effectiveness of public or Service equipment etc);

- u. Section 30 (misapplication and waste of public or Service property);
- v. Section 31 (offences relating to issues and decorations);
- w. Section 33A(2) (releasing prisoner or allowing escape);
- x. Section 33B (resisting arrest);
- y. Section 33C (escape);
- z. Section 34 (unauthorised disclosure of information);
- aa. Section 34A (false statements on entry);
- ab. Section 35 (false documents);
- ac. Section 36A (ill-treatment);
- ad. Section 37 (disgraceful conduct of a cruel, indecent or unnatural kind);
- ae. Section 39 (conduct to prejudice of naval discipline);
- af. Section 40 (attempt, where the offence attempted is one of those above);
- ag. Section 47K (failure to attend hearing after release from custody).

This includes an offence under one of the above sections which was committed because NDA57 section 41 (aiding and abetting, and inciting) applied.

231. An offence under NDA57 section 42 (criminal conduct) may be dealt with at a summary hearing if the corresponding civil offence is one of those listed at Schedule 1 to AFA06. However if the corresponding civil offence is listed at Part 2 of Schedule 1 to AFA06 it may not be heard summarily without the permission of higher authority, unless the CO hearing the charge is a 2\* or above.

232. **AWOL under RFA96.** An offence of AWOL under RFA96 section 96 or 97 may be dealt with at a summary hearing under AFA06 even if committed before commencement<sup>639</sup>.

233. **Charges capable of being heard summarily.** Appendix 4 to [Annex A](#) explains the conditions that must be met before a charge is 'capable of being heard summarily' under AFA06. In the case of an SDA offence, section 52(4) of AFA06 is *also* met if the accused:

- a. Was subject to military or air-force law or to NDA57 from the time of the offence to commencement, and
- b. Has been subject to Service law since commencement.

## ***Schedule 2 offences***<sup>640</sup>

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<sup>639</sup> Where a period of AWOL began before commencement and continued until after commencement, legal advice should be sought.

<sup>640</sup> See article 42 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

234. In addition to the offences listed at [Annex D](#), the following SDA offences count as 'Schedule 2 offences' for the purposes of Part 5 of AFA06:

- a. An offence under AA/AFA55 section 24 or NDA57 section 2 (misconduct in action);
- b. An offence under AA/AFA55 section 25(1)(a), (b), (c), (d) or (f) or NDA57 section 3(1)(a), (b), (c), (d) or (f) (assisting the enemy);
- c. An offence under AA/AFA55 section 26(1) or NDA57 section 4(1) (obstructing operations);
- d. An offence under AA/AFA55 section 30 or NDA57 section 5 (looting);
- e. An offence under AA/AFA55 section 31 or NDA57 section 9 (mutiny);
- f. An offence under AA/AFA55 section 32 or NDA57 section 10 (failure to suppress mutiny);
- g. An offence under AA/AFA55 section 37 or NDA57 section 16 (desertion) where the accused intends to avoid active service<sup>641</sup>;
- h. An offence under AA/AFA55 section 44A(1)(f) or NDA57 section 29A(1)(f) (causing sequestration etc of aircraft) where the offender acts wilfully or with wilful neglect;
- i. An offence under AA/AFA55 section 48A or NDA57 section 19 (loss or hazarding of ship);
- j. An offence under AA/AFA55 section 49 or NDA57 section 20 (dangerous flying etc) where the offender acts wilfully or with wilful neglect;
- k. An offence under AA/AFA55 section 68 or NDA57 section 40 of attempting to commit any of the offences above;
- l. An offence under AA/AFA55 section 70 or NDA57 section 42 (criminal conduct) where the corresponding civil offence is:
  - (1) An offence listed in paragraph 12 of Schedule 2 to AFA06;
  - (2) An offence under the Sexual Offences Act 1956, sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 or 32;
  - (3) An offence under the Mental Health Act 1959, section 128;
  - (4) An offence under the Indecency with Children Act 1960, section 1;
  - (5) An offence under the Sexual Offences Act 1967, section 4 or 5;
  - (6) Attempt, conspiracy or incitement to commit any of the offences above;
  - (7) An offence under Part 2 of the Serious Crime Act 2007 of assisting or encouraging the commission of an offence within (1) above.

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<sup>641</sup> For the meaning of 'active service' in this context, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) section 8(3).

## **Offences discovered post-commencement and cases in progress at commencement**

235. Paragraphs set 236 to 262 out how, for the purposes of transitional arrangements, SDA offences which are discovered post-commencement or matters which are ongoing at commencement are to be dealt with.

### **Situation 1 - SDA offences discovered post-commencement**

236. This situation will occur where an offence is committed pre-commencement but does not come to light until after commencement. Offences which are committed before 31 Oct 09 must be charged under one of the SDAs. Where, post-commencement, it appears that an offence might have been committed pre-commencement, it will generally be handled in the same way as a Service offence. For this reason the AFA 06 arrangements and therefore the [Chapter 6](#) guidance will apply. The transitional guidance in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences) should be read to confirm the arrangements for SDA offences post-commencement.

237. **Situation 2 - Where a CO is aware that a SDA offence has been committed but a suspect has not been charged pre-commencement.** The circumstances in which a CO will have 'initial powers' in relation to a case (such as the power to bring a charge) because of events which occurred before commencement<sup>642</sup> are explained at paragraphs 241 to 244 below

238. **Situation 3 - Where an accused has been charged with an SDA offence but the charge has not been disposed of pre-commencement.** The circumstances in which a CO has powers under AFA06 in relation to a charge brought under the SDAs before commencement are explained in paragraphs 245 to 262 below.

239. Situations 2 and 3 outlined above are matters which will be ongoing at commencement and the transitional arrangements that apply are complicated. COs should take not take action without staff legal advice.

240. This guidance should be read in conjunction with the flow diagrams at [Annex S](#) starting at the 'Transitional guidance - Overview' flow diagram.

### ***Situation 2 - Where a CO is aware that a SDA offence has been committed but a suspect has not been charged pre-commencement***

241. If no charge was brought before commencement<sup>643</sup>, the CO may have initial powers under AFA06 section 119(2), (4) or (5). If so, he can bring a charge or refer the case to the DSP, under section 120.

242. The CO has initial powers under section 119(2) if:

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<sup>642</sup> The question whether a CO has 'initial powers' will normally arise only where no charge was reported to him before commencement and no charge has yet been brought under AFA06. However, it is also possible that a CO might need 'initial powers' in respect of a case where a charge was reported to him before commencement, e.g. because the proceedings were stayed but the CO now wishes to bring another charge.

<sup>643</sup> The CO may also have initial powers if a charge was brought before commencement but no charge is 'current at commencement', see footnote 1 above.

- a. At commencement, they are aware<sup>644</sup> of an allegation or circumstances indicating that a person under his command has or may have committed an SDA offence;
- b. The case has not been investigated by Service Police;
- c. If the case has been investigated by civilian police, it is not likely to be referred to the Service Police; and
- d. The CO is not required by AFA06 section 113 or 114 to ensure that the Service Police are aware of the matter<sup>645</sup>.

243. The CO has initial powers under section 119(4) if, before commencement, the Service Police made a deemed referral for the purposes of section 116(3)<sup>646</sup>, see paragraph 259 below.

244. The CO has initial powers under section 119(5) if, before commencement, the PA referred *part* of a case back to them, and no charge relating to that part of the case is 'allocated for Court Martial trial' or 'allocated for summary hearing'<sup>647</sup>. If the PA referred the *whole* case back, the summary charge will be 'allocated for summary hearing', so the CO does not need initial powers: he already has the section 123 powers in relation to the existing charge. If the PA only referred *part* of the case back, however, it may be that the summary charge relates to the part which the PA retained. In these circumstances there may be no summary charge which relates to the part of the case that was referred back; but in that case the CO has initial powers.

### **Situation 3 - Where an accused has been charged with an SDA offence but the charge has not been disposed of pre-commencement**

245. **Possible outcomes.** Where a charge was reported to the accused's CO before commencement and has not been disposed of before commencement, it *may* be possible for the CO to hear it, or exercise the section 123 powers in relation to it, under AFA06. The main possibilities are as follows:

- a. The charge is 'allocated for Court Martial trial'. That is, the DSP has the section 125 powers in relation to the charge, and the CO has no powers.
- b. The charge is 'allocated for summary hearing', and the CO may hear it. Note that 'allocated for summary hearing' is a technical term. It means only that the CO has the section 123 powers in relation to the charge. It does *not* necessarily mean that the charge will in fact be heard summarily, or even that it *can* be heard summarily. Hence the third possibility:
- c. The charge is 'allocated for summary hearing', *but the CO may not hear it* (or may not yet hear it); or

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<sup>644</sup> See article 43(4) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, which modifies the words 'becomes aware' in section 119(2).

<sup>645</sup> AFA06 sections 113 and 114 apply not only where a CO 'becomes' aware (after commencement) of a possible Schedule 2 offence or of prescribed circumstances, but also where they were already aware of the matter *before* commencement, Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 43(1) to (3). For SDA offences which count as Schedule 2 offences, see paragraph 234.

<sup>646</sup> Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 50.

<sup>647</sup> Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 51.

- d. No further steps may be taken on the charge<sup>648</sup>.

246. **Charges preferred by the PA.** In paragraph 245, ‘the charge’ means the charge reported to the CO under AA/AFA55 section 76 or NDA57 section 52B, or any charge that the CO may have substituted for that charge before commencement. Where a charge has been reported to the CO and the case has been referred to the PA, the PA may have preferred a new charge (possibly identical to the one originally reported) with a view to court-martial trial. In these circumstances the SPA should be consulted as to whether the charge preferred by the PA is ‘allocated for Court Martial trial’. If it is, the CO will have no powers in relation to *that* charge unless and until the DSP refers it back; and the CO will also have no powers in relation to *the charge originally reported to them*.

## Determining possible outcomes

247. In the rest of this Part:

- a. It is assumed either that no charge has been preferred by the PA, or that any charge preferred by the PA is not ‘current at commencement’ (e.g. because the PA has discontinued proceedings on it); and
- b. ‘The summary charge’ is short for ‘the charge reported to the CO under AA/AFA55 section 76 or NDA57 section 52B, or any charge that the CO may have substituted for that charge before commencement’. The expression ‘summary charge’ should *not* be read as implying that the charge can or should be heard summarily.

Note that the summary charge will in certain circumstances be ‘allocated for Court Martial trial’, even though it is by definition a charge which under the SDAs could not be tried by court-martial (because a court-martial could only try charges preferred by the PA).

## Question 1 - Is the summary charge ‘current at commencement’?

248. The summary charge will be ‘current at commencement’ if the conditions set out at article 46(4) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 are met. Those conditions are summarised in the flow diagram at [Appendix 1 to Annex S](#) entitled ‘Summary charge current?’ and in paragraphs 249 and 250 below.

249. **Was a finding recorded before commencement?**

- a. **Yes.** If so, the summary charge cannot be current: it has been superseded by the finding. If the summary charge was found proved and punishment was not awarded before commencement, punishment must be awarded (under the SDAs, *not* AFA06) if this has not yet been done, see the transitional guidance in [Chapter 13](#) (Summary hearing sentencing and punishments).
- b. **No.** If no finding was recorded on the summary charge before commencement:
- (1) Was the charge dismissed without a hearing, under AA 1955 section 76(5)(a) or NDA 1957 section 52B(5)(a)?
  - (2) Were further proceedings on the charge stayed under AA/AFA55 section 76(4) or NDA57 section 52B(4)?

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<sup>648</sup> But it may be possible to bring another charge, see footnote 1 above.

(3) Did higher authority refer the charge back to the CO under AA/AFA55 section 76A(2) or NDA57 section 52C(2) with a direction to dismiss it or to stay further proceedings on it?

If the answer to any of these questions<sup>649</sup> is *yes*, the summary charge is not 'current at commencement'<sup>650</sup>. If the answer to all of these questions is *no*, then ...

**250. Was the case referred to the PA before commencement?**

a. **No.** If not, the summary charge is 'current at commencement'. Go to paragraph 251 below.

b. **Yes.** If so, the status of the summary charge depends on the action (if any) that the PA took before commencement.

(1) If the PA preferred a charge, the summary charge is *not* 'current at commencement' *unless* the PA also referred the case back to the CO or the ASA under AA/AFA55 section 83B(2) or 83BB(2A) or NDA57 section 52I(2) or 52II(2A)<sup>651</sup>. If the PA did not refer the case back, the charge preferred by the PA will normally be 'allocated for Court Martial trial', and the summary charge falls away.

(2) If the PA did not prefer a charge, the summary charge *is* 'current at commencement'<sup>652</sup> *unless* the PA informed the CO before commencement that the PA had decided to take no action, i.e. that he had decided *neither* to prefer a charge *nor* to refer the case (or a part of the case to which the charge relates) back to the CO.

**Question 2 - Is the summary charge 'allocated for summary hearing'?**

251. A summary charge which is 'current at commencement' is not necessarily 'allocated for summary hearing' immediately after commencement<sup>653</sup>. It may be 'allocated for Court Martial trial' instead, so that it is the DSP rather than the CO who has powers in relation to it (even though it was not the PA who preferred it). The allocation of the charge will depend on the factors in paragraphs 252 to 254.

**252. Did the accused elect court-martial trial of the charge?**

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<sup>649</sup> There is one further case in which a summary charge is not 'current at commencement', viz. where the time limit for court-martial trial has already expired. The time limit applicable for this purpose is defined in article 48 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009. This situation is very unlikely to arise.

<sup>650</sup> Article 46(4)(e) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 also provides that a charge is not 'current at commencement' if another charge has been substituted for it, because the new charge takes the place of the original one. In these circumstances the questions in the flowchart and the text must be considered in relation to the *new* charge.

<sup>651</sup> If the PA preferred a charge and referred *part* of the case back, the summary charge is not 'current at commencement' unless it relates to the part that was referred back.

<sup>652</sup> But 'allocated for Court Martial trial', see paragraph 253 below.

<sup>653</sup> Even if it is 'allocated for summary hearing' immediately after commencement, it will become 'allocated for Court Martial trial' if the CO refers it to the DSP. Conversely, if the charge is initially 'allocated for Court Martial trial' it will become 'allocated for summary hearing' if the DSP refers it back to the CO.

a. **Yes.** If so (and he did not withdraw the election with leave before commencement)<sup>654</sup>, the summary charge is 'allocated for Court Martial trial' immediately after commencement. The CO need not formally refer it, but should pass the details to the SPA if they are not already aware of the matter.

b. **Declined.** If the accused *declined* the opportunity to elect court-martial trial before commencement (or did elect but withdrew the election with leave before commencement), special rules apply, see paragraph 262 below.

c. **Not given the opportunity.** If the accused was *not given the opportunity to elect court-martial trial* before commencement, the summary charge is 'allocated for summary hearing' immediately after commencement unless it is an 'excluded' charge (as defined by article 47 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), in which case it is initially 'allocated for Court Martial trial'. The factors which determine whether a charge is 'excluded' are summarised in the flow diagram at [Appendix 2 to Annex S](#) entitled 'Excluded charge?' and paragraphs 253 and 254 below.

**253. Was the case referred to the PA before commencement?**

a. **Yes and case was not referred back.** If so, and the case (including any part of the case to which the charge relates) *was not referred back* before commencement, the summary charge is 'allocated for Court Martial trial' immediately after commencement. The CO need not refer it.

b. **Yes but case was referred back.** If the case was referred to the PA, but the case (or any part of the case to which the charge relates) *was referred back* before commencement, the summary charge is 'allocated for summary hearing' immediately after commencement. As to whether it can be *heard* summarily, see paragraphs 256 to 261 below.

c. **No.** If the case was not referred to the PA before commencement, then ...

**254. Was the summary charge referred to higher authority before commencement?**

a. **Yes.** If so, and the summary charge was not referred back to the CO (or to the ASA) before commencement, the summary charge is automatically 'allocated for Court Martial trial' immediately after commencement<sup>655</sup>. The CO need not formally refer it, but should pass the details to the SPA.

b. **No.** If the summary charge was not referred to higher authority, or was referred back to the CO (or to the ASA), it is 'allocated for summary hearing' immediately after commencement if it is '*capable of being heard summarily*'. See the flow diagram at [Appendix 3 to Annex S](#) entitled 'Charge capable of being heard summarily?'. If any of the requirements shown in that flow diagram are *not* met, the summary charge is 'allocated for Court Martial trial' immediately after commencement<sup>656</sup>. The CO need not formally refer it, but should pass the details to the SPA.

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<sup>654</sup> If the case was referred to the PA following the election, a withdrawal of the election with leave does not prevent the charge from being 'allocated for Court Martial trial' unless the PA referred the case back.

<sup>655</sup> This is so even if the charge was referred to higher authority with a view to its being heard by the ASA.

<sup>656</sup> Unless the accused was given the opportunity to elect court-martial trial before commencement, see paragraph 262 below.



## ***Consequences of summary charge being ‘allocated for summary hearing’***

255. If the summary charge is ‘allocated for summary hearing’, the CO has the powers conferred by AFA06 section 123. That is, he may:

- a. Amend the charge,
- b. Substitute another charge which is ‘capable of being heard summarily’,
- c. Bring an additional charge which is ‘capable of being heard summarily’,
- d. Discontinue proceedings on the charge, or
- e. Refer the charge to the DSP.

If the CO has made a delegation under the Armed Forces (Part 5 of the AFA06) Regulations 2009, it is the subordinate commander who has the section 123 powers.

256. However, the summary charge cannot necessarily be *heard* by the CO (or the subordinate commander) even if it is ‘allocated for summary hearing’. There are two main reasons for this:

- a. **Summary charges not ‘capable of being heard summarily’.** First, a charge may not be heard summarily if it is *not ‘capable of being heard summarily’*<sup>657</sup> (see [Appendix 3 to Annex S](#)). For the circumstances in which a charge is ‘capable of being heard summarily’, see paragraph 254b above. A charge which is not ‘capable of being heard summarily’ may be ‘allocated for summary hearing’ if the case was referred back by the PA before commencement (see paragraph 253). In these circumstances the CO may either substitute a charge which *is* ‘capable of being heard summarily’, and hear that charge<sup>658</sup>, or discontinue the proceedings.
- b. **Further restrictions on the power to hear a charge.** Second, article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 imposes restrictions on the power to *hear* a charge, even if it is ‘allocated for summary hearing’ *and* ‘capable of being heard summarily’. These restrictions are summarised in the flow diagram at [Appendix 4 to Annex S](#) entitled ‘Allocated for summary hearing’ and paragraphs 257 to 261 below.

257. Article 49 applies if:

- a. The Service Police have investigated the case; or
- b. A civilian police force has investigated the case and may refer it to the Service Police; or
- c. The CO is aware of:

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<sup>657</sup> Unless the accused was given the opportunity to elect court-martial trial before commencement, see paragraph 262 below.

<sup>658</sup> Article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, discussed below, will not apply because the case has been referred back.

(1) An allegation or circumstances suggesting that a Schedule 2 offence<sup>659</sup> may have been committed by a person under his command, or

(2) Circumstances prescribed by the Armed Forces (Part 5 of the AFA06) Regulations 2009 for the purposes of AFA06 section 114.

258. If the summary charge is 'allocated for summary hearing' and 'capable of being heard summarily', and article 49 does not apply, the charge may be heard summarily.

259. If article 49 applies, the position *immediately after commencement* is that the summary charge may not be heard summarily unless:

a. The case, or a part of the case to which the charge relates, was referred back by the PA before commencement; or

b. The Service Police made a 'deemed referral' for the purposes of AFA06 section 116(3) before commencement, which was not countermanded before commencement. A deemed referral is a report to a person's CO, before commencement, that:

(1) There is sufficient evidence to charge<sup>660</sup> the person with an offence, but *not* sufficient evidence to charge them with a Schedule 2 offence<sup>661</sup>; and

(2) The Service Police are not aware of any circumstances prescribed by the Armed Forces (Part 5 of the AFA06) Regulations 2009 for the purposes of AFA06 section 116(2)(b). See the flow diagram at [Appendix 3 to Annex A](#) for the procedure for a CO to determine whether circumstances of a prescribed description exist when he has become aware of an allegation or circumstances.

260. If either of those exceptions applies, the summary charge may be heard summarily despite article 49.

261. If neither of those exceptions applies, the summary charge may not *yet* be heard summarily. It may be heard summarily if, *after* commencement, the Service Police refer the case to the accused's CO under AFA06 section 116(3). If section 116(2) applies, however, it will never be possible to hear the charge summarily, because the Service Police will not be able to refer the case under section 116(3). In these circumstances the CO should refer the charge to the DSP.

### ***Opportunity to elect court-martial trial declined before commencement***

262. If the accused was given the opportunity to elect court-martial trial before commencement but declined to elect (or did elect but withdrew the election with leave before commencement), and the summary charge is current at commencement, special rules apply, see the flow diagram at [Appendix 5 to Annex S](#) entitled 'Right to elect offered'.

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<sup>659</sup> For SDA offences which count as Schedule 2 offences, see paragraph 234.

<sup>660</sup> ie a prima facie case, not necessarily a 'realistic prospect of conviction', section 116(5).

<sup>661</sup> For SDA offences which count as Schedule 2 offences, see paragraph 234.

- a. If, after giving the accused the opportunity to elect, the CO referred the summary charge to higher authority, and higher authority did not refer it back, the summary charge is 'allocated for Court Martial trial'.
- b. If the CO did not refer the summary charge to higher authority (or he did, but higher authority referred it back), the summary charge is 'allocated for summary hearing'. If the charge was brought under NDA57, and was within the CO's jurisdiction under that Act, it does not matter that the charge is not 'capable of being heard summarily' under AFA06. Permission to hear the charge is not required.
- c. Even if the summary charge is 'allocated for summary hearing', however, article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 may prevent it from being *heard* summarily, see paragraphs 256b to 261 above. If article 49 applies, the charge may not be heard summarily unless:
- (1) One of the exceptions in paragraph 259 applies, or
  - (2) The Service Police refer the case to the CO under AFA06 section 116(3) after commencement.
- d. If article 49 does not apply, or one of the exceptions in paragraph 259 applies, or the Service Police refer the case to the CO under AFA06 section 116(3), the summary charge may be heard summarily. If a hearing of the charge began before commencement, evidence heard before commencement need not be reheard; but the remainder of the hearing must be conducted as a fresh hearing under AFA06 and in accordance with the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009. See the transitional guidance in [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

This annex contains the following flowcharts to assist in the process of investigation, charging and mode of trial. They should be read in conjunction with the relevant paragraphs of this chapter.

Appendix 1- Investigation procedure	1-6-A1-1
Appendix 2 – Charging and mode of trial	1-6-A2-1
Appendix 3 – Existence of prescribed circumstances	1-6-A3-1
Appendix 4 – Procedure to determine if a charge is capable of being heard summarily	1-6-A4-1
Appendix 5 – Procedure to be followed when amending, substituting or bringing an additional charge	1-6-A5-1
Appendix 6 – Procedure to determine whether higher authority permissions required	1-6-A6-1

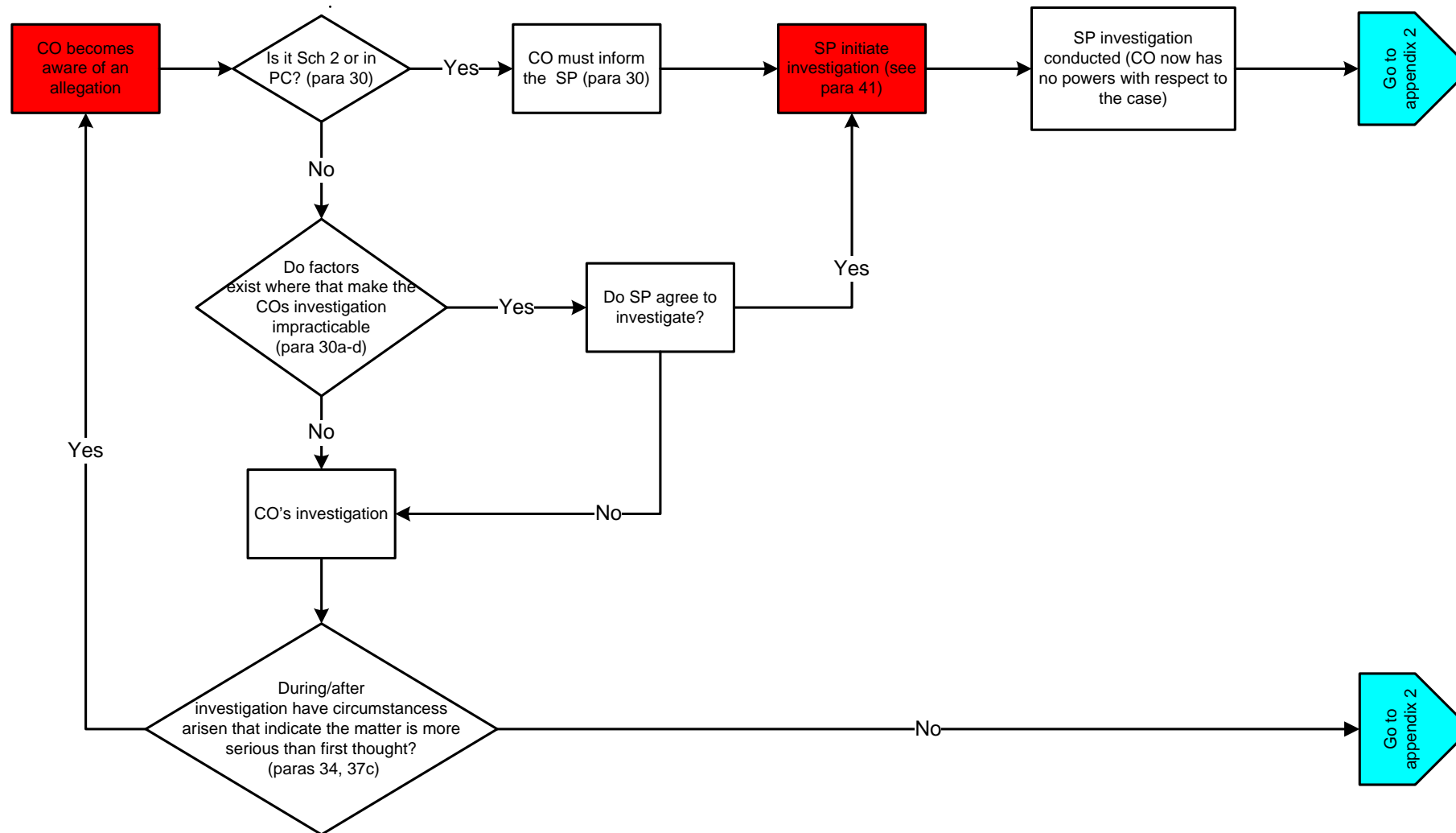
PC = Prescribed Circumstances  
SP = Service Police  
Sch 2 = Schedule 2 AFA06 (Annex C)

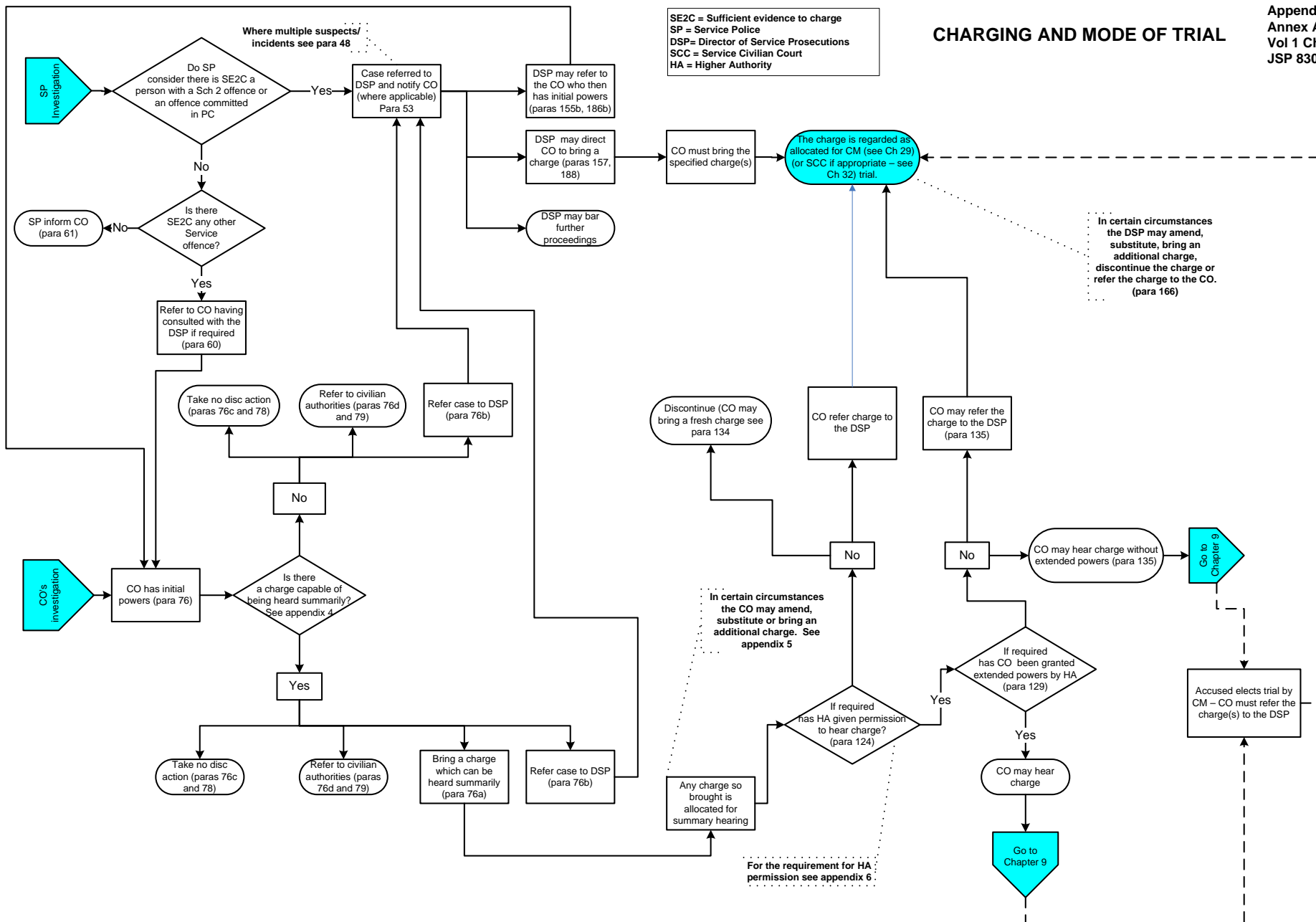
 Start point

To determine whether  
circumstances of a  
prescribed description  
(PC) exist go to appendix 3

## INVESTIGATION PROCEDURE

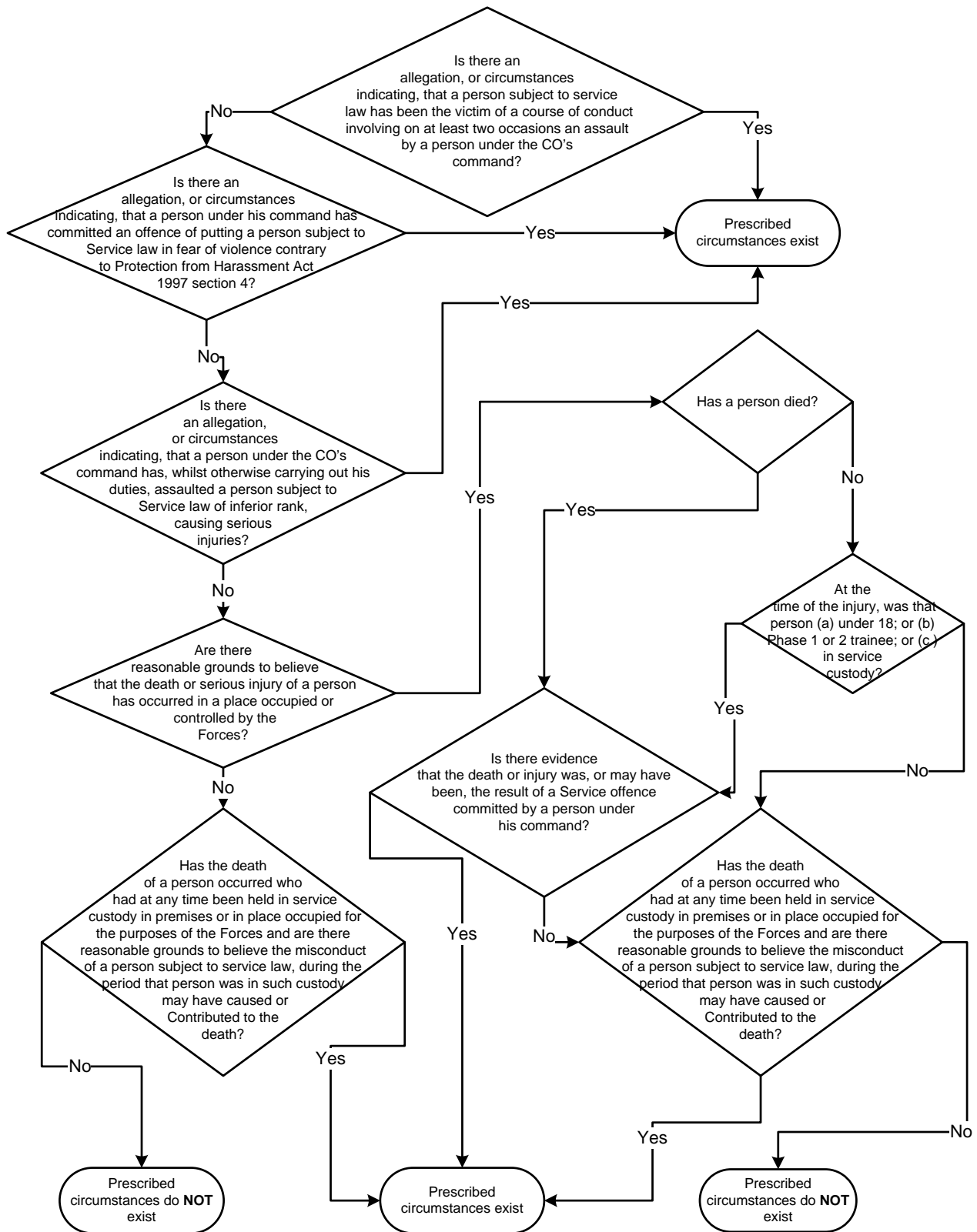
Appendix 1 to  
Annex A to  
Vol 1 Ch 6  
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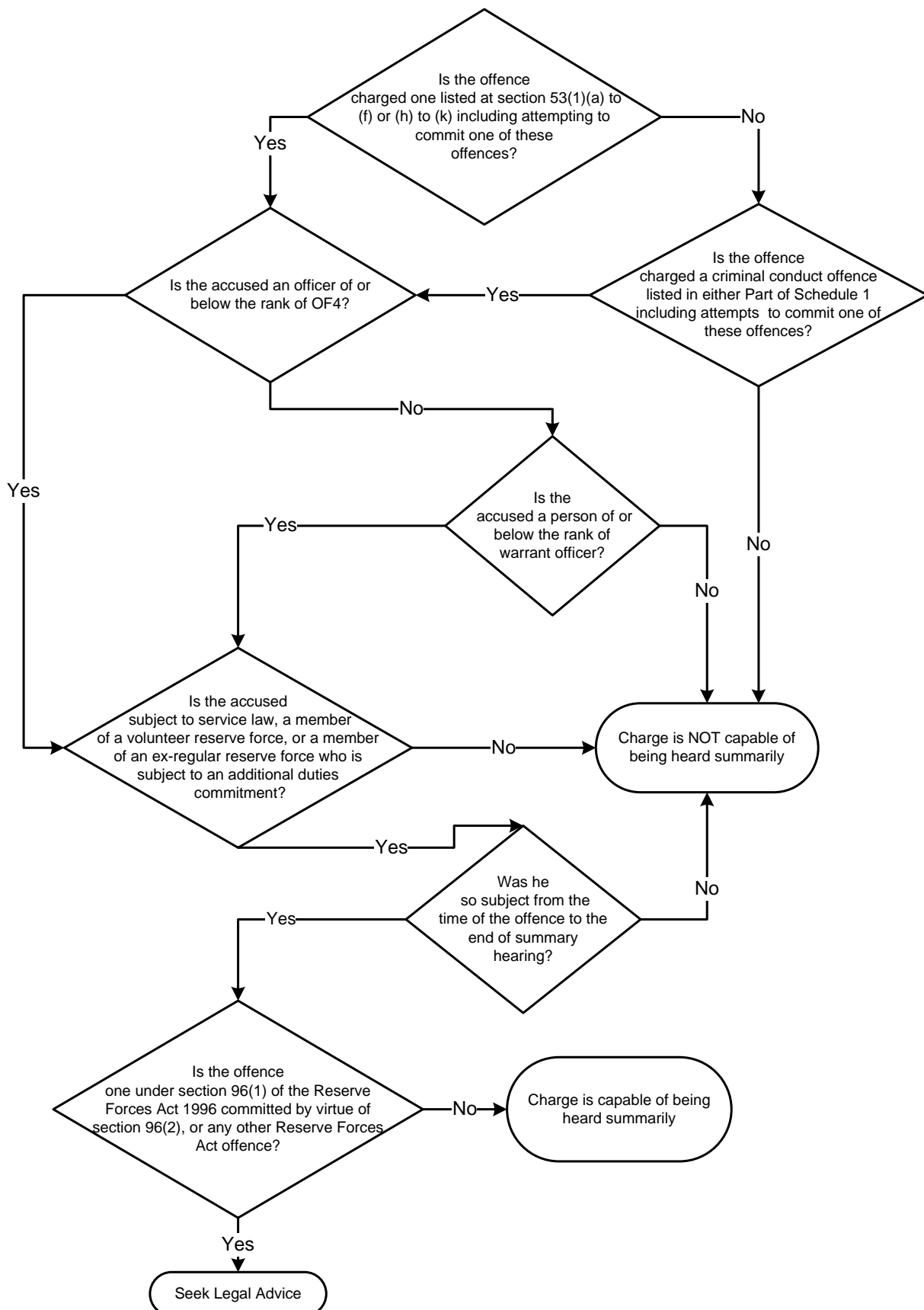
**PROCEDURE FOR CO TO DETERMINE WHETHER  
CIRCUMSTANCES OF A PRESCRIBED DESCRIPTION EXIST  
WHEN HE HAS BECOME AWARE OF ALLEGATION OR  
CIRCUMSTANCES**

Appendix 3 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



# PROCEDURE TO DETERMINE WHETHER A CHARGE IS CAPABLE OF BEING HEARD SUMMARILY

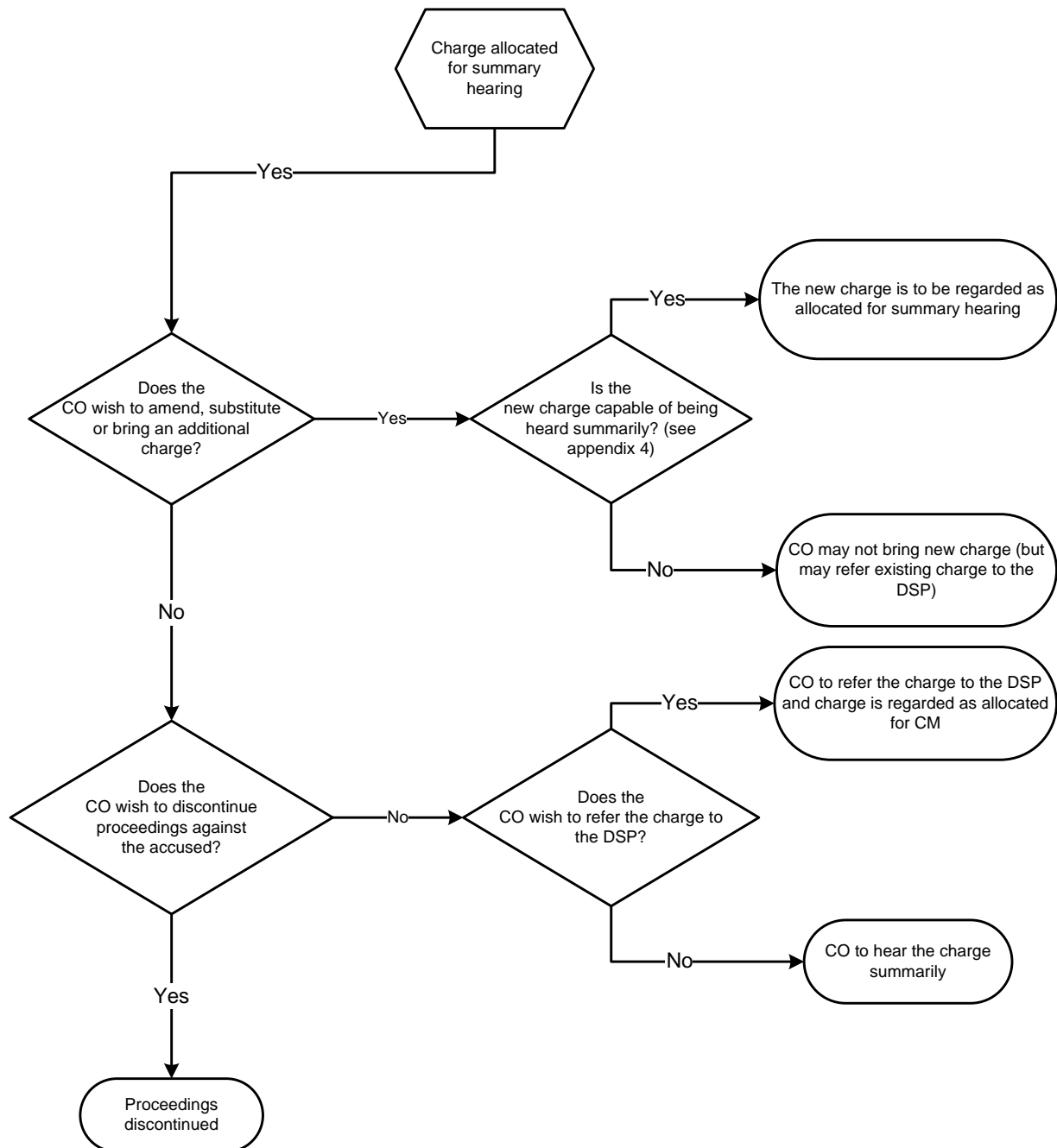
Appendix 4 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL





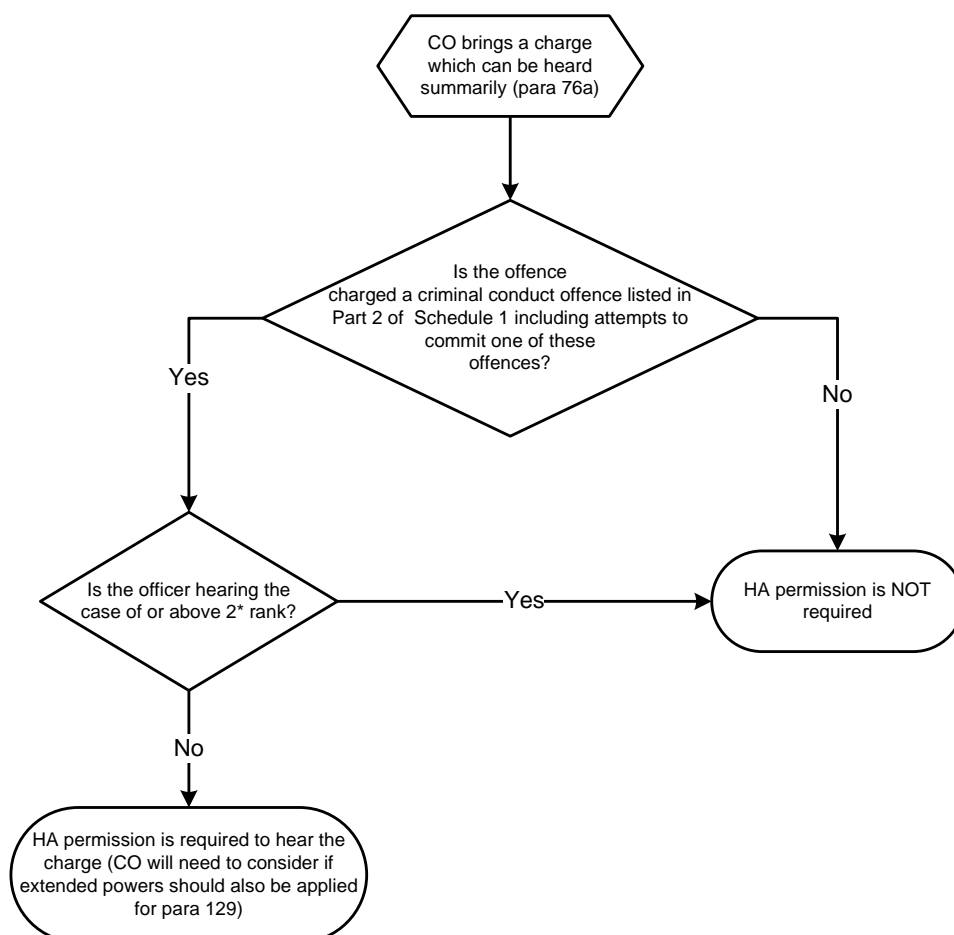
# PROCEDURE TO BE FOLLOWED WHEN AMENDING SUBSTITUTING OR BRINGING AN ADDITIONAL CHARGE

Appendix 5 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



# PROCEDURE TO DETERMINE WHETHER HA PERMISSION REQUIRED

Appendix 6 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



## OFFENCES CAPABLE OF BEING HEARD SUMMARILY WITHOUT PERMISSION OF HIGHER AUTHORITY (SECTION 53 OF THE ACT)

### Non-criminal conduct (disciplinary) offences

1. The following non-criminal conduct offences are capable of being heard summarily without permission. Further detail can be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences):

- a. Looting any vehicle, equipment or stores abandoned by an enemy (section 4(3)).
- b. Absence without leave (section 9).
- c. Failure to cause apprehension of deserters or absentees (section 10).
- d. Disobedience to lawful commands (section 11).
- e. Misconduct towards a superior officer (section 12).
- f. Contravention of standing orders (section 13).
- g. Using force against a sentry etc (section 14).
- h. Failure to attend for or perform a duty (section 15).
- i. Malingering (section 16(1) (a), or an offence under section 16(1) (c) committed by omission).
- j. Disclosure of information to the enemy (section 17).
- k. Making a false record (section 18).
- l. Conduct to the prejudice of good order and military discipline (section 19).
- m. Unfitness or misconduct through alcohol or drugs (section 20).
- n. Fighting and threatening behaviour (section 21).
- o. Ill treatment of subordinates (section 22).
- p. Disgraceful conduct of a cruel or indecent kind (section 23).
- q. Damage to or loss of public or Service property (section 24).
- r. Misapplying or wasting public or Service property (section 25).
- s. Obstructing or failing to assist a Service policeman (section 26).
- t. Resistance to arrest etc (section 28).

- u. Offences in relation to Service custody (section 29).
  - v. Allowing escape, or unlawful release, of prisoners etc (section 30(1) of negligently doing an act that results in a person's escape, or an offence under section 30(2)).
  - w. Low flying (section 34).
  - x. Annoyance by flying (section 35).
  - y. Inaccurate certification (section 36).
  - z. Failure to attend a hearing after release from custody after charge (section 107).
  - aa. Failure to provide a sample for a drugs test (section 305).
  - ab. Failure to provide a sample for analysis after serious incident (section 306).
  - ac. Enlistment offences (section 328).
  - ad. Service Inquiry offences<sup>662</sup> (section 343).
  - ae. Absence without leave (section 96 or 97 of the Reserve Forces Act 1996).
2. An attempt (section 39) to commit any offence listed in paragraph 1 above.

### **Criminal conduct offences**

3. The following criminal conduct (section 42) offences, as set out at Part 1 of Schedule 1, are capable of being heard summarily without permission. Further detail can be found in [Chapter 8](#) (Criminal conduct offences):

- a. Theft (section 1 of the Theft Act 1968).
- b. Taking vehicle etc without consent (section 12 of the Theft Act 1968).
- c. Possession of controlled drug (section 5(2) of the Misuse of Drugs Act 1971).
- d. Criminal damage (section 1(1) of the Criminal Damage Act 1971).
- e. Making off without payment (section 3 of the Theft Act 1978) where the payment required or expected did not exceed £100.
- f. Interference with vehicles (section 9 of the Criminal Attempts Act 1981).
- g. Assault and battery (section 39 of the Criminal Justice Act 1988).
- h. Careless driving etc (section 3 of the Road Traffic Act 1988).
- i. Driving a vehicle where driver has consumed excessive amount of alcohol etc (section 5 of the Road Traffic Act 1988).

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<sup>662</sup> See Service Inquiry Regulations 2008 for full details of the offences.

- j. Tampering with vehicles etc (section 25 of the Road Traffic Act 1988) where the vehicle was on a road.
  - k. Dangerous cycling (section 28 of the Road Traffic Act 1988).
  - l. Careless cycling etc (section 29 of the Road Traffic Act 1988).
4. An attempt to commit an (indictable) offence (section 43) listed in paragraph 3 above.

**OFFENCES CAPABLE OF BEING HEARD SUMMARILY BY A 2\*  
COMMANDING OFFICER OR WITH PERMISSION OF HIGHER  
AUTHORITY (SECTION 54 OF THE ACT)**

1. The following offences are capable of being heard summarily by a 2\* CO or with permission of HA, further detail can be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences):

- a. Assault occasioning actual bodily harm (section 47 of the Offences against the Person Act 1861).
- b. Possession in public place of offensive weapon (section 1 of the Prevention of Crime Act 1953).
- c. Abstracting of electricity (section 13 of the Theft Act 1968).
- d. Possession in public place of point or blade (section 139 of the Criminal Justice Act 1988).
- e. Dishonestly obtaining electronic communications services (section 125 of the Communications Act 2003).
- f. Possession or supply of apparatus etc for dishonestly obtaining electronic communication services (section 126 of the Communications Act 2003).
- g. Fraud (section 1 of the Fraud Act 2006).
- h. Dishonestly obtaining services (section 11 of the Fraud Act 2006).
- i. Attempting to commit one of the offences listed above.

## SCHEDULE 2 OFFENCES

1. The following offences<sup>663</sup> are **not** capable of being heard summarily, further detail can be found in [Chapter 7](#) Non-criminal conduct (disciplinary) offences and [Chapter 8](#) (Criminal conduct offences):

- (1) An offence under section 1 (assisting an enemy).
- (2) An offence under section 2(1) (misconduct on operations).
- (3) An offence under section 3 (obstructing operations) which relates to an action or operation against an enemy.
- (4) An offence under section 4(1) or (2) (looting).
- (5) An offence under section 6 (mutiny).
- (6) An offence under section 7 (failure to suppress mutiny).
- (7) An offence under section 8 (desertion) where the accused intended to avoid a period of active service (within the meaning of that section).
- (8) An offence under section 31(1) (hazarding of ship).
- (9) An offence under section 33(1) (dangerous flying etc).
- (10) An offence under section 39 of attempting to commit an offence within any of paragraphs (1) to (9).
- (11) An offence under section 40 of encouraging or assisting another person to commit an offence within any of paragraphs (1) to (9).
- (12) An offence under section 42 (criminal conduct) as respects which the corresponding offence under the law of England and Wales is—
  - (a) Murder;
  - (b) Manslaughter;
  - (c) Kidnapping;
  - (d) High treason;
  - (e) Piracy;
  - (f) Cheating the public revenue;
  - (g) An offence under section 2 of the Treason Act 1842 (c. 51)

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<sup>663</sup> Special provisions governing these offences is dealt with in Part 6 of this chapter.

(attempt to injure or alarm the Sovereign);

(h) An offence under section 3 of the Treason Felony Act 1848 (c. 12) (compassing the deposition of the Sovereign etc);

(i) An offence under section 4, 18, 22, 23, 28 or 29 of the Offences against the Person Act 1861 (c. 100) (soliciting murder, wounding with intent, using chloroform etc to commit indictable offence, administering poison, causing injury by explosives, using explosives etc with intent);

(j) An offence under section 20 of that Act of inflicting grievous bodily harm;

(k) An offence under section 2 or 3 of the Explosive Substances Act 1883 (c. 3) (causing explosion likely to endanger life or property etc);

(l) An offence under section 1 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (corruption in office);

(m) An offence under section 1 of the Prevention of Corruption Act 1906 (c. 34) (corrupt transactions with agents), other than an offence falling within that section by virtue only of the third paragraph of subsection (1) of that section;

(n) An offence under section 1 or 2 of the Perjury Act 1911 (c. 6) (perjury or false statements on oath);

(o) An offence under section 1 or 7 of the Official Secrets Act 1911 (c. 28) (spying or harbouring spies); (p) an offence under section 1 of the Infant Life (Preservation) Act 1929 (c. 34) (child destruction);

(q) An offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to children);

(r) An offence under section 1 of the Infanticide Act 1938 (c. 36) (infanticide);

(s) An offence under section 33 or 33A of the Sexual Offences Act 1956 (c. 69) (keeping a brothel etc);

(t) An offence under section 1 of the Geneva Conventions Act 1957 (c. 52) (grave breaches of conventions);

(u) An offence under section 2 of the Suicide Act 1961 (c. 60) (assisting suicide etc);

(v) An offence under section 5, 16, 16A, 17, 18 or 20 of the Firearms Act 1968 (c. 27) (unlawful possession or use of firearm etc);

(w) An offence under section 8, 10 or 21 of the Theft Act 1968 (c. 60) (robbery, aggravated burglary, blackmail);

(x) An offence under section 12A of that Act (aggravated vehicle taking) involving an accident which caused the death of any person;



- (y) An offence under section 4, 5(3) or 8 of the Misuse of Drugs Act 1971 (c. 38) (production and supply of controlled drugs, possession of such drugs with intent to supply, permitting production of such drugs);
- (z) An offence under section 1(2) of the Criminal Damage Act 1971 (c. 48) (destroying or damaging property with intent to endanger life);
- (aa) An offence under section 1 of the Biological Weapons Act 1974 (c. 6) (developing biological agents etc);
- (ab) An offence under section 51 of the Criminal Law Act 1977 (c. 45) (bomb hoaxes);
- (ac) An offence under section 1 of the Protection of Children Act 1978 (c. 37) (indecent photographs of children);
- (ad) An offence under section 170 of the Customs and Excise Management Act 1979 (c. 2) (fraudulent evasion of duty etc);
- (ae) An offence under section 1 of the Taking of Hostages Act 1982 (c. 28) (hostage-taking);
- (af) An offence under any of sections 1 to 4 of the Aviation Security Act 1982 (c. 36) (hijacking, destroying, damaging or endangering safety of aircraft etc);
- (ag) An offence under section 1 or 2 of the Child Abduction Act 1984 (c. 37) (abduction of child);
- (ah) An offence under any of sections 1 and 18 to 23 of the Public Order Act 1986 (c. 64) (riot, stirring up racial or religious hatred, possession of inflammatory material);
- (ai) An offence under section 134 or 160 of the Criminal Justice Act 1988 (c. 33) (torture, possession of indecent photograph of child);
- (aj) An offence under section 1, 3A or 22A of the Road Traffic Act 1988 (c. 52) (causing death by dangerous driving, causing death by careless driving when under the influence of drink or drugs, causing danger to road-users);
- (ak) An offence under any of sections 1 to 6 or 8(6) of the Official Secrets Act 1989 (c. 6) (disclosure of information relating to security, intelligence, defence, international relations etc);
- (al) An offence under any of sections 1 or 9 to 13 of the Aviation and Maritime Security Act 1990 (c. 31) (endangering safety at aerodromes, offences against the safety of ships and fixed platforms);
- (am) An offence under section 72 of the Value Added Tax Act 1994 (c. 23) (evasion of VAT);
- (an) An offence under Part II of the Channel Tunnel (Security) Order 1994 (S.I. 1994/570) (offences relating to Channel Tunnel trains and the

tunnel system);

(ao) An offence under section 2 of the Chemical Weapons Act 1996 (c. 6) (use etc of chemical weapons);

(ap) An offence under section 11, 12, 15, 16, 17, 18, 38B, 39, 54, 56, 57 or 58 of the Terrorism Act 2000 (c.11);

(aq) An offence under section 51 or 52 of the International Criminal Court Act 2001 (c. 17) (genocide, crimes against humanity, war crimes etc);

(ar) An offence under section 47, 79, 80, 113 or 114 of the Anti-terrorism, Crime and Security Act 2001 (c. 24);

(as) An offence under section 1 of the Dealing in Cultural Objects (Offences) Act 2003 (c. 27) (dealing in tainted cultural objects);

(at) Any offence under Part 1 of the Sexual Offences Act 2003 (c. 42) except one under section 3, 66, 67 or 71;

(au) An offence under any of sections 1, 2, 5, 6 or 8 to 11 of the Terrorism Act 2006;

(av) an offence under section 62(1) of the Coroners and Justice Act 2009 (possession of prohibited images of children);

(aw) An offence under 1, 2 or 6 of the Bribery Act 1020.

(13) An offence under section 42 as respects which the corresponding offence under the law of England and Wales is—

(a) An offence under section 1 of the Criminal Attempts Act 1981 (c. 47) of attempting to commit an offence within a sub-paragraph of paragraph 12;

(b) An offence under section 1 of the Criminal Law Act 1977 (c. 45) of conspiracy to commit such an offence;

(c) An offence under Part 2 of the Serious Crime Act 2007 of encouraging or assisting the commission of such an offence<sup>664</sup>.

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<sup>664</sup> The effect of paragraph 13 is that any (a) attempt to commit, or (b) conspiracy to commit, or (c) offence of encouraging or assisting the commission of, any of the offences listed in paragraph 12 is a Schedule 2 offence. For example, a conspiracy to cheat the public revenue is Schedule 2, whereas a conspiracy to commit fraud is not.

## **PRESCRIBED CIRCUMSTANCES IN RELATION TO THE NEED TO ENSURE THAT CERTAIN CIRCUMSTANCES ARE REFERRED BY THE CO TO THE SERVICE POLICE**

1. Prescribed circumstances under the Act relate to two distinct, but connected aims. The first aim is to ensure that certain circumstances are investigated by the Service Police. The second is to ensure that certain situations where there is evidence of a Service offence are referred to the DSP for a decision whether to charge and if so, as to what the charges are to be.

2. The Act requires such steps where there is evidence of a Schedule 2 offence. Prescribed circumstances provide for additional circumstances in which the Service Police must be made aware or in which a decision on charging must be taken by the DSP.

3. Regulations under the Act prescribe:

a. In relation to a commanding officer<sup>665</sup>, circumstances in which he must, as soon as reasonably practicable, ensure that the Service Police are aware of the circumstances; and

b. In relation to the Service Police circumstances in which, if they consider there is sufficient evidence to charge a Service offence, the case must be referred to the DSP for a decision on what charge, if any, is to be brought.

4. Becoming aware of prescribed circumstances will not always place a duty on a CO to ensure that the Service Police are aware. This will depend on whether the CO is a prescribed officer in relation to the particular prescribed circumstance. For example, if a number of COs become aware of such circumstances, including perhaps the CO of the victim and one or more suspects, Regulations under the Act define who, in different circumstances, would be required to ensure that the Service Police are made aware. Broadly speaking, the CO of any suspect will be under a duty to ensure that the Service Police are made aware. The other COs may wish to liaise to ensure the Service Police are made aware. They do not have to contact the Service Police individually.

5. The following are prescribed circumstances in relation to the relevant CO<sup>666</sup>:

**(a) (a) an allegation has been made which would indicate to a reasonable person, or there are other circumstances which would indicate to a reasonable person, that a person subject to service law has or may have been the victim of—**

**(i) a course of conduct by a person subject to service law, involving on at least two occasions an assault in which that individual participated as a principal offender or as a secondary party; or**

**(ii) an offence under section 42 as respects which the corresponding offence under the law of England and Wales is the offence under section 4 of the Protection from Harassment Act 1997, committed by a person subject to**

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<sup>665</sup> The CO or a subordinate commander to whom the CO has delegated this function may authorise someone to inform the Service Police on his behalf but the ultimate responsibility for informing the Service Police remains with the CO.

<sup>666</sup> The Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, regulation 3.

**service law;**

(iii)

(b)

a. *Person subject to service law* – includes every member of the regular forces at all times and every member of the reserve forces (a) in permanent service on call-out (b) in home defence service on call-out (c) in full-time service (d) undertaking any training or duty, or (e) serving on the permanent staff of a reserve force. Persons subject to service law are defined in ss 367, 368 & 369 of the Armed Forces Act 2006.

(i)

(ii) b. *Course of conduct* - is a legal concept on which there is considerable case law. In some cases a course of conduct is obvious, as where there is evidence that one person has undertaken a campaign of misconduct against another. But there may be a course of conduct where the connection between incidents is less obvious. For example the mere fact of two assaults cannot of itself establish a course of conduct, the sort of factors which may be sufficient to establish a course of conduct would be if there was also evidence that the assailant intended to or had threatened that he would carry out further assaults or the two assaults came after a sustained campaign of threats and intimidation in the past. In all but the most obvious cases where the CO suspects that there may be a course of conduct he should take Staff legal advice.

(iii)

(iv) c. *Assault* - See [Chapter 8](#) (Criminal conduct offences).

(v)

d. *Principal offender* – means the person who actually assaults the victim.

(vi)

e. *Secondary party* – means the person(s) who aids, abets, counsels or procures the commission of the offence see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

(vii)

f. *On at least two occasions* – means on distinct occasions which are clearly separated. The principal offender may assault the victim more than once on a single occasion but his conduct would not fall within this regulation unless he assaulted the victim on at least one other occasion.

(viii)

g. *Section 4 of the Protection from Harassment Act 1997* – a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against them is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions. This offence consists of putting a person in fear of *violence on more than one occasion*. Legal advice should be sought whenever it is believed that this offence might apply.

(ix)

**(c) an allegation has been made which would indicate to a reasonable person, or there are other circumstances which would indicate to a reasonable person, that a person subject to service law has or may have been the victim of an assault causing serious injury, inflicted by a person of superior rank or rate while the assailant was otherwise carrying out his duties;**

(d)

(e) h. *Serious injury* – means a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ.

(f)

(g) i. *Superior rank or rate* – means a person of higher rank than the victim regardless of which Service the victim and the assailant are members. Determining relative rank between Services is a matter for Queen's Regulations (section 377(3) of the Act). If a person holds acting rank then that acting rank will be relevant when

determining whether they are of a higher rank than the victim. Local acting rank will be relevant when determining whether they are of a higher rank than the victim.

(h)

(i) j. *Otherwise carrying out his duties* – the assailant must be carrying out his duties at the time of the alleged assault. Assaulting service personnel and causing them serious injury cannot be part of the assailant's duties, hence the reference to 'otherwise carrying out his duties'.

(j)

**(k) there are what appear to the prescribed officer to be reasonable grounds to believe that the death of any person, or serious injury to a relevant person, has occurred in a relevant place, unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a Service offence committed by a person of whom he is the commanding officer;**

(l)

(m) k. *Prescribed officer* – covers in this particular case the commanding officer of any person (see regulation 4 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2008), but a duty to ensure that the Service Police are informed does not fall on them if they are satisfied that there is no reasonable indication that someone in his command may have caused the death or serious injury.

(n)

l. *Relevant place* – means any premises or other place which at the time of the death or serious injury was permanently or temporarily occupied or controlled for the purposes of Her Majesty's forces, and any vehicle, ship or aircraft which at the time of the death or serious injury was in use for the purposes of Her Majesty's forces.

(o)

(p) m. *Death of any person* – this is not confined to service personnel and relevant civilians. It would include detainees, a visitor or a prisoner of war for example.

(q)

n. *Relevant person* – means;

(1) A person who is *not* a member of the regular or reserve forces or

(2) A person who is a member of the regular or reserve forces and:

(a) Is under 18 years old;

(b) Has enlisted in the regular or reserve forces but has not completed Phase 1 and Phase 2 Training;

(c) Is an officer or officer cadet and has not completed Phase 1 Training; or

(4) Is in service custody.

(r) o. *Unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a service offence committed by a person of whom they are the commanding officer; -* The effect is that there will not be a prescribed circumstance if it is clear, for example, that the dead person was killed by incoming enemy fire or has died from natural causes in a hospital occupied or controlled by HM forces.

(s)

**(t) the death of a person has occurred and—**

**(i) it appears to the prescribed officer that the person had at any time been held in a relevant place in service custody within the meaning of the Act; and**

**(ii) there are reasonable grounds to believe that the misconduct, during the period that person was in such custody, of a person subject to service law or a civilian subject to service discipline may have caused (directly or indirectly), or may have contributed to, the death.**

(u)

p. *Prescribed officer* – means the commanding officer of a person subject to service law or a civilian subject to service discipline whose misconduct may have caused (directly or indirectly), or may have contributed to, the death

q. *The person had at any time been held in a relevant place in service custody* - the deceased need not have died in service custody; this regulation will apply to a person who dies after being released from service custody if para. d (ii) above applies.

r. *Relevant place* – means any premises or other place which at the time of the suspected misconduct was permanently or temporarily occupied for the purposes of HM forces, and any vehicle, ship or aircraft which at the time of the suspected misconduct was in use for the purposes of HM forces

s. *Service custody within the meaning of the Act* – in the Armed Forces Act 2006 there are numerous references to service custody which includes custody without charge, custody after charge and detention in service custody following the passing of a custodial sentence. The reference to service custody in this regulation means all references to service custody in the 2006 Act.

t. *Misconduct* – means any conduct which falls below what would normally be expected of the person (whether a Service person or a civilian). Such conduct will, in the case of a person subject to service law, usually amount to at least a disciplinary service offence, but it is not limited to where there was a service offence. The general aim of the provision is that, where there is a failure of standards which may have caused or contributed to a death in service custody, this should be investigated, to see whether a service offence has been committed.

u. *During the period that person was in such custody* – this regulation only applies if the suspected misconduct took place when the deceased was in service custody.

v. *May have caused (directly or indirectly), or may have contributed to, the death* - This is a wide test. There must be reasonable grounds to believe that misconduct – which might, for example, be a direct assault, a failure to help a person who had been injured, or a failure to guard a person from harm where there was a responsibility to do so, - may have been a factor in the person's death. The general aim should be borne in mind: that deaths in service custody should be investigated by

the Service Police if there is reasonable ground to believe that misconduct was a contributory factor.

6. The prescribed circumstances in relation to references by the Service Police to the DSP are set out in regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. There are differences between those prescribed circumstances and those relating to a CO's duty to ensure that the Service Police are aware of a matter. The main reason for these differences is that those under regulation 5 only apply where the Service Police consider that there is sufficient evidence to charge a person with a Service offence. Those which govern a CO's duty relate in part to circumstances which need to be investigated even if there is no immediate evidence of an offence. The prescribed circumstances under regulation 5 are summarised in paragraph 54 of Chapter 6.

## CO'S INVESTIGATION - GUIDANCE

### General

1 The aim of this guidance is to provide basic advice to personnel other than the Service Police on gathering evidence whilst conducting a CO's investigation<sup>667</sup>. It is not for the person conducting the investigation to prove whether a person has committed an offence; rather, they are to gather all the evidence in order that a CO can make a properly informed decision on how to proceed with the matter. This guidance should be read in conjunction with [Chapter 11](#) (Summary hearing dealing with evidence). Staff legal advice may be obtained at any point during a CO's investigation, as well as advice from HA discipline staffs and the Service Police<sup>668</sup>.

2. A CO's investigation is appropriate for simple disciplinary offences or where, owing to operational constraints, the Service Police are not available. Although the legal rules of evidence do not apply to gathering evidence during unit investigations or to the use of evidence in summary hearing, an accused has the right to elect for CM trial or appeal to the SAC, where only admissible evidence may be used. If new information subsequently comes to light or after the investigation has begun the matter appears to be more complex than initially envisaged, it may need to be handed over to the Service Police.

3. It may, in exceptional circumstances, be necessary to conduct initial investigations in those cases where normally the Service Police should carry out the investigation. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and investigate, for example, an SSBN on patrol. If this situation arises, the CO should be aware that he has departed from the normal procedure and should bring the Service Police into the investigation as soon as is reasonably practicable.

4. As a civilian can only be dealt with by the SCC or the CM, normally the Service Police should conduct any investigation.

5. **Advice during investigation.** Personnel conducting CO's investigations may consult with the Service Police and may seek advice from the relevant staff legal adviser or HA staffs. RN coxswains, however, should seek advice from the relevant Naval Provost Marshal, in the first instance.

### Admission

6. An admission or confession includes any statement, written or oral, which is wholly or partly adverse to the person who made it. If a suspect is questioned (other than under caution by the Service Police) he should not be put under any pressure to make an admission.

7. Where an accused has admitted certain matters in relation to an offence, the CO should satisfy themselves that any admission not made in an interview under caution was not

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<sup>667</sup> See paragraphs 32 of this chapter for additional guidance on investigating allegations of harassment or bullying (prescribed circumstances).

<sup>668</sup> RN coxswains will obtain advice from relevant NPM staff, who if necessary will raise the issue with the DSP (see paragraph 5 of this Annex).



made under pressure. Where an admission or a confession is made, the CO should exercise care in using that evidence.

## **Witness evidence**

8. In all cases, no matter how minor, it will be necessary to collect witness evidence by way of written statement. There is no required format for a witness statement; however, it should include the following information:

- a. Service number (if applicable), rank/rate/title and name of the witness;
- b. The facts (including the date/time/location of the incident);
- c. Signature of the witness; and
- d. Date of witness statement.

9. If a witness is unavailable to provide a statement to the person conducting the investigation, if for example, he has been deployed, the person conducting the investigation may request the witness write or type out the statement, sign it and send it by post (an email will not be sufficient as it can not be signed). These statements will be disclosed to the accused before summary hearing.

10. When written statements are taken from witnesses, the best practice is for the witness to compose his own statement using his own words. The person conducting the investigation is, however, through experience and knowledge of the case, more likely to be aware of the particular areas of relevance, about which he may ask the witness. Care should be taken not to provide the witness with information relating to the matter known only to the person conducting the investigation or other witnesses, which may influence his evidence. The importance of detailed witness statements, written when the incident is still fresh in the mind of the witness, cannot be overstated, particularly if the investigation results in a CM trial or summary appeal some months after the alleged offence.

11. If the victim is vulnerable, for example, a Service person under 18 years of age, it is preferable if the Service Police conduct the interview with that person and record a statement.

12. Civilian witnesses cannot be compelled to attend a summary hearing and if civilian witnesses are central to the case, the Service Police should normally conduct the investigation, as it is more likely that the matter will be dealt with by CM trial.

## **Identification**

13. Where there is a requirement to conduct formal identification procedures, for example identification parades, the matter should be referred to the Service Police to investigate. If in doubt, seek staff legal advice or guidance from the Service Police.

## **Medical evidence**

14. **Violent offences.** In any case involving the use of violence against another person, the evidence of the medical officer<sup>669</sup> is often important. It may be appropriate in such cases that both the victim and the suspect are examined by a medical officer. Where bruising or

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<sup>669</sup> In the RN a Medical Assistant can also perform this function.

other injuries may emerge over a period of time, a follow-up medical examination should be considered.

15. When unfitness or misconduct through drink or drugs is under investigation, a medical examination may be obtained to determine whether there is any other reason why the suspect may be in that condition. In cases of unfitness or misconduct through alcohol or drugs, the decision of the following rests with the officer hearing the charge: fitness of a Service person to perform his duty or any duty he might reasonably be expected to perform; acting in a disorderly manner or a manner likely to bring discredit on the Service. However, in all cases of unfitness through alcohol or drugs, medical evidence can be of significant value at a subsequent summary hearing.

## **Search and seizure**

16. Searches will normally be conducted by the Service Police. If in the course of an investigation the person conducting the investigation believes that it is necessary to perform a search and secure evidence, see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention).

## **Rights of the suspect**

17. The rights of a suspect are set out in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#), This should be brought to a suspect's attention as soon as reasonably practicable at the commencement of the investigation, to ensure that they are aware of his rights.

18. On completion of a CO's investigation, the findings of the investigation are to be provided to the CO and should normally contain:

- (i) a. All witness statements;
- (ii)
- (iii) b. All other records of evidence;
- (iv)
- (v) c. A list of all exhibits and details as to where these exhibits are held and can be inspected;
- (vi)
- (vii) d. All documentary exhibits;
- (viii)
- (ix) e. The suspects disciplinary records; and
- (x)
- (xi) f. A suggested charge<sup>670</sup>, if appropriate.

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<sup>670</sup> This is not binding on the CO. The CO makes the final decision on what charge should be brought.

## **Your rights if you are accused of an offence under the Service justice system**

This guide is to help you understand your rights, and what help is available to you, if you are to be dealt with in the Service justice system. It aims to give you enough information to help you make informed decisions, but it will not answer every question you have. If you have any questions about your rights, ask for an officer, a warrant officer (WO), a senior rate or a senior non-commissioned officer (SNCO) to help you.

This copy has been issued to:

Service number. ....

Rank or rate .....

Name .....

Ship, unit, establishment .....



# Your rights if you are accused of an offence under the Service justice system

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**Activation hearing**

Your commanding officer must tell you, in writing, about:

Assisting officer

**Appeals from summary hearing to the Summary Appeal Court**

Appeal

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## Definitions

**In this guide, the words and phrases listed below have the meanings shown.**

<b>Activation hearing</b>	A hearing at which your commanding officer will decide whether you should start a sentence of detention which had been suspended.
<b>Armed forces criminal legal aid authority</b>	The organisation that you will apply to for legal aid if you are being tried by the Court Martial or appearing before the Summary Appeal Court. If you are entitled to have a lawyer represent you, you can ask the armed forces criminal legal aid authority to appoint a lawyer to act for you.
<b>Arrest</b>	In this guide, the word 'arrest' also covers when a person who was AWOL surrenders to a civilian policeman.
<b>Assisting officer</b>	<p>Assisting officer is the term used for a person who will help you when you are in custody. It could be an officer, WO, senior rate or SNCO.</p> <p>The 'accused's assisting officer' is the person who will help you to prepare for your summary hearing and represent you at that hearing.</p> <p>The 'appellant's assisting officer' is the person who will help you prepare for your summary appeal and represent you at that appeal.</p> <p>The 'offender's assisting officer' is the person who will help you to prepare for an activation hearing and represent you at that hearing.</p> <p>The 'defendant's assisting officer' is the person who will help you to prepare for your trial in the Court Martial, and can help you or your legal representative at that trial.</p>
<b>Commanding officer</b>	Except where this guide says otherwise, all references to your commanding officer include other officers acting on your commanding officer's behalf.
<b>Court administration officer</b>	The court administration officer will make the arrangements for trials at a Court Martial, custody hearings before a judge advocate and hearings before the Summary Appeal Court. They are independent of the chain of command.
<b>Court Martial</b>	A court that has a judge advocate and between three and seven lay members (officers or WOs not from your chain of command). The lay members decide if a person is guilty of a charge and the judge advocate and lay

members decide on any sentence.

<b>Director of Service Prosecutions</b>	The head of the Service Prosecuting Authority. His prosecuting officers prepare cases for trial and appear in court. They also represent the Director of Service Prosecutions at the Summary Appeal Court. The Director of Service Prosecutions is independent of the chain of command.
<b>Reviewing authority</b>	If the case against you is found proved at a summary hearing, an appointed officer will automatically review your case to decide whether the correct procedure was followed and the punishment awarded was reasonable.
<b>Home nation consul</b>	An embassy or high commission staffed by people from the country you are a citizen of and based in the country you are living in.
<b>Judge advocate</b>	Is a civilian judge who is chosen by the Judge Advocate General
<b>Service Civilian Court</b>	The Service Civilian Court is a standing court that can deal with civilians who can be charged with offences under the Armed Forces Act 2006. Its powers are like those of a magistrates' court in England and Wales.
<b>Summary Appeal Court</b>	The Summary Appeal Court decides appeals from summary hearings. It is made up of a judge advocate and two service members from outside your chain of command.
<b>Summary hearing</b>	A hearing where you are charged in front of your commanding officer or other officer.

**Note: Forms referred to in this guide are available on JPA from the SPVA information centre under 'JPA forms'. They are also available in JSP 830 Manual of Service Law.**



## ***General***

### **Advice**

- ❖ If you have been arrested for or charged with an offence you should read this guide carefully. It will help you to understand your rights and what will happen next.
- ❖ Part 1 of this guide is to help you if you are arrested or kept in custody.
- ❖ Part 2 of this guide is to help you if you are charged and face a summary hearing.

### **Help**

- ❖ This guide only tells you about the law that applies to the rights of those accused of an offence. If you want to know more, ask your assisting officer to provide a copy of the Manual of Service Law and any other related documents.
- ❖ You can get help from an officer, WO, senior rate or SNCO of your choice.
- ❖ You can watch the Service Justice System DVD to help you understand what will happen if you are charged.

#### **Legal representation**

- If you are arrested or kept in custody, you can get legal advice.
- You cannot have a lawyer represent you at a summary hearing.
- You can ask for legal advice to help you decide whether you want a Court Martial trial rather than a summary hearing.
- You can ask for legal advice about appealing if a charge brought against you is found proved at a summary hearing.
- You are allowed a lawyer at a Summary Appeal Court or a Court Martial.

## ***Part 1 – Arrest and custody***

### **Arrest**

#### **Who can arrest you**

- ❖ Service Police can arrest any member of HM Forces, no matter what their rank. Officers, WOs or NCOs can sometimes arrest people. Your arrest might not be valid if you are arrested by someone of a lower rank to you who is not a service policeman. If this is the case you should tell your commanding officer.
- ❖ You can find out more about arrest from chapter 4 (Arrest and search, stop and search, entry search and seizure and retention) of the Manual of Service Law.

#### **Reporting your arrest**

- ❖ If you have been arrested, you must report it to your commanding officer as soon as possible.
- ❖ You are formally charged when you are served with a charge sheet signed by your commanding officer.
- ❖ If you are not charged, you can only be kept in custody if the person who arrested you has good reason to believe that you need to be kept in custody so:
  - evidence relating to the offence you were arrested for can be gathered or protected; or
  - you can continue to be questioned.

## **Custody without charge – your rights**

**Once you have been arrested, you may be held in custody.**

**If you are kept in custody you:**

- ✓ must be given certain information;
- ✓ can apply to be released;
- ✓ can ask for writing materials;
- ✓ can contact certain people; and
- ✓ can choose an assisting officer to help you.

### **Information that must be given to you**

- You must be given a 'Custody information for a person held in custody without charge' form every time you are kept in custody. You should read this form carefully.
- You will be asked to sign for this form to confirm that you have received it.
- You will not have to say anything, but if you do say anything about your arrest or the alleged offence, or about being kept in custody, that will be recorded.

### **Applying to be released**

- At any time you can ask to be released from custody. To do this you can ask or write to the person who arrested you or your commanding officer.
- Explain why you think you should be released.
- If you have an assisting officer or lawyer, you can ask them to help you get released.

### **Asking for writing material**

- You should be given writing materials (paper, pens and so on) if you ask for them.

### **Contacting certain people**

- You can choose one person to be told about your arrest and where you are being held.
- You can make at least one phone call to a legal adviser. This call is free.

- You can phone relatives or friends to speak to them for a reasonable time. You can also receive phone calls at reasonable times. You will have to pay for any phone calls you make.
- You can send letters, but you will have to pay for posting them.

Some or all of these rights can be delayed or withheld. If this happens you will be told why.

### **Choosing an assisting officer to help you**

- You can choose an officer, WO, senior rate or SNCO to help you as your assisting officer. If you have any difficulty finding a suitable person to be your assisting officer, your commanding officer will give you the names of at least two people who can help you. If you do not want an assisting officer you will be asked to sign a form to confirm this.

### **Attending for duty**

- ❖ When you are in custody you will carry out work or training for between six and nine hours a day, except on Sundays and public holidays.

### **Commanding officer's decision on custody**

- ❖ When your commanding officer has been told about your arrest they must decide if you should stay in custody without being charged. They will only decide to keep you in custody if they have good reason to believe that this is necessary.
- ❖ Your commanding officer must also be sure that the offence you were arrested for is being investigated properly and as quickly as possible.
- ❖ If your commanding officer decides that you should stay in custody, this must only be for as long as is necessary.

### **Legal representation**

If you are arrested and interviewed by the Service Police, you have the right to be represented by a lawyer. A lawyer may be provided free of charge through the civilian duty solicitor scheme, or a service lawyer may be available, especially overseas. If you want to appoint your own lawyer, you may have to pay their costs if you do not have legal aid. See JSP 838 The Armed Forces Legal Aid Scheme, for more information.

### **Consular protection of foreign nationals**

- ❖ If you are a foreign national who is serving in HM Forces, and you are arrested or detained by someone other than the service police, you have a legal right to contact your home nation consul. If you want to contact your home nation, tell your commanding officer as soon as possible.

### **Time limits on custody**

The maximum length of time that you can be held in custody without being charged is 48 hours from the time of your arrest. That time may be extended to 96 hours only if a judge advocate agrees. If you are not charged within 96 hours, you must be released.

- ❖ While you are in custody, at the end of every 12-hour period your commanding officer must consider whether you should stay in custody. At any time you can write to your commanding officer asking to be released.
- ❖ If your commanding officer orders that you should be kept in custody they must tell you why.
- ❖ Within 48 hours from the time of your arrest you will be:
  - released (with or without charge); or
  - taken before a judge advocate for them to decide whether you should be kept in custody (you may or may not have been charged).

## **Further custody without charge**

- ❖ If your commanding officer wants to keep you in custody without charge for more than 48 hours, they must ask for a hearing before a judge advocate. The judge advocate will decide if you should stay in custody and, if so, for how long.
- ❖ In very exceptional circumstances your commanding officer may order you to stay in custody for longer than 48 hours, up to a maximum of 96 hours, if it is not practical to arrange a hearing with a judge advocate before then. If this happens, your commanding officer must consider your custody at least every six hours.

### **Further custody – your rights**

If your commanding officer intends to ask a judge advocate for permission to keep you in custody without being charged, they must tell you this in writing, setting out the reasons for their decision. You have a right to:

- be at the hearing with the judge advocate, and to tell the judge advocate why you think you should be released;
- be represented by a lawyer at the hearing; and
- apply for legal aid or other similar arrangements in place in your area.

If you do not have a lawyer and want one, the judge advocate may adjourn (postpone) the hearing for you to contact one. This may mean that you stay in custody during the adjournment.

## **Judge advocate's powers**

The judge advocate can order that you stay in custody for up to 96 hours after your arrest before you are charged or released. At the end of the period the judge advocate sets, if your commanding officer still wants to keep you in custody he or she must apply to the judge advocate again.

- The judge advocate can either refuse your commanding officer's application, or adjourn the hearing for up to 48 hours after your arrest, and order that you be kept in custody. If the judge advocate refuses the application to keep you in

custody and it has been less than 48 hours since your arrest, he or she will order that you are charged or released immediately.

You can find out more about custody without charge in chapter [5](#) (Custody) of the Manual of Service Law.

### **Interviews or identification parades by Service Police**

There are codes of practice which cover the way you should be treated by the Service Police. You can ask to read the codes of practice whenever you are questioned or put on an identification parade. The Service Police must give you a reasonable time to read the codes of practice. You may also want to get legal advice if you have not already done so.

## ***Custody after charge – your rights***

'Charging' is where you are formally accused of committing an offence. Your commanding officer will sign a charge sheet which states the offence or offences you have been accused of committing and will give you a copy of it.

### **Duties**

- ❖ When you are in custody you will carry out work or training for between six and nine hours a day, except on Sundays and public holidays

### **Action by your commanding officer**

- ❖ After you have been charged, if your commanding officer thinks that you should stay in custody until your case has been dealt with, he or she must arrange a custody hearing before a judge advocate as soon as possible.

#### **Custody after charge – your rights**

Your commanding officer must give you written notice to confirm that they intend to apply for you to be kept in custody. This notice will explain his or her reasons, and will set out your rights, including your right to:

- **be brought before a judge advocate as soon as possible;**
- **be represented by a lawyer; and**
- **be told why your commanding officer thinks you should be kept in custody.**

### **Judge advocate's powers**

- ❖ At your first hearing the judge advocate can order that you stay in custody for up to eight days.
- ❖ More information on why a judge advocate can make this decision, and the things he or she takes into account, is given in chapter 5 (Custody) of the Manual of Service Law.
- ❖ You or your lawyer can talk to the judge advocate about any points you think are important.



- ❖ If the judge advocate makes an order for you to stay in further custody, that order will automatically end once you have been dealt with for the offence.

## **Review of custody after charge**

- ❖ If the judge advocate orders that you stay in custody, he or she will set a date for your case to be reviewed. The date must be before the period of further custody runs out, unless you have already been released.
- ❖ At the review, the judge advocate will decide if you should stay in custody and, if so, for how long. The maximum period he can order is a further eight days, unless you agree to a longer period of up to 28 days. You can only agree to this if you have a lawyer.
- ❖ If the judge advocate decides that you should be released, he may still set conditions for your release. This will mean that your freedom will be restricted in some way. For example, you may have to report to the guard room at certain times. If you do not keep to these conditions, your commanding officer may order that you are arrested.
- ❖ The judge advocate will hold a hearing for a review if:
  - your further custody has not been reviewed before;
  - your commanding officer has asked for one because the reasons for keeping you in custody may no longer exist; or
  - it is during your trial by the Court Martial.
- ❖ In other cases, the judge advocate may decide to deal with the review on paper rather than at a hearing, but only after you have had the chance to write to the judge advocate (a copy of your letter will be given to your commanding officer). It will help if you raise some new points that support your request to be released.
- ❖ Your commanding officer may also write to the judge advocate about your custody. You will receive a copy of that letter.
- ❖ The judge advocate's decision will be given to you in writing.

<p>If your commanding officer ever feels that the reasons for your custody no longer apply, he or she can either release you or ask the judge advocate to review your case.</p>
---

### **MCTC (Colchester)**

- ❖ If you are held in MCTC, your commanding officer will be Commandant MCTC, who will make applications about your custody if necessary.

### **Custody at Court Martial**

- ❖ If your Court Martial trial has started and you are in custody, similar rules apply. However, any decisions on whether you should stay in custody are made by the judge advocate of the Court Martial.

## ***Part 2 – Summary hearing, activation hearing and appeal***

### **Summary hearing**

#### **General**

The most serious offences must be investigated by the Service Police and reported directly to the Director of Service Prosecutions for Court Martial trial. However, less serious offences are investigated by your commanding officer. Most offences committed are less serious and your commanding officer can deal with them at a summary hearing if you wish.

#### **Informing you**

At least 24 hours before your summary hearing, you must be given the following.

- A copy of the charge sheet, showing the charges you face
- A copy of the case summary
- A copy of the written evidence relevant to the charge against you
- Details of any exhibits and where you can inspect them
- A copy of your disciplinary record
- A copy of any material collected during the investigation which is not intended to be used (you may be able to use some of this in your defence.)
- A copy of any permission of higher authority for extended powers to award:
  - extended detention (29 to 90 days);
  - a reduction in rank or disrating (WOs and below only);
  - removal of seniority (officers only);
  - a fine of 15 to 28 days' pay (officers and WOs only); or
  - detention (leading hand and below in the Royal Navy, lance corporal and below in the Royal Marines and Army, corporal and below in the Royal Air Force).
- A copy of this guide
- A copy of any permission to let your commanding officer hear some more serious charges
- The time of the hearing

## **You must also be told that you have the following rights.**

- To choose to be tried in the Court Martial instead of having the charge dealt with by your commanding officer at a summary hearing
- To be helped by an assisting officer
- To question witnesses called by your commanding officer
- To give evidence yourself
- To call your own witnesses
- To appeal to the Summary Appeal Court, if the charge is proved.

### **Legal advice**

You can get legal advice from a civilian lawyer, but you may have to pay for this. If a service lawyer is available, you can get advice from them free of charge.

See JSP 838 The Armed Forces Legal Aid Scheme, for more information.

You cannot be represented by a lawyer at a summary hearing, but you can get legal advice before the hearing. This could help you decide whether to admit the charge.

In particular, you might want to get legal advice on whether you should ask for a trial at the Court Martial instead of having a summary hearing.

If you want to talk to a lawyer you must be given a reasonable chance to do so before the hearing. If you are not given enough time you may ask for more time.

## **Assisting officer**

- ❖ When you appear at a summary hearing you may be helped by an assisting officer.
- ❖ You can choose your assisting officer. This will normally be someone you know who is an officer, WO, senior rate or SNCO. Some people (for example, people who have been involved in the case against you) cannot be your assisting officer.
- ❖ If the person you want is not available, or does not want to be your assisting officer, your commanding officer will give you at least two names of people who can be your

assisting officer. You do not have to use the people suggested by your commanding officer.

- ❖ If you do not want an assisting officer, your commanding officer will go ahead with your hearing without one.

Your assisting officer is not a lawyer. They are there to give you advice before the hearing and at it, and to help with paperwork. He or she can help you decide if you should choose to have a Court Martial trial, but you may want to discuss this with a lawyer.

- ❖ If you prefer to have a summary hearing rather than a trial at the Court Martial, your assisting officer will help you decide whether to admit or deny the charge. However, he or she cannot make this decision for you. Your assisting officer can help you decide if you should give evidence or call witnesses, and can make a statement for you about your character or any special reasons why your punishment should be reduced.
- ❖ Your assisting officer will be with you during the hearing and you can talk to them at any time during the hearing. Your assisting officer can also help you to prepare questions for witnesses and ask those questions for you.
- ❖ You can get some helpful ideas about what to discuss with your assisting officer or lawyer from chapter 9 (Summary hearing and activation of suspended sentences of Service detention) of the Manual of Service Law. Annex F of the manual contains instructions for your assisting officer.

## **Before the summary hearing**

- ❖ Before starting the hearing, your commanding officer will ask you if you have been given all of the information listed on page 15 of this guide.
- ❖ Your commanding officer will ask you if you understand the charge or charges and if you have had enough time to prepare for the hearing.

### **Choosing a Court Martial trial**

Before starting a summary hearing, your commanding officer will ask if you understand that you have the right to elect (choose) to have a Court Martial trial rather than a summary hearing.

Your commanding officer will then ask you whether or not you want to be tried by the Court Martial.

If you choose to have a Court Martial trial and are found guilty, the court will not be able to give you a punishment that is more severe than the punishment your commanding officer could give to you if you had a summary hearing.

### **At the start of a summary hearing**

- ❖ If you have chosen a summary hearing, your commanding officer will read out the charge and ask you whether you admit to or deny the charge.

### **Admitting the charge**

- ❖ If you admit the charge or charges, your commanding officer will read out a case summary and ask you if you agree with it. If you do not agree with all of the facts, your commanding officer may call witnesses to find out what the facts are. You will have the opportunity to tell the commanding officer which witnesses you think should be called. The final decision on which witnesses to call will be made by the commanding officer. Once the witnesses have been heard, the commanding officer will decide on the facts of your case.
- ❖ If you agree with the case summary, your commanding officer will accept it as the facts of the case and keep it in the Record of Summary Hearing. He or she will then sentence you.

### **Denying the charge**

- ❖ If you do deny the charge, or you admit some charges but not others, your commanding officer will hear the evidence given by witnesses. Evidence from these witnesses will be read from written statements. If you or your commanding officer want to question a witness, they must come to the hearing. The witness statement will then

be read out by your commanding officer, and you or your assisting officer can ask the witness questions.

You can also give evidence yourself, but you do not have to and cannot be forced to do so. If you do give evidence, it must be 'on oath' or after making a 'solemn affirmation' (that is, you must swear to tell the truth). You may also give your evidence in the form of a written statement, and your commanding officer will be able to question you.

- ❖ You can call witnesses yourself. If you want to call a witness, you should tell your commanding officer this at least 24 hours before the hearing. Their evidence can be read from written statements or given in person.
- ❖ If your commanding officer wants to question your witnesses, the witness must appear in person at the hearing.
- ❖ If your commanding officer finds that the charge against you is not proved, he or she will dismiss it and end the summary hearing.
- ❖ If you are charged with several offences, he or she may find all the charges proved, dismiss some of the charges and find some proved or dismiss all the charges.

## **Sentencing**

- ❖ If your commanding officer finds the charge proved, or if you have admitted the charge, he or she will then hear any evidence you have provided about your character and performance and look at any other factors that may be useful in deciding on the right sentence.
- ❖ You have the right to have witnesses to comment on your character and professional performance. You (or your assisting officer) and your commanding officer can ask these witnesses questions.
- ❖ You or your assisting officer can then make a plea in mitigation of punishment (that is, tell the commanding officer about the offence, your personal circumstances or anything else that could help to reduce the punishment).

- ❖ The commanding officer will look at your disciplinary record. If you admitted the charge or charges, your commanding officer will give you credit for this when deciding on a punishment.
- ❖ Your commanding officer will tell you what the punishment is and will explain the reasons for that decision.
- ❖ If you are sentenced to detention, you can choose to start your sentence immediately. If you do not choose to start your sentence immediately, it will be delayed for 14 days to give you time to appeal to the Summary Appeal Court.
- ❖ If you have spent time in custody after being charged with the offence, this time will be taken off the detention you must serve.
- ❖ You will be given a copy of the Record of Summary Hearing when it is over.
- ❖ You will be told about your right to appeal against the finding or punishment and your right to ask for legal advice about appealing.
- ❖ If you appeal to the Summary Appeal Court you can have a lawyer represent you in the court. You can apply for legal aid.
- ❖ If you do want to appeal, you should do so within 14 days of the date your commanding officer sentenced you. If you need more time to decide, you must ask the Summary Appeal Court for more time.
- ❖ You can find out more about summary hearings, and punishments your commanding officer can decide in chapter 13 (Summary hearing – sentencing and punishments) of the Manual of Service Law.
- ❖ You can find out more about the Summary Appeal Court in chapter 27 (Summary Appeal Court) of the Manual of Service Law.



## **Activation hearing**

- ❖ If you are charged with an offence during the period of a suspended sentence of detention, and your commanding officer finds the charge proved at a summary hearing, at that hearing your commanding officer will decide whether or not you should serve the sentence of detention that had been suspended.
- ❖ If a civilian court convicts you of an offence committed during the period of a suspended sentence of detention, a special hearing will be arranged as soon as possible. This is called an activation hearing and it will be held before your commanding officer.
- ❖ In this case you will be given the following information.
  - A copy of your disciplinary record
  - A copy of the Record of Summary Hearing, or a copy of any record of the proceedings before the Summary Appeal Court that suspended the sentence of detention
  - Copies of the records of all summary hearings, the written records of any activation hearings, and any records of proceedings where reasons were given for any decision not to activate your suspended sentence of detention
  - Any details your commanding officer has about any proved offences you have committed during the time the sentence of detention was suspended
  - A copy of any notice a higher authority has given your commanding officer to give them extended powers.

**Your commanding officer must tell you, in writing, about:**

- ✓ his power to activate a suspended sentence of detention;
- ✓ your right to appeal;
- ✓ your right to give your commanding officer your opinion on whether your sentence should be activated or the terms of any activation order; and
- ✓ your right to have an assisting officer.

**Assisting officer**

- ❖ An assisting officer can help you at an activation hearing.
- ❖ You can choose an assisting officer. This will normally be someone you know who is an officer, WO, senior rate or SNCO. Some people (for example, people who have been involved in the case against you) cannot be your assisting officer.
- ❖ If the person you want to be your assisting officer cannot be, or does not want to be, your assisting officer, your commanding officer will give you at least two names of people who are available to you. You do not have to use the people suggested by your commanding officer.
- ❖ If you choose not to have an assisting officer, your commanding officer may go ahead with your hearing without one.
- ❖ Your assisting officer is not a lawyer. His or her job is to give you advice. They can help you to decide if you should call character witnesses. Your assisting officer can help you give your commanding officer your opinion on whether all or part of your suspended sentence of detention should be activated.
- ❖ Your assisting officer will be with you throughout the hearing and you can talk to them at any time. Your assisting officer may help you to prepare questions for character witnesses before and during the hearing.
- ❖ Annex O of chapter 9 (Summary hearing and activation of suspended sentences of Service detention) of The Manual of Service Law has more information about activation hearings and instructions for your assisting officer.

## ***Appeals from summary hearing to the Summary Appeal Court***

### **Appeal**

If your commanding officer finds the charge proved, you can appeal against that finding or the punishment. You should normally appeal within 14 days of being sentenced, but you can ask for permission to appeal later than this. Your appeal will be heard by the Summary Appeal Court.

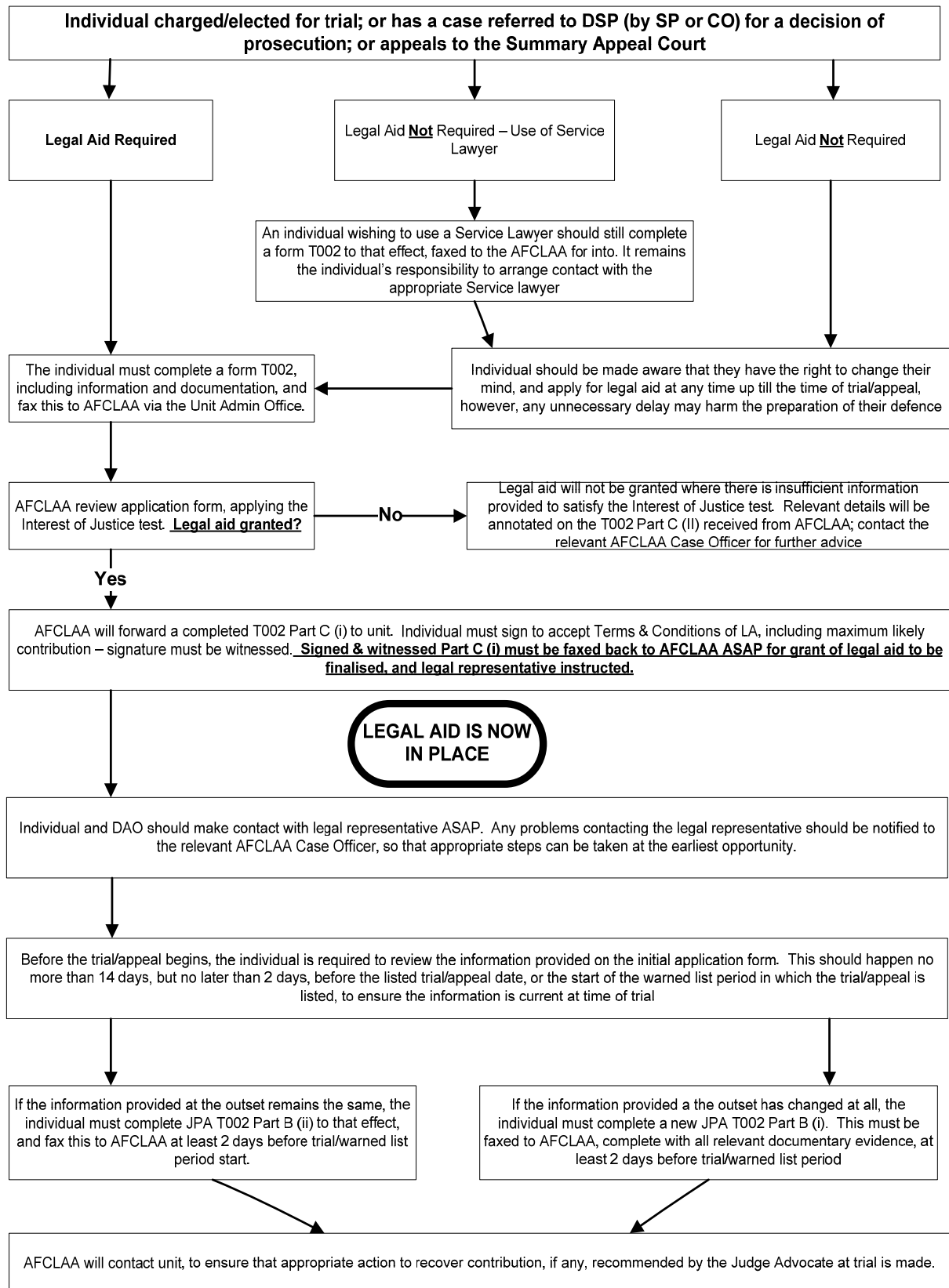
The Summary Appeal Court may change your sentence but it cannot make it more severe than your commanding officer's punishment.

You can find out more about the Summary Appeal Court and making appeals in the Manual of Service Law (Chapter 15, Summary hearing review and appeal).

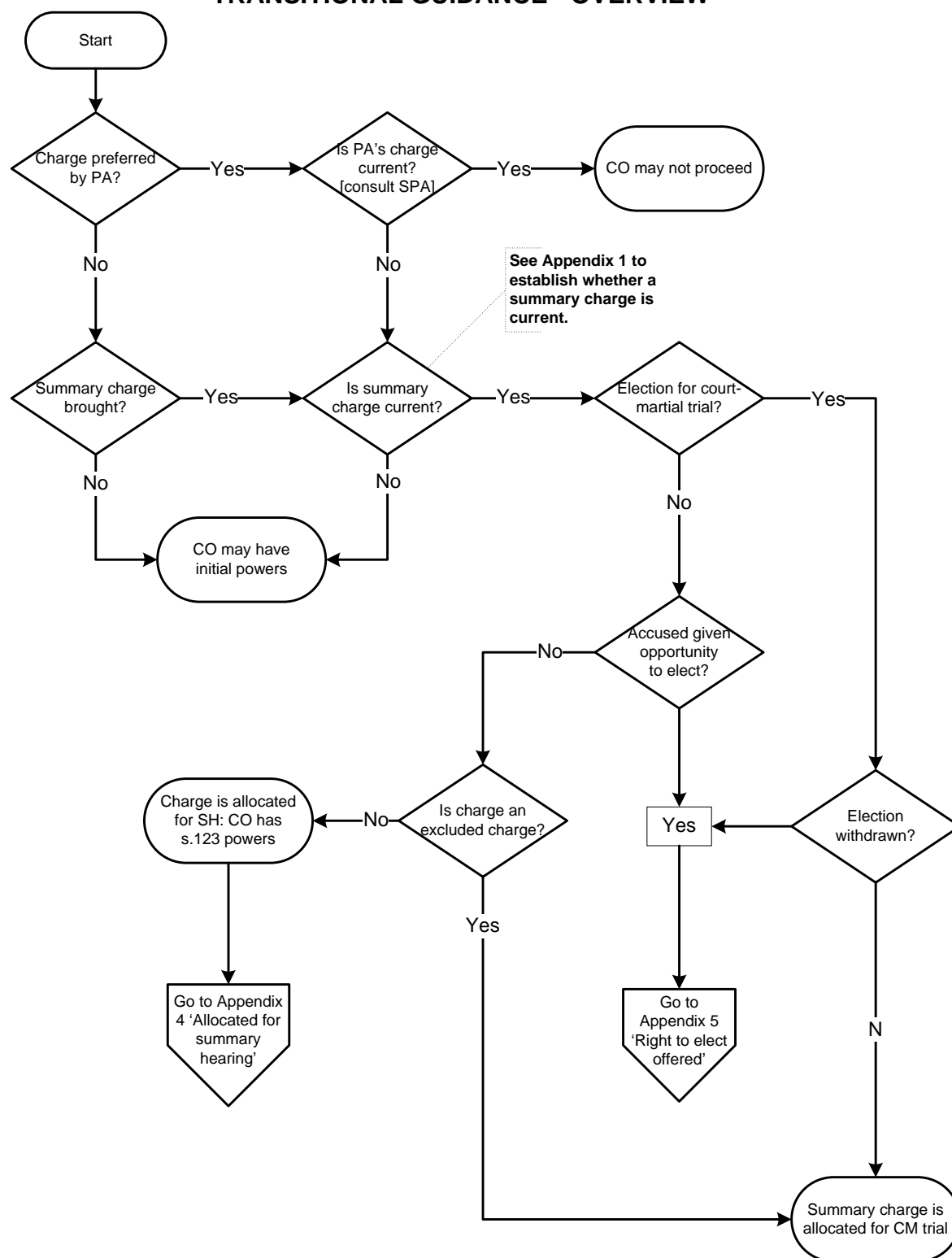
If you are thinking about appealing to the Summary Appeal Court you should get legal advice. See JSP 838 Armed Forces Legal Aid Scheme for more information.

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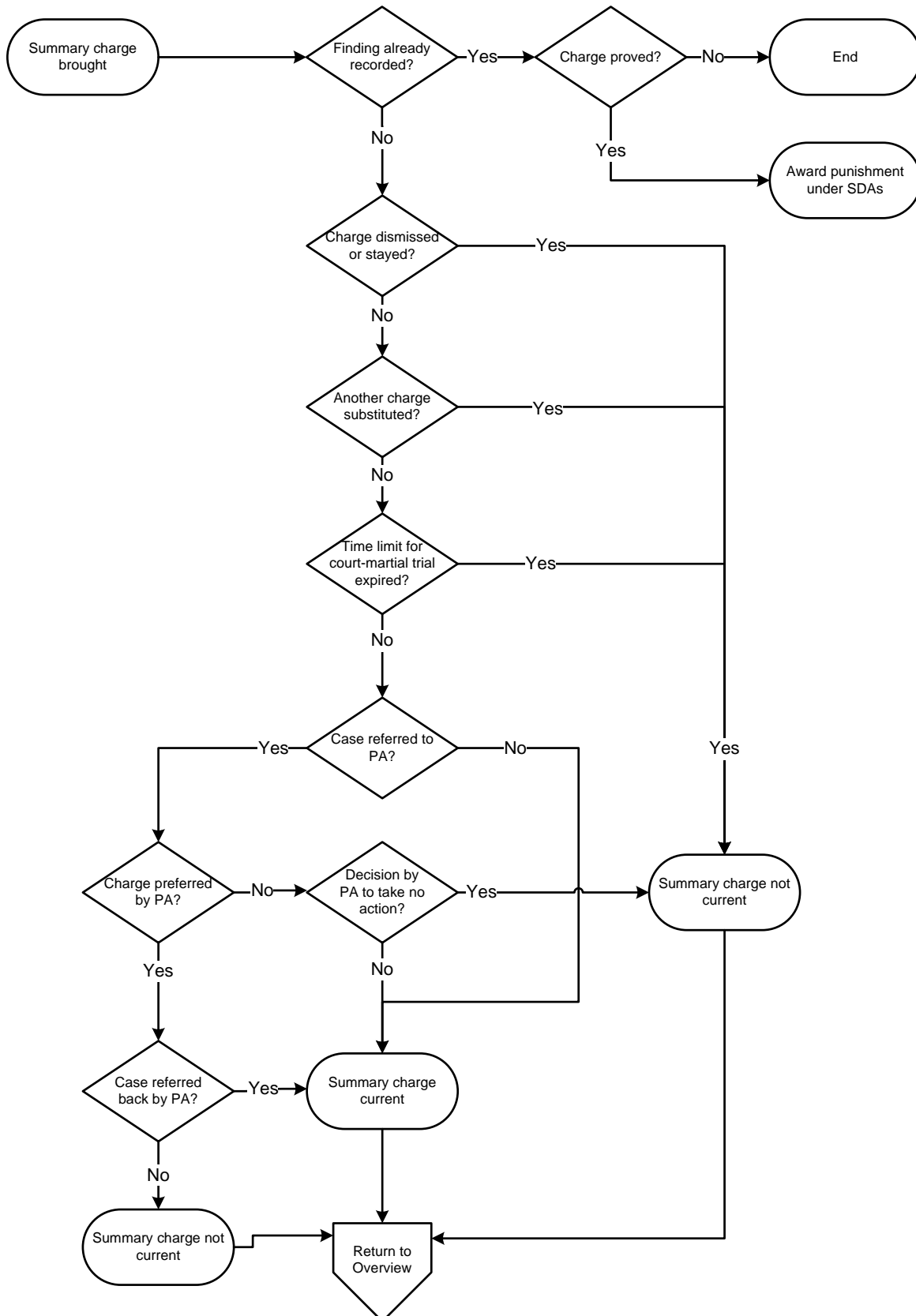
## FLOW CHART – LEGAL AID PROCESS



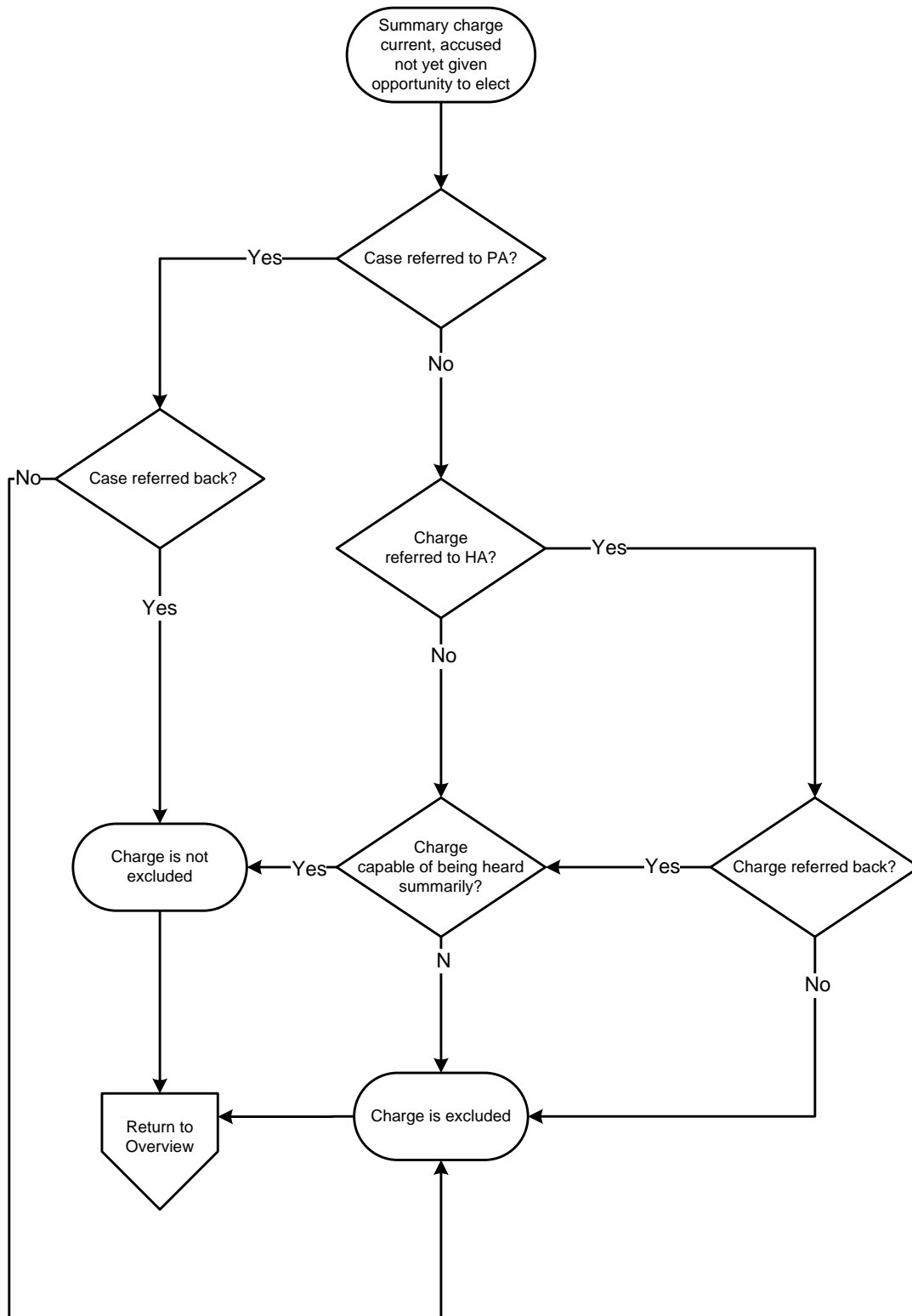
## TRANSITIONAL GUIDANCE - OVERVIEW



## SUMMARY CHARGE CURRENT?

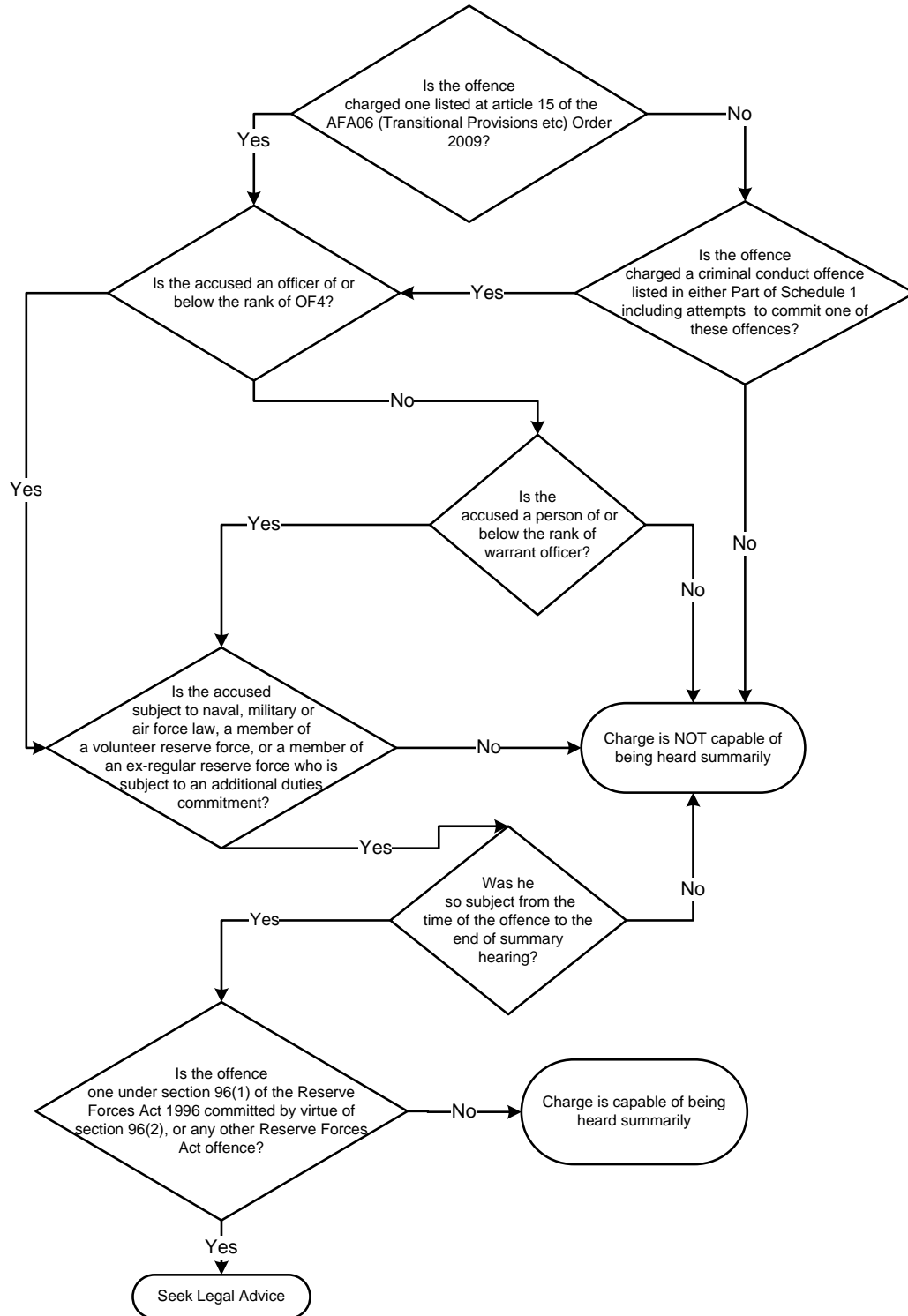


## EXCLUDED CHARGE?

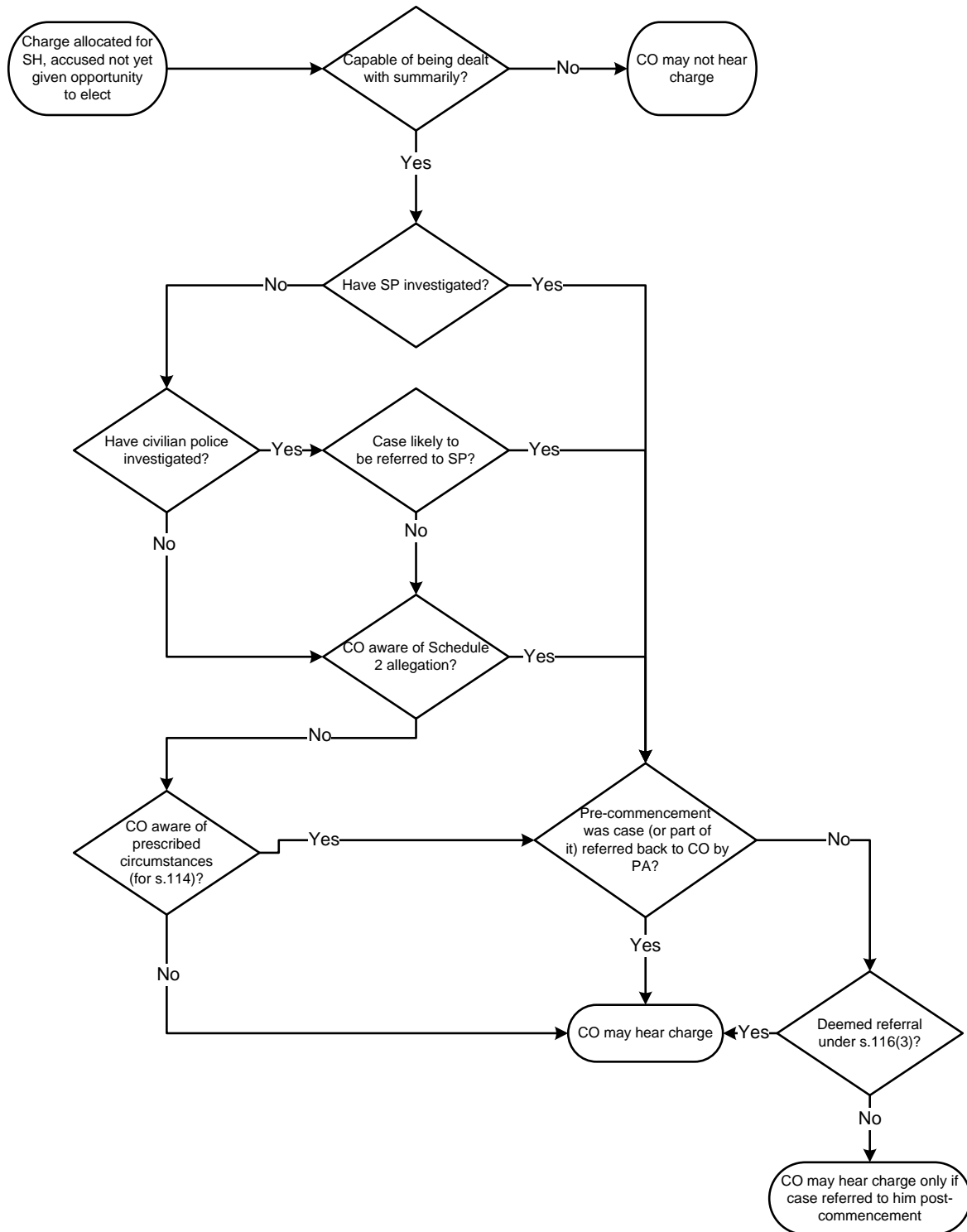




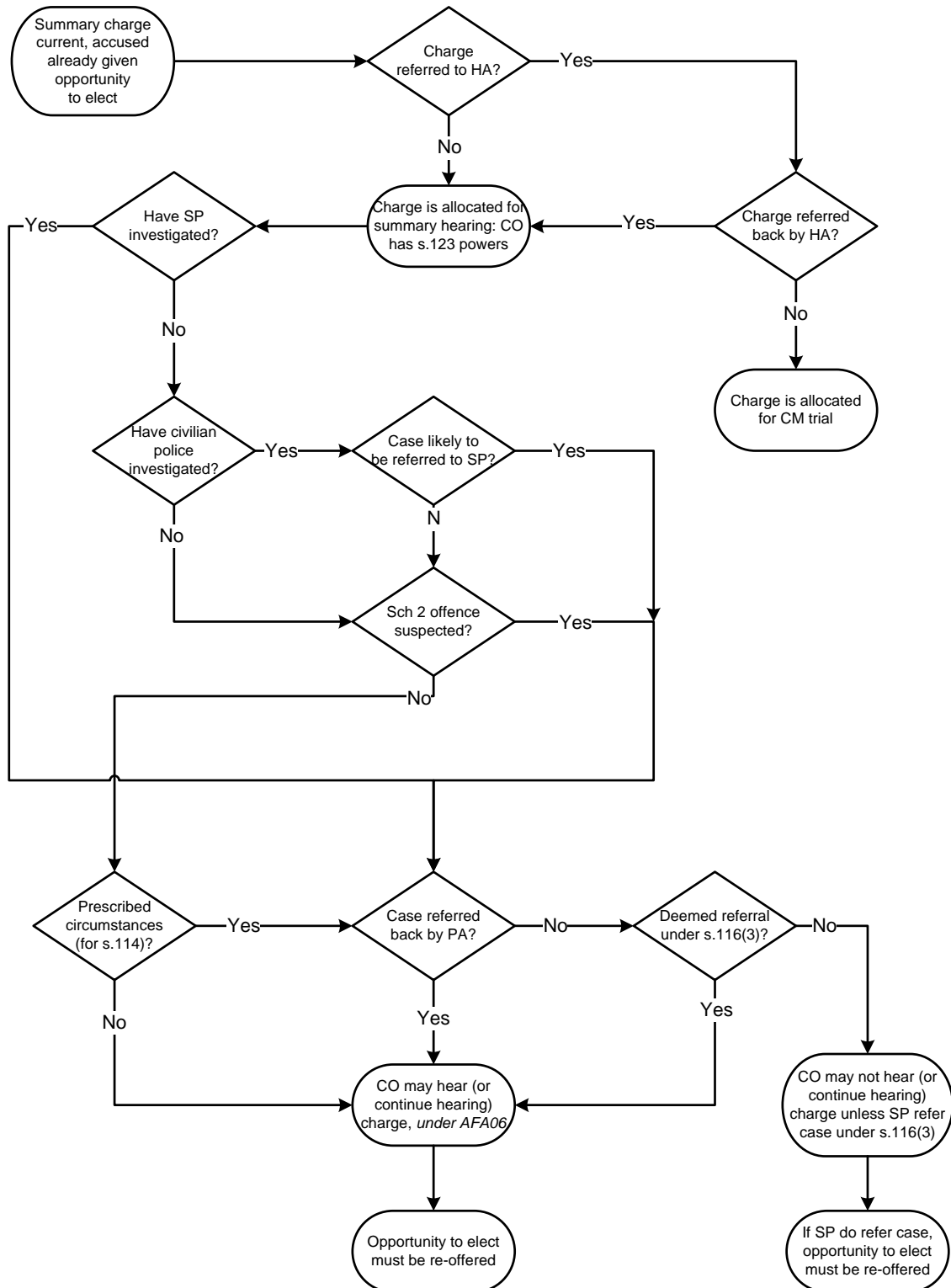
## CHARGE CAPABLE OF BEING HEARD SUMMARILY?



## ALLOCATED FOR SUMMARY HEARING



## RIGHT TO ELECT OFFERED



## Chapter 7

### Non-criminal conduct (disciplinary) offences

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## Chapter 7

### Non-criminal conduct (disciplinary) offences

#### Introduction

1. This chapter contains information pertaining to those occasions when Service personnel and/or relevant civilians, see [Chapter 3](#) (Jurisdiction and time limits), commit disciplinary offences. Many of these offences can be dealt with summarily by the CO although others, including those of a more serious or complex nature will be tried at the Court Martial.

#### Chapter structure

2. This chapter is structured to address each offence in the following format:

<b>AFA 06 reference</b>	Offence as detailed within the Armed Forces Act 2006 (the Act).
<b>Type of offence</b>	Details of how the offence should be dealt with.
<b>Specimen charges</b>	Provided to assist in drafting of charges but where in doubt the advice of the DSP or staff legal adviser should be sought.
<b>Ingredients of the offence</b>	Guidance to the meaning of particular elements of the offence.
<b>Defences</b>	Contains defences which are particular to the offence. Other Defences will be contained within <a href="#">Chapter 12</a> (Defences, mitigation and criminal responsibility).
<b>Notes</b>	Further guidance and alternative charges.

#### Transitional guidance

3. Application of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 can be complicated and staff legal advice should always be taken. This guidance is restricted to the more common straightforward cases; however more complex situations will need careful consideration on a case by case basis. In all cases reference should be made to the Order itself, in particular, in the case of charging offences<sup>671</sup>.

4. Where a person commits an offence before commencement (i.e. 31<sup>st</sup> October 09), the suspect cannot be charged with a Service offence (i.e. one of those offences set out in section 50 of the AFA 06). Instead, the suspect must be charged with the relevant SDA offence. For transitional purposes, and for the purposes of the flowchart at [Annex A](#), an 'SDA offence' means any of the following (note that, for those purposes, the expression includes more than just offences under the 1955 and 1957 acts):

- a. Any offence under Part 2 of AA 1955 or AFA 1955;
- b. Any offence under Part 1 of NDA 1957;
- c. An offence under section 47K of NDA 1957;

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<sup>671</sup> See Parts 1 to 3 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

- d. An offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed before commencement;
- e. An offence under section 18 or 20 of AFA 1991 committed before commencement;
- f. An offence under any of sections 95 to 97 of RFA 1996 committed before commencement; or
- g. An offence under paragraph 5(1) of Schedule 1 to RFA 1996 committed before commencement by a person within a specific category<sup>672</sup>.

5. For example, if a soldier steals something on the 29 Sep 09 (whilst subject to military law) but that offence does not come to light until on or after the 31 Oct 09, the soldier must be charged under section 70 of the AA55. They must not be charged with an offence under section 42 of the AFA 06. Where an accused is charged with a SDA offence, the SDA offence can be tried by a Service court or can be dealt with in a summary hearing under the AFA 06 by virtue of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

6. In most cases it will be obvious whether the suspect should be charged with an AFA 06 offence or a SDA offence. There may however be some situations where the matter is not so clear. Where these situations arise COs should seek staff legal advice before bringing a charge. The situations arise where:

- a. **The offence is incomplete at commencement (relevant to offences under paragraphs 4a, b, f or g above).** An offence will be incomplete at commencement if the SDA offence has two or more elements and at least one of the elements occurs prior to commencement and at least one occurs after commencement. Where this occurs the accused can be charged under the relevant SDA offence even though the last element of the offence does not occur until after 31 Oct 09<sup>673</sup>. So for example, if a soldier deliberately leaves the ignition key in a Service vehicle on 30 Oct 09 with the result that the vehicle is stolen on 31 Oct 09, the soldier can be charged under the relevant SDA provision (in this case section 44(1)(b) of the AA55).
- b. **A course of conduct is still ongoing at commencement (relevant to offences under paragraphs 4a, b or f above).** This situation is most likely to occur where a Service person is AWOL. For example, where a soldier goes absent prior to commencement and does not return until after commencement. The effect of article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 is that the whole course of conduct (both before and after commencement) can be charged under section 38 of the AA55. It will also be permissible to charge the accused with two shorter periods of AWOL; one under the AA55 for the period that terminates at commencement and one under section 9 of the AFA 06 which begins at commencement<sup>674</sup>.
- c. **It is not clear when the conduct occurred.** This situation might arise where a suspect is alleged to have committed an offence within a period that began before 31 Oct 09 but finished after this date, but it is unclear exactly when (during the period) that alleged offence was committed. For example, in January 2010 a recruit might complain that they were assaulted during training a couple of months earlier, but cannot

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<sup>672</sup> See article 2(5) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>673</sup> See article 9 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>674</sup> See article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

remember whether the assault occurred before or after 31 Oct 09. Where this occurs the suspect can be charged under the relevant SDA provision. However, the suspect must only be charged with the relevant SDA offence where the alleged conduct must have been an offence. The only question is when it was committed, and therefore which offence it was. In the example above, the assault must have been either an offence under section 70 of the AA/AFA55 (or section 42 of the NDA57) or an offence under section 42 of the AFA06. If the alleged conduct amounts to an offence under the SDAs but does not amount to any offence under AFA06, it must be proved to have occurred before commencement. Conversely, if it would be an offence under AFA06 but not under the SDAs, it must be proved to have occurred after commencement<sup>675</sup>.

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<sup>675</sup> See article 11 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.



## Offences

### Section 1 - Assisting an enemy

#### 1 Assisting an enemy

(1) A person subject to service law commits an offence if, without lawful excuse, he intentionally–

- (a) communicates with an enemy;
- (b) gives an enemy information that would or might be useful to the enemy;
- (c) fails to make known to the proper authorities any information received by him from an enemy;
- (d) provides an enemy with any supplies; or
- (e) harbours or protects an enemy other than a prisoner of war.

(2) A person subject to service law who has been captured by an enemy commits an offence if, without lawful excuse, he intentionally serves with or assists the enemy–

- (a) in the prosecution of hostilities or of measures likely to influence morale; or
- (b) in any other manner not authorised by international law.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.

(AFA06 s.1)

#### 1. Type of offence

This is a Schedule 2 offence and **may not be** heard summarily<sup>676</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

#### 2. Specimen charges

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did communicate with an enemy by [reporting orally/email/text/signal/letter etc] concerning .....

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(b) OF THE ARMED FORCES ACT 2006

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<sup>676</sup> Section 53 Schedule 2 of the Act.

[AB] on ....., intentionally and without lawful excuse did give information to an enemy concerning ..... that would or might be useful to the enemy.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(c) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did fail to make known to the proper authorities information concerning ..... received by him from an enemy.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(d) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did provide an enemy with supplies, namely .....

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(e) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did harbour in ..... an enemy other than a prisoner of war.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(2)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., having been captured by an enemy, intentionally and without lawful excuse, did serve with [*or assists*] the enemy in the prosecution of hostilities [*or of measures likely to influence morale*] by .....

ASSISTING AN ENEMY CONTRARY TO SECTION 1(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., having been captured by an enemy, intentionally and without lawful excuse, did serve with [*or assists*] the enemy in any other manner not authorised by international law by .....

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Without lawful excuse*

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

An accused will have a lawful excuse if a person has authority, or is under orders, to communicate with the enemy or give information to the enemy if for example; their duties required them to participate in the broadcast of information operations or psyops messages to an enemy.

The accused is to be treated as not having had a lawful excuse unless they raise sufficient evidence as to whether they had such an excuse. Once the issue has been raised, the accused may not be convicted unless the court is satisfied beyond all reasonable doubt that

the accused acted in the way alleged, and that when doing so they did not have a lawful excuse.

See also section 325 of the Act (evidential burden as respects excuses).

#### *Intentionally*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For an offence under this section to be proved, the conduct of the accused must have been intentional.

#### *Communicates*

Communicates should be given its ordinary dictionary definition. It includes all forms of communication by every possible means (email, text, signal, letter or telephone conversation etc)

#### *An enemy*

For *enemy* see section 374 of the Act.

#### *Information that would or might be useful*

It does not matter whether the accused considered that information would or might be useful to an enemy. For subsection (1)(b) of this offence it is only necessary to show that the accused intended to pass the information to an enemy. It does not matter whether the information is true or accurate or whether the accused believed it to be true or accurate. It will be for the officer hearing the charge to decide whether the information was or might have been of use to the enemy.

#### *Proper authorities*

This would generally be a superior officer or somebody with functional authority over the accused.

#### *Prisoner of war (PW)*

PW are combatants captured during armed conflict and are entitled to certain fundamental rights at all times, including physical security. Their rights are engaged at the point of capture, when they fall under the power of the capturing unit.

For PW generally see JWP 383 Chapter 8 (The Law Of Armed Conflict – Prisoners of War)

#### *Captured by an enemy*

This is not limited only to those UK personnel captured (i.e. fall under the power of enemy combatants) during armed conflict who have PW status but will include those captured by any enemy<sup>677</sup>.

#### *Serves with or assists the enemy*

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<sup>677</sup> Section 374 of the Act.

Serving with means taking a direct part, with the enemy, in hostilities or other operations against UK forces or other military or police forces co-operating with them. Assistance includes indirect assistance.

#### *Prosecution of hostilities*

This is not limited to actions against UK forces in armed conflict.

#### *Measures likely to influence morale*

This can either improve the morale of the enemy or undermine the morale of, for example, UK forces or civilians.

#### *Any other manner not authorised by international law*

Thus, for example, the Geneva Conventions permit capturing forces to compel prisoners of war to do certain types of work. Where UK forces are carrying out this sort of work they will not be committing an offence under subsection (2).

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

### **Subsection (1)**

It would not be an offence under subsection (1)(a) if the accused was required in the course of their duty to pass a message by a particular means, or even if they did so negligently, and the message was intercepted. The communication to any enemy must have been intentional.

In relation to subsection (1)(b) the accused must have intended to provide the information to an enemy. The offence is complete when the information is provided. It does not matter whether the enemy does anything with it.

It is important that any information received from an enemy is made available to the proper authorities. Subsection (1)(c) provides that unless they are permitted to do so as part of their duties it is not for individual personnel to decide whether or not to pass the information on.

It would not be an offence under subsection (1)(d) if an accused had abandoned equipment unless they did so in order to supply it to an enemy.

A accused who has harboured or protected a prisoner of war in the course of providing this protection will not have committed an offence under subsection (1)(e).

### **Subsection (2)**

For an offence to be committed under this section the accused who has been captured must have intentionally served with or intentionally assisted the enemy (see below).

### **Alternative charges**

Section 17 (disclosure of information useful to an enemy), section 19 (conduct prejudicial to good order and discipline), section 13 (contravention of standing orders) or section 15 (failure to attend for or perform duty etc).

## Section 2 - Misconduct on operations

### 2 Misconduct on operations

(1) A person subject to service law commits an offence if, without reasonable excuse, he—

- (a) surrenders any place or thing to an enemy; or
- (b) abandons any place or thing which it is his duty to defend against an enemy or to prevent from falling into the hands of an enemy.

(2) Subsections (3) to (5) apply to a person subject to service law who is—

- (a) in the presence or vicinity of an enemy;
- (b) engaged in an action or operation against an enemy; or
- (c) under orders to be prepared for any action or operation by or against an enemy.

(3) A person to whom this subsection applies commits an offence if he fails to use his utmost exertions to carry out the lawful commands of his superior officers.

(4) A person to whom this subsection applies commits an offence if he is on guard duty and posted or ordered to patrol, or is on watch, and—

- (a) without reasonable excuse, he sleeps; or
- (b) (without having been regularly relieved) he leaves any place where it is his duty to be.

(5) A person to whom this subsection applies commits an offence if, without reasonable excuse, he intentionally communicates with a person who is—

- (a) a member of any of Her Majesty's forces or of any force co-operating with them, or
- (b) a relevant civilian,

and the communication is likely to cause that person to become despondent or alarmed.

(6) In subsection (5) “relevant civilian” means a person who—

- (a) is a civilian subject to service discipline; and
- (b) is accompanying a person subject to service law who is—
  - (i) in the presence or vicinity of an enemy; or
  - (ii) engaged in an action or operation against an enemy.

(7) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life. (AFA06 s.2)

### 1. Type of offence

The offences in the section are comprised in subsection (1)(a) and (b), subsection (3), subsection (4)(a) and (b) and subsection (5)(a) and (b).

The offences in subsection 1 are Schedule 2 offences and **may not** be heard summarily<sup>678</sup>. The offences in subsections 3, 4 and 5 although not Schedule 2 offences **may not** be heard

<sup>678</sup> Schedule 2 of the Act.

summarily either<sup>679</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

## **2. Specimen charges**

### **MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(1)(a) OF THE ARMED FORCES ACT 2006**

[AB] on ....., without reasonable excuse, when being the officer in command of ....., did surrender the said *place/thing* to an enemy.

### **MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(1)(b) OF THE ARMED FORCES ACT 2006**

[AB] on ....., without reasonable excuse, when it was his duty to defend a ..... against an enemy [*or prevent from falling into the hands of an enemy*], did abandon the said .....

### **MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(3) OF THE ARMED FORCES ACT 2006**

[AB] on ....., being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*] when ordered by ....., his superior officer, to ....., did fail to use his utmost exertions to carry out the said lawful command.

### **MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(4)(a) OF THE ARMED FORCES ACT 2006**

[AB] on ....., being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*] while on watch [*or guard duty and posted*] [*or ordered to patrol*], without reasonable excuse, did sleep.

### **MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(4)(b) OF THE ARMED FORCES ACT 2006**

[AB] on ....., being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*] while on watch [*or guard duty and posted*] [*or ordered to patrol*], namely ....., without having been regularly relieved, did leave the said place where it was his duty to be.

### **MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(5)(a) OF THE ARMED FORCES ACT 2006**

[AB] on, ....., being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*], without reasonable excuse, did intentionally communicate with X, a person who was a member of Y, of Her Majesty's forces [*or of a force co-operating*

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<sup>679</sup> Section 53 of the Act.

with Her Majesty's force], by (*saying/shouting etc*) ..... and that communication was likely to cause that person to become despondent or alarmed.

## MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(5)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., being in the presence or vicinity of an enemy [*or being engaged in an action or operation against an enemy*] [*or being under orders to be prepared for any action or operation by or against an enemy*], without reasonable excuse, did intentionally communicate with X, a person who was a relevant civilian, by (*saying/shouting etc*) .... and that communication was likely to cause that person to become despondent or alarmed.

A charge under subsection (1) or (3) may affirm an intent to assist.

### **3. Ingredients of the offence**

#### *A person subject to Service law*

An offence under this section cannot be committed by civilians subject to Service discipline. For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Surrenders or abandons*

It is an offence under subsection (1)(a) to surrender a place or a thing to an enemy. This requires a direct surrender to, for example, an enemy unit. Abandoning is not limited in this way, however, the abandoning of places or things is an offence under subsection (1)(b) only if it is the duty of the individual to defend that place or things to prevent it falling into the hands of an enemy.

#### *An enemy*

For *enemy* see section 374 of the Act.

#### *Action, Operation*

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

#### *'duty to defend' (subsection (1))*

The duty to defend a place or thing against the enemy or to prevent it from falling into the hands of the enemy is one which may arise from circumstances where an objective assessment will need to be made from service experience of what course of action is to be expected from a Service person of the accused's rank or experience in the circumstances prevailing at the time.



### *Subsection (2): Application of subsections (3), (4) and (5)*

Offences under subsection (3), (4) and (5) can only be committed in the circumstances set out in section 2. That means while the accused was taking part in, or under orders to take part in, operations against an enemy or was in the vicinity of an enemy. If these circumstances do not exist, alternative offences should be considered, such as a charge under section 15 (failure to attend for or perform duty etc) rather than under subsection (4) where personnel sleep on watch or improperly leave their place of duty.

### *Fails to use their utmost exertions*

This should be assessed objectively taking into account factors such as the training and experience of the individual and the circumstances in which the incident occurred.

### *Superior officers*

For the purpose of this section the command or commands must have been given by a superior officer<sup>680</sup> who is subject to Service law, this would include, for example, where the Commander of British Forces (CBF) has ordered a UK commander to follow the tactical commands of their coalition commander. However, in such a case the offence would be in relation to the failure to use utmost exertions to carry out the lawful command of the CBF's order.

See also the guidance on section 11 (misconduct towards a superior officer).

### *Co-operating force*

This applies to a military force that is co-operating with one of Her Majesty's forces; for example, when the forces are participating together in an exercise or operation under a formal agreement.

### *Without having been regularly relieved*

The relief provided must be a person who has authority to take on that duty.

### *Communicates*

Communicates should be given its normal dictionary meaning. It would include all forms of communication by every possible means (email, text, signal, letter or telephone conversation etc). For an offence to have been committed under this section the communication must be likely to cause certain specified persons (see below) to become despondent or alarmed. These terms should be given their normal dictionary meaning.

### *Specified persons*

The persons who become despondent or alarmed are set out in subsection (5). A relevant civilian is someone who is subject to Service discipline and they must be operating in the circumstances set out in subsection (6)(b)(i) and (ii). This would include contractors who are deployed with Service personnel who are on operations but it would not be an offence to communicate with a contractor who is, for example, working in a UK Naval Base with Service personnel who are under orders to deploy on operations.

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<sup>680</sup> Section 374 of the Act.

#### *Co-operating force subsection (5)(a)*

This applies to a military force that is co-operating with one of Her Majesty's forces, for example, when the forces are participating together in an exercise or operational under a formal agreement.

#### *'Despondent or alarmed' subsection (5)*

It is not necessary that the words in the communication should be false. It is not necessary to prove that the words actually caused a person to become despondent or alarmed, only that it was likely to do so.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **5. Notes**

This offence is only to be charged in relation to misconduct on operations.

## Section 3 - Obstructing operations

### 3 Obstructing operations

- (1) A person subject to service law commits an offence if–
- (a) he does an act that is likely to put at risk the success of an action or operation of any of Her Majesty's forces; and
  - (b) he intends to prevent, or is reckless as to whether he prevents, the success of the action or operation.
- (2) A person subject to service law commits an offence if–
- (a) without lawful excuse, he does an act that delays or discourages an action or operation of any of Her Majesty's forces; and
  - (b) he intends to delay or discourage the action or operation.
- (3) In this section “act” includes an omission and references to the doing of an act are to be read accordingly.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–
- (a) if the offence relates to an action or operation against an enemy, may be for life;
  - (b) otherwise, must not exceed ten years.

(AFA06 s.3)

### 1. Type of offence

An offence under this section **may not** be heard summarily<sup>681</sup>. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

The offences in this section are comprised in subsection (1)(a) and (b) and subsection (2)(a) and (b). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these subsections they should, as soon as is practicable, make the Service Police aware of the matter.

An offence under section 3 which relates to an action or operation against an enemy is a Schedule 2 offence. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

OBSTRUCTING OPERATIONS CONTRARY TO SECTION 3(1) OF THE ARMED FORCES ACT 2006

[AB] on ..... (insert details of the act), an act likely to put at risk the success of Operation WOODCUTTER, [an operation against an enemy], intending to prevent the success of the

<sup>681</sup> Section 53 Schedule 2 of the Act.

operation or being reckless as to whether the success of the operation would be so prevented.

## OBSTRUCTING OPERATIONS CONTRARY TO SECTION 3(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, (insert details of the act), an act that delayed Operation WOODCUTTER, [an operation against an enemy], intending to delay the operation.

### 3. Ingredients of the offence

*A person subject to Service law (subsection (1) and (2))*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

This offence cannot be committed by civilians subject to Service discipline.

*Likely to put at risk the success (subsection (1)(a))*

Evidence of the purpose of an action or operation may be found in any associated mission directive. This may be relevant to any assessment of its success. It will be for a officer hearing the charge to decide whether the act or omission of the individual was likely to risk the success of the action or operation. This is an objective test.

*Action, operation (subsection (1))*

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

*Intentionally, Recklessly (subsection (1) and (2))*

For intention and recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Even if the act or omission was likely to risk the success of the action or operation, for the offence under subsection (1) to be proved, the individual must have either intended to prevent or been reckless as to whether they prevented the success of the action or operation.

Under subsection (2), there must have been intention

*An enemy (subsection (4))*

For *enemy* see section 374 of the Act.

### 4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful excuse provides a defence in relation to an offence under subsection (2). An accused will have a lawful excuse if, for example, they had been acting under the last order communicated to them.

## **5. Notes**

Offences under this section are only to be charged in relation to misconduct on operations. While operations or actions will often be against an enemy (see above), this need not be the case. Outside operations, acts and omissions may amount to other offences. Examples are negligence under section 15 (failure to attend for, or perform, duty) or offences under section 12 (disobedience to lawful commands) or section 13 (contravention of standing orders).

## Section 4 - Looting

### 4 Looting

- (1) A person within subsection (4) commits an offence if, without lawful excuse—
- (a) he takes any property from a person who has been killed, injured, captured or detained in the course of an action or operation of any of Her Majesty's forces or of any force co-operating with them; or
  - (b) he searches such a person with the intention of taking property from him.
- (2) A person within subsection (4) commits an offence if, without lawful excuse—
- (a) he takes any property which has been left exposed or unprotected in consequence of—
    - (i) an action or operation of any of Her Majesty's forces or of any force co-operating with them; or
    - (ii) an event, or state of affairs, in relation to which such an action or operation is undertaken; or
  - (b) he searches any place or thing with the intention of taking property of a description mentioned in paragraph (a).
- (3) A person within subsection (4) commits an offence if he takes otherwise than for the public service any vehicle, equipment or stores abandoned by an enemy.
- (4) A person is within this subsection if he is—
- (a) a person subject to service law; or
  - (b) a civilian subject to service discipline.
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence—
- (a) in the case of an offence under subsection (1) or (2), may be for life;
  - (b) in the case of an offence under subsection (3), must not exceed seven years.

(AFA06 s.4)

### 1. Type of offence

Offences under **subsection (1) and (2) are Schedule 2 offences**. An offence under these subsections **may not** be heard summarily<sup>682</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances which indicate an offence has been committed under these subsections, they must, as soon as is reasonably practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

<sup>682</sup> Section 53 Schedule 2 of the Act.

**Only an offence under subsection (3) may be heard summarily<sup>683</sup>.** In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

## **2. Specimen charges**

### **LOOTING CONTRARY TO SECTION 4(1)(a) OF THE ARMED FORCES ACT 2006**

[AB] on ....., without lawful excuse, took a wallet from [CD], a person detained during Operation JUDGE, an operation conducted by Her Majesty's Forces.

### **LOOTING CONTRARY TO SECTION 4(1)(b) OF THE ARMED FORCES ACT 2006**

[AB] on ....., without lawful excuse, searched [CD] a person detained during Operation JUDGE with the intention of taking his property, namely his wallet.

### **LOOTING CONTRARY TO SECTION 4(2)(a) OF THE ARMED FORCES ACT 2006**

[AB] on ....., without lawful excuse, took a compact disc player, properly left exposed in consequence of Operation JUDGE, an operation conducted by Her Majesty's forces.

### **LOOTING CONTRARY TO SECTION 4(2)(b) OF THE ARMED FORCES ACT 2006**

[AB] on ....., without lawful excuse, searched a house [details] with the intention of taking property which had been left exposed or unprotected as a consequence of Operation JUDGE, an operation conducted by Her Majesty's forces.

### **LOOTING CONTRARY TO SECTION 4(3) OF THE ARMED FORCES ACT 2008**

[AB] on ....., otherwise than for the public service, took a vehicle, namely [describe vehicle], property abandoned by an enemy of Her Majesty's forces.

## **3. Ingredients of the offence**

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law/civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Without lawful excuse*

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful excuse only applies in relation to offences under subsection (1) and (2).

*Takes*

Takes should be given its normal dictionary meaning. It requires an intention to take, either temporarily or permanently. For an offence under subsection (1)(b) or (2)(b) a search must have been made with the intention of taking property. For an offence under subsection (3), the taking by the accused must have been intended for something other than it being put to the public service.

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<sup>683</sup> Section 53 of the Act.

Unlike the offence of theft, this offence does not require proof of dishonesty or intention to permanently deprive. This offence merely requires a person to take an item without authority.

#### *Property*

Property should be given its normal dictionary meaning and covers anything which can be taken. It therefore includes, for example, both Service equipment and personal belongings.

#### *Action, operation*

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

#### *Co-operating force*

This applies to a military force that is co-operating with one of Her Majesty's forces; for example, when the forces are participating together in an exercise or operation under a formal agreement.

#### *An enemy*

For *enemy* see section 374 of the Act.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **5. Notes**

Spare.



## Section 5 - Failure to escape etc

### 5 Failure to escape etc

(1) Subsections (2) and (3) apply to a person subject to service law who has been captured by an enemy.

(2) A person to whom this subsection applies commits an offence if–

- (a) he is aware of steps that he could take to rejoin Her Majesty's forces;
- (b) he could reasonably be expected to take those steps; and
- (c) without lawful excuse, he fails to take them.

(3) A person to whom this subsection applies commits an offence if, without lawful excuse, he intentionally prevents or discourages another person subject to service law who has been captured by an enemy from taking any reasonable steps to rejoin Her Majesty's forces.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years.

(AFA06 s.5)

### 1. Type of offences

Offences under this section **may not** be dealt with summarily<sup>684</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is reasonably practicable, make the Service Police aware of the matter. In all cases, reference should be made to an appropriate staff legal adviser at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

FAILURE TO ESCAPE CONTRARY TO SECTION 5(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., having being captured by an enemy, without lawful excuse failed to take steps of which he was aware, which he could reasonably have been expected to take, to rejoin Her Majesty's forces by [detail failure(s) and circumstances].

FAILURE TO ESCAPE CONTRARY TO SECTION 5(3) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse prevented or discouraged [CD], a person subject to Service law and captured by an enemy, from taking any reasonable steps to rejoin Her Majesty's forces by [detail conduct and circumstances].

### 3. Ingredients of the offence

*A person subject to Service law*

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<sup>684</sup> Section 53 of the Act.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *Captured by an enemy*

This is not limited only to those UK personnel captured (i.e. fall under the power of enemy combatants) during armed conflict who have Prisoner of War status but will include those captured by any enemy<sup>685</sup>.

#### *Steps - reasonably be expected to take*

For an offence to be committed under subsection (2) it must be proved that the accused was aware of steps that they could take, that (in the view of the officer hearing the charge) it was reasonable to expect them to take those steps, that they failed to take them, and that they did not have a lawful excuse to fail to do so. For example, a Service person who, after capture, is left unattended in an unlocked vehicle with an apparently unobstructed escape route might reasonably be expected to attempt an escape.

#### *Without lawful excuse*

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

An accused will have a lawful excuse if, for example, they are ordered by their superior officer not to attempt an escape which would compromise another, larger, escape plan.

The accused is to be treated as not having had a lawful excuse unless they raise sufficient evidence as to whether they had such an excuse. Once the issue has been raised, the accused may not be convicted unless the officer hearing the charge is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so they did not have a lawful excuse.

#### *Prevents or discourages*

For the offence under subsection (3) to be proved, the conduct of the accused towards other captured personnel must have been intended to have the effect of preventing or discouraging their taking reasonable steps to rejoin Her Majesty's forces. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). For example, where a superior officer dissuaded subordinates from an attempt to escape, because to do so would risk the removal of certain privileges, this offence may be committed.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

Spare.

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<sup>685</sup> Section 374 of the Act.

## Section 6 - Mutiny

### 6 Mutiny

- (1) A person subject to service law commits an offence if he takes part in a mutiny.
- (2) For the purposes of this section a person subject to service law takes part in a mutiny if–
- (a) in concert with at least one other person subject to service law, he–
    - (i) acts with the intention of overthrowing or resisting authority; or
    - (ii) disobeys authority in such circumstances as to subvert discipline;
  - (b) he agrees with at least one other person subject to service law to overthrow or resist authority; or
  - (c) he agrees with at least one other person subject to service law to disobey authority, and the agreed disobedience would be such as to subvert discipline.
- (3) For the purposes of subsection (2)–
- (a) “authority” means lawful authority in any part of Her Majesty's forces or of any force co-operating with them;
  - (b) the reference to acting includes omitting to act.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.

(AFA06 s.6)

### 1. Type of offence

The offence is comprised in subsection (1) by virtue of subsection (2)(a)(i) or (ii) and subsection (2)(b) or (c).

This is a Schedule 2 offence and **may not** be heard summarily<sup>686</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is reasonably practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2 Specimen charge

MUTINY CONTRARY TO SECTION 6(2)(a)(i) OF THE ARMED FORCES ACT 2006

[AB] on ....., in concert with [CD] a person [persons] subject to Service law, acted with the intention of overthrowing or resisting authority by [detail conduct].

<sup>686</sup> Section 53 Schedule 2 of the Act.

## MUTINY CONTRARY TO SECTION 6(2)(a)(ii) OF THE ARMED FORCES ACT 2006

[AB] on ....., in concert with [CD] a person [persons] subject to Service law, disobeyed authority in such circumstances as to subvert discipline by [detail conduct and circumstances].

## MUTINY CONTRARY TO SECTION 6(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., in agreement with [CD] a person [persons] subject to Service law, agreed to overthrow or resist authority namely by [detail conduct].

## MUTINY CONTRARY TO SECTION 6(2)(c) OF THE ARMED FORCES ACT 2006

[AB] on ....., agreed with [CD] a person [persons] subject to Service law, to disobey authority by [detail conduct] and that agreed disobedience was such as to subvert discipline.

### **3. Ingredients of the offence.**

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *At least one other person*

The offence of mutiny cannot be committed by a single individual acting on their own. The individual must act in concert (subsection (2)(a) (i) and (ii)) or in agreement (subsections (2)(b) and (c)), with at least one other person who is also subject to Service law. An individual who by themselves disobeys a lawful command should, therefore, be dealt with under section 12(1) (disobedience to lawful commands).

#### *Acts with the intention/disobeys authority*

For an offence under subsection (2)(a) there must be some conduct going beyond agreement. The conduct must involve either an act or omission and it must either have involved an intention to overthrow or resist authority or disobedience of authority in such circumstances as to subvert discipline.

Under subsection (2)(b) and (c) an agreement alone is enough if the agreement is either to overthrow or resist authority or to disobey authority in such circumstances as to subvert discipline.

#### *In concert*

For an offence under subsection (2)(a) at least two persons subject to Service law must have their charges found proved of the necessary misconduct acting jointly. It will not therefore be mutiny for two members of the armed forces to disobey the same order, unless they act *in concert*.

#### *Disobeys*

Disobeys should be given its normal dictionary meaning namely refusing or deliberately failing to obey. For the offence of mutiny, disobedience of *authority* may be relevant. This is wider than disobedience of a lawful command.

Authority may be disobeyed where there has been a lawful command. For such cases where the conduct could not amount to mutinous conduct see section 12 (disobedience to a lawful command). Authority may also be disobeyed even where there is no specific command issued to the accused personally. For example, a breach of standing orders which place an area out of bounds may suffice for section 12, but will only support a charge of mutiny if all of the elements mentioned above are in place.

#### *Lawful authority*

In the context of this section this means the authority of those in command. While UK personnel almost always serve directly under UK (Her Majesty's forces) Command there are circumstances where they may be in a formed unit which is under coalition command or may be attached to or embedded in a foreign force. Where a foreign force is co-operating with Her Majesty's forces in an exercise or operation disciplinary issues will usually be the subject of a formal agreement. In such cases, this offence may be committed where for example the lawful authority disobeyed is the authority of that co-operating force. Such cases will be rare, but where they occur they will raise important jurisdictional issues and staff legal advice should always be sought.

#### *Overthrow(ing) or resist(ing)*

The terms *overthrow* and *resist* should be given their normal dictionary meaning ie. *overthrow*, to remove forcibly from power or to put an end to an institution; *resist*, to strive against; to refuse to comply.

#### *Subvert discipline*

Under subsection (2)(a)(ii) and (2)(c) the accused's conduct or intended conduct respectively must be such as to undermine discipline. It will be a matter of evidence as to whether that is the case.

#### *Agrees*

Under subsection (2)(b) and (c), it is sufficient that the accused *agrees* with another person to make or prepare a plan, to carry out the required conduct at some future time. This is as opposed to subsection (2)(a)(i) and (ii) which would require some act such as actual planning or approaching third parties.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Duress*

Where a person is threatened with violence unless he acquiesce in the mutiny this may provide a defence.

### **5. Notes**

Mutiny is the most serious of all forms of indiscipline, therefore, charges under this section should normally only be preferred when the facts disclose a concerted and deliberate challenge to authority which strikes at the very heart of discipline and is calculated to prejudice significantly the ability of a unit to carry out its role, task or duties.

This section creates two types of offence; the first type is framed under subsection (2)(a) and deals with the actual commission of specific acts which are intended to overthrow or resist authority or subvert discipline. The second under subsection (2)(b) and (c) revolves around agreement between two or more individuals, subject to Service law, to act.

## Section 7 - Failure to suppress mutiny

<b>7</b>	<b>Failure to suppress mutiny</b>  (1) A person subject to service law commits an offence if–  (a) he knows that a mutiny is occurring or is intended; and  (b) he fails to take such steps as he could reasonably be expected to take to prevent or suppress it.  (2) For the purposes of this section a mutiny occurs when a person subject to service law, in concert with at least one other person subject to service law–  (a) acts with the intention of overthrowing or resisting authority; or  (b) disobeys authority in such circumstances as to subvert discipline.  (3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.  <div>(AFA06 s.7)</div>
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### 1. Type of offence

This is a Schedule 2 offence and **may not** be heard summarily<sup>687</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charge

FAILURE TO SUPPRESS MUTINY CONTRARY TO SECTION 7(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., knowing that a mutiny was occurring [or knowing that a mutiny was intended] failed to take such steps as he could reasonably be expected to take to prevent or suppress it.

### 3. Ingredients of offence.

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Knows that a mutiny is occurring or is intended*

The offence of failing to suppress a mutiny can only be committed in the circumstances set out in subsection (2), which is where there is an act of mutiny, as opposed to an agreement. Subsection (2) repeats only the section on mutiny section 6(2)(a), and not when there is only an agreement under section 6(2)(b) and (c). For mutiny generally see notes under section 6.

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<sup>687</sup> Section 53 Schedule 2 of the Act.

The accused must actually know the acts set out in subsection (2)(a) or the disobedience set out in subsection (2)(b) are occurring or that they are intended to occur. It is not necessary for the individual to know that the acts or disobedience legally amount to the technical offence of mutiny.

*Fails to take such steps as they could reasonably be expected to take.*

In addition to knowledge that a mutiny is occurring, or is intended, the accused must fail to take reasonable steps to prevent or suppress it. What is reasonable will depend on the circumstances including: the rank and or experience of the individual; their ability to intervene or inform those in authority; and the danger involved in taking such action. An assessment of what could reasonably be expected is both an objective and subjective judgement. That is, it will include an assessment of what a reasonable person would do but could also take into account factors personal to the accused, which bear upon what *they* could reasonably do.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

##### *Duress*

Where a person is threatened with violence unless they acquiesce in the mutiny this may provide a defence.

The accused cannot be convicted if, in all the circumstances of the case, it would not have been reasonable for them to have intervened or taken other action to stop the mutiny for example, owing to the danger involved or a physical inability to act.

#### **5. Notes**

Spare.



## Section 8 - Desertion

### 8 Desertion

- (1) A person subject to service law commits an offence if he deserts.
- (2) For the purposes of this Act a person deserts if he is absent without leave and—
  - (a) he intends to remain permanently absent without leave; or
  - (b) he intends to avoid a period of active service.
- (3) In this section “active service” means service in—
  - (a) an action or operation against an enemy;
  - (b) an operation outside the British Islands for the protection of life or property; or
  - (c) the military occupation of a foreign country or territory.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence—
  - (a) if the offender intended to avoid a period of active service, may be for life;
  - (b) otherwise, must not exceed two years.

(AFA06 s.8)

### 1. Type of offence

An offence under **subsection (2)(a)** may not be heard summarily<sup>688</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

An offence under subsection **(2)(b)** is a **Schedule 2 offence** (where the accused intended to avoid a period of active service) and **may not** be heard summarily. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this subsection they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

For reserve forces this offence may be tried in a civil court as well as the Court Martial. See section 98 of the RFA 96 as amended and [Chapter 3](#) (Jurisdiction and time limits).

### 2. Specimen charges

DESERTION CONTRARY TO SECTION 8(2)(a) OF THE ARMED FORCES ACT 2006

<sup>688</sup> Section 53 Schedule 2 of the Act.

[AB] of [name of unit], was absent without leave from [date] to [date] and intended to remain permanently absent without leave.

#### DESERTION CONTRARY TO SECTION 8(2)(b) OF THE ARMED FORCES ACT 2006

[AB] of [name of unit] absented himself without leave from [date] to [date] with intent to avoid serving in operations outside the British Islands for the protection of life or property, namely [insert details or name of Operation]

or

[AB] of [name of location] when deployed on actions or operations against an enemy namely, [insert name of operation] absented himself without leave from [date] to [date].

### **3. Ingredients of the offence**

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *Absence without leave*

For all offences of desertion it must be proved that the accused was in fact absent without leave from their unit, or other place of duty, see section 9 (absence without leave).

#### *Intends to remain permanently absent without leave*

Under subsection (2)(a) the accused must intend to remain absent permanently. This intention may be formed at various times. If the accused made the decision never to return either before, or at the time they left or failed to attend their unit or place of duty without leave, then this would be desertion. Furthermore, the charge of desertion would be found proved if at the time they went absent without leave they intended to return but they subsequently, while absent, formed the intention to stay away permanently.

The offence could also be committed after a period of authorised leave. The accused might have gone on authorised leave intending never to return. If, at the end of the authorised leave that intention still remains and, they do not in fact return, then the charge of desertion would be found proved.

It will be a matter of evidence whether the intent has been formed by the accused. It may be proved by direct evidence, e.g., an admission by the accused or remarks made by them to others; or it may be inferred from the surrounding circumstances; for example, the accused may have thrown away their kit, destroyed their ID card or changed their name. It may be shown from attempts to evade arrest, engagement in civilian employment, the length of absence, marriage to a resident of a foreign country, etc. It is for the officer hearing the charge to decide in each case whether the existence of the intent may be inferred from the facts.

However the burden of proving that the accused has deserted will always rest with the person hearing the charge or with the prosecution at CM.

The fact that an accused was recovered by being apprehended is not conclusive evidence of an intention to remain permanently absent since the arrest may occur before the date on which the accused intended to return. Although voluntary surrender may lead to a view that it is not desertion, desertion may have been committed even if the accused has voluntarily surrendered since the accused may have intended to remain permanently absent at one stage and later may

have changed their mind. Both apprehension and surrender are facts to be weighed by the officer hearing the charge along with the rest of the evidence.

#### *Intends to avoid any particular service or kind of service*

Under subsection (2)(b) it must be proved that the accused intended to avoid active service (see below). That may be an intention to avoid active service generally, for example, to avoid a deployment to an operational theatre, or it may be a particular duty or aspect of a duty that arises during such a deployment, for example to avoid an order to mount a recce of an area or a specific attack on enemy forces.

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *‘Active service’*

Subsection (3) sets out the meaning of active service. These are:

#### *Actions or operations against an enemy*

An enemy is defined in section 374 of the Act and includes not only those engaged in armed operations against any of Her Majesty’s forces or any force co-operating with any of Her Majesty’s forces, but also all pirates, armed mutineers and armed rebels and armed rioters. It is therefore possible to commit the offence of desertion by absenting oneself without leave with intent to avoid serving in operations against pirates or armed rebels for example in Peace Support Operations or Maritime Interdiction Operations or any particular aspect of such operation.

#### *Outside the British Islands*

The British Islands are Great Britain, Northern Ireland, the Isle of Man and the Channel Islands<sup>689</sup>. Outside the British Islands should be given its normal dictionary meaning of any place outside the territorial waters of the British Islands, such that UK Overseas Territories are outside the British Islands. Thus absence without leave with the intent to avoid serving with a unit which will be deploying abroad (for the protection of life or property – see below) would amount to desertion within the meaning of subsection (2) of the Act.

Note that it is possible for the charge to be found proved under subsection (2) of the Act when already serving overseas, e.g. if a Service person serving in Germany absents himself without leave with intent to avoid service in a relevant place outside the British Islands, the charge of desertion would be found proved.

#### *Operations ....for the protection of life or property*

Many operations will involve, explicitly or implicitly, the protection of life or property, and the phrase should be given its normal dictionary meaning. It would include peace support operations or military aid to the civil power.

#### *Military occupation of a foreign country or territory*

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<sup>689</sup> Interpretation Act 1978.

Territory is considered to be occupied if it has actually come under the authority of a hostile army [armed forces] and it will extend to the territory where such authority has been established and can be exercised<sup>690</sup>.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

If it is not possible to prove the necessary intent to establish desertion, consideration should be given as to whether the individual may be charged under section 9 (absence without leave) or section 15 (failure to attend for or perform duty etc).

If a person tries to leave a unit or other place of duty with the intention of remaining permanently absent, or tries to absent himself without leave with the intention of avoiding service overseas, but is prevented from leaving, they can be charged with attempting to desert by virtue of section 39 (attempts).

For members of the reserve forces see section 98 of the RFA 96.

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<sup>690</sup> See article 42 Hague Regulations 18 Oct 1907 concerning the Laws and Customs of Wars on Land and JSP 383 (The Law Of Armed Conflict).

## Section 9 - Absence without leave

### 9 Absence without leave

(1) A person subject to service law commits an offence if subsection (2) or (3) applies to him.

(2) This subsection applies to a person if he is intentionally or negligently absent without leave.

(3) This subsection applies to a person if–

(a) he does an act, being reckless as to whether it will cause him to be absent without leave; and

(b) it causes him to be absent without leave.

(4) In subsection (3) “act” includes an omission and the reference to the doing of an act is to be read accordingly.

(5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.9)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>691</sup>.

### 2. Specimen charges

ABSENCE WITHOUT LEAVE CONTRARY TO SECTION 9(1) OF THE ARMED FORCES ACT 2006

[AB] was [intentionally/negligently] absent without leave from [date] to [date]

or

[AB] was [intentionally/negligently] absent without leave from [time] on [date] to [time] on [date], namely [number] hours and [number] minutes

### 3. Ingredients of the offences

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Absent without leave*

It must be proved that the accused was absent from their unit, or other place of duty and that the accused’s absence was not authorised. They may either improperly have left their unit or they may have failed to return to it at the required time. The accused would be absent without leave where they had never been granted leave or where they remained absent after authorised leave had expired, or where their leave had been rescinded by a subsequent lawful order to

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<sup>691</sup> Section 53 of the Act.

return to their unit. In all cases it would be necessary to prove by evidence that there was no authorised leave in place. Where authorised leave had been rescinded this would require evidence that that fact had been communicated to them.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point they return, or are apprehended. It will be for evidence to establish these points. A Service person who is absent without leave ceases to be absent if they are taken into Service custody, arrested by a constable as suspected of being an absentee or if they surrender themselves as being illegally absent to a provost officer or to a Service unit or to a constable or at a police station in the UK or consular officer elsewhere.

Where the accused has been granted leave but merely fails to comply with administrative orders (such as by failing to hand in a leave card) the accused does not leave improperly: in such circumstances, the accused should be charged with an offence under section 13 (contravention of standing orders).

A person who obtains leave by a false pretence should be charged under section 19 (conduct prejudicial to good order and discipline).

#### *Intentionally or negligently*

For intention, recklessness and negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It must be proved that the accused either knew that they were not entitled to be absent or negligent or was reckless [see below] as to whether they were so entitled.

To establish that the accused was *intentionally* absent without leave under subsection (2), it must be proved that the accused intended to absent himself from their place of duty knowing that they were not entitled to be absent. The accused's intent to absent himself knowing they were not entitled to do so must be decided by the officer hearing the charge or CO by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances, e.g., an admission by the accused or remarks made by them to others.

To establish that the accused was *negligently* absent without leave under subsection (2) it must be proved that the accused either did something that a member of the armed forces of their experience, age, training and seniority should not have done, or failed to do something that a member of the armed forces of their experience, age, training and seniority should have done; and that, as a result of their negligent act or omission, they were absent and that their absence was not authorised. Examples would include where an accused oversleeps because they failed to make arrangements to be woken, where the accused loses a rail warrant and has insufficient money so that they cannot arrive at the unit before leave has expired, or where they fail to read unit orders and so overstays the leave.

#### *Recklessly*

To establish that the accused was *recklessly* absent without leave under subsection (3) it must be proved that the accused was aware that by acting or failing to act in a given manner, there was a risk that the accused would be absent without leave, yet they unreasonably went on to take that risk and in so doing was absent without leave. Examples would include where an accused renders himself incapable of returning to their unit through drink, or where the accused returns to their unit by inappropriate means (eg hitch-hiking) and so returns late.

If there were evidence that the accused intended to remain permanently absent, the proper charge would be desertion under section 8 (desertion).

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

If an accused honestly, but mistakenly, believes leave to have been granted the offence will not be committed. The existence or otherwise of reasonable grounds for such belief will be relevant only to the question of whether they honestly held the belief they professed.

#### **5. Notes**

##### *Charging*

In the charge, the period of absence should be expressed in days, hours and minutes. However, where it is unclear precisely when the accused left it is unobjectionable to insert 'on or about [date]' or 'not later than [date]', or in the case of their return 'not earlier than [date].'

The period of improper absence should normally be calculated from the time when leave expires (or the time of breaking out) until the time of return to the place of duty. Absence may however terminate in many different ways and calculation of the period of absence for the purpose of framing the charge and deciding the punishment (including forfeiture of pay) can be finally determined only by the officer hearing the charge, having regard to its circumstances.

Where a person surrenders or is apprehended as an absentee away from the locality in which their leave expired it is within the discretion of the officer hearing the charge to consider the absence as having terminated at the time of the surrender or apprehension. However, where a lengthy journey is involved in returning to the place where leave expired it may be appropriate to include the time of travel in computing the period of absence.

Where a person is arrested by the civilian authorities on another charge and is handed over to the Service authorities absence without leave is to be treated as ceasing from the time of their arrest.

##### *Particular duty*

Absence from a particular duty should not be charged under this section but under section 15 (failure to attend or perform a duty etc).

## Section 10 - Failure to cause apprehension of deserters or absentees

### 10 Failure to cause apprehension of deserters or absentees

(1) A person subject to service law commits an offence if–

(a) he knows that another person–

(i) has committed, is committing or is attempting to commit an offence under section 8 (desertion); or

(ii) is committing or attempting to commit an offence under section 9 (absence without leave); and

(b) he fails to take such steps as he could reasonably be expected to take to cause that person to be apprehended.

(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.10)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>692</sup>.

### 2. Specimen charges

FAILING TO TAKE STEPS TO CAUSE THE APPREHENSION OF A DESERTER  
CONTRARY TO SECTION 10(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on....., knowing that [CD] was a deserter, failed to take such steps as he could reasonably be expected to take to cause that person to be apprehended.

FAILING TO TAKE STEPS TO CAUSE THE APPREHENSION OF A PERSON  
ATTEMPTING TO ABSENT HIMSELF WITHOUT LEAVE TO SECTION 10(1)(b) OF THE  
ARMED FORCES ACT 2006

[AB] on....., knowing that [CD] was attempting to absent himself without leave, failed to take such steps as he could reasonably be expected to take to cause that person to be apprehended.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Knows*

This must be actual knowledge that desertion has been committed, is being committed or is being attempted or, in the case of absence, that it is being committed or attempted. It is not enough that the accused *should* have known or that they wilfully shut their eyes to the truth. The evidence must prove that they actually knew what the main offender was doing and that it amounted to the offence as appropriate.

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<sup>692</sup> Section 53 of the Act.



#### *Another person*

This will be a person subject to Service law and therefore capable of offending under Service law.

#### *Desertion*

For desertion see commentary on section 8.

#### *Absence without leave*

For absence without leave see commentary on section 9.

#### *Fails to take steps that they might reasonably be expected to take to cause apprehension of deserters or absentees*

In addition to knowledge as above, it must be shown that the accused failed to take such steps as they could reasonably be expected to take to cause that person to be apprehended. It is a question of fact for the officer hearing the charge to decide what steps the person could reasonably be expected to have taken in the circumstances of each case. This phrase is setting a standard which is both objective and subjective. That is, it will include an assessment of what a reasonable person would do but could also take into account factors personal to the accused, which bear upon what *they* could reasonably do. Factors could include the degree of personal risk, the likelihood of success and the seniority, age and experience of the accused.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **5. Notes**

Spare.

## Section 11 - Misconduct towards a superior officer

### 11 Misconduct towards a superior officer

- (1) A person subject to service law commits an offence if—
  - (a) he uses violence against a superior officer (“B”); and
  - (b) he knows or has reasonable cause to believe that B is a superior officer.
- (2) A person subject to service law commits an offence if—
  - (a) his behaviour towards a superior officer (“B”) is threatening or disrespectful; and
  - (b) he knows or has reasonable cause to believe that B is a superior officer.
- (3) For the purposes of this section—
  - (a) the behaviour of a person (“A”) towards another person (“B”) includes any communication made by A to B (whether or not in B's presence);
  - (b) “threatening” behaviour is not limited to behaviour that threatens violence.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed—
  - (a) in the case of an offence under subsection (1), or an offence under subsection (2) of behaviour that is threatening, ten years;
  - (b) in any other case, two years.

(AFA06 s.11)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>693</sup>.

### 2. Specimen charges

USING VIOLENCE AGAINST A SUPERIOR OFFICER CONTRARY TO SECTION 11(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., used violence to [CD], a superior officer, knowing or having reasonable cause to believe that ..... was a superior officer.

USING THREATENING OR DISRESPECTFUL BEHAVIOUR TOWARDS A SUPERIOR OFFICER CONTRARY TO SECTION 11(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., used threatening/disrespectful behaviour towards [CD], a superior officer, knowing or having reasonable cause to believe that ..... was a superior officer.

### 3. Ingredients of the offence

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<sup>693</sup> Section 53 of the Act.

### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

### *Uses violence (against)*

For an offence under subsection (1) there must be actual violence used *against* the superior officer and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against them. However, the level need not be severe. It can be any kind of violence such as striking, kicking, butting with the head, pushing or throwing an object at a person. There is no requirement for there to be an injury caused or intended to be caused. It would not be enough under this section however for violence to be used, for example, by punching the wall as that would not be *against* the superior officer. However it might be threatening or disrespectful (see below).

### *Superior officer*<sup>694</sup>

Superior officer, in relation to a person (A), means an officer, warrant officer or non-commissioned officer who is subject to Service law and is of superior rank or rate to A; or is of equal rank or rate to A and is exercising authority as A's superior (see below).

It does not matter whether the superior officer is of the same or different Service to the accused, providing that the superior officer is also subject to Service law. This would include Service personnel from other nations when they are posted to serve with UK forces and become subject to Service law, but would not include, for example, coalition forces or other nations' personnel alongside whom UK Service personnel happen to be working.

A person of a higher rank or rate than the accused will always be their superior officer under the Act. In addition there can be occasions when someone of the same rank or rate as the accused will be their superior officer. This would not apply in the case of those of the lowest rank and rates in each Service: a private, able rate and airman (ac, LAC and SAC) can never be the superior officer of another private, able rate or airman. All other ranks or rates can become the superior officer of another person of the same rank where they are *exercising authority as [the accused's] superior*. In order to be their superior officer however it must be an official entitlement to exercise authority over the other, such as having been tasked to carry out a temporary duty or a specific assignment which puts them in a position of authority over that other individual. Where an accused does not know or does not have reasonable cause to believe that a person is their superior officer and uses violence against them consideration may be given to a charge under section 21 (fighting or threatening behaviour etc).

### *Knows or has reasonable cause to believe*

It is necessary that there was actual knowledge that the individual was a superior officer or that the accused had reasonable cause to believe they were a superior officer. If the superior officer was the accused's commanding officer or their sub unit commander this would be sufficient to prove actual knowledge, because the person and their rank were known to them. Similarly, if it is shown that the superior officer is a higher rank than the accused and at the time of the offence was in uniform this would impute actual knowledge. Where the superior officer is not known to the accused or is not in uniform it will be necessary to consider whether the accused knew in the circumstances, or whether they should have known. The

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<sup>694</sup> Section 374 of the Act.

test of whether they would have reasonable cause to believe is an objective one and should be judged on the evidence in the case. If the accused raises the issue that they did not know, it is not for them to prove that. In that case the person hearing the charge should consider the evidence produced, and the evidence of the accused and decide, on the basis of their view of the evidence, whether it has been shown that the accused knew or had reasonable cause to believe. In cases where the individuals are of the same rank or rate as each other there should be evidence of the superior's authority as well as how the accused was aware of that authority or had reasonable cause to be aware of it.

#### *Behaviour towards*

Behaviour here includes both actions and words, whether spoken or written. It does not matter what form the communication takes (email, text, signal, letter or telephone conversation etc). The behaviour does not have to be in the presence of the superior officer, but the superior officer must have been the intended recipient and the subject of the comment. For example, a comment made to a third party or muttered under one's breath deliberately within earshot of the superior officer. Alternatively, where an email is sent and the superior officer is an intended addressee. It is possible for this to be the case even when the accused is not in the superior officer's presence at the time they receive the communication. It is a question of fact whether the behaviour was *towards* the superior officer. This offence is not intended to be used to charge individuals in relation to comments they may make to each other in private about a superior officer. If threatening or insubordinate language is used about a superior officer to a third party, then consideration may be given to a charge under section 19 (conduct prejudicial to good order and discipline).

#### *Threatening or disrespectful*

*Threatening* behaviour can include anything said by the accused and is not limited to behaviour that threatens personal violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example threats to burn someone's house down, or to injure a member of their family. Threatening should be given its normal dictionary meaning and considered objectively. It is for the person hearing the charge to decide as a question of fact.

*Disrespectful* should also be given its normal dictionary meaning. Within the Service context, insubordinate language will always be disrespectful but it may also be threatening behaviour. Disrespectful covers the situation where a subordinate, having been given a lawful command which does not require immediate compliance, indicates in respectful words and tone that they did not intend to comply with the order. Disrespectful in this context means disrespectful of the authority of the superior. If the command is disobeyed, consideration may be given to a charge under section 12 (disobedience to a lawful command).

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

The actual violence or behaviour alleged does not have to be particularised in the charge, however it must be set out in the case summary against the accused.

## Section 12 - Disobedience to lawful commands

### 12 Disobedience to lawful commands

(1) A person subject to service law commits an offence if–

- (a) he disobeys a lawful command; and
- (b) he intends to disobey, or is reckless as to whether he disobeys, the command.

(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years.

(AFA06 s.12)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>695</sup>.

### 2. Specimen charges

DISOBEDIENCE OF A LAWFUL COMMAND CONTRARY TO SECTION 12(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally or recklessly disobeyed an order to recharge an Extended Duration Breathing Apparatus when ordered to do so by [CD].

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Disobeys*

Disobedience requires awareness of what is being disobeyed, so it must be shown that the command was clear as to what is required and when it is to be carried out. It must also have been received by the person charged. A command need not be given directly, but it does have to be personal to the accused (although it might have been delivered to more than one person at the same time). A command can be oral or written and can be conveyed by a third person, providing it can be shown that the accused received it and knew that it originated from someone who had authority to give it.

The offence will have been committed at the time of the failure to obey the lawful command. If the command required the person to carry out an act at a point in the future, the offence is committed at that later time, not at the time the order was given. For example, if a task is ordered to be carried out by 1200 there is no offence until 1200 has passed.

*Lawful command*

A command is lawful if:

- a. It is within the authority of the person giving it;

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<sup>695</sup> Section 53 of the Act.

- b. It is for a proper Service purpose. For example, an officer may not order a Service person to wash their private car or to pay a fine awarded by the Magistrates' Court as neither order is for a Service purpose;
- c. It is possible for the command to be carried out; and
- d. It is not contrary to UK domestic law, International Law or relevant local law.

As to the power of British overseas territory force officers to give lawful orders see section 369(2).

#### *Intends to disobey*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Reckless as to whether they disobey*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

If the accused genuinely made a mistake and misunderstood the terms of the command they may have a defence.

### **5. Notes**

This section is specifically designed for those occasions where an offender intends not to carry out the order or they are reckless as to whether they are doing what they have been ordered to

Failure to obey a standing or routine order should be charged under section 13 (contravention of standing orders).

A person who obeys a command, but in a manner which is sub-standard, should not be charged under this section. Such behaviour might instead amount to an offence under section (15)(2) (negligently performing a duty).

## Section 13 - Contravention of standing orders

### 13 Contravention of standing orders

(1) A person subject to service law, or a civilian subject to service discipline, commits an offence if–

- (a) he contravenes a lawful order to which this section applies; and
- (b) he knows or could reasonably be expected to know of the order.

(2) This section applies to standing orders, and other routine orders of a continuing nature, of any of Her Majesty's forces, made for any–

- (a) part of Her Majesty's forces;
- (b) area or place; or
- (c) ship, train or aircraft;

but paragraph (a) of this subsection does not apply in relation to a civilian subject to service discipline.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.13)

#### 1. Type of offence

An offence under this section **may be** heard summarily<sup>696</sup>.

#### 2. Specimen charges

CONTRAVENTION OF STANDING ORDERS CONTRARY TO SECTION 13(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., contravened order number 21 of RAF Station LITTLE SNORING Standing Order Serial Number 1 dated 1 January 2009, an order known to him or which he might reasonably be expected to have known, by entering the female accommodation which had been placed out of bounds by the said order.

#### 3. Ingredients of the offence

*A person subject to Service law/a civilian subject to Service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Contravenes*

To contravene a lawful order means to breach or disobey an order.

*Lawful order*

An order is lawful if:

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<sup>696</sup> Section 53 of the Act.

- a. It is within the authority of the person giving it;
- b. It is for a proper Service purpose;
- c. It is possible for the command to be carried out; and
- d. It is not contrary to UK domestic law, International Law or relevant local law.

As to the power of British overseas territory force officers to give lawful orders see section 369(2) of the Act.

#### *Knows or could reasonably be expected to know*

It must be shown that the order contravened was known to the accused, or that they might reasonably be expected to know of it. The test of reasonable expectation is an objective one however there must have been some obvious requirement imposed on the individual for them to familiarise themselves with any standing orders before they can be charged with contravention under this offence. Evidence must be produced on this point so that the person hearing the charge can satisfy himself that the accused either did know or could reasonably be expected to know.

#### *Her Majesty's forces*

Consist of Her Majesty's naval, military and air forces.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The following defences may be available:

#### *Lack of knowledge.*

It is open to the accused to raise the defence that the order was not known to them and they could not reasonably have been expected to know it. This might be particularly relevant where the accused has only been at the unit for a few days or is only visiting temporarily.

If an accused genuinely made a mistake and misunderstood the standing order they may have a defence.

### **5. Notes**

Standing and routine orders are made in a number of ways and for a number of purposes. These will include unit, formation and tri-Service orders. It will not be unusual for personnel to be subject to more than one set of orders at one time.

Orders must be drafted so that it is clear to whom they apply. Visiting Service persons or civilians should have any relevant orders drawn to their attention. It is usual for them to be asked to read a copy of the relevant orders and sign a statement that they have read them.

Evidence must be produced to prove that the orders were published as required and that the individual knew or could reasonably be expected to have known of them.



The original or certified copy of any order made in a Service book or other document in pursuance of any Service duty to which this offence relates (purporting to be signed by the CO of the accused or by some other person whose duty it was to make the entry) must be given in evidence.

Where standing orders are applicable to civilians subject to Service discipline it must be clear (by appropriate drafting and notice) who is expected to obey different orders.

This section applies to standing and routine orders of a continuing nature but does not apply to orders that only apply to a single occasion. A breach of the latter should be charged under section 12 (disobedience to lawful commands).

## Section 14 - Using force against a sentry

### 14 Using force against a sentry etc

(1) A person subject to service law commits an offence if–

(a) he uses force against a member of any of Her Majesty's forces, or of any force co-operating with them, who is–

(i) on guard duty and posted or ordered to patrol;

(ii) on watch; or

(iii) under orders to regulate traffic by land, water or air; or

(b) by the threat of force he compels such a person to let him or any other person pass.

(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.14)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>697</sup>.

### 2. Specimen charges

USING FORCE AGAINST A PERSON ON GUARD DUTY CONTRARY TO SECTION 14(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on ....., used force against [CD], The Loamshire Rifles, who was on guard duty and posted as the main gate sentry.

USING FORCE AGAINST A PERSON ON GUARD DUTY CONTRARY TO SECTION 14(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on ....., used force against [CD] who was on watch on the gangway of HMS TENACIOUS as Quarter Master of the middle watch.

COMPELLING A PERSON ON GUARD DUTY TO LET A PERSON PASS CONTRARY TO SECTION 14(1)(b) OF THE ARMED FORCES ACT 2006.

[AB] on ....., compelled [CD] of the United States Army, a member of a force co-operating with Her Majesty's forces who was the sentry on guard duty and posted on the north bridge, to let him pass by threatening to strike the said soldier with a crowbar.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

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<sup>697</sup> Section 53 of the Act.

### *Uses force*

For a charge under subsection (1)(a) it is sufficient to show that the accused used force against a guard. This includes for example pushing, striking, punching, kicking, head-butting, biting etc.

It must be proved that the person against whom the accused used force was one of those persons detailed in subsection (1)(a)(i), (ii) or (iii) and evidence must be adduced to support this.

### *Co-operating force*

This applies to a military force that is co-operating with one of Her Majesty's forces. This will occur when, for example, the forces are participating together in an exercise or operation under a formal agreement.

### *The threat of force*

For a charge under subsection (1)(b) the threat of force must be such that the person threatened could reasonably expect that force was about to be used. This might be inferred either from the character of the threat or from the surrounding circumstances. In addition the threat of force must be such that it compels a guard to let them or another person pass. This is so even where the accused or other person does not in fact gain entry to the establishment.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

This offence recognises the vital role that is played by members of the guard force and those undertaking similar duties. It is specifically designed to protect such personnel when they are subjected to violence, or the threat of violence, because of the duty they are undertaking. However, if the offence is more serious because, for example the guard has sustained serious injury, it will be more appropriate to charge a criminal conduct offence under section 42 of the Act.

It is possible for this offence to be committed even where the accused was drunk. For voluntary intoxication see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## Section 15 - Failure to attend for, or perform, duty

### 15 Failure to attend for or perform duty etc

(1) A person subject to service law commits an offence if, without reasonable excuse, he—

- (a) fails to attend for any duty;
- (b) leaves any duty before he is permitted to do so; or
- (c) fails to perform any duty.

(2) A person subject to service law commits an offence if he performs any duty negligently.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.15)

#### 1. Type of offence

An offence under this section **may be** heard summarily<sup>698</sup>.

#### 2. Specimen charges

FAILING TO ATTEND FOR A DUTY CONTRARY TO SECTION 15(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on ....., without reasonable excuse, failed to attend the Working Parade at 0830 hrs, being a parade it was his duty to attend.

LEAVING A DUTY CONTRARY TO SECTION 15(1)(b) OF THE ARMED FORCES ACT 2006.

[AB] on ....., without reasonable excuse, and before he was permitted to do so left a muster of the fire and emergency party, a muster which it was his duty to attend.

FAILING TO PERFORM A DUTY CONTRARY TO SECTION 15(1)(c) OF THE ARMED FORCES ACT 2006.

[AB] on ....., when chief clerk at Battalion Headquarters 1<sup>st</sup> Battalion, the Welsh Rangers, failed, without reasonable excuse, to ensure that the daily rations state (Army form F711) for that day was completed as his duty required him to do.

NEGLIGENTLY PERFORMING A DUTY CONTRARY TO SECTION 15(2) OF THE ARMED FORCES ACT 2006.

[AB] on ....., on date, did negligently perform his duty whilst handling a service rifle by causing the unintended discharge of [a] round[s].

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<sup>698</sup> Section 53 of the Act.

## NEGLIGENTLY PERFORMING A DUTY CONTRARY TO SECTION 15(2) OF THE ARMED FORCES ACT 2006.

[AB] between ..... and ..... when caterer of the Sergeants' Mess at RAF LITTLE SNORING, negligently performed his duty in that he was unable to properly balance the catering account.

### **3. Ingredients of the offence**

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and Time Limits).

#### *Without reasonable excuse (offences under subsection (1) only)*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The onus is on the accused to raise the issue that they have a reasonable excuse. Where they do so (or the evidence suggests it) it is for the officer hearing the charge to be satisfied beyond reasonable doubt that there was no reasonable excuse for the alleged misconduct of the accused. If they cannot be satisfied beyond reasonable doubt they must find the charge not proved.

For example, if an accused claims to have had a reasonable excuse that they did not know of the duty it is for the officer hearing the charge to determine whether they did know or ought to have known of that duty in the circumstances. To do so they should take into account whether a relevant order was posted on an appropriate notice board or computer etc to which they had access and where they could and ought to have seen it; or that an order was given to them orally.

#### *Fails to attend (offences under subsection (1) only)*

The accused must have failed to attend for the duty. Attend means presence at the right place and the right time. Where there is a failure to attend a regular duty (e.g., attendance in an office for work) for which there is no specific order there should be evidence from the accused's superior officer of the practice regarding time and place for attendance for work.

#### *Duty*

This means the normal professional duties of the person subject to Service law, plus any other duties incidental to Service life. This includes, but is not limited to:

- a. Any duty to attend at a particular place or muster/parade.
- b. Any duty imposed on an accused because they are acting in some specific capacity (e.g., mess treasurer or officer of the watch)
- c. Any duty arising from some order given to the accused or applicable to them
- d. Any duty arising from the accused's rank or rating.

#### *Fails to perform any duty (offences under subsection (1) only)*

This covers the situation where the accused does not perform the duty at all.

*Negligently performs a duty (an offence under subsection (2) only)*

For negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

A description of the failure or negligence, sufficient to let the accused know what the charge is about, must be included in the particulars of the charge.

Charges under subsection (1)(a) should not state the offence as absence from a place of duty. The mischief of this offence is not absence without leave but the missing of a particular duty. If a person fails to attend for a protracted period or leaves and fails to return for a protracted period, consideration should be given to a charge under section 9 (absence without leave) as an alternative to subsections (1)(a) or (b).

Charges under subsection (1) should be reserved for cases where such a specific duty is placed upon the accused - where no specific duty has been placed upon them any act or omission which would be to the prejudice of good order and Service discipline may be charged under section 19 (conduct prejudicial to good order and discipline) or otherwise section 13 (contravention of standing orders). Where the allegation is that the accused failed to comply with a lawful command the appropriate charge would be one contrary to section 12 (disobedience to lawful commands) rather than under this section.

A charge under subsection (2) may sometimes usefully form an alternative to a charge involving dishonesty in appropriate circumstances.

When there is more than one occasion of failing to attend a parade, each must be charged separately and not combined into one charge.

## Section 16 - Malingering

### 16 Malingering

- (1) A person subject to service law commits an offence if, to avoid service–
- (a) he pretends to have an injury;
  - (b) by any act he causes himself an injury;
  - (c) by any act or omission he aggravates or prolongs any injury of his;
- or
- (d) he causes another person to injure him.
- (2) A person subject to service law commits an offence if, at the request of another person subject to service law (“B”) and with the intention of enabling B to avoid service–
- (a) by any act he causes B an injury; or
  - (b) by any act or omission he aggravates or prolongs any injury of B.
- (3) In this section–
- “injury” includes any disease and any impairment of a person's physical or mental condition, and the reference to injuring is to be read accordingly;
- “service” includes any particular duty or kind of duty.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.16)

### 1. Type of offence

Any offence under **subsection (1)(a)** and **subsection (1)(c)** (committed by omission) **may be** heard summarily<sup>699</sup>. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

All other offences under this section **may not be** heard summarily<sup>700</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, reference should be made to an appropriate staff legal adviser at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

MALINGERING CONTRARY TO SECTION 16(1)(a) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to avoid Service pretended that he was suffering from a sprained ankle.

MALINGERING CONTRARY TO SECTION 16(1)(b) OF THE ARMED FORCES ACT 2006.

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<sup>699</sup> Section 53 of the Act.

<sup>700</sup> Section 53 and Schedule 2 of the Act.

[AB] on ....., with intent to avoid Service injured himself by omitting to apply sun-screen.

MALINGERING CONTRARY TO SECTION 16(1)(c) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to avoid Service prolonged the injury from which he was suffering from by failing to take prescribed medicine for that injury.

MALINGERING CONTRARY TO SECTION 16(1)(d) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to avoid Service caused [CD] to injure him by placing his foot in a position to be injured after asking [CD] to run over his foot in a motor vehicle.

MALINGERING CONTRARY TO SECTION 16(2) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to enable [CD] to avoid Service at the request of [CD] shot [CD] in the right foot.

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Pretends*

Pretends should be given its normal dictionary meaning.

*Injury*

See subsection (3); the injury may either be temporary or permanent.

*To avoid service*

See subsection (3).

*Intention*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There was no intention to avoid Service.

The injury is real and/or caused by accident.

### **5. Notes**

The charge should show the precise way in which the accused is alleged to have malingered.

The contracting of a venereal disease or failure to report it, or the failure of an injured person to cease sporting activity on medical advice so prolonging the injury, cannot be charged



under this section unless it is done with the intention of avoiding Service. In such cases however, consideration may be made for charging under section 12 (disobedience to lawful commands), section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline).

Offences under this section may only be committed by persons subject to Service law. Where an accused causes another person to injure them, they will have committed an offence under subsection (1)(d). The other person will only have committed an offence if they are also subject to Service law.

## Section 17 - Disclosure of information useful to an enemy

### 17 Disclosure of information useful to an enemy

(1) A person subject to service law commits an offence if–

- (a) without lawful authority, he discloses information that would or might be useful to an enemy; and
- (b) he knows or has reasonable cause to believe that the information would or might be useful to an enemy.

(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.17)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>701</sup>.

### 2. Specimen charge

DISCLOSING INFORMATION CONTRARY TO SECTION 17(1) OF THE ARMED FORCES ACT 2006.

[AB] on ....., when speaking on an insecure military telephone network, without lawful authority disclosed the order of battle of ....., information relating to a matter upon which information would or might be useful to an enemy and knowing or having reasonable cause to believe that the said information would or might be useful to an enemy.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Without lawful authority*

It will need to be proved that the accused did not have lawful authority. Lawful authority means express or implied permission to disclose information to another party.

*Discloses*

Discloses requires some positive act by the accused such as telling, revealing or showing the information to some other party. Where the information falls into the hands of a third party as a result of an accidental act on the part of an accused, for example by leaving a briefcase containing documents that would be useful to the enemy on a train, this would not amount to an offence under this section, although it may well amount to an offence contrary to section 15(2) (neglect of duty).

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<sup>701</sup> Section 53 of the Act.

### *Information that would or might be useful*

The offence requires it to be proved that the information disclosed would or might be useful to an enemy. This is an objective test. The information disclosed may not be useful to an enemy if it is already within the public domain. The information need not be true or accurate, nor reach the enemy or their agents.

### *Knows or has reasonable cause*

The offence also requires it to be proved either that an individual knew or had reasonable cause to believe that the information would or might be useful. If the knowledge of the accused cannot be proved, it is sufficient to prove that the accused had reasonable cause to believe that the information would or might be useful to an enemy. This is an objective test.

For example, where a Service person writes to a friend and discloses information about equipment shortages this would be an offence if they knew or had reasonable cause to believe it contained information which would or might be useful to an enemy.

### *Enemy*

For *enemy* see section 374 of the Act.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

Spare.

## Section 18 - Making false records

### 18 Making false records etc

- (1) A person subject to service law commits an offence if–
- (a) he makes an official record, knowing that it is false in a material respect; and
  - (b) he knows or has reasonable cause to believe that the record is official.
- (2) A person who adopts as his own a record made by another person is for the purposes of subsection (1) to be treated, as well as that other person, as making the record.
- (3) A person subject to service law commits an offence if–
- (a) with intent to deceive, he tampers with or suppresses an official document; and
  - (b) he knows or has reasonable cause to believe that the document is official.
- (4) A person subject to service law commits an offence if–
- (a) with intent to deceive, he fails to make a record which he is under a duty to make; and
  - (b) he knows or has reasonable cause to believe that the record would, if made, be official.
- (5) For the purposes of this section–
- (a) “record” means a document or an entry in a document;
  - (b) “document” means anything in which information is recorded;
  - (c) a record or document is official if it is or is likely to be made use of, in connection with the performance of his functions as such, by a person who holds office under the Crown or is in the service of the Crown.
- (6) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.18)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>702</sup>.

### 2. Specimen charges

MAKING A FALSE OFFICIAL RECORD CONTRARY TO SECTION 18(1) OF THE ARMED FORCES ACT 2006.

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<sup>702</sup> Section 53 of the Act.

[AB] on ....., when orderly officer of 1<sup>st</sup> Battalion the Blankshire Regiment made a written report, an official record, which was to their knowledge false in a material respect, in that it purported to show that he had turned out the guard of the said unit twice during their tour of duty, knowing or having reasonable cause to believe the said written report was an official record.

TAMPERING WITH AN OFFICIAL DOCUMENT CONTRARY TO SECTION 18(3) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to deceive, suppressed the imprest account of A Company, 1<sup>st</sup> Battalion the Blankshire Regiment, an official document by burning it, knowing or having reasonable cause to believe the said document was an official document.

FAILING TO MAKE AN ENTRY IN AN OFFICIAL RECORD CONTRARY TO SECTION 18(4) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to deceive, failed to make a record which it was their duty to make in the daily stock book of the RAF LITTLE SNORING Sergeants' Mess, namely the receipt of 4000 cigarettes, knowing or having reasonable cause to believe the said record of receipt would, if made, have been official.

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Makes an official record*

A false record may be made by omitting a material particular from it; a person who signs a document or record which is not otherwise false with another's name makes a false record. If a person signs a blank form with the intention it will be filled in by another person in a manner which will be false in a material respect the charge of making a false official record would be found proved. A person who signs their own name when they are not entitled to sign makes a false record.

*Knowing that it is...*

For the purpose of an offence under subsection (1) it is not necessary to prove that the accused acted with intent to deceive but only that they knew at the time when they did the alleged act that the record, document or entry was false in a material respect.

*Material respect*

A material respect is one likely to play a part in influencing the minds of those whose duty may require them to consider the whole document. An example is a false entry on a claim for expenses which would be likely to play a part in influencing the decision to allow or disallow the claim.

*Knows or has reasonable cause to believe*

The offence will only be proved if a person knows or has reasonable grounds for believing that the record is official (for definition of when a record or document is official see subsection (5)(c) above).

Belief should be given its normal dictionary meaning, and what is a reasonable cause to believe is for the officer hearing the charge to decide. The officer hearing the charge can imply from the surrounding circumstances of the case, what would have been within the knowledge of the accused. In doing so they would wish to consider the Service experience of the accused, relevant training and time in post.

#### *Official record/official document*

See subsection (5). Documents are not just paper documents but any record of information in any form including computer records. Making a false entry into JPA would come within subsection (1). Documents such as reports, returns, pay lists, certificates and supporting vouchers to official financial transactions are all official records, as are documents relating to Service funds. This offence is not limited to MOD or Service documents. In theory it could be used to deal with other official forms such as tax forms however in practice a charge under this section should only be considered if there is some Service connection.

#### *Adopts as their own*

It is not the case that every person who signs a document adopts it as their own. For example a travel form that is countersigned as being correct to the best of the individual's knowledge and belief is not a form that will have been adopted by that counter-signing officer. The mischief in adopting a document as their own comes with the individual knowing that the document is false in a material respect. For example if an individual countersigns a document knowing that it is false in a material respect then they will have adopted it as their own. He may then be charged as well as the originator under subsection (1).

#### *With intent to deceive*

In subsections (3) and (4) intent should be given its normal dictionary meaning. To deceive is to induce a person to believe that a thing is true when it is false and which the person practising the deceit knows or has reasonable cause to believe is false.

#### *Tampers with or suppresses a document*

It must be proved that either the whole or part of the document was deliberately altered, destroyed, removed or otherwise tampered with or suppressed. This should be such that it affects the document sufficiently so that a deceit is carried out. The words false in a material respect have no application here.

#### *Fails to make a record*

This includes a failure to make out any document or record at all when there is a duty to make such a document.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It would be a defence that the accused was not responsible for the making of the record or tampering with it.

If a charge of failing to make a record is alleged the accused may contend they were not under a duty to make it.

Where intent to deceive is required the accused may argue they had formed no such intent but that their actions owed more to an honest mistake or even incompetence on their part.

## **5. Notes**

A false record or document may be made by omitting a material particular from it.

Altering an official travel warrant could be charged under this section.

A charge under this section does not necessarily have to involve financial gain. If dishonesty in respect of financial gain can be proved then an offence under section 42 of the Act should be considered for example a charge relating to theft, forgery or fraud.

A person who has signed or otherwise adopted as their own a document made by another shall be treated as well as that other, as the maker of the document (see subsection (2)).

## Section 19 - Conduct prejudicial to good order and discipline

### 19 Conduct prejudicial to good order and discipline

- (1) A person subject to service law commits an offence if he does an act that is prejudicial to good order and service discipline.
- (2) In this section “act” includes an omission and the reference to the doing of an act is to be read accordingly.
- (3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.19)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>703</sup>.

### 2. Specimen charges

CONDUCT PREJUDICIAL TO GOOD ORDER AND SERVICE DISCIPLINE CONTRARY TO SECTION 19(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., wore the rank of Lieutenant on his uniform, a rank of which he was not entitled to wear.

CONDUCT PREJUDICIAL TO GOOD ORDER AND SERVICE DISCIPLINE CONTRARY TO SECTION 19(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., was in possession of 1 pair of boots, the property of [CD] without his permission.

### 3. Ingredients of offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

### Prejudicial to

***It does not have to be shown that good order and Service discipline is actually affected. Conduct of the accused which is either harmful or likely to be harmful can therefore, be said to be prejudicial.***

### Good order and Service discipline

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<sup>703</sup> Section 53 of the Act.



***To be punishable under this section, conduct must be prejudicial to both good order and to Service discipline.***

***Good order has a wide meaning, encapsulating good order as would be understood in civilian life and applicable to civilians. Conduct by a Service person which is prejudicial to good order may not necessarily be prejudicial to Service discipline however it is accepted that every act which is prejudicial to Service discipline is also prejudicial to good order.***

***Any conduct by an individual which breaches good order will adversely affect Service discipline if it has a direct bearing on the unit to which the offender belongs. However, an officer who creates a disturbance when they are away from their unit and in civilian clothes may have displayed conduct to the prejudice of good order but not necessarily of Service discipline.***

Criminal conduct offences should be charged under section 42 of the Act and must not be charged under this section unless the character of the alleged offence is essentially prejudicial to Service discipline. For example, driving a vehicle in a manner dangerous to the public on the highway is not necessarily prejudicial to Service discipline; but, if it were a Service vehicle, such driving might well be prejudicial and could be charged under this section if, for some reason, it is inadvisable or impossible to charge it under another section such as section 42 of the Act.

A charge cannot be proved for an offence against this section unless the following are proved:

- a. The conduct (act or omission) on their part, as specified in the particulars of charge.
- b. The conduct, considered objectively, had the character of being prejudicial to good order and Service discipline.
- c. The accused intended to act (or omitted to act) as they did or had been reckless whether they were so acting (or omitting to act).
- d. There may be an additional element that must be proven where the wording of the charge imports an extra element e.g. the *lying* to a superior officer.
- e. If the first three, or if appropriate four, elements of the offence are proved, it is *no defence* for the accused to assert that they *did not know* that their conduct was likely to prejudice good order and Service discipline.

To establish a charge under this section there must be either a definite dereliction of a Service duty on the part of the accused, or at least some reasonably direct connection between the accused's behaviour and its effect on good order and discipline.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## 5. Notes

Any conduct which amounts to a Service offence should be charged under whichever section is appropriate. Negligent discharge of a weapon during an unload procedure should be charged as negligent performance of a duty<sup>704</sup>. Whilst there may be no legal objection to any conduct which is prejudicial being charged under this section, it should not be used where there is a more appropriate alternative Service offence or for example to merely circumvent a defence which might otherwise have been available to the accused. E.g. contravention of standing orders should not be charged under this section merely to deprive the accused of the defence that they knew or could reasonably be expected to know of the order.

If a series of acts or omissions are all part of one transaction they can be charged in one charge; otherwise they must be separate charges.

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<sup>704</sup> Section 15(2) of the Act.

## Section 20 - Unfitness or misconduct through alcohol or drugs

### 20 Unfitness or misconduct through alcohol or drugs

(1) A person subject to service law commits an offence if, due to the influence of alcohol or any drug—

(a) he is unfit to be entrusted with his duty or any duty which he might reasonably expect to be called upon to perform; or

(b) his behaviour is disorderly or likely to bring discredit to Her Majesty's forces.

(2) Subsection (1) does not apply to the influence of a drug on a person (“A”) if—

(a) the drug was taken or administered on medical advice and A complied with any directions given as part of that advice;

(b) the drug was taken or administered for a medicinal purpose, and A had no reason to believe that the drug might impair his ability to carry out the duties mentioned in subsection (1)(a) or (as the case may be) result in his behaving in a way mentioned in subsection (1)(b);

(c) the drug was taken on the orders of a superior officer of A; or

(d) the drug was administered to A on the orders of a superior officer of the person administering it.

(3) In this section—

(a) “drug” includes any intoxicant other than alcohol;

(b) a person's “behaviour” includes anything said by him.

(4) In proceedings for an offence under this section, any paragraph of subsection (2) is to be treated as not having applied in relation to the defendant unless sufficient evidence is adduced to raise an issue as to whether it did.

(5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.20)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>705</sup>.

### 2. Specimen charges

UNFITNESS OR MISCONDUCT THROUGH ALCOHOL OR DRUGS CONTRARY TO SECTION 20(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., having taken cannabis was unfit to be entrusted with his duty as Guard Commander.

UNFITNESS OR MISCONDUCT THROUGH ALCOHOL OR DRUGS CONTRARY TO SECTION 20(1)(b) OF THE ARMED FORCES ACT 2006

<sup>705</sup> Section 53 of the Act.

[AB] on ....., when drunk repeatedly swore at the guard.

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Due to the influence of*

The amount of alcohol or drugs taken is irrelevant. All that must be proven is that some alcohol or drugs were taken and this caused one of the four situations as listed in subsection (1) above, namely:

- a. He is unfit to be entrusted with their duty; or
- b. He is unfit to be entrusted with any duty they might reasonably expect to be called upon to perform; or
- c. His behaviour is disorderly; or
- d. His behaviour is likely to bring discredit to Her Majesty's forces.

*Drug*

Notwithstanding the definition at subsection (3)(a) this has a wide meaning and includes anything taken into the body which affects the control of the body.

*Unfit to be entrusted*

A further subjective test is applied. It does not have to be proved that the accused was in an unfit state however there is no requirement for the accused to be in an extreme condition; the officer hearing the charge simply has to be satisfied that they were unfit to be *entrusted* with a duty. A person in authority must form the opinion that the individual is unfit to be entrusted to perform a particular duty. That determination is not conclusive but is evidence of the accused alleged unfitness. The amount of alcohol or drug consumed is insufficient on its own to found a charge under subsection (1). The consumption must render the accused unfit to do their duty i.e. unable to carry out the duty in an acceptable manner.

*Duty*

This means the normal professional duties of the person subject to Service law, and any other duties incidental to Service life. This includes, but is not limited to:

- a. Any duty to attend at a particular place or muster/parade
- b. Any duty imposed on an accused because they were acting in some specific capacity (e.g., mess treasurer or officer of the watch)
- c. Any duty arising from some order given to the accused or applicable to them
- d. Any duty arising from the accused's rank or rating.

*Might reasonably expect to be called upon to perform*

A subjective test is applied. If the duty is a specific one particular to the accused, it must be proved that the accused had proper notice and knowledge of it. The expectation in respect of normal duties is as laid down in terms of reference or relevant orders for example, Unit Orders, Part One Orders.

*Disorderly*

This should be given its normal dictionary meaning. It includes both verbal and physical misconduct.

*Likely to bring discredit to Her Majesty's forces.*

This is behaviour that falls below that standard which is expected of a Service person. The circumstances where the misconduct occurred must be where the public are likely to witness this conduct and the public must be aware that the accused is a member of Her Majesty's forces.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

**Subsection (2)** specifies the circumstances in which an accused could be exonerated of a charge under **subsection (1)**, in relation to *drugs only*, provided sufficient evidence is offered to support the relevant circumstance(s).

*Medical*

Medical by its normal dictionary meaning includes the preserving or restoring of health as well as the treatment of illnesses and similar conditions.

If a drug is ordered to be taken directly or indirectly by a superior officer and the accused relies on **subsection (2)(c) or (d)** then the accused must believe that it was in accordance with medical advice and that they were complying with any such directions.

#### **5. Notes**

Any person may give evidence as to their opinion on whether the accused was under the influence of drugs or alcohol at the relevant time. As a matter of general principle this person should also qualify their reasons for holding such an opinion, e.g. because the accused's eyes were glazed, they were unsteady on their feet or they smelled of alcohol. This evidence need not be provided by medical personnel. However, if the accused has been examined by a medical officer in relation to an injury (for example, a head injury), that medical officer could be asked to provide their opinion as to whether other factors have caused their condition. If there is any suggestion that substances, other than alcohol (for example prescription drugs), have caused their condition then medical opinion will be required.

If an individual is suspected of having consumed illicit drugs, regardless of whether they have behaved in one of the four ways in subsections (1)(a) and (1)(b) the Service Police should be called upon to investigate the circumstances further. If there is evidence of use of illicit drugs, consideration should be given to bringing a charge under section 42 of the Act (Possession of a controlled drug contrary section 5(2) of the Misuse of Drugs Act 1971).

If an individual's conduct suggests that they may be charged with another more serious offence whilst under the influence of alcohol, the other offence should be considered first and it may be that the drunkenness is considered as either an additional offence or as an aggravating feature of the first offence. Drunkenness in these circumstances can only be charged if there is a separate factual basis for doing so, for example a Service person is arrested for drunkenness and subsequently assaults the arresting officer.

## Section 21 - Fighting or threatening behaviour, etc.

### 21 Fighting or threatening behaviour etc

- (1) A person subject to service law commits an offence if, without reasonable excuse, he fights another person.
- (2) A person subject to service law commits an offence if–
  - (a) without reasonable excuse, his behaviour is–
    - (i) threatening, abusive, insulting or provocative; and
    - (ii) likely to cause a disturbance; and
  - (b) he intends to be, or is aware that his behaviour may be, threatening, abusive, insulting or provocative.
- (3) For the purposes of this section a person's “behaviour” includes anything said by him.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.21)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>706</sup>.

### 2. Specimen charges

FIGHTING CONTRARY TO SECTION 21(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., without reasonable excuse fought with [CD] of The Broadback Yeomanry.

USING THREATENING, ABUSIVE, INSULTING OR PROVOCATIVE BEHAVIOUR,  
CONTRARY TO SECTION 21(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., without reasonable excuse threw the contents of his beer glass in the face of [CD] being provocative behaviour likely to cause a disturbance.

### 3. Ingredients of offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Without reasonable excuse.*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

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<sup>706</sup> Section 53 of the Act.

The onus is on the accused to raise the defence that they have a reasonable excuse. Where they do so (or the evidence suggests it) it is for the officer hearing the charge to be satisfied beyond reasonable doubt that there was no reasonable excuse for the alleged misconduct of the accused. If they cannot be satisfied they must find the charge not proved.

For example, an accused may claim that they had a reasonable excuse because: they were acting in self-defence; or they got involved in order to try to stop the commission of an offence; or they had mistakenly but honestly believed they were under threat. If the officer considers that an accused had or may have had a reasonable excuse they must dismiss the charge.

### *Fights*

Fight is given its normal dictionary meaning, (i.e. a person taking part in a struggle or contention), and as to whether a fight has occurred is a question of fact for the officer hearing the charge. It must be proved that an accused intended to fight. If both parties were merely engaging in 'horseplay' this may not amount to an offence under subsection (1). If the accused struck another who did not retaliate there would be no fight (but a charge of assault may be brought under section 42). A fight between the accused and any other person is covered by the section (it is not necessary that the other person should be another member of Her Majesty's forces therefore one person can be charged with fighting).

### *Threatening, abusive, insulting or provocative*

It is necessary to identify the way in which the offence under subsection (2) was committed for the purposes of framing the charge. Only one of these types of behaviour should be used for a charge. Where more than one of these types of behaviour is present, an accused may be charged with separate offences arising out of different acts occurring during the same incident.

Whether an accused's behaviour amounts to any one (or more) of these is a question of fact for the particular circumstances of each case, having regard to the normal dictionary meanings of these words. However *threatening* relates only to circumstances where violence is threatened and does not include disrespectful behaviour. *Provocative* means challenging and/or confrontational and is not merely insulting.

### *Likely to cause a disturbance*

The behaviour does not have to have actually caused a disturbance but, in the circumstances, it must be likely that a disturbance could occur. This is wider than causing harassment or alarm to an individual. Whether the behaviour is likely to have caused a disturbance is an objective test.

## **4. Defences**

For defences generally and more on voluntary intoxication see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Voluntary intoxication*

If it is considered that an accused was so drunk or under the influence of drugs that they could not have formed an intention to fight then the charge must be dismissed. This will involve taking into consideration whether the accused voluntarily consumed alcohol and whether they were able and in fact did form the necessary intent at the time. A drunken or drugged intent nevertheless is still an intent.



## **5. Notes**

If excessive force is used in an alleged fighting charge the accused should be charged with another offence, for example under section 42 of the Act (criminal conduct - assault or battery).

If an accused is charged with fighting it is not a defence to claim that the other party gave their consent to the fighting. If that were the case the other party could also be charged with fighting.

## Section 22 - Ill-treatment of subordinates

### 22 Ill-treatment of subordinates

(1) A person subject to service law who is an officer, warrant officer or non-commissioned officer commits an offence if–

- (a) he ill-treats a subordinate (“ B” );
- (b) he intends to ill-treat B or is reckless as to whether he is ill-treating B; and
- (c) he knows or has reasonable cause to believe that B is a subordinate.

(2) For the purposes of this section a person (“ B” ) is a subordinate of another person (“ A” ) if–

- (a) B is subject to service law; and
- (b) A is a superior officer of B.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.22)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>707</sup>. However if this offence is committed in circumstances of a prescribed nature<sup>708</sup> then the instructions in [Chapter 6](#) (Investigation, charging and mode of trial) must be adhered to. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charge.

ILL-TREATMENT OF A SUBORDINATE CONTRARY TO SECTION 22(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., ill-treated [CD], whom he knew or had reasonable cause to believe was a subordinate.

### 3. Ingredients of offence.

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

As this offence can only be committed by an officer, warrant officer or NCO this means that it cannot be committed by personnel below the ranks of leading rate, lance corporal or corporal (RAF).

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<sup>707</sup> Section 53 of the Act.

<sup>708</sup> Section 114 of the Act.

### *Ill treats*

Ill treatment is to be given its normal dictionary meaning of treating badly or cruelly. A series of minor actions against a victim, which would in themselves not amount to offences of assault, might amount to ill treatment. Ill treatment includes but is not limited to physical force. Bullying or frightening may suffice, as may behaviour or treatment that is unnecessarily harsh or which degrades or humiliates another person. Whether conduct amounts to ill-treatment is a question of fact for the person hearing the charge to decide on the circumstances of each case.

### *A subordinate*

In order to be a subordinate the victim must be subject to Service law and the accused must be their superior officer<sup>709</sup>. This offence, therefore, cannot be committed by or against a civilian. For example a military instructor would not be able to be charged under this section where the victim was a civilian trainee. Staff legal advice should be sought on other appropriate charges.

Superior officer, means an officer, warrant officer or non-commissioned officer who is subject to Service law and who is a superior rank or rate to the victim or is of equal rank or rate to them and is exercising authority as their superior.

It does not matter, therefore, whether the superior officer is of the same or different Service to the victim, providing that the superior officer is also subject to Service law. This would include Service personnel from other nations when they are posted to serve with UK forces and become subject to Service law, but would not include, for example, coalition forces or other nations' personnel alongside whom UK Service personnel happen to be working.

A person of a higher rank or rate than the victim will always be their superior officer under the Act. In addition there can be occasions when someone of the same rank or rate as the accused will be their superior officer. This would **not** apply in the case of those of the lowest rank and rates in each Service: a private, able rate (or below) and airman (AC, LAC and SAC) can never be the superior officer of another private, able rate (or below) or airman. All other ranks or rates can become the superior officer of another person of the same rank where they are *exercising authority as [the accused's] superior*. In order to be their superior officer however it must be an official entitlement to exercise authority over the other, such as having been tasked to carry out a temporary duty or a specific assignment which puts them in a position of authority over that other individual.

### *Intends*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Reckless*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Knows or had reasonable cause to believe that [the victim] is a subordinate*

It is necessary that there was actual knowledge that the individual was a subordinate or that the accused had reasonable cause to believe they were a subordinate. Where the subordinate is of a different rank or rate to the accused and they belong to the same unit this

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<sup>709</sup> Section 374 of the Act

should be sufficient to prove actual knowledge, because the person and their rank or rate was known to them. Similarly, if they were from different units but were both in uniform at the time of the offence this could impute actual knowledge.

Where the subordinate is not known to the accused or was not in uniform it will be necessary to consider whether the accused knew in the circumstances that they were their subordinate, or whether they should have known. The test of whether they would have reasonable cause to believe is an objective one and should be judged on the evidence in the case. If the accused raises evidence on this, it is not for them to prove it. The person hearing the charge should consider all the evidence and decide, based on their view of the evidence, whether it has been shown that the accused knew or had reasonable cause to believe.

In cases where the individuals are of the same rank or rate as each other there should be evidence of the superior's authority which would indicate that the accused was aware that the victim was a subordinate.

If on the evidence, it is doubtful as to whether the accused knew or had reasonable cause to believe that the victim was their subordinate it may mean this offence should not be charged. However, consideration should be given as to whether any other offences have been committed (e.g. assault).

#### **4. Defences.**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Consent to ill-treatment is no defence.

#### **5. Notes.**

Conduct that could amount to ill treatment may also amount to other disciplinary or criminal conduct offences, for example assault. Depending on the circumstances, another charge may be more appropriate. Before charging under this section staff legal advice should be sought.

## Section 23 - Disgraceful conduct of a cruel or indecent kind

### 23 Disgraceful conduct of a cruel or indecent kind

(1) A person subject to service law commits an offence if–

(a) he does an act which is cruel or indecent; and

(b) his doing so is disgraceful.

(2) In this section “act” includes an omission and the reference to the doing of an act is to be read accordingly.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.23)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>710</sup>.

### 2. Specimen charges

DISGRACEFUL CONDUCT OF A CRUEL KIND CONTRARY TO SECTION 23(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., held a cat by the hind legs and repeatedly beat it against a wall.

DISGRACEFUL CONDUCT OF AN INDECENT KIND CONTRARY TO SECTION 23(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., removed all his clothing and said to [CD], “Come on, let’s see what a man can do to you with some real equipment”, or words to that effect.

### 3. Ingredients of the offence.

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Does an act*

It is a question of fact whether the accused does an act for the purpose of this offence. By virtue of subsection (2) *does an act* also includes an omission to act. For example, a person who accidentally traps an animal in a door will act cruelly if on realising this, they fail to open the door and release the animal.

*Cruel or indecent*

These terms are to be given their normal dictionary meaning. Whether an act is cruel or indecent must be assessed using the objective test. When making the assessment the officer hearing the charge should consider the circumstances in which the act or omission

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<sup>710</sup> Section 53 of the Act.

occurred. Thus, an act of sexual nature that occurs in private with the consent of persons present and where such persons are old enough to give consent will not generally be regarded as indecent.

*And ...is disgraceful*

Disgraceful must be given its normal dictionary meaning. It is insufficient to prove that the conduct in question was cruel or indecent. It must also be proved that the circumstances, motive of the accused or other factors make it disgraceful. For example, killing an animal may involve cruelty but the circumstances, such as obtaining food to survive, would prevent the conduct amounting to an offence. Similarly, removing one's clothes would require an objective test to be applied when considering whether the conduct in question is disgraceful.

#### **4. Defence.**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes.**

Consideration should be given to the professional responsibilities or obligations of the accused i.e. where a soldier has responsibility for the care of animals and they act in a negligent way whereby the act constitutes cruelty they should be charged under this section rather than section 15 (failure to attend for, or perform, duty).

Where the alleged conduct may amount to a criminal conduct offence under section 42 of the Act, for example sexual assault, legal advice should be obtained before any charge under this section is considered. The act(s) or omission(s) alleged to constitute the disgraceful conduct must be included in the particulars of charge.

It is possible for this offence to be committed even where the accused was drunk. For voluntary intoxication see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## Section 24 - Damage to or loss of public or service property

### 24 Damage to or loss of public or service property

(1) A person subject to service law commits an offence if–

(a) he does an act that causes damage to or the loss of any public or service property or any property belonging to another person subject to service law; and

(b) either–

(i) he intends to cause damage to or the loss of the property, and there is no lawful excuse for his act; or

(ii) he is reckless as to whether he causes damage to or the loss of the property.

(2) A person subject to service law commits an offence if–

(a) negligently, he does an act that causes damage to or the loss of any public or service property; or

(b) he does an act that is likely to cause damage to or the loss of any public or service property and–

(i) he is reckless as to whether he causes damage to or the loss of the property; or

(ii) he is negligent.

(3) For the purposes of this section–

(a) “act” includes an omission and references to the doing of an act are to be read accordingly;

(b) references to causing include allowing;

(c) “loss” includes temporary loss;

(d) “property” means property of a tangible nature, and references to public or service property are to be read accordingly.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed–

(a) in the case of an offence under subsection (1), ten years;

(b) in the case of an offence under subsection (2), two years.

(AFA06 s.24)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>711</sup>, however consideration should always be given as to whether Schedule 2 offences might apply, see [Chapter 6](#) (Investigation, charging and mode of trial). For example, damaging property with an intention to endanger life<sup>712</sup> is listed in Schedule 2 of the Act. As soon as a CO becomes aware of an

<sup>711</sup> Section 53 Schedule 2 of the Act.

<sup>712</sup> Criminal Damage Act 1971 section 1(2).

allegation or circumstances that indicate an offence that the property in question might have been damaged with this intention and may have been committed under this section, they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

## 2. Specimen charges

DAMAGING OR LOSS OF PUBLIC OR SERVICE PROPERTY OR PROPERTY BELONGING TO ANOTHER PERSON SUBJECT TO SERVICE LAW CONTRARY TO SECTION 24(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., damaged a Service vehicle registration number ..... belonging to [name of unit] to the value of £....., by pouring water into the fuel tank of the said vehicle intending to damage or being reckless as to whether such vehicle would be damaged.

DAMAGING PROPERTY BELONGING TO ANOTHER CONTRARY TO SECTION 24(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., threw a glass tankard belonging to [CD], a person subject to Service law, against a wall intending to damage such property or being reckless as to whether such property would be damaged; thereby causing damage to the said tankard to the value of £.....

NEGLIGENTLY DAMAGING PUBLIC PROPERTY CONTRARY TO SECTION 24(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., negligently caused damage to a bivouac, belonging to the Secretary of State for Defence, by lighting a candle inside the bivouac and leaving the bivouac unattended, thereby causing damage to the said bivouac to the value of £.....

## 3. Ingredients of offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Does an act*

It is a question of fact whether the accused *does an act* for the purpose of this offence. By virtue of subsection (3)(a) of the Act *does an act* also includes an omission to act. For example, a person who when legitimately refuelling a vehicle, omits to turn off the pump when the tank is full and instead allows the fuel to overflow will be causing a loss of the fuel.

*Causes*

The loss or damage alleged in the charge must have resulted from the alleged act of the accused. An omission is also capable of causing damage or loss. By virtue of **subsection (3)(b)** *causes* for these purposes includes *allowing*.

*Damage to*

This will include not only permanent or temporary actual damage but also permanent or temporary impairment of value or usefulness, such as installing a virus on a computer. For



the purpose of offences charged under this section, damage also includes destruction of property.

#### *Loss of*

This will include temporary loss see subsection (4). In some circumstances a loss will be incurred because property has been irreparably damaged.

#### *Property*

To show the property belonged to another person who was subject to Service law, evidence must be given as to the identity of the owner and why this person was at the time subject the Service law. This offence cannot be committed where the property in question belongs to civilians subject to Service discipline.

Two other types of property are mentioned in this section, public property and Service property. Public property and Service property are defined in section 26 of the Act which provides:

**26 Sections 24 and 25: “public property” and “service property”**

**(1) This section applies for the purposes of sections 24 and 25.**

**(2) “Public property” means property belonging to or held for the purposes of–**

- (a) a department of the Government of the United Kingdom;**
- (b) any part of the Scottish Administration;**
- (c) a Northern Ireland department; or**
- (d) the National Assembly for Wales.**

**(3) “Service property” means property–**

- (a) belonging to or used for the purposes of any of Her Majesty's forces;**
- (b) belonging to a Navy, Army and Air Force Institute; or**
- (c) belonging to an association established, or having effect as if established, under section 110 of the Reserve Forces Act 1996 (c. 14) (reserve associations).**

**(AFA06 s.26)**

#### *Intends*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Is likely to cause*

An objective test will be applied. It must be shown that it was reasonably foreseeable that damage or loss was likely to occur in the circumstances: It is insufficient to merely show that there was a remote possibility of damage etc. This may be the case if it is the timely intervention of a third party that prevents loss or damage occurring.

#### *Reckless*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Negligence*

For negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

*Lawful excuse.* An accused will have a lawful excuse if, for example their normal duties required them to do something to the property that would result in its damage or loss. This is only available where the offence is alleged to have been committed intentionally.

## **5. Notes**

In addition to the above, before a charge under section 24 of the Act is brought, consideration should be given as to whether there may be a more appropriate charge under section 42 of the Act, for example, arson for deliberate fire raising. Where the property has been damaged or destroyed a charge of criminal damage may be more appropriate. This might be the case where the property belonging to the person subject to Service law is totally unconnected with the Service. For example, where a Service person's personal television is damaged. However if a Service person's property is used in the Service context e.g. a personal rucksack or leatherman then an offence under this section should normally be charged. Where the allegation relates to offences under this section which involve *loss*, there may be no corresponding criminal conduct offence available. If there is any doubt staff legal advice should be sought.

It should be noted that this offence can be committed in a number of ways;

Causing damage to or the loss of property can be committed intentionally or recklessly to all three types of property (public, Service and property belonging to another person subject to Service law).

The offence can only be committed negligently in relation to public or Service property.

In addition it is possible to negligently or recklessly do an act which is likely to cause damage to or the loss of public or Service property. Service property includes such things as:

- a. Mess property (even if purchased with non-public funds) when it is property used for the purpose of Her Majesty's forces; or
- b. Any clothing, equipment, decorations *etc* issued to a Service person for their use for Service purposes.

It does not include property belonging to civilians subject to Service discipline.

## Section 25 - Misapplying or wasting public or Service property

### 25 Misapplying or wasting public or service property

(1) A person subject to service law commits an offence if he misapplies or wastes any public or service property.

(2) A person guilty of an offence under this section is liable to any punishment mentioned in rows 2 to 12 of the Table in section 164.

(AFA06 s.25)

#### 1. Type of offence

An offence under this section **may be** heard summarily<sup>713</sup>.

#### 2. Specimen charge

##### MISAPPLYING OR WASTING PUBLIC PROPERTY CONTRARY TO SECTION 25(1) OF THE ARMED FORCES ACT 2006

**[AB] on ....., misapplied 10 fire buckets belonging to the RNAS [name] fire station, public property by using the said fire buckets to grow shrubs.**

##### MISAPPLYING OR WASTING SERVICE PROPERTY CONTRARY TO - SECTION 25(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., wasted Service property, namely 15 gallons of Service diesel fuel, to the value of £20.00, by allowing the said diesel to overflow the fuel tank.

#### 3. Ingredients of offence

*A person subject to service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Misapplies*

Misapplies requires misconduct on the part of the accused. It is not sufficient for the accused to merely use the property in question they must also use it for an improper purpose. It is irrelevant whether the accused or any other person has benefited from the misapplication. The misapplication need not result in any actual loss to the Service.

*Wasting*

This term should be given its normal dictionary meaning. The act requires some form of misconduct. For example, a legitimate disposal would not be *wasting*; there must be some unnecessary loss to the Service.

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<sup>713</sup> Section 53 of the Act.

### *Public property and Service property*

Two types of property are mentioned in this section, public property and Service property. . Public property and Service property are defined in section 26 of the Act which provides (as below):

**26 Sections 24 and 25: “public property” and “service property”**

**(1) This section applies for the purposes of sections 24 and 25.**

**(2) “Public property” means property belonging to or held for the purposes of–**

- (a) a department of the Government of the United Kingdom;**
- (b) any part of the Scottish Administration;**
- (c) a Northern Ireland department; or**
- (d) the National Assembly for Wales.**

**(3) “Service property” means property–**

- (a) belonging to or used for the purposes of any of Her Majesty's forces;**
- (b) belonging to a Navy, Army and Air Force Institute; or**
- (c) belonging to an association established, or having effect as if established, under section 110 of the Reserve Forces Act 1996 (c. 14) (reserve associations).**

**(AFA06 s.26)**

An offence under this section can be committed intentionally or recklessly. For intention and recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **4. Defences.**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Mistake*

An honest but mistaken belief by the accused that they have used or applied the property in a proper manner. Additionally, an accused will have a defence if they acted on the order of a superior and they honestly believed the order was lawful.

#### **5. Notes.**

In a Service environment, it is essential that public and Service property is protected from misapplication and waste.

Because an offender cannot be awarded a punishment of imprisonment, where the evidence suggests that the circumstances of the case are more serious, for example because the accused may have acted dishonestly, it may be more appropriate to bring a charge under section 42 of the Act for theft or other dishonesty offences. Similarly, where the accused is alleged to have acted negligently, consideration should be given as to whether an offence under section 15 (negligently performing a duty) might be brought. In cases of doubt, staff legal advice should be sought.

*Property* must always be of a tangible nature. It will include captured enemy property.

*Service property* includes such things as:

- a. Mess property (even if purchased with non-public funds) when it is property used for the purpose of Her Majesty's forces; or
- b. Any clothing, equipment, decorations *etc* issued to a Service person for their use for Service purposes.

It does not include property belonging to civilians subject to Service discipline.

## **Section 26 – Definition of public property or service property**

This section has been incorporated into Section 24 and 25 to which it relates.

## Section 27 - Obstructing or failing to assist a service policeman

### 27 Obstructing or failing to assist a service policeman

(1) A person within subsection (2) commits an offence if–

(a) he intentionally obstructs, or intentionally fails to assist when called upon to do so, a person who is–

(i) a service policeman acting in the course of his duty; or

(ii) a person subject to service law lawfully exercising authority on behalf of a provost officer; and

(b) he knows or has reasonable cause to believe that that person is a service policeman or a person exercising authority on behalf of a provost officer.

(2) A person is within this subsection if he is–

(a) a person subject to service law; or

(b) a civilian subject to service discipline.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.27)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>714</sup>.

### 2. Specimen charges

OBSTRUCTING A SERVICE POLICEMAN CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., did obstruct [CD], a Service Policeman, by preventing the said Service policeman from entering [name] nightclub in Gosport.

OBSTRUCTING A PERSON LEGALLY EXERCISING AUTHORITY UNDER, OR ON BEHALF OF, A PROVOST OFFICER CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., did obstruct [CD], a person lawfully exercising authority under, or on behalf of, a provost officer, by preventing the said non-commissioned officer from entering [name] nightclub in Worcester.

FAILING TO ASSIST A SERVICE POLICEMAN CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., when called upon for assistance by [CD], a Service policeman, refused to assist the said Service policeman.

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<sup>714</sup> Section 53 of the Act.

## FAILING TO ASSIST A PERSON LEGALLY EXERCISING AUTHORITY UNDER, OR ON BEHALF OF, A PROVOST OFFICER CONTRARY TO SECTION 27(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., when called upon for assistance by [CD], a person legally exercising authority under, or on behalf of, a provost officer, refused to assist the said non-commissioned officer.

### 3. Ingredients of offence

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Intentionally*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

*Obstructs*

The obstruction must be a positive act. Standing by and doing nothing is not obstruction unless there is a legal duty to do something.

*Fails to assist*

Where a Service policeman actually calls upon a person for assistance and such a person then deliberately refrains from acting, this should be charged as failing to assist under this section. Failing to answer questions is not *failing to assist* or *obstruction*. However, in some circumstances a duty to answer a question or provide information may be imposed by statute e.g. Road Traffic Act 1988 section 174. In such circumstances the offence should be charged under the relevant statute.

*Knows or has reasonable cause to believe*

To find the offence proven, it is necessary for the accused to have known or had reasonable cause to believe that the person they obstructed or failed to assist was a Service policeman acting in the course of their duty, or a person subject to Service law lawfully exercising authority on behalf of a provost officer.

*A person..... legally exercising authority under, or on behalf of, a provost officer*

A person legally exercising authority under, or on behalf of, a provost officer includes all members of the Navy, Army or Royal Air Force when acting under the orders of a Naval, Military or Royal Air Force provost officer. It includes naval patrols exercising authority on behalf of a provost officer as defined above. Shore patrols do not exercise authority under this section unless they are acting under the orders of an officer appointed as Naval Provost Marshal, Provost Marshal (Army) or Provost Marshal (Royal Air Force).

*Provost officer*

A *provost officer* means a commissioned officer who is a Service policeman.

### 4. Defences



For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It is a defence for a person charged under this section to prove that they neither knew nor had reasonable cause to believe that the person in relation to whom the offence is alleged to have been committed was neither a Service policeman nor a person acting under, or on behalf of, a provost officer. It is for the accused to introduce evidence of this in cases where this statutory defence is pleaded.

The burden of proof on the accused is on the balance of probabilities rather than beyond reasonable doubt.

For burden of proof generally see [Chapter 12](#) (Summary hearing – dealing with evidence).

Since it is for the accused to raise the above defence (by cross-examination or by giving or calling evidence) there is no obligation upon the officer hearing the charge to adduce evidence to rebut it until they had done so. However, in practice it is usual to elicit from witnesses called to prove the matters referred to in subsection (1)(a)(i) and (1)(a)(ii) above any additional evidence they can give to rebut this defence (e.g. that the person concerned was in uniform and identifiable as a member of the Service Police or that they were personally known to the accused).

## **5. Notes**

Regimental police or coxswains do not normally exercise authority under provost officers and so to obstruct them would not be an offence under this section unless they were so acting but may be charged under other sections as appropriate.

## Section 28 - Resistance to arrest etc

### 28 Resistance to arrest etc

(1) A person subject to service law (“A”) commits an offence if another person (“B”), in the exercise of a power conferred by or under this Act, orders A into arrest and–

- (a) A disobeys the order;
- (b) A uses violence against B; or
- (c) A’s behaviour towards B is threatening.

(2) A person subject to service law, or a civilian subject to service discipline, commits an offence if–

- (a) he uses violence against a person who has a duty to apprehend him, or his behaviour towards such a person is threatening; and
- (b) he knows or has reasonable cause to believe that the person has a duty to apprehend him.

(3) For the purposes of this section–

- (a) a person’s “behaviour” includes anything said by him;
- (b) “threatening” behaviour is not limited to behaviour that threatens violence;
- (c) a “duty” to apprehend a person means such a duty arising under service law.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.28)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>715</sup>.

### 2. Specimen charges

DISOBEYING AN AUTHORISED PERSON WHO ORDERS HIM INTO ARREST  
CONTRARY TO SECTION 28(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., on being ordered into arrest by [CD], when he the accused was concerned in a disorder, disobeyed the said order.

USING VIOLENCE TOWARDS AN AUTHORISED PERSON WHO ORDERS HIM INTO  
ARREST CONTRARY TO SECTION 28(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., on being ordered into arrest by [CD], used violence against Flight Lieutenant Q Wings.

<sup>715</sup> Section 53 of the Act.

BEHAVING IN A THREATENING MANNER TOWARDS AN AUTHORISED PERSON WHO ORDERS HIM INTO ARREST CONTRARY TO SECTION 28(1)(c) OF THE ARMED FORCES ACT 2006

[AB] on ....., on being ordered into arrest by [CD], threatened [CD].

USING VIOLENCE TOWARDS AN AUTHORISED PERSON WHO HAS A DUTY TO APPREHEND CONTRARY TO SECTION 28(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., on being apprehended used violence towards [CD].

### **3. Ingredients of the offence**

*A person subject to service law/civilian subject to service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*A person in the exercise of a power conferred by or under this Act*

For those persons who have the power to arrest see [Chapter 4](#) (Arrest and search, stop and search, search, entry and seizure and retention).

*Disobeys*

Disobedience requires awareness of what is being disobeyed, so it must be shown that the order into arrest was clear and that it was received by the person charged. The power to arrest may be exercised personally; by giving orders for the arrest of the person who is to be arrested; or, where that person is subject to Service law, by ordering them into arrest. Therefore the offence is committed by disobeying the person who is carrying out the arrest.

However, if the arrest is unlawful, and the accused disobeys and/or resists the person who is carrying out the arrest the accused will not have committed an offence due to the fact that this section presupposes that the person carrying out the arrest is acting in the exercise of a power conferred by or under the Act, and a person has an unqualified right to resist an unlawful arrest. Whilst this is so, the degree of force which may be used in doing so is qualified – they may not use grossly excessive force. For example, a person wrongly arrested may not use lethal force in resisting arrest.

*Uses Violence*

There must be actual violence used *against* the person whose duty it is to arrest or apprehend and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against them. However, the level need not be severe. It can be any kind of violence such as striking, kicking, butting with the head, pushing or throwing an object at a person. There is no requirement for there to be an injury caused or intended to be caused. It would not be enough under this section however for violence to be used, for example, by punching the wall as that would not be *against* the person whose duty it is to arrest or apprehend.

### *Threatening behaviour*

Threatening behaviour can include anything said by the accused and is not limited to behaviour that threatens violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example a threat to interfere with the brakes of a person's car. *Threatening* should be considered using the objective test. It is for the officer hearing the charge to decide as a question of fact.

### *Duty to apprehend*

Apprehend covers both an arrest (essentially for the purpose of charging an offence or to prevent an offence for which see section 67) and other types of lawful capture, such as of someone escaping from custody. It can also include the initial placing into detention of an individual by a person with no actual powers of arrest (such as a member of the civilian guard force) pending that person's arrest by for example a provost officer.

Once a person decides (or is made aware it has been decided) that it is appropriate or necessary to apprehend an accused then it is their duty to do so.

The officer hearing the charge must be satisfied that the person whose duty it was to apprehend the accused had lawful authority to do so. If this cannot be proved then no duty to apprehend will be deemed to have arisen, and therefore an accused's use of reasonable force to resist such apprehension/arrest would be lawful.

A duty to apprehend will arise in certain circumstances and includes:

- a. An offender escaping from lawful custody for example Service detention or imprisonment.
- b. Where civilian police either in the UK or overseas make a decision to arrest an individual;
- c. Individuals being apprehended by a member of a guard force;
- d. The arrest by the civilian police of a member of the reserve forces for desertion;
- e. The arrest of a civilian witness on a warrant issued by a judge advocate by the civilian police in order to compel the attendance of a witness at Court Martial;
- f. A Service policeman who either sees a crime being committed by an accused or (unless it is a minor matter that can be dealt with by way of a warning) who has reasonable cause to suspect an accused of an offence;
- g. A person authorised by a provost officer to arrest a civilian accused subject to Service discipline; or
- h. An officer who is not a Service policeman who reasonably suspects an accused of committing a Service offence.

### *Knows or has reasonable cause to believe*

The offence will only be proved if the accused knows or has reasonable grounds for believing that the other person has a duty to apprehend or arrest them. This does not mean that the accused must be aware of the exact circumstances behind their lawful arrest/apprehension, (see mistake below) but that at the time of their arrest/apprehension they know or have

reasonable cause to believe that the person arresting/apprehending them has the lawful authority to do so.

This knowledge or reasonable cause to believe on the part of the person being apprehended/arrested most usually will be imparted by the person arresting/apprehending the accused, informing them they are for example a Service policeman, and why they are arresting them, and/or by the uniform of the Service policeman or guard etc. Belief should be given its normal dictionary meaning, and what is reasonable cause to believe is for the officer hearing the charge to decide. The officer hearing the charge can imply from the surrounding circumstances of the case, what would have been within the knowledge of the accused at the time.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

##### *Mistake*

It does not have to be proved that the accused was aware of the circumstances that would have made the arrest lawful. He could for example be the innocent victim of a case of mistaken identity – the arrest could be lawful, since for example the Service Police had reasonable grounds for suspecting them and therefore arresting them, yet they would not know that. If they assaulted the person who carried out the arrest the charge would be found proved.

If however, for example the person to be arrested believes the person seeking to make the arrest was not a person authorised, e.g. people impersonating Service Police, their criminality is judged on their mistaken view of the facts. The reasonableness or unreasonableness of the accused's belief is relevant only to the question of whether the accused genuinely held that belief, and will need to be judged by the officer hearing the charge, considering all of the surrounding circumstances.

It shall be a defence for any person charged under this section to prove that they neither knew nor had a reasonable cause to believe that the person in relation to whom the offence is alleged to have been committed was an authorised person exercising a power of arrest under this Act.

#### **5. Notes**

Disobeying any other order, or the use of violence or threatening behaviour in response to any order, other than that of ordering the accused into arrest should be charged under section 11 (misconduct to a superior officer) or section 12 (disobedience to lawful commands).

Where an accused is alleged to have assaulted a civilian police officer, or resisted a civilian police officer's attempt to arrest them, (e.g. where the civilian police were acting in concert with the Service Police to effect an arrest), consideration should be given to charging the accused under section 42 of the Act either with an offence contrary to section 38 of the Offences against the Person Act 1861, (assault with intent to resist arrest) or contrary to section 89(1) of the Police Act 1996 (assaulting a constable in the execution of their duty).

## Section 29 - Offences in relation to Service custody

### 29 Offences in relation to service custody

- (1) A person subject to service law, or a civilian subject to service discipline, commits an offence if he escapes from lawful custody.
- (2) A person subject to service law, or a civilian subject to service discipline, commits an offence if—
  - (a) he uses violence against a person in whose lawful custody he is, or his behaviour towards such a person is threatening; and
  - (b) he knows or has reasonable cause to believe that the custody is lawful.
- (3) For the purposes of this section—
  - (a) references to custody are to service custody;
  - (b) a person's behaviour includes anything said by him;
  - (c) “threatening” behaviour is not limited to behaviour that threatens violence.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.29)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>716</sup>.

### 2. Specimen charges

ESCAPE FROM LAWFUL CUSTODY CONTRARY TO SECTION 29(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., when in arrest in the guardroom Trenchard Lines escaped.

[AB] on ....., when serving a sentence of service detention at the Military Corrective Training Centre, Colchester, escaped.

[AB] on ....., when in the lawful custody of [CD] of the Naval Provost Marshal Headquarters (Eastern) escaped.

USING VIOLENCE WHILST IN CUSTODY CONTRARY TO SECTION 29(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., being in the lawful custody of [CD] of the Naval Provost Marshal Headquarters (Eastern), and knowing or having reasonable cause to believe that the custody was lawful, did use violence towards the said [CD]..

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<sup>716</sup> Section 53 of the Act.

## USEING THREATENING BEHAVIOUR WHILST IN CUSTODY CONTRARY TO SECTION 29(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., did use threatening behaviour towards [CD] whilst in custody at RAF LITTLE SNORING.

### 3. Ingredients of the offence

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

#### *Escapes*

What constitutes an escape is a question of fact, but before a prisoner can be said to have escaped, it must be shown that they were out of the control and reach of their escort, if appropriate, even if they are subsequently recaptured.

#### *Lawful custody*

It must be proven that the accused was lawfully detained in Service custody. This may be by producing relevant evidence e.g. an arrest warrant or a committal order, or evidence that the accused had been absent or sentenced to detention. In addition, the accused must know that they are in custody. It is therefore vital that the person placing the accused into custody makes this clear to the accused and, as far as is reasonably possible, ensures that the accused understands that they are in custody. Custody in relation to this offence means Service custody wherever that may be, for example temporary facilities used on operations abroad. Service custody includes being under arrest, whether in a custody facility or whilst being transferred to a custody facility or whilst being held temporarily, for example to prevent an offence being committed.

#### *Uses violence*

There must be actual violence used *against* the person in whose lawful custody the accused was, and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against them. However, the level need not be severe. It can be any kind of violence such as striking, kicking, butting with the head, pushing or throwing an object at a person. There is no requirement for there to be an injury caused or intended to be caused. It would not be enough under this section however for violence to be used, for example, by punching the wall as that would not be *against* the person in whose lawful custody the accused was.

#### *Threatening behaviour*

Threatening behaviour can include anything said by the accused and is not limited to behaviour that threatens violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example a threat to interfere with the brakes of a person's car. *Threatening* should be considered using the objective test. It is for the officer hearing the charge to decide as a question of fact.

#### *Knows or has reasonable cause to believe*

The charge will only be found proved if person escaping knows or has reasonable grounds for believing that the custody is lawful. In practice it would be virtually impossible for a person to be in lawful custody without being aware of that fact, because they should have been told by the person arresting them, why they were being placed into custody either at the time or as soon as practically possible afterwards. The officer hearing the charge will need to satisfy himself that this was indeed communicated to the accused.

Belief should be given its normal dictionary meaning, and what is reasonable cause to believe is for the officer hearing the charge to decide. The officer hearing the charge can imply from the surrounding circumstances of the case, what would have been within the knowledge of the accused. The fact that e.g. an accused had had their custody approved by a judge advocate, had been sentenced to detention at summary hearing, and/or had been served with a document explaining why they were being placed in custody would help prove an accused's actual knowledge.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

If a person is not in lawful custody, they are entitled to use reasonable force to prevent their false imprisonment; they may not use grossly excessive force. For example, a person wrongly detained may not use lethal force in effecting their escape.

#### **5. Notes**

If evidence is not available to prove lawful custody, consideration should be given to a charge of assault contrary to section 42 of the Act.

Descriptive details of the use of violence or threatening behaviour should not be included in the charge.

A person who escapes and who then remains absent without leave, or deserts, could be charged under this section in addition to being charged with section 9 (absence without leave) or section 8 (desertion).

This offence is not applicable to a UK Service person who is a prisoner of war (PW).



## Section 30 - Allowing escape, or unlawful release, of prisoners etc

### 30 Allowing escape, or unlawful release, of prisoners etc

(1) A person subject to service law commits an offence if–

- (a) he knows that a person is committed to his charge, or that it is his duty to guard a person;
- (b) he does an act that results in that person's escape; and
- (c) he intends to allow, or is reckless as to whether the act will allow, that person to escape, or he is negligent.

(2) A person subject to service law commits an offence if–

- (a) he knows that a person is committed to his charge;
- (b) he releases that person without authority to do so; and
- (c) he knows or has reasonable cause to believe that he has no such authority.

(3) In this section “act” includes an omission and the reference to the doing of an act is to be construed accordingly.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed–

- (a) in the case of an offence under subsection (1) where the offender intended to allow the person to escape, or an offence under subsection (2) where the offender knew he had no authority to release the person, ten years;
- (b) in any other case, two years.

(AFA06 s.30)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>717</sup>.

### 2. Specimen charges

ALLOWING A PERSON TO ESCAPE CONTRARY TO SECTION 30(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., when he was Guard Commander of 'A' Wing, Military Corrective Training Centre, Colchester, allowed [CD], a person [whom it was his duty to guard] [who was committed to his charge], to escape.

RELEASING A PERSON WITHOUT AUTHORITY CONTRARY TO SECTION 30(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., when a member of the landing party from HMS DAUNTLESS released [CD] a member of the civil population, a person who was committed to his charge.

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<sup>717</sup> Section 53 of the Act.

### **3. Ingredients of the offence**

*A person subject to Service law.*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Knows*

Knows should be given its normal dictionary meaning. Actual knowledge on the part of the accused that the prisoner was committed to their charge or that it was their duty to guard the prisoner must be proved. This can be done by producing evidence in the form of the guard roster, or for example, evidence that the prisoner had been committed to the accused's charge, and that the accused knew this. In practice it would be virtually inconceivable that an accused would not know this, and know therefore that they had a formal responsibility to ensure that the person they were guarding/who was committed to their charge did not escape.

*Committed to their charge*

This means that a person by virtue of their post or due to orders has formal responsibility. This could be personal charge of the prisoner or overall responsibility for it.

Situations where a prisoner may be committed to an accused's charge include:

- a. A Guard Commander of a unit guardroom holding a Service person arrested for absence or; an officer given command over a PW camp or a facility to hold security detainees or common criminals in an operational area. The officer will understand their responsibility to ensure no one escapes and for putting in place suitable arrangements (guards, fences etc) to ensure that this does not happen.
- b. A prisoner in Service custody abroad, being returned to the UK. For example, where an officer or other person is responsible for having a prisoner escorted back to the UK, they are not necessarily obliged personally to guard the prisoner. Instead, it would be sufficient for them to make adequate provision for others to guard the prisoner. Therefore, if the officer does not make adequate arrangements to ensure the prisoner remains secure they may be charged with this offence.

*Duty to guard*

A duty to guard arises self evidently when an accused is assigned to guard a prisoner in custody and they know this (see above).

*Does an act*

It is a question of fact whether the accused "does an act" for the purpose of this offence. *Does an act* also includes an omission to act. For example a guard, who on noticing the keys to the cell block are accessible to the person who is committed to their charge, fails to move them out of their reach, thereby facilitating their escape.

*Escapes*

What constitutes an escape is a question of fact, but before a prisoner can be said to have escaped, it must be shown that they were out of the control and reach of their escort, if appropriate, even if they are subsequently recaptured.

### *Intends*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Reckless*

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Negligent*

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Allow*

It must be proved that the accused's act (or omission to act) substantially facilitated (or *allowed*) the escape to take place. If it did not, then the charge is not proven (although consideration may wish to be given for example, to a charge under section 15 (failing to perform a duty)).

Where it is alleged that the accused *intends to allow*, this imparts some knowledge on the part of the accused of what is being allowed or authorised. In these circumstances the accused will have committed the more serious offence as ordinarily, a person cannot be said to *allow* a particular event, still less authorise it, unless they are aware of the activity being carried on.

Where however it is alleged that the accused was reckless as to whether their act would allow an escape, it covers a situation where an accused took an unjustified risk as to whether their act (or omission to act) would allow an escape, for example by taking the risk of not placing a guard by an unbarred toilet window whilst the prisoner (who then escaped out of the window) went to the toilet.

To negligently allow an escape, it must be proved an accused (taking into account their training and experience) failed to take reasonable steps to prevent an escape. The officer hearing the charge must be satisfied beyond reasonable doubt that the accused failed to meet the objective test of what would be expected of them in those circumstances, and that this failure allowed the escape to occur.

### *Releases*

This should be given its normal dictionary meaning. An accused can release a person without authority recklessly or negligently. Where an accused does so, the appropriate charge will be contrary to subsection (1) (rather than subsection (2)).

### *Authority*

Where a person is authorised by their superior officer to release a prisoner, it is not for that person to question that authority. If later it turns out their superior officer had no such authority, the person so ordered to release the prisoner will not have committed an offence so long as they acted in good faith.

### *Knows or has reasonable cause to believe*

This knowledge or reasonable cause to believe on the part of the accused must be ascertained by the officer hearing the charge either from direct evidence produced detailing what the accused was told (or not told), or for example the absence of any relevant written

release authority, or from the surrounding circumstances. Belief should be given its normal dictionary meaning, and what is reasonable cause to believe is for the officer hearing the charge to decide.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

##### *Duress*

If a prisoner holds a gun to the head of a guard and threatens to shoot either them or another guard unless the guard allows them to escape this would form a defence.

##### *Self Defence/defence of others*

If there was a fire in the prison/detention facility and the person let all of the prisoners out to protect their lives, this would form a defence since the person would not intend to allow the prisoners to escape from custody, merely to leave the burning prison, would not be reckless as to whether this would allow them to escape, since they would have taken a justifiable risk, and would not be negligent, since they would have acted in a way that a person in their position ought to act.

#### **5. Notes**

The person committed to the accused's charge or whom it is their duty to guard need not be subject to Service law, e.g. contractors, dependants, pirates, or common criminals in an operational theatre.

## Section 31 - Hazarding of ship

### 31 Hazarding of ship

(1) A person subject to service law commits an offence if he does an act that causes the hazarding of any of Her Majesty's ships and–

(a) he intends to cause damage to or the stranding or loss of the ship, and there is no lawful excuse for his act; or

(b) he is reckless as to whether he causes damage to or the stranding or loss of the ship.

(2) A person subject to service law commits an offence if, negligently, he does an act that causes the hazarding of any of Her Majesty's ships.

(3) For the purposes of this section–

(a) “act” includes an omission and references to the doing of an act are to be read accordingly;

(b) references to causing include allowing;

(c) “Her Majesty's ships” means all ships belonging to or used for the purposes of any of Her Majesty's forces.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–

(a) in the case of an offence under subsection (1), may be for life;

(b) in the case of an offence under subsection (2), must not exceed two years.

(AFA06 s.31)

### 1. Type of offence

An offence under subsection (1) is a **Schedule 2 offence** and **may not be heard summarily**<sup>718</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under subsection (2) may not be heard summarily<sup>719</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

<sup>718</sup> Section 53 Schedule 2 of the Act.

<sup>719</sup> Section 53 and Schedule 2 of the Act.

## HAZARDING OF ONE OF HER MAJESTY'S SHIPS CONTRARY TO SECTION 31(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, caused Her Majesty's Ship TENACIOUS to become stranded, intending to cause the said vessel to become stranded, or being reckless as to whether the vessel would become so stranded.

## NEGLIGENTLY HAZARDING OF ONE OF HER MAJESTY'S SHIPS CONTRARY TO SECTION 31(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, negligently did an act, namely, gross deviation from the planned navigational track, that hazarded Her Majesty's Ship TENACIOUS.

### **3. Ingredients of the offence**

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *Does an act*

It is a question of fact whether the accused *does an act* for the purpose of this offence. *Does an act* also includes an omission to act. For example, a ship's captain fails to check a navigation plan which contains an error or danger to navigation, thereby hazarding the ship.

#### *Her Majesty's ship*

Means all ships belonging to or used for the purposes of any of Her Majesty's forces. *Ship* includes a hovercraft and any description of vessel.

#### *Hazarding*

This means unjustifiably exposing the vessel to danger or harm, or to the risk of danger or harm.

#### *Intends*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Reckless*

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Negligently*

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Causes*

It must be proved that the act or omission to act was at least a contributory factor. Where it was so remote from the hazarding that it could not have contributed to it, the offence will not have been committed, although consideration should be given to a charge contrary to section 15 (failing to perform a duty).

#### *Lawful excuse*

A person will have a lawful excuse if they act because of some lawful reason. For example, there may well be circumstances where it is inevitable that a ship will be put at risk, for example when in action against an enemy. In those circumstances it may be justified to do something which is bound to damage a ship (for example by ramming an enemy) or even to destroy a ship (perhaps to avoid its capture).

The accused is to be treated as not having had a lawful excuse unless sufficient evidence is produced to raise an issue as to whether they had such an excuse. Once the issue has been raised, the accused must not be convicted unless the officer hearing the charge is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so they did not have a lawful excuse.

### *Stranding*

It is not sufficient to prove that the ship touched the bottom. It must be established that the ship ran aground or settled on the bottom, or into or onto some object affixed to the ground, and remained fast for a time (i.e. other than momentarily). A ship is not stranded if e.g. she scrapes over a shoal patch.

### *Loss*

This means total loss. A surface ship can be lost without necessarily being lost to view as e.g. when salvage operations for her recovery are abandoned. Salvage operations undertaken for the purposes merely of saving anything of value that may be in the hull, but not the hull itself, will not prevent a ship from being regarded as lost. A vessel which is wholly submerged and incapable of coming to the surface by her own efforts is lost within the meaning of this section.

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

This section should be regarded as applying only to persons who are responsible for the navigation, control, management, or propulsion of the ship. Thus, if a person unconnected with these responsibilities does something by which the loss or hazarding is caused, e.g., leaving a watertight hatch open, or smoking near inflammable matter, they should not be charged under this section. In such circumstances charges contrary to section 13 (contravention of standing orders), or section 15 (failing to perform a duty) should be charged.

The following examples may assist in deciding whether this charge or another should be proceeded with:

- a. If the Captain was on the bridge personally directing operations when hazarding occurred, they should be charged under this section;
- b. If the Captain was on the bridge when some error in an order given by the Officer of the Watch caused the ship to run aground, both the CO and the Officer of the Watch should be charged under this section;
- c. If a Captain was below at the time their ship was hazarded, and the person hearing the charge merely contend that they ought to have been on the bridge, they should normally be charged under section 15 of the Act with negligently performing

their duty by leaving the bridge in circumstances which should be stated, or in not being on the bridge when they should have been;

d. If the CO (or navigating officer) were to be tried for hazarding their ship while in charge of a Pilot when a *common degree of attention* on their part *would have prevented the hazarding*, they should be charged under this section; or

e. When the ship is controlled from the operations room, the Principal Warfare Officer controls the ship by passing instructions to the Officer of the Watch. If the ship is hazarded during this time both the Officer of the Watch and the Principal Warfare Officer should be considered for charge under this section.

Where it is established from the evidence that an act or omission to act contributed to the hazarding, and further negligent acts or omissions to act affected the subsequent loss or stranding, both charges could be preferred, but it would usually be oppressive to do this unless there was a real time difference between the first hazarding and the eventual stranding, so that there were two distinct phases.



## Section 32 - Giving false air signals etc

### 32 Giving false air signals etc

(1) A person subject to service law commits an offence if, without lawful excuse, he intentionally—

- (a) gives a false air signal; or
- (b) alters or interferes with an air signal or any equipment for giving an air signal.

(2) In this section “air signal” means a message, signal or indication given (by any means) for the guidance of aircraft or a particular aircraft.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.

(AFA06 s.32)

### 1. Type of offence

An offence under this section **may not be** heard summarily<sup>720</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charge

GIVING A FALSE AIR SIGNAL CONTRARY TO SECTION 32(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, intentionally showed a flare by night in order to indicate that the said place was a suitable landing place for aircraft when it was known to him that the said place was unsuitable for the landing of aircraft.

ALTERING OR INTERFERING WITH AN AIR SIGNAL CONTRARY TO SECTION 32(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, intentionally interfered with an air signal by interrupting the electrical supply to the runway of the said station, causing the runway landing lights to be extinguished.

### 3. Ingredients of the offence

*A person subject to Service law.*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

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<sup>720</sup> Section 53 and Schedule 2 of the Act.

### *Lawful excuse*

A person will have a lawful excuse if for example, a person has authority, or is under orders, to modify an air signal or to adjust air signalling equipment. The accused is to be treated as not having had a lawful excuse unless they raise some evidence as to whether they had such an excuse.

Once the issue has been raised, the accused may not be convicted unless the officer hearing the charge is satisfied beyond all reasonable doubt that the accused acted in the way alleged, and that when doing so they did not have a lawful excuse.

For more information in respect of lawful excuse see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Intentionally*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Gives, alters or interferes with*

These expressions should be given their normal dictionary meaning.

### *Air signal*

Air signal is defined in subsection (2). They are of great importance as they are for the guidance of aircraft<sup>721</sup>. A false air signal may cause loss of life. This offence is not limited to Her Majesty's aircraft.

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

This offence is designed to support air safety so should usually only be considered for offences directly related to air operations.

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<sup>721</sup> Section 374 of the Act.

## Section 33 - Dangerous flying etc

### 33 Dangerous flying etc

(1) A person subject to service law commits an offence if–

(a) he does an act–

(i) when flying or using an aircraft, or

(ii) in relation to an aircraft or aircraft material,

that causes or is likely to cause loss of life or injury to any person; and

(b) either–

(i) he intends to cause loss of life or injury to any person, and there is no lawful excuse for his act; or

(ii) he is reckless as to whether he causes loss of life or injury to any person.

(2) A person subject to service law commits an offence if, negligently, he does an act–

(a) when flying or using an aircraft, or

(b) in relation to an aircraft or aircraft material,

that causes or is likely to cause loss of life or injury to any person.

(3) In this section–

“act” includes an omission and the reference to the doing of an act is to be read accordingly;

“aircraft material” includes–

(a) parts of and accessories for aircraft (whether or not for the time being in aircraft);

(b) armaments in or for use in aircraft;

(c) any other equipment or instrument in or for use in aircraft;

(d) any equipment for use in connection with the taking-off or landing of aircraft or for detecting the movement of aircraft;

(e) any fuel for the propulsion of aircraft; and (f) any lubricant for aircraft or for anything within any of paragraphs (a) to (d).

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–

(a) in the case of an offence under subsection (1), may be for life;

(b) in the case of an offence under subsection (2), must not exceed two years.

(AFA06 s.33)

### 1. Type of offence

An offence under this section is a **Schedule 2 offence** (where the offender is reckless) and **may not be** heard summarily<sup>722</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

## 2. Specimen charges

DANGEROUS FLYING CONTRARY TO SECTION 33(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse when pilot of Her Majesty's aircraft X2590, flew the said aircraft above the M5 motorway in Somerset at a height of fifty metres causing injury to [CD] intending thereby to cause injury to any person or, being reckless as to whether injury would thereby be caused.

NEGLIGENTLY DOING AN ACT IN RELATION TO AIRCRAFT OR AIRCRAFT MATERIAL CONTRARY TO SECTION 33(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., when carrying out a pre flight check on Her Majesty's aircraft X2590 negligently left a screwdriver in the air intake of the port engine of the said aircraft being an act likely to cause loss of life or injury to any person.

## 3. Ingredients of the offence

*A person subject to Service law.*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Does an act*

It is a question of fact whether the accused *does an act* for the purpose of this offence. It includes an omission to act. For example, a pilot or ground crew who fails to carry out a required check.

*"Flying", "using", "or in relation to".*

These words should be given their normal dictionary meaning. For the latter two they are wide enough to cover people other than pilots. They would cover the acts and omissions other persons including for example ground crews and passengers.

*Aircraft*

This offence covers aircraft<sup>723</sup> which are not only Her Majesty's aircraft. For example, it would include British military personnel who are controlling foreign military or civilian aircraft or for example, where foreign aircraft use military airfields in the UK.

*Aircraft material*

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<sup>722</sup> Section 53 Schedule 2 of the Act.

<sup>723</sup> Section 374 of the Act.

See subsection (3) above.

#### *Causes or likely to cause*

It must be proved that the act caused or was likely to cause loss of life or injury. For causing there must be a loss of life or injury. However, the same act which did not actually cause a loss of life or injury is still an offence if it was *likely to cause* such loss or injury. This will be a matter of evidence for the officer hearing the charge to decide. For causing it must be proved that the act or omission to act was at least a contributory factor to the loss of life or injury occurring. Where the act was so remote that it could not have contributed to it, the offence will not have been committed, although consideration should be given to a charge contrary to section 15 (failing to perform a duty).

#### *Injury*

This could include psychiatric/psychological injury, and not just strictly physical injury.

#### *Lawful excuse*

A person will have a lawful excuse if they act because of some lawful reason. For example, there may well be circumstances where it is inevitable that a pilot will fly dangerously, for example when in action against an enemy, and taking evasive action, or in an emergency. The accused is to be treated as not having had a lawful excuse unless sufficient evidence is produced to raise an issue as to whether they had such an excuse. Once the issue has been raised, the accused must not be convicted unless the officer hearing the charge is satisfied beyond reasonable doubt that the accused acted in the way alleged, and that when doing so they did not have a lawful excuse.

#### *Intends*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Reckless*

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Negligently*

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **4. Defences**

If the incident was either beyond the accused's control or they made a mere error of judgement, not amounting to negligence, following a mechanical defect such as an instrument failure this would provide a defence.

### **5. Notes**

Spare.

## Section 34 – Low flying

### 34 Low flying

(1) A person subject to service law commits an offence if–

(a) he flies an aircraft at a height less than the minimum height, other than–

(i) when taking off or landing; or

(ii) in any other circumstances prescribed by regulations made by the Defence Council; and

(b) he intends to fly, or is reckless as to whether he flies, the aircraft at a height less than the minimum height, or he is negligent.

(2) If a person flies an aircraft in contravention of subsection (1) on the orders of another person who is in command of the aircraft, that other person is for the purposes of this section to be treated as flying the aircraft.

(3) In this section “minimum height” means the height prescribed by regulations made by the Defence Council.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.34)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>724</sup>.

### 2. Specimen charge

UNLAWFUL LOW FLYING CONTRARY TO SECTION 34(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., when pilot of Her Majesty's aircraft X2590 intentionally, flew the said aircraft at a height of less than the 2,000 feet minimum prescribed limit in Ministry of Defence Military Aircraft Regulations made by the Defence Council or was reckless as to whether the said aircraft was being flown below 2,000 feet.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Aircraft*

For the purposes of offences under this section, aircraft are defined under section 374 of the Act.

*Minimum height*

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<sup>724</sup> Section 53 of the Act.

A fixed wing aircraft will low fly for the purpose of this charge if without authorisation it is flown below 2,000 feet above the ground or other surface. A rotary aircraft (including light propeller aircraft) will low fly if without authorisation it is flown at a height below 500 feet above the ground or other surface<sup>725</sup>. The minimum height and the circumstances in which a pilot will have authorisation to fly below these are set out in regulation 4 of Low Flying Regulations 2009.

#### *When taking off or landing*

This will also include practice approaches where the aircraft descends as if to land but does not in fact do so.

#### *Any other circumstances prescribed by regulations*

See regulation 4 of Low Flying Regulations 2009.

#### *Intends*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Reckless*

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Negligently*

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A pilot may have a defence if they can show that they were low flying under the orders of another person in command of the aircraft. The other person who is in command of the aircraft may be charged with an offence under this section.

### **5. Notes**

Where a pilot has flown an aircraft in a manner which is contrary to guidance set out in JSP 550 but they do not fall within this offence, consideration should be given to another appropriate Service offence, for example section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline).

If the low flying occurred over a place where the pilot has had previous associations e.g. over their home or school, evidence may be produced on this matter to suggest a motive for associating the accused with the alleged low flying although this in itself would never be sufficient to justify conviction.

Where low flying has occurred and the pilot has not received prior authorisation for this, evidence that the pilot did not notify their chain of command of the low flying where it was reasonably practicable for them to do so may be produced. For example, where the pilot has

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<sup>725</sup> Low Flying Regulations 2009 regulation 3 and JSP 550.

flown an aircraft below the minimum height because of adverse weather<sup>726</sup> and has not reported it in accordance with the relevant procedures set out in JSP 550.

Before bringing a charge under this section JSP 550 should also be consulted (Military Aviation Policy Regulations and Directives).

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<sup>726</sup> Low Flying Regulations 2009 regulation 4(c).



## Section 35 - Annoyance by flying

### 35 Annoyance by flying

(1) A person subject to service law commits an offence if–

- (a) he flies an aircraft so as to annoy or be likely to annoy any person;
- (b) he can reasonably avoid flying the aircraft as mentioned in paragraph (a); and
- (c) he intends to fly, or is reckless as to whether he flies, the aircraft so as to annoy any person, or he is negligent.

(2) If a person flies an aircraft in contravention of subsection (1) on the orders of another person who is in command of the aircraft, that other person is for the purposes of this section to be treated as flying the aircraft.

(3) A person guilty of an offence under this section is liable to any punishment mentioned in rows 3 to 12 of the Table in section 164.

(AFA06 s.35)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>727</sup>.

However, if circumstances indicate or there is an allegation that the manner of the flying was likely to cause loss of life or injury, consideration should be given to an offence under section 33 (dangerous flying) which is a Schedule 2 offence.

### 2. Specimen charge

ANNOYANCE BY FLYING CONTRARY TO SECTION 35(1) ARMED FORCES ACT 2006

[AB] on ..... when pilot of Her Majesty's aircraft X2590 negligently flew the said aircraft so as to annoy or be likely to annoy any person in circumstances where he could reasonably have avoided flying the said aircraft in such manner

### 3. Ingredients of the offence

*A person subject to service law.*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*A person.....who flies*

It is not only a pilot who can be charged with an offence under this section the offence may be committed by anyone who is in command of the aircraft (see subsection (2)). For example a Flight Commander in the Royal Navy may be the pilot or the observer. Similarly in the training environment a pilot may be required to follow the orders of an instructor who will be in command of the aircraft for the purposes of this section.

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<sup>727</sup> Section 53 of the Act.

### *Annoy or likely to annoy*

Annoy or likely to annoy should be given their normal dictionary meaning. In the absence of any victim it is not necessary to show that another person was annoyed by the manner in which the aircraft was flown. It is sufficient to only show that it was likely in the circumstances that another person *could* have been annoyed.

### *Reasonably avoid*

A pilot who flies an aircraft in a manner which causes annoyance or is likely to cause annoyance does not commit an offence under this section unless the manner of their flying could be reasonably avoided. Even if a pilot is authorised to fly at a low level in a particular area, if they were to fly several times over their girlfriend's house just to impress her and in doing so they caused annoyance to others in that area then they would commit an offence under this section. However, if the manner of the flying is due to an exigency such as bad weather within the reasonable scope of the authorisation of the flight no offence would be committed.

### *Intends*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Reckless*

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Negligent*

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

Where there is a suggestion that the aircraft flew low without authorisation but there is no annoyance consideration may be given to a charge under section 34 (low flying) or an offence under section 13 (contravention of standing order).

## Section 36 - Inaccurate certification

### 36 Inaccurate certification

(1) A person subject to service law commits an offence if he makes or signs a relevant certificate without having ensured its accuracy.

(2) In this section “relevant certificate” means a certificate (including an electronic certificate) relating to—

(a) any matter affecting the seagoing or fighting efficiency of any of Her Majesty's ships;

(b) any of Her Majesty's aircraft;

(c) any aircraft material; or

(d) any equipment of a description prescribed by regulations made by the Defence Council.

(3) In subsection (2)—

“Her Majesty's ships” has the meaning given by section 31;

“Her Majesty's aircraft” means all aircraft belonging to or used for the purposes of any of Her Majesty's forces;

“aircraft material” has the meaning given by section 33.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.36)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>728</sup>.

### 2. Specimen charges

INACCURATE CERTIFICATION CONTRARY TO SECTION 36(1) ARMED FORCES ACT 2006

[AB] on ....., when pilot of Her Majesty's aircraft X2590 signed the Daily Inspection Certificate relating to the said aircraft without having ensured its accuracy.

### 3. Ingredients of the offence

*A person subject to Service law.*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Makes*

Makes should be given its normal dictionary meaning. For this offence it generally means an accused who completes the relevant certificate except for signing.

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<sup>728</sup> Section 53 of the Act.

### *Signs*

This includes signing the certificate electronically and also includes an accused who countersigns a certificate made by another person. In this case an accused who signs a certificate without having ensured its accuracy, would have committed an offence under subsection (1) as well as the person who made it.

### *Relevant certificate*

See subsection (2). Note that an electronic certificate is caught under this section.

### *Without having ensured its accuracy*

This means an accused makes or signs a certificate without having first checked it is correct. An accused therefore must confirm that the relevant checks and/or procedures have been carried out, and have been carried out correctly and accurately, in order for them to be able to certify the safety and working condition of Service ships, and aircraft, or materials used in connection with aircraft, or other prescribed equipment. An accused cannot claim they reasonably believed a certificate to be accurate - it must be accurate.

### *Equipment...prescribed*

At the time of publication of this volume and chapter of the MSL, there are no equipments that have been so prescribed.

*This offence can be committed intentionally, recklessly or negligently.*

### *Intention*

For *intention* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Recklessness*

For *recklessness* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Negligence*

For *negligence* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

Spare.

## Section 37 - Prize offences by officer in command of ship or aircraft

### 37 Prize offences by officer in command of ship or aircraft

(1) A person subject to service law who, while in command of any of Her Majesty's ships or aircraft, takes any ship or aircraft as prize commits an offence if he unlawfully fails to ensure that all the ship papers or aircraft papers found on board are sent to a prize court of competent jurisdiction.

(2) A person subject to service law who, while in command of any of Her Majesty's ships or aircraft, takes any ship, aircraft or goods as prize commits an offence if he unlawfully fails to ensure that—

- (a) the ship is brought to a convenient port for adjudication;
- (b) the aircraft is brought to a convenient airfield for adjudication; or
- (c) the goods are brought to a convenient port or airfield for adjudication.

(3) In this section—

“Her Majesty's ships” and “Her Majesty's aircraft” have the meanings given (respectively) by sections 31 and 36;

“prize court” means a prize court within the meaning of the Naval Prize Act 1864 (c. 25);

“ship papers” and “aircraft papers” have the meanings given by section 2 of that Act.

(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.37)

### 1. Type of offence

Offences under this section are **Schedule 2** offences and **may not be** heard summarily<sup>729</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

PRIZE OFFENCE BY AN OFFICER IN COMMAND OF SHIP OR AIRCRAFT CONTRARY TO SECTION 37(1) OF THE ARMED FORCES ACT 2006

[AB] while in command of Her Majesty's Ship ..... took ..... as prize, and unlawfully failed to ensure all the ..... [specify ship or aircraft] papers found on board were sent to a prize court of competent jurisdiction.

PRIZE OFFENCE BY AN OFFICER IN COMMAND OF SHIP OR AIRCRAFT CONTRARY TO SECTION 37(2) OF THE ARMED FORCES ACT 2006

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<sup>729</sup> Section 53 Schedule 2 of the Act.

[AB] while in command of Her Majesty's Ship ..... took..... as prize, and unlawfully failed to ensure that the ..... [specify ship/aircraft/goods) were brought to a [specify convenient port/airfield] for adjudication.

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*While in command of Her Majesty's ships or aircraft*

The responsibilities in relation to prize relate to the person who is in command of the ship or aircraft at the time the prize is taken. It is this person who will commit any offence under these sections.

*Her Majesty's ships and Her Majesty's aircraft*

For definition of ship and aircraft see section 374 of the Act.

Her Majesty's ships and aircraft means not only those ships or aircraft that belong to the armed forces but extends to those that are being *used for the purposes of* either the Royal Navy, Army or Royal Air Force.

*Fails to ensure*

It will need to be shown that the person in command of the ship or aircraft did not take all reasonable steps to ensure the necessary actions under each of the sections where taken. This will be a question of fact for the Court Martial.

*Papers*

The term *ship papers* includes all books, passes, sea briefs, charter parties, bills of lading, letters, and other documents and writings delivered up or found on board a captured ship.

The term *aircraft papers* includes all books, passes, charter parties, bills of lading, manifests, certificates, licences, lists, tickets, notes, letters and other documents and writings delivered up or found on board a captured aircraft.<sup>730</sup>

*Goods*

The goods that are able to be taken as prize relate to cargo on board ships or aircraft.

### **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There may be a lawful reason why the responsibility to send papers or to deliver a ship, aircraft or goods to a convenient port or airfield for adjudication does not need to be carried out; for example if it could not be as a result of enemy action.

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<sup>730</sup> Naval Prize Act 1864 section 2.

## 5. Notes

During an armed conflict commanding officers are entitled to capture most enemy ships and aircraft and any goods in them (known as *prize*). Under international law they must bring such prize to an appropriate place for a proper adjudication on whether they were lawfully taken as prize.

*Prize* is a term used in international law to refer to equipment, vehicles, vessels and aircraft captured *during* armed conflict. The most common use of prize in this sense is the capture of an enemy ship and its cargo. Once the ship is secured on friendly territory, it will be made the subject of a *case before a prize court which would* then go on to determine the status of the property and the manner in which it was to be disposed of.

The offences under this section all relate to the law of prize and breaches of the responsibilities imposed on those in command under international law. These offences can only be tried at the Court Martial. For full details of the law in relation to prize reference should be made to specialist publications such as Halsbury's Laws and the Naval Prize Act 1864.

## Section 38 - Other prize offences

### 38 Other prize offences

- (1) A person subject to service law commits an offence if—
  - (a) he ill-treats a person who is on board a ship or aircraft when it is taken as prize; or
  - (b) he unlawfully takes anything in the possession of such a person.
- (2) A person subject to service law commits an offence if he unloads, unpacks or otherwise interferes with any goods that are on board a ship or aircraft which has been taken as prize, unless—
  - (a) the goods have been adjudged by a prize court (within the meaning of the Naval Prize Act 1864 (c. 25)) to be lawful prize; or
  - (b) the goods are removed for safe keeping or for necessary use by any of Her Majesty's forces or any force co-operating with them.
- (3) A person subject to service law commits an offence if, without lawful excuse, he unloads, unpacks or otherwise interferes with any goods that are on board a ship or aircraft that has been detained in exercise of a belligerent right or under an enactment.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.38)

### 1. Type of offence

Offences under this section are **Schedule 2 offences** and **may not be** heard summarily<sup>731</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

ILLTREATMENT OF PERSONNEL FROM A SHIP OR AIRCRAFT TAKEN AS PRIZE  
CONTRARY TO SECTION 38(1)(A) OF THE ARMED FORCES ACT 2006

[AB] on ....., did ill-treat ..... who was on board ....., the said [ship/aircraft] having been taken as prize.

UNLAWFULLY TAKING AN ITEM BELONGING TO PERSONNEL FROM A SHIP OR  
AIRCRAFT TAKEN AS PRIZE CONTRARY TO SECTION 38(1)(B) OF THE ARMED FORCES  
ACT 2006

[AB] on ....., unlawfully took ..... from ..... who was on board ....., the said [ship/aircraft] having been taken as prize.

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<sup>731</sup> Section 53 Schedule 2 of the Act.



## INTERFERENCE WITH GOODS BELONGING TO A SHIP OR AIRCRAFT TAKEN AS PRIZE CONTRARY TO SECTION 38(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., unlawfully unloaded / unpacked / interfered with (delete as appropriate or specify) ..... (specify the nature of the goods) that were onboard ....., the said [ship/aircraft] having been taken as prize.

## INTERFERENCE WITH GOODS BELONGING TO A SHIP OR AIRCRAFT DETAINED IN EXERCISE OF A BELLIGERENT RIGHT OR UNDER AN ENACTMENT CONTRARY TO SECTION 38(3) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse unloaded/unpacked/otherwise interfered with (delete as appropriate or specify) ..... goods ..... [specify the nature of the goods] that were on board ..... , [specify the name the ship or aircraft] a ship/aircraft that was detained in exercise of a belligerent right/under an enactment [specify the nature of authority to detain].

### **3. Ingredients of the Offence**

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *Ill-treats*

Ill treatment is to be given its normal dictionary meaning of treating badly or cruelly. A series of minor actions against a victim, which would in itself not amount to an offence of assault, might amount to ill treatment. Ill treatment includes but is not limited to physical force. Bullying or frightening may suffice, as may behaviour or treatment that is unnecessarily harsh or which degrades or humiliates another person. Whether conduct amounts to ill-treatment is a question of fact for the officer hearing the charge to decide on the circumstances of each case.

#### *Unlawfully takes anything in the possession*

It is not generally lawful to remove personal belongings of those on board ships or aircraft taken as prize. However, it would be lawful to remove and temporarily retain their weapons for force protection. The taking of any items should be officially recorded and the property retained within authorised secure facilities.

Unlike the offence of theft, this offence does not require proof of dishonesty or intention to permanently deprive. This offence merely requires a person to take an item without authority. Takes should be given its normal dictionary meaning. It requires an intention to take, either temporarily or permanently.

#### *Unloads or unpacks or otherwise interferes with*

It is only permissible to unload, unpack or otherwise interfere with the goods described in subsection (2) if:

- a. A prize court has determined the prize to be lawful; or
- b. It is necessary for safekeeping or for use by Her Majesty's or co-operating forces.

For the purposes of this subsection interfering with goods may include disabling and/or destroying.

### *Goods*

*Goods* covers any cargo on board a ship or aircraft.

### *Safekeeping*

Means such steps as are necessary to prevent loss or protect others. In extreme circumstances this may permit dangerous goods to be destroyed.

### *Necessary use by any of Her Majesty's and co-operating forces*

This means the goods can be used to enhance the existing Service resources where this would assist the undertaking of their mission. For example, where weapons are the goods, this will allow the weapons to be used where they are needed to protect Her Majesty's or co-operating forces. It could also include a situation where such weapons were used to enhance the offensive or defensive capability of the force.

### *Co-operating force*

This applies to a military force that is co-operating with one of Her Majesty's forces. This will occur, for example, when the forces are participating together in an exercise or operation under an agreement.

### *Without lawful excuse*

A lawful excuse may arise under **subsection (3)** for example where a person demonstrates that they were acting under the lawful order of a superior officer.

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

*Prize* is a term used in international law to refer to equipment, vehicles, vessels and aircraft captured *during* armed conflict. The most common use of prize in this sense is the capture of an enemy ship and its cargo. Once the ship is secured on friendly territory, it will be made the subject of a *case before a prize court which would* then go on to determine the status of the property and the manner in which it was to be disposed of.

An offence under subsections (1) and (2) are prize offences and can only be committed during an armed conflict situation. An offence under subsection (3) can be committed at any time. An example of an offence under subsection (3) would be interfering with controlled drugs seized during an anti-drug boarding operation.

## Section 39 - Attempts

### 39 Attempts

- (1) A person subject to service law commits an offence if he attempts to commit an offence to which this subsection applies.
- (2) Subsection (1) applies to any service offence except--
  - (a) an offence committed by virtue of section 41 (aiding and abetting);
  - (b) an offence under this section or section 42.
- (3) A civilian subject to service discipline commits an offence if he attempts to commit an offence to which this subsection applies.
- (4) Subsection (3) applies to--
  - (a) an offence under section 4, 13, 27, 28(2), 29, 107 or 306 of this Act or under section 18 or 20 of the Armed Forces Act 1991 (c 62); and
  - (b) an offence under section 40 of encouraging or assisting the commission of an offence mentioned in paragraph (a).
- (5) For the purposes of this section a person attempts to commit an offence if, with intent to commit the offence, he does an act which is more than merely preparatory to the commission of the offence.
- (6) For those purposes, a person may attempt to commit an offence even though the facts are such that the commission of the offence is impossible.
- (7) Where--
  - (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence, but
  - (b) if the facts of the case had been as he believed them to be his intention would be so regarded,then for the purposes of this section he shall be regarded as having had an intent to commit that offence.
- (8) Where in proceedings for an offence under this section there is evidence sufficient in law to support a finding that the defendant did an act falling within subsection (5), the question whether his act fell within that subsection is a question of fact.
- (9) A person guilty of an offence under this section is liable to the same punishment as he would be liable to if guilty of the offence attempted.

(AFA06 s.39)

### 1. Type of offence

Under paragraph 10, Schedule 2 of the Act, an offence of attempting the commission of an offence within any of paragraphs 1-9 of Schedule 2 of the Act will be a **Schedule 2 offence** and therefore **may not be heard** summarily<sup>732</sup>. For the handling of cases in relation to

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<sup>732</sup>Section 53 Schedule 2 of the Act.

Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section (offences within paragraphs 1-9 of Schedule 2 as referred to above) they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not a Schedule 2 offence but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under this section may be heard summarily as long as the full offence may also be heard summarily<sup>733</sup>.

## **2. Specimen charges**

ATTEMPTING TO COMMIT A SERVICE OFFENCE CONTRARY TO SECTION 39 OF THE ARMED FORCES ACT 2006 NAMELY LOOTING

[AB] on ..... ,attempted to steal a gold ring from the person of an airman killed in the course of an action by 1<sup>st</sup> Battalion The Blankshire Regiment to capture the enemy-occupied air base at South Ridge, Upland.

ATTEMPTING TO COMMIT A SERVICE OFFENCE CONTRARY TO SECTION 39 OF THE ARMED FORCES ACT 2006 NAMELY MALINGERING

[AB] on ....., attempted to shoot himself in the left foot with intent thereby to render himself unfit for service.

ATTEMPTING TO COMMIT A OFFENCE CONTRARY TO SECTION 39 OF THE ARMED FORCES ACT 2006 NAMELY ILL-TREATING AN OFFICER OF INFERIOR RANK

[AB] on ....., attempted to [strike/kick/ punch] [CD], The Wessex Rangers, an officer of inferior rank.

## **3. Ingredients of the offence**

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Attempts to commit*

To constitute an offence under the section an act must be more than merely preparatory to the commission of an offence. The act must be a step towards the commission of the intended offence and must be more than merely remotely connected with the commission of that offence.

*Intent*

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<sup>733</sup> Section 53 Schedule 2 of the Act.

There must be evidence to show that the accused intended to commit the full offence; merely being reckless as to whether they might be committing an offence is insufficient.

If the accused embarks on a course of action, but changes their mind before committing an act sufficient to amount to an attempt, they cannot be convicted of an attempt. However, if they change their mind at a point that is too late to deny that they had gone as far as an attempt, the offence of attempt may be found proved. As to whether there has been an act amounting to an attempt is a question of fact for the officer hearing the charge to decide.

An accused's failure to commit the full offence due to circumstances outside their control or due to their own ineptitude, inefficiency or insufficiency is not a defence to an offence under this section of the Act.

#### *Attempting the impossible*

If the facts are such that the commission of the offence is impossible but the accused is not aware of this, the accused may still commit an offence under this section.

#### *Mistaken belief of facts*

If the accused is mistaken about the facts of the case, where the accused has the necessary intent to commit the full offence, the accused may still be regarded as having committed the offence, if the facts of the case had been as they falsely believed them to be.

For example, if a Service person (with an intention to malingering) intentionally self-administers a substance into an open wound believing that it would aggravate the injury but unbeknown to them the substance could not have had the intended effect, they cannot be charged with the full offence (malingering); however because of the operation of subsection (7) they may nevertheless be convicted of an attempt.

#### *An act which is more than merely preparatory*

Mere preparation, even with intent, does not amount to an attempt. For example, buying a box of matches with the intent of setting fire to a building is without more, merely a preparatory act. However, actually lighting a match in the vicinity of flammable materials in or near the building with the intent of setting fire to the building would be an act sufficient to amount to an offence under this section of the Act.

Although preparation for an offence may not be sufficient for an attempt, if such preparation consists of doing something which is to the prejudice of good order and Service discipline, consideration should be given to bringing a charge under section 19 of the Act (conduct prejudicial to good order and discipline).

#### *Offences to which this section applies*

A person subject to Service law can be charged with attempting to commit any Service offences except aiding and abetting (section 41 of the Act) and any criminal conduct offences (section 42 of the Act). The Service offences which a civilian subject to Service discipline may be charged with attempting to commit are more limited and are listed in **subsection (4)**.

## **4. Defences**

For Defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

Spare.

## Section 40 – Encouraging and assisting

### 40 Encouraging and assisting

- (1) A person subject to service law commits an offence if he encourages or assists the commission of a service offence (other than an offence under section 42).
- (2) A civilian subject to service discipline commits an offence if he encourages or assists the commission of an offence mentioned in section 39(4).
- (3) Reference in this section to encouraging or assisting the commission of an offence is to the doing of an act that would have constituted an offence under Part 2 of the Serious Crime Act 2007 if the offence encouraged or assisted had been an offence under the law of England and Wales.
- (4) In determining whether an act would have constituted an offence under that Part, section 49(4) of that Act has effect as if for "offences under this Part and listed offences" it read "offences under sections 39 and 40 of the Armed Forces Act 2006".
- (5) Any requirement in that Part to specify matters in an indictment applies for the purposes of this section as it applies for the purposes of that Part, but with references to the indictment being read as references to the charge sheet.
- (6) A person guilty of an offence under this section is liable to the same punishment as he would be liable to if guilty of--
  - (a) the service offence encouraged or assisted; or
  - (b) if convicted of the offence under this section by reference to more than one such service offence, any one of those service offences.

(AFA06 s.40)

### 1. Type of offence

Under paragraph 11, Schedule 2 of the Act, an offence of encouraging or assisting the commission of an offence within any of paragraphs 1-9 of Schedule 2 of the Act will be a **Schedule 2 offence** and therefore **may not be** heard summarily<sup>734</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section (offences within paragraphs 1-9 of Schedule 2 as referred to above) they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not a Schedule 2 offence but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

In all other cases legal advice should always be sought before framing any charge of encouraging or assisting a Service offence under section 40.

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<sup>734</sup> Section 53 Schedule 2 of the Act.

## **2. Specimen charge**

ENCOURAGING OR ASSISTING DISOBEDIENCE OF A LAWFUL COMMAND CONTRARY TO SECTION 40 AND SECTION 12(1) OF THE ARMED FORCES ACT 2006.

[A B] on ..., encouraged or assisted LOGS(CS)(P) Jones to disobey the lawful Command of POLOG(CS) Grainger.

## **3. Ingredients of offence**

*Persons subject to service law and civilians subject to Service discipline*

For persons subject to service law and civilians subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Note that a civilian subject to service discipline can only commit the offence of encouraging or assisting if they encourage or assist another person to commit an offence mentioned in Section 39(4) of the Act.

*Encourages or assists*

Encouraging or assisting are not necessarily separate activities; conduct described as 'encouraging' and conduct described as 'assisting' may overlap. Encouraging includes not only instigating and persuading but also conduct that simply emboldens a person who has already decided to commit an offence. Assisting means any conduct on the part of an individual that, as a matter of fact, makes it easier for another person to commit the principal offence. For example, a person who acts as a lookout during a burglary. A person who is under a duty to act but refrains from doing so is capable of assisting the commission of an offence. A security guard who fails to turn on a burglar alarm with the intention of assisting another to burgle the premises of the security guard's employer would be guilty of assisting the principal offender.

The words encourages or assists should be given their ordinary meaning. Encourages essentially means supporting, persuading or giving confidence to another to commit a service offence. Encouragement also includes threatening or pressurising another person to commit a service offence, or offering a bribe; this is because someone who threatens or pressurises someone to commit a service offence should be in no better position than someone who attempts to persuade another to commit an offence. A person subject to service law who attempts to persuade another to commit a service offence by threatening them with an adverse annual report, or by offering a bribe, would commit an offence under section 40.

The essence of the offence lies in the encouraging and assisting; it is therefore irrelevant that the person encouraged or assisted does not in fact carry out the act. For example, where A offers B a sum of money to make a false record a charge of encouraging or assisting against A would be proved even though A's efforts at persuasion or encouragement were totally ineffective and B refused to have anything to do with the scheme.

The elements of encouragement, or of threats or other pressure, may be implied by an accused as well as stated expressly. For example a defendant may strongly imply that if the other person does not commit an offence they may 'suffer for it'.

A person can in fact be assisted without being aware of the act of assistance. For example, a person who dislikes their neighbour and leaves a ladder by the side of their neighbour's



property when they know their neighbour is away on holiday, intending that this should assist a burglary of the neighbour's property, has done an act capable of assisting an offence even though the burglar may not be aware of the assistance which they have been given. By contrast, a person cannot in fact be encouraged unless they are aware of the encouragement. Therefore where a letter is sent encouraging the addressee to commit a service offence, but it is not proved that it reached the intended recipient; this might more appropriately be charged as an attempt to encourage the commission of a service offence. However, the sending of the letter is an act capable of encouraging the commission of an offence regardless of whether it is received by the intended recipient. This is a technical area of law and legal advice should always be sought before framing a charge under section 40.

#### 4. Defences

For 'defences' generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

##### *Acting reasonably*

It will be a defence to this offence, if the person charged with such an offence acted reasonably, that is in the circumstances they were aware of, or in the circumstances they reasonably believed existed, it was reasonable for them to act as they did. There are a number of factors that the court could consider when determining whether an act was reasonable in the circumstances. These factors (which are not exhaustive) are the seriousness of the anticipated offence(s); any purpose for which the defendant claims to have been acting; any authority by which they claim to have been acting.

For example, D lends P a knife and P then goes on to burgle a property. P then goes on to commit another offence of attacking a person with the knife causing minor harm (assault). In this case D could be convicted of encouraging and assisting burglary. He could also be prosecuted of encouraging and assisting burglary or assault. D would however have a defence of acting reasonably if they could prove (on the balance of probabilities) that at the time they gave P the knife, knowing what they knew at the time, they reasonably believed P was going to use the knife to cut some rope or butcher some meat. Where D gave P the knife near to the scene of the crime, in the early hours of the morning, knowing P was a serial burglar, a court would be unlikely to find that D did act reasonably and therefore be likely to convict them.

#### 5. Notes

References to 'encouraging or assisting' the commission of an offence in section 40 must be read with the provisions in Part 2 of the Serious Crime Act 2007, which provide for three separate offences ( see sections 44, 45 and 46 of the Serious Crime Act 2007). Those offences are:-

- Intentionally encouraging or assisting another person to commit an offence. For *intention* generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).
- Encouraging or assisting an offence *believing* that it will be committed, and that the encouragement or assistance will assist the commission of the offence. (In other words the defendant understood that their encouragement or assistance would be used to commit the offence).
- Encouraging or assisting one or more offences *believing one or more* will be committed. (In other words where the defendant understood that their

encouragement or assistance would be used to commit one or more of a range of different offences, without necessarily knowing which one(s)).

This section applies to encouraging or assisting the commission of a service offence other than an offence under section 42- criminal conduct. Encouraging or assisting criminal conduct is provided for in section 46.

As with offences of conspiracy and attempt (for which see sections 45 and 39 respectively) it is possible to commit this offence even though the facts are such that the commission of the principal (intended) offence is impossible. It is the accused's state of mind that must be considered, not the unknown impossibility of the principal offence being committed. For example, a defendant who encouraged or assisted a person to sabotage a service vehicle by adding a substance to its fuel tank, commits an offence under this section even if that substance would not in fact damage the vehicle in any way.

Where a defendant is charged with encouraging or assisting offences believing one or more will be committed, these possibly contemplated disciplinary offences must be identified on the charge sheet.

## Section 41 - Aiding, abetting, counselling or procuring

### 41. Aiding, abetting, counselling or procuring

- (1) Where a person subject to service law aids, abets, counsels or procures the commission by another person of an offence to which this subsection applies, he commits that offence.
- (2) Subsection (1) applies to any service offence except an offence under section 42.
- (3) A person who by virtue of subsection (1) commits an offence is liable to be charged, tried (including dealt with at a summary hearing) and punished as a principal offender.
- (4) Where a civilian subject to service discipline aids, abets, counsels or procures the commission by another person of an offence mentioned in section 39(4), he commits that offence and is liable to be charged, tried and punished as a principal offender.

(AFA06 s.41)

### 1. Type of offence

An individual who aids, abets, counsels or procures the commission of any non criminal conduct offence is treated under section 41 as though they committed the offence themselves (as a principal offender) and charged with the principal offence. Therefore the guidance for the principal offence in this chapter applies.

### 2. Specimen charges

No offence will be charged under this section. The accused will always be charged as the principal offender under the section of the principal offence.

### 3. Ingredients of offence.

*A person subject to service law/civilian subject to service discipline*

For persons subject to Service law and civilians subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

Persons subject to Service law may commit an offence under subsections (1) to (3).

Civilians subject to Service discipline may commit an offence under subsection (4)

*Aid and abet*

The term *aid and abet* means to assist the actual perpetrator of an offence (the principal offender): that assistance may be rendered at the time when the offence was committed or before the time when the offence was committed and at a different place. For example, to keep watch near the scene of the commission of an offence, or to distract someone's attention while an offence is committed, is aiding and abetting if the aider and abettor knew what was going on. Likewise the supply of a weapon by a person who knew that there was a real possibility it would be used for murder, will make that person an aider and abettor (accessory) to the principal offence. The accused need not know the precise crime that was intended or which was committed: If they realise or contemplate that there is a real

possibility that a number of offences may be committed, and one of those offences is committed, the fact that they have lent assistance to the principal to commit the offence will be sufficient.

#### *Counsel or procure*

An accused *counsels or procures* an offence when; knowing that an offence is contemplated, they approve of or assent to it, and their approval or assent encourages the principal offender to commit it. It is not necessary for the accused counselling or procuring the offence to be present when the offence is committed. An example would be encouraging or persuading an individual to make a false official record to conceal the loss of an expensive item of Service equipment.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Otherwise the defences available are as for the principal offence charged.

#### **5. Notes.**

It is important to note that a person charged with this offence, will not be charged under this section, but under the principal offence they are alleged to have aided and abetted or counselled and procured. The distinction between aiding and abetting, counselling and procuring is not significant when it comes to wording the charge.

This section does not apply to criminal conduct offences (section 42 of the Act). Under the criminal law of England and Wales a person who aids, abets, counsels or procures the commission of a criminal offence has their charge found proved of that offence under common law. Where the offence is a criminal conduct offence consideration should be given to bringing a charge under section 47 of the Act which modifies that common law offence for the purposes of the Act.

## Section 49 - Air Navigation Order offences

### 49. Air Navigation Order offences

- (1) If a person subject to service law, or a civilian subject to service discipline, does in or in relation to a military aircraft any act that if done in or in relation to a civil aircraft would amount to a prescribed Air Navigation Order offence, the act shall be treated for the purposes of section 42(1) as punishable by the law of England and Wales.
- (2) Where an act is an offence under section 42 by reason of subsection (1) above—
  - (a) section 42(8)(b) does not apply; and
  - (b) it shall be assumed for the following purposes that the act amounted to the offence under the law of England and Wales that it would have amounted to if it had been done in or in relation to a civil aircraft.
- (3) Those purposes are—
  - (a) the purpose of determining what punishment may be imposed for the offence under section 42;
  - (b) the purpose of determining for the purposes of any of the following provisions of this Act whether the act constituting the offence under section 42 is—
    - (i) an offence under the law of England and Wales;
    - (ii) any particular such offence;
    - (iii) such an offence of any particular description.
- (4) In this section –  
“military aircraft” has the meaning given by section 92 of the Civil Aviation Act 1982 (c. 16);  
“civil aircraft” means an aircraft that is registered in the United Kingdom and is not a military aircraft;  
“Air Navigation Order offence” means an offence under an Order in Council made under section 60 of the Civil Aviation Act 1982 (whenever made, and whether or not also made under any other enactment);  
“prescribed” means prescribed by an order made by the Secretary of State for the purposes of this section.

(AFA06 s.49)

### 1. Type of offence

An offence under this section **may not be** heard summarily<sup>735</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

#### ANO Article 73

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, ENDANGERING THE SAFETY OF AN AIRCRAFT CONTRARY TO ARTICLE 73 OF THE AIR

<sup>735</sup> Section 53 and Schedule 2 of the Act.

## **NAVIGATION ORDER 2005/1970**

[AB] on ..., [negligently/recklessly] acted in a manner likely to endanger [type of aircraft and military registration number] or [any of the (number of) persons therein], namely by [particulars of conduct].

### **ANO Article 74**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, PERMITTING AN AIRCRAFT TO ENDANGER THE SAFETY OF ANY PERSON OR PROPERTY CONTRARY TO ARTICLE 74 OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on....., [negligently/recklessly] [caused/permitted] [type of aircraft and military registration number] to endanger any person or property, namely by [particulars of conduct].

### **ANO Article 75(1)**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, DRUNKENNESS IN AN AIRCRAFT CONTRARY TO ARTICLE 75(1) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on....., entered [type of aircraft and military registration number] when he was drunk.

or

When in [type of aircraft and military registration number] on ..... [AB] was drunk.

### **ANO Article 75(2)**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, DRUNKENNESS IN AN AIRCRAFT CONTRARY TO ARTICLE 75(2) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on ....., when acting as a member of the crew of [type of aircraft and military registration number], was under the influence of drink or a drug to such an extent as to impair his capacity so to act.

or

[AB] on ....., when being carried in [type of aircraft and military registration number] for the purpose of acting as a member of the crew, was under the influence of drink or a drug to such an extent as to impair his capacity so to act.

### **ANO Article 77**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, DISOBEYING A LAWFUL COMMAND OF THE COMMANDER OF AN AIRCRAFT CONTRARY TO ARTICLE 77 OF THE AIR NAVIGATION ORDER 2005/1970

AB on ..., when in [Type of aircraft and military registration number] did not obey the order to [particulars of order] which was issued by [CD], the commander of the said aircraft.

### **ANO Article 78(a)**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, USING THREATENING, ABUSIVE OR INSULTING WORDS TOWARDS A MEMBER OF THE CREW OF AN AIRCRAFT CONTRARY TO ARTICLE 78(a) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on ..., when in [type of aircraft and military registration number] said [particulars of words] or words to that effect to [CD] who was a crew member of the said aircraft.

### **ANO Article 78(b)**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, BEHAVING IN A THREATENING, ABUSIVE, INSULTING OR DISORDERLY MANNER TOWARDS A MEMBER OF THE CREW OF AN AIRCRAFT CONTRARY TO ARTICLE 78(b) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on....., when in [type of aircraft and military registration number] [particulars of conduct] towards [CD] who was a crew member of the said aircraft.

### **ANO Article 78(c)**

COMMITTING A CIVIL OFFENCE CONTRARY TO SECTION 42(1) OF THE ARMED FORCES ACT 2006, NAMELY, INTENTIONALLY INTERFERING WITH THE PERFORMANCE OF CREW MEMBERS DUTIES CONTRARY TO ARTICLE 78(c) OF THE AIR NAVIGATION ORDER 2005/1970

[AB] on ..., when in [type of aircraft and military registration number] intentionally interfered with [CD] duty to [particulars of duty] by [particulars of conduct].

## **3. Ingredients of the offence**

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law and civilians subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits). It should be noted that civilians will be subject to Service law when they are in a UK military aircraft in flight<sup>736</sup>.

*In relation to a military aircraft*

Offence under this section can only be committed in a military aircraft. See also subparagraph 4 which refers to s92 Civil Aviation Act 1982 which provides that: -

‘military aircraft’ means:

- a. An aircraft of the naval, military or air forces of any country; or
- b. Any other aircraft in respect of which there is in force a certificate issued in accordance with any Order in Council in force under section 60, 87, 89, 91, 101(1)(a) or 107(2) of this Act that the aircraft is to be treated for the purposes of that Order in Council as a military aircraft; and

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<sup>736</sup> Schedule 15 of the Act.

- c. A certificate of the Secretary of State that any aircraft is or is not a military aircraft for the purposes of this section shall be conclusive evidence of the fact certified.”

*Prescribed Air Navigation Order offence*

Air Navigation Orders made by Order in Council under the Civil Aviation Act 1982 (CAA), create offences of misconduct on civil aircraft. The CAA does not generally apply to military aircraft however so in most circumstances a person cannot be charged with an Air Navigation Order offence if the misconduct takes place within a military aircraft. Because of the wording of section 49 of the Act, it is possible to *prescribe* certain Air Navigation Order offences. Once an Air Navigation Order offence has been prescribed in this way, it will also be possible to also commit this offence on a military aircraft.

The following are the Air Navigation Order offences that have been prescribed for the purposes of section 49(1) and (4) of the Act.

- (a) recklessly or negligently acting in a manner likely to endanger an aircraft, or any person in the aircraft, under article 73 of the Order;
- (b) recklessly or negligently causing or permitting an aircraft to endanger any person or property under article 74 of the Order;
- (c) entering an aircraft when drunk, or being drunk in an aircraft, under article 75(1) of the Order;
- (d) when acting as a member of the crew of an aircraft or while carried in an aircraft for the purpose of so acting, being under the influence of drink or a drug to such an extent as to impair his capacity so to act, under article 75(2) of the Order;
- (e) while in an aircraft, failing to obey a lawful command which the commander of an aircraft may give for the purpose of securing the safety of the aircraft and of persons or property carried in it, or the safety, efficiency or regularity of air navigation, under article 77 of the Order;
- (f) while in an aircraft, using threatening, abusive or insulting words towards a member of the crew of the aircraft under article 78(a) of the Order;
- (g) while in an aircraft, behaving in a threatening, abusive, insulting or disorderly manner towards a member of the crew of the aircraft under article 78(b) of the Order; and
- (h) while in an aircraft, intentionally interfering with the performance by a member of the crew of the aircraft of his duties under article 78(c) of the Order.

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*Treated for the purpose of section 42(1) as punishable by the law of England and Wales*

This must be read in conjunction with section 42(1) of the Act. This means that a person who is subject to Service law or a civilian who is subject to Service discipline will commit an offence under section 42 of the Act if they behave in a manner that would amount to a corresponding Air Navigation Order offence which has been prescribed.

*Sub paragraph 2(a) – “section 42(8)(b) does not apply”*

Sub paragraph 2(a) modifies the definition of the phrase *the corresponding offence under the law of England and Wales* which is found at section 42(8) of the Act. This phrase is frequently used in the Act in relation to criminal conduct offences and normally its meaning has to be modified to take into account that an accused’s act may not be an offence under English law because the offence has occurred outside England and Wales. In this case



however, instead of disregarding the place where the act was done, this subsection works by disregarding the type of aircraft in which the act was performed.

For intention, negligence or recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

Air Navigation Orders made under the Civil Aviation Act 1982 (CAA), create offences of misconduct on civil aircraft. The CAA does not generally apply to military aircraft however so in most circumstances a person cannot be charged with an Air Navigation Order offence if the misconduct takes place within a military aircraft. Because of the wording of section 49 of the Act, it is possible to *prescribe* certain Air Navigation Order offences. Once an Air Navigation Order offence has been prescribed in this way, it will also be possible to commit this offence on a military aircraft.

Although a prescribed Air Navigation Order offence may not be dealt with summarily<sup>737</sup> it may be dealt with by the Service Civilian Court or the Court Martial.

Nothing in this section prevents persons on board a military aircraft in flight being charged with other types of Service offences. For example a person who steals may still be charged with theft under section 42 of the Act.

There are some elements peculiar to Air Navigation Order offences that have specific meaning. Examples include the words *likely to endanger* which means *where there is a real risk that should not be ignored* and *drunkenness* which means *a person is drunk when they have taken alcohol to an extent which affects their steady self control*.

Some forms of conduct on an aircraft may be prohibited through standing orders and a charge under section 13 (contravention of standing orders) may therefore be appropriate.

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<sup>737</sup> Section 53 of the Act.

## Section 107(5) - Failure to attend hearings which are a condition of release from Service custody

### 107. Failure to attend hearings which are a condition of release from service custody

- (1) A person commits an offence if upon being released from service custody after charge:
  - (a) he is a person on whom a requirement has been imposed by a Judge Advocate, to attend any hearings in the proceedings against him; and
  - (b) without reasonable excuse, he fails to attend any hearing to which the requirement relates.
- (2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.

(AFA06 s.107(5))

#### 1. Type of offence

An offence under this section **may be** heard summarily<sup>738</sup>.

#### 2. Specimen charge

FAILURE TO ATTEND A HEARING FOLLOWING RELEASE FROM SERVICE CUSTODY  
CONTRARY TO SECTION 107(5) OF THE ARMED FORCES ACT 2006

[AB] ..... being a person on whom a requirement has been imposed under section 107(3)(a) of the Armed Forces Act 2006 to secure his attendance at a hearing at.....on..... without reasonable excuse, failed to attend the said hearing.

#### 4. Ingredients of offence

*Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any requirements to attend a hearing made by a Judge Advocate remains with them and is their responsibility. For example, a reasonable excuse could be incapacity through illness or accident or lawful authorisation not to attend.

*In contravention of the requirement placed upon them*

The record of the decision of the Judge Advocate relating to the time and place for the person to attend the hearing or a certified true copy of the decision will be evidence of the time and place for the person to attend the hearing.

#### 4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

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<sup>738</sup> Section 53 of the Act.

## **5. Notes**

Spare.

## Section 229 – Breach of a Service Restraining Order

### 229 Service Restraining Orders

- (1) The Court Martial or the Service Civilian Court may make an order under this section where-
- (a) it convicts or acquits a person (“the defendant”) of an offence; and
  - (b) the defendant is subject to service law or is a civilian subject to service discipline.
- (2) An order under this section-
- (a) prohibits the defendant from doing anything proscribed in the order; and
  - (b) has effect for a fixed period specified in the order or until further order.
- (3) An order under this section may be made, and a prohibition may be included in the order, only for the purpose of protecting a person mentioned in the order from conduct which amounts to harassment.
- (4) A person subject to service law or a civilian subject to service discipline commits an offence if, without reasonable excuse, he does anything which he is prohibited from doing by an order under this section.
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence should not exceed five years.

(AFA 06 s.229)

### 1. Type of Offence

An offence under section 229 **may not be** heard summarily<sup>739</sup>, but will be dealt with by the court originally imposing the order, whether the Court Martial or the Service Civilian Court.

### 2. Specimen Charge

FAILURE TO COMPLY WITH A SERVICE RESTRAINING ORDER CONTRARY TO SECTION 229 (4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a service restraining order has been imposed under section 229(4) of the Armed Forces Act 2006, namely [*state prohibition*] without reasonable excuse failed to comply with the said order in that he on the ..... day of ..... [*state act constituting breach*].

### 3. Ingredients of Offence

*A person subject to service law / civilian subject to service discipline (subsection 1(a) and (4))*

For persons subject to service law and civilian subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Harassment*

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<sup>739</sup> Section 53 Schedule 2 of the Act.

Harassing a person includes alarming a person or causing that person distress.

*Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any order made by a Judge Advocate restraining them from prohibited acts remains with them and is their responsibility. An example of a reasonable excuse could be that they were ordered by a police officer to enter an area they were prohibited from entering under the order.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

Spare.

## Section 266 - Financial statement orders

### 266 Financial Statement Orders

- (1) Before sentencing a person who has been convicted of a service offence, a court may make a financial statement order; but this does not apply to the Summary Appeal Court.
- (2) A financial statement order is an order requiring the person to give to the court, within such period as may be specified in the order, such a statement of his financial circumstances as the court may require.
- (3) A person who without reasonable excuse fails to comply with a financial statement order commits an offence and is liable to a fine not exceeding level 3 on the standard scale.
- (4) A person who in providing any statement in pursuance of a financial statement order-
  - (a) makes a statement which he knows to be false in a material particular,
  - (b) recklessly provides a statement which is false in a material particular,
  - (c) knowingly fails to disclose any material fact,commits an offence and is liable to a fine not exceeding level 4 on the standard scale.

(AFA 06 s.266)

### 1. Type of Offence

An offence under section **may not be** heard summarily<sup>740</sup>, but will be dealt with by the Service Court that originally imposed the order, whether the Court Martial or the Service Civilian Court.

### 2. Specimen Charge

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(3) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, without reasonable excuse failed to comply with the said order.

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, made a statement which he knew to be false in a material particular, namely .....

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

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<sup>740</sup> Section 53 Schedule 2 of the Act.

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, recklessly made a statement which was false in a material particular, namely .....

#### FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, knowingly failed to disclose a material fact, namely .....

### **3. Ingredients of Offence**

#### *Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any financial statement order made by a Judge Advocate remains with them and is their responsibility. An example of a reasonable excuse could be that they became ill shortly after the imposition of the order and was unable to provide the order.

#### *Recklessly*

To prove that the accused was reckless when they made a statement under subsection (4) (b), it must be proved that the accused made a statement in the awareness of a risk that it might have been false, but unreasonably went on to take the risk and make the statement anyway.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### **5. Notes**

Spare.

## Section 305 - Failure to provide a sample for drug testing

### 305. Failure to provide a sample for drug testing

- (1) A drug testing officer may, in order for it to be ascertained whether or to what extent a person subject to service law has or has had drugs in his body, require the person to provide a sample of his urine for analysis.
- (2) A drug testing officer may not impose a requirement under subsection (1) if—
  - (a) he or his commanding officer is the person's commanding officer; or
  - (b) the sample is sought in connection with an investigation under this Act of an offence or an investigation of an incident within section 306(1)(a).
- (3) A person commits an offence if he fails to comply with a requirement imposed under subsection (1).
- (4) In this section—  
“drug” means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971 (c. 38); and  
“drug testing officer” means an officer, warrant officer or non-commissioned officer who is authorised by or in accordance with regulations made by the Defence Council for the purpose of obtaining samples for analysis for drugs
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks.

(AFA06 s. 305)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>741</sup>.

### 2. Specimen charges

FAILING TO PROVIDE A SAMPLE FOR DRUG TESTING CONTRARY TO SECTION 305(3) OF THE ARMED FORCES ACT 2006

[AB], a person subject to Service law, did on....., when requested to do so by a drug testing officer, failed to provide a sample of urine for testing for the presence of drugs.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*A drug testing officer*

Is any officer, warrant officer or non-commissioned officer appointed or drafted to have immediate authority over or to serve as a member of an Armed Forces Compulsory Drug Testing Team and is authorised for the purpose of obtaining samples for analysis for drugs.

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<sup>741</sup> Section 53 of the Act.



### *Fail to provide a sample of urine*

If a person required to provide a sample of urine under this section, either refuses to provide a sample of their urine, is unable to provide such a specimen or adulterates the specimen, they shall be deemed to have failed to provide a specimen of urine.

### *Testing for the presence of drugs*

The sample may only be requested and tested to ascertain whether or to what extent a person subject to service law has, or has had drugs in their body.

### *Drugs*

Means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). However, it may be a defence for a person to provide medical evidence providing reasons for their inability to provide a sample of urine when requested.

A person may also be afforded a defence if the sample of urine was not taken in accordance with the mandated procedures contained in JSP 835 (Alcohol and substance misuse and testing).

## **5. Notes**

Spare.

## Section 306 - Failure to provide a sample for alcohol and drug testing after serious incident

### 306. Failure to provide a sample for alcohol and drug testing after serious incident

- (1) This section applies where—
  - (a) an incident has occurred which in the opinion of an officer resulted in, or created a risk of, death or serious injury to any person or serious damage to any property; and
  - (b) in the opinion of the officer, it is possible that a person within subsection (3) (“A”) may have caused or in any way contributed to—
    - (i) the occurrence of the incident;
    - (ii) any death or serious injury to any person, or serious damage to any property, resulting from it; or
    - (iii) the risk of any such death, injury or damage.
- (2) The officer may, in order for it to be ascertained whether or to what extent A has or has had alcohol or drugs in his body, require A to provide a sample for analysis.
- (3) A person is within this subsection if—
  - (a) he is a person subject to service law or a civilian subject to service discipline; and
  - (b) the officer mentioned in subsection (1) is his commanding officer.
- (4) A person commits an offence if without reasonable excuse he fails to comply with a requirement imposed under subsection (2).
- (5) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks.

(AFA06 s. 306)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>742</sup>.

### 2. Specimen charges

FAILING TO PROVIDE A SAMPLE FOR ALCOHOL AND DRUG TESTING AFTER  
SERIOUS INCIDENT CONTRARY TO SECTION 306(4) OF THE ARMED FORCES ACT  
2006

[AB] being a [person subject to Service law/civilian subject to Service discipline] did on.....,  
when requested to do so by an officer, fail to provide a sample of urine [breath] for testing for the  
presence of drugs [alcohol].

### 3. Ingredients of the offence

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law and civilians subject to Service discipline see [Chapter 3](#)  
(Jurisdiction and time limits).

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<sup>742</sup> Section 53 of the Act.

*An officer*

Means an officer described in section 306(1) of the Act.

*Fail to provide a sample for alcohol and drug testing*

If a person required to provide a sample for alcohol and drug testing under this section, either refuses to provide a sample, is unable to provide such a sample or adulterates the sample, they shall be deemed to have failed to provide a sample for testing. A sample means a sample of urine or breath.

*Testing for the presence of drugs or alcohol*

The sample may only be requested and tested to ascertain whether or to what extent a person subject to service law or a civilian subject to service discipline has, or has had drugs or alcohol in their body.

*Drugs and alcohol*

Means a controlled drug as defined by section 2 of the Misuse of Drugs Act 1971. Alcohol has its normal dictionary meaning.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). However, it may be a defence for a person to provide medical evidence providing reasons for their inability to provide a sample of urine or breath when requested.

A person may also be afforded a defence if the sample was not taken in accordance with the mandated procedures contained in JSP 835 (Alcohol and substance misuse and testing).

#### **5. Notes**

Spare.

## Section 328 - Knowingly giving false answers during the enlistment procedure

### 328. Knowingly giving false answers during the enlistment procedure

- (1) The Defence Council may by regulations make provisions with respect to the enlistment of persons into the regular forces (including enlistment outside the United Kingdom).
- (2) The regulations (The Armed Forces (Enlistment) regulations 2008 Art 9) make provision for –
  - ((a) – (e) and (g) omitted)
  - (f) creating offences relating to knowingly giving false answers during the enlistment procedure.
- (3) Omitted.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in rows 2-12 of the Table in section 164.

(AFA06 s. 328)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>743</sup>.

### 2. Specimen charges

KNOWINGLY GIVES FALSE ANSWERS DURING THE ENLISTMENT PROCEDURE  
CONTRARY TO SECTION 328(2)(f) OF THE ARMED FORCES ACT 2006

[AB] on ....., did knowingly give false answers to questions contained in the enlistment paper and put to them by the recruiting officer, for the purposes of enlisting in the UK regular forces.

### 3. Ingredients of the offence

*Knowingly gives false answers*

Means that the accused knew that the answers they gave were false. In this case, that the answers they have made in relation to the enlistment paper and those put to them by the recruiting officer, are known to them to be false at the time they made the answer.

*Enlistment paper*

This is the document prescribed in The Armed Forces (Enlistment) Regulations 2008, Schedule 2, and is used in connection with the enlistment of a person in the regular forces. It contains personal details of the person including name, date of birth, place of birth, nationality, partner's details, previous convictions etc

*Recruiting officer*

Means a person who is appointed by:

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<sup>743</sup> Section 53 of the Act.

- a. The Defence Council, who may appoint any British consul-general, consul or vice-consul and any person duly exercising the authority of a British consul, in a country or territory of which Her Majesty is not the head of state; or
- b. The Naval Secretary, Military Secretary and Air Secretary and any officer on their staffs not below the rank of naval captain, colonel or group captain who may appoint an officer.

*United Kingdom Regular Forces*

Means the Royal Navy and Royal Marines, the British Army and the Royal Air Force.

**4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

**5. Notes**

Spare.

## Section 343 - Offences in relation to Service inquiries

Section 343(4) of the Armed Forces Act 2006 makes provision for regulations to be made by the Secretary of State to create offences in connection with Service Inquiries. These regulations are contained within The Armed Forces (Service Inquiries) Regulations 2008, and the extent and detail of the offences is contained in regulation 16.

### Offences under the Armed Forces (Service Inquiries) Regulations 2008 Regulation 16.

#### 343. Offences under the Armed Forces (Service Inquiries) Regulation 2008 Regulation 16.

- (1) A person is guilty of an offence if he fails without reasonable excuse to do anything that he is required to do by a witness notice served upon him in accordance with regulation 14 (witness notice).
- (2) A person is guilty of an offence if, during a service inquiry, he does anything that is intended to have the effect of—
  - (a) distorting or otherwise altering any evidence, document or other thing that is given, produced or provided to a service inquiry panel, or
  - (b) preventing any evidence, document or other thing from being given, produced or provided to a service inquiry panel, or does anything that he knows or believes is likely to have such effect.
- (3) A person is guilty of an offence if, during a service inquiry —
  - (a) he intentionally suppresses or conceals a document that is, and that he knows or believes to be, a relevant document, or
  - (b) he intentionally alters or destroys any such document.
- (4) For the purposes of paragraph (3) a document is a “relevant document” if it is likely that the service inquiry panel would (if aware of its existence) wish to be provided with it.
- (5) A person does not commit an offence under paragraph (2) or (3) by doing anything that he is authorised to do by the president or by virtue of regulation 13(5).
- (6) An offence under any of paragraphs (1) to (3) is triable summarily by a civilian court in the United Kingdom, the Isle of Man or in a British overseas territory, and shall be punishable by a fine not exceeding level 3 on the standard scale.

(AFA06 s.343)

#### 1. Type of offence

An offence under this section **may be** heard summarily<sup>744</sup>.

#### 2. Specimen charges

FAILURE TO COMPLY WITH A WITNESS NOTICE SERVED IN CONNECTION WITH A SERVICE INQUIRY CONTRARY TO THE ARMED FORCES ACT 2006 SECTION 343(4) NAMELY REGULATION 16 OF THE ARMED FORCES (SERVICE INQUIRIES) REGULATIONS 2008

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<sup>744</sup> Section 53 of the Act.

### Regulation 16(1)

[AB] did, on ....., at....., without reasonable excuse fail to act in accordance with a witness notice by failing to .....

COMMITTING AN ACT INTENDED TO HAVE AN EFFECT ON A SERVICE INQUIRY  
CONTRARY TO THE ARMED FORCES ACT 2006 SECTION 343(4) NAMELY  
REGULATION 16 OF THE ARMED FORCES (SERVICE INQUIRIES) REGULATION 2008

### Regulation 16(2)(a)

[AB] did, between ..... and ....., during the course of a Service Inquiry, distort or alter any [evidence, document or other thing given, produced or provided] to a Service Inquiry panel.

### Regulation 16(2)(b)

[AB] did, between ..... and ....., during the course of a Service Inquiry, prevent any [evidence, document or other thing] from being [given, produced or provided] to a Service Inquiry panel.

### Regulation 16(3)(a)

[AB] did, between ..... and ....., during the course of a Service Inquiry, intentionally suppress or conceal a document knowing or believing it to be a relevant document to the conduct of the Service Inquiry panel.

### Regulation 16(3)(b)

[AB] did, between ..... and ....., during the course of a Service Inquiry, intentionally destroy a relevant document.

## **3. Ingredients of the offence**

### *Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Witness notice*

Is a notice issued on application to a judge advocate<sup>745</sup>.

### *Distort, alter, suppress, conceal or destroy*

Should be given their normal dictionary meaning.

### *Service Inquiry panel*

Has the same meaning as in section 343 and *panel* is to be construed accordingly.

### *Document*

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<sup>745</sup> The Armed Forces (Service Inquiries) Regulations 2008, regulation 13.

Includes information recorded in any form. References to producing or providing a document in relation to information recorded are to be read as producing or providing a copy of the information in a legible form.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

Evidence given by persons to a Service Inquiry panel is not admissible against a person at a summary hearing or in proceedings before a civilian court or a Service court (Summary Appeal Court, Court Martial, Service Civilian Court or Court Martial Appeal Court).

For further information pertaining to Service Inquiries<sup>746</sup> and perjury in relating to evidence given at a Service Inquiry see [Chapter 6](#) (Investigation, charging and mode of trial).

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<sup>746</sup> See JSP 832 (Service Inquiries).



## Section 18(8) Armed Forces Act 1991 – Family child assessment order

### 18(8) Family Child Assessment Orders

(8) A person subject to service law or a civilian subject to service discipline, commits an offence if he intentionally obstructs any person exercising a power conferred by virtue of the making of an assessment order.

(8A) A person guilty of an offence under this section is liable to any punishment mentioned in rows 5 to 12 of the Table in section 164 of the Armed Forces Act 2006.

(8B) For the purpose of determining the court's powers when sentencing a civilian offender (within the meaning of Part 1 of Schedule 3 to the Armed Forces Act 2006) for an offence under this section, subsection (8A) has effect as if the reference were to rows 5 to 12 were to rows 2 to 7.

(8C) For the purpose of determining the court's powers when sentencing an offender to whom Part 2 of that Schedule applies (ex-servicemen etc) for an offence under this section, subsection (8A) has effect as if the reference were to rows 5 to 12 were 5 to 10.

(AFA91 s.18(8))

### 1. Type of Offence

An offence under section 18(8) **may not be** heard summarily<sup>747</sup>.

### 2. Specimen Charge

OBSTRUCTING A PERSON CARRYING OUT A FAMILY CHILD ASSESSMENT ORDER  
CONTRARY TO SECTION 18(8) OF THE ARMED FORCES ACT 1991

[AB] on the .... day of ..... obstructed [name], a person carrying out a family child assessment order.

### 3. Ingredients of Offence

*A person subject to service law / civilian subject to service discipline (subsection 1(a) and (4))*

For persons subject to service law and civilian subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

#### *Intentionally*

An act is done intentionally if it is deliberate and wilful, not accidental or inadvertent. It is therefore necessary for the prosecution to prove that the act in question was done with the intention of obstructing. Provided that the person charged intended to do an act which amounted to obstruction, it is immaterial that they did not appreciate that what they did amounted in law to obstruction.

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<sup>747</sup> Section 53 Schedule 2 of the Act.

### *Obstructs*

Obstruction need not involve physical violence; anything which makes it more difficult for a person to carry out their duty amounts to obstruction.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It would be a defence to this charge for the accused to show that they did not act intentionally, but accidentally or inadvertently.

## **5. Notes**

Spare.

## Section 20(9) Armed Forces Act 1991 – Obstructing a person exercising the power to remove a child.

### 20(9)

(9) A person subject to service law, or a civilian subject to service discipline, commits an offence if he -

(a) intentionally obstructs any person exercising the power under subsection (2)(b) above to remove, or prevent the removal of, a child; or (b) intentionally fails to comply with an exclusion requirement included in a protection order by virtue of section 20A below.

(9A) A person guilty of an offence under this section is liable to any punishment mentioned in rows 5 to 12 of the Table in section 164 of the Armed Forces Act 2006.

(9B) For the purposes of determining the court's powers when sentencing a civilian offender (within the meaning of Part 1 of Schedule 3 to the Armed Forces Act 2006) for an offence under this section, subsection (9A) has effect as if the reference to rows 5 to 12 were to rows 2 to 7.

(9C) For the purposes of determining the court's powers when sentencing an offender to whom Part 2 of that Schedule applies (ex-servicemen etc) for an offence under this section, subsection (9A) has effect as if the reference to rows 5 to 12 were to rows 5 to 10.

(AFA91 s.20(9))

### 1. Type of Offence

An offence under section 20(9) **may not be** heard summarily<sup>748</sup>.

### 2. Specimen Charge

OBSTRUCTING A PERSON CARRYING OUT A PROTECTION ORDER CONTRARY TO SECTION 20(9)(a) OF THE ARMED FORCES ACT 1991

[AB] on the .... day of ..... obstructed [name], a person carrying out a protection order.

FAILURE TO COMPLY WITH AN EXCLUSION ORDER CONTRARY TO SECTION 20(9)(b) OF THE ARMED FORCES ACT 1991

[AB] on the .... day of .... failed to comply with an exclusion order in that (s)he [*failed to leave relevant premises at... / entered relevant premises at / entered defined area*]

### 3. Ingredients of Offence

*A person subject to service law / civilian subject to service discipline (subsection 1(a) and (4))*

For persons subject to service law and civilian subject to service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Intentionally*

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<sup>748</sup> Section 53 Schedule 2 of the Act.

An act is done intentionally if it is deliberate and wilful, not accidental or inadvertent. It is therefore necessary for the prosecution to prove that the act in question was done with the intention of obstructing. Provided that the person charged intended to do an act which amounted to obstruction, it is immaterial that they did not appreciate that what they did amounted in law to obstruction.

### *Obstructs*

Obstruction need not involve physical violence; anything which makes it more difficult for a person to carry out their duty amounts to obstruction.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It would be a defence to this charge for the accused to show that they did not act intentionally, but accidentally or inadvertently.

## **5. Notes**

Spare.

## **RFA 96<sup>749</sup> Section 95. Reserve force offences**

**s.95**

**(1) A member of a reserve force who—**

- (a) when required by or in pursuance of orders or regulations under section 4 to attend at any place, fails without reasonable excuse to attend in accordance with the requirement;**
- (c) by any fraudulent means obtains or is an accessory to the obtaining of any pay or other sum contrary to orders or regulations under section 4;**
- (d) knowingly or recklessly makes a statement false in any material particular in giving any information required by orders or regulations under section 4; or**
- (e) fails without reasonable excuse to comply with orders or regulations under section 4,**

**(1A) A member of a reserve force ("A") commits an offence if--**

- (a) a superior officer ("B"), in pursuance of orders or regulations under section 4, is acting in the execution of his office;**
- (b) A's behaviour towards B is threatening or disrespectful; and**
- (c) A knows or has reasonable cause to believe that B is a superior officer.**

**(1B) For the purposes of subsection (1A)--**

- (a) "superior officer" has the same meaning as in the Armed Forces Act 2006;**
- (b) section 11(3) of that Act (meaning of "behaviour" and "threatening") applies.**

**(1C) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).]**

**(2) A person guilty of an offence under this section is liable--**

**(a) on conviction by the Court Martial--**

- (i) in the case of an offence under subsection (1)(a) or (e) or (1A), to any punishment mentioned in rows 5 to 12 of the Table in section 164 of the Armed Forces Act 2006;**
- (ii) in the case of an offence under subsection (1)(c) or (d), to any punishment mentioned in that Table, but any sentence of imprisonment or service detention imposed in respect of the offence must not exceed 51 weeks;**

**(b) on summary conviction by a civil court--**

- (i) in the case of an offence under subsection (1)(a), (e) or (1A), to a fine not exceeding level 3 on the standard scale; and**
- (ii) in the case of an offence under subsection (1)(c) or (d) to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale (or both).**

**(2A) For the purposes of determining the Court Martial's powers when sentencing an offender to whom Part 2 of Schedule 3 to the Armed Forces Act 2006 applies (ex-servicemen etc) for an offence under subsection (1)(a) or (e) or (1A), subsection (2)(a)(i) has effect as if the reference to rows 5 to 12 were to rows 5 to 10.**

**(RFA 96 s.95)**

<sup>749</sup> Reserved Forces Act 1996 is contained within MSL Volume 3.

## 1. Type of Offence

An offence under this section **may not be** heard summarily<sup>750</sup>, though it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

## 2. Specimen charges

### FAILURE TO ATTEND CONTRARY TO SECTION 95(1)(a) OF THE RESERVE FORCES ACT 1996

[AB] on ..... , without reasonable excuse failed to attend for guard duty at Melchett Barracks, Aldershot, when required to do so by an order made under Section 4 of the Reserve Forces Act 1996.

### OBTAINING PAY OR OTHER SUM BY FRAUDULENT MEANS CONTRARY TO SECTION 95(1)(c) OF THE RESERVE FORCES ACT 1996

[AB] on ..... fraudulently obtained [*pay amounting to £xx / the sum of £xx*] in that he falsely represented to [CD] that he was entitled to Lodging Allowance.

### MAKING A FALSE STATEMENT CONTRARY TO SECTION 95(1)(d) OF THE RESERVE FORCES ACT 1996

[AB] on ..... when required to give information by an order made under section 4 of the Reserve Forces Act 1996, knowingly made a statement that was false in a material particular, namely that he had never previously been married.

### FAILURE TO COMPLY WITH REGULATIONS CONTRARY TO SECTION 95 (1) (e) OF THE RESERVE FORCES ACT 1996

[AB] on ..... failed without reasonable excuse to comply with an order made under section 4 of the Reserve Forces Act 1996, in that he left his personal weapon unattended.

### USING THREATENING OR DISRESPECTFUL BEHAVIOUR TOWARDS A SUPERIOR OFFICER CONTRARY TO SECTION 95(1A)(a) OF THE RESERVE FORCES ACT 1996

[AB] on .... used threatening / disrespectful behaviour towards [CD], a superior officer.

## 3. Ingredients of Offence

*Without reasonable excuse*

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<sup>750</sup> Section 53 of the Act

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). An accused would have a reasonable excuse with regard to offences under s. 95(1)(a) if the order had genuinely never been communicated to them for whatever reason.

### *Knowingly / Recklessly*

To prove that the accused made the false statement knowingly, it must be shown that they knew that it was false and deliberately made it nonetheless. To prove that the accused was reckless when they made a statement under subsection (4) (b), it must be proved that the accused made a statement in the awareness of a risk that it might have been false, but unreasonably went on to take the risk and make the statement anyway.

### *Superior officer*<sup>751</sup>

Superior officer, in relation to a person (A), means an officer, warrant officer or non-commissioned officer who is subject to Service law and is of superior rank or rate to A; or is of equal rank or rate to A and is exercising authority as A's superior (see below).

It does not matter whether the superior officer is of the same or different Service to the accused, providing that the superior officer is also subject to Service law. This would include Service personnel from other nations when they are posted to serve with UK forces and become subject to Service law, but would not include, for example, coalition forces or other nations' personnel alongside whom UK Service personnel happen to be working.

A person of a higher rank or rate than the accused will always be their superior officer under the Act. In addition there can be occasions when someone of the same rank or rate as the accused will be their superior officer. This would not apply in the case of those of the lowest rank and rates in each Service: a private, able rate and airman (ac, LAC and SAC) can never be the superior officer of another private, able rate or airman. All other ranks or rates can become the superior officer of another person of the same rank where they are *exercising authority as [the accused's] superior*. In order to be their superior officer however it must be an official entitlement to exercise authority over the other, such as having been tasked to carry out a temporary duty or a specific assignment which puts them in a position of authority over that other individual. Where an accused does not know or does not have reasonable cause to believe that a person is their superior officer and uses violence against them consideration may be given to a charge under section 21 (fighting or threatening behaviour etc).

### *Knows or has reasonable cause to believe*

It is necessary that there was actual knowledge that the individual was a superior officer or that the accused had reasonable cause to believe they were a superior officer. If the superior officer was the accused's commanding officer or their sub unit commander this would be sufficient to prove actual knowledge, because the person and their rank were known to them. Similarly, if it is shown that the superior officer is a higher rank than the accused and at the time of the offence was in uniform this would impute actual knowledge. Where the superior officer is not known to the accused or is not in uniform it will be necessary to consider whether the accused knew in the circumstances, or whether they should have known. The

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<sup>751</sup> Section 367 of the Act.

test of whether they would have reasonable cause to believe is an objective one and should be judged on the evidence in the case. If the accused raises the issue that they did not know, it is not for them to prove that. In that case the person hearing the charge should consider the evidence produced, and the evidence of the accused and decide, on the basis of their view of the evidence, whether it has been shown that the accused knew or had reasonable cause to believe. In cases where the individuals are of the same rank or rate as each other there should be evidence of the superior's authority as well as how the accused was aware of that authority or had reasonable cause to be aware of it.

#### *Behaviour towards*

Behaviour here includes both actions and words, whether spoken or written. It does not matter what form the communication takes (email, text, signal, letter or telephone conversation etc). The behaviour does not have to be in the presence of the superior officer, but the superior officer must have been the intended recipient and the subject of the comment. For example, a comment made to a third party or muttered under one's breath deliberately within earshot of the superior officer. Alternatively, where an email is sent and the superior officer is an intended addressee. It is possible for this to be the case even when the accused is not in the superior officer's presence at the time they receive the communication. It is a question of fact whether the behaviour was *towards* the superior officer. This offence is not intended to be used to charge individuals in relation to comments they may make to each other in private about a superior officer. If threatening or insubordinate language is used about a superior officer to a third party, then consideration may be given to a charge under section 19 (conduct prejudicial to good order and discipline).

#### *Threatening or disrespectful*

*Threatening* behaviour can include anything said by the accused and is not limited to behaviour that threatens personal violence. Such behaviour can include any defiant gesture or act which would not necessarily end in actual violence for example threats to burn someone's house down, or to injure a member of their family. Threatening should be given its normal dictionary meaning and considered objectively. It is for the person hearing the charge to decide as a question of fact.

*Disrespectful* should also be given its normal dictionary meaning. Within the Service context, insubordinate language will always be disrespectful but it may also be threatening behaviour. Disrespectful covers the situation where a subordinate, having been given a lawful command which does not require immediate compliance, indicates in respectful words and tone that they do not intend to comply with the order. Disrespectful in this context means disrespectful of the authority of the superior. If the command is disobeyed, consideration may be given to a charge under section 12 (disobedience to a lawful command).

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

The offence under section 95 (1)(c) includes acting as a principal or an accessory. To be an accessory is the same as aiding and abetting an offence. To aid and abet means to assist the actual perpetrator of an offence (the principal offender): that assistance may be rendered at the time when the offence was committed or before the time when the offence was committed and at a different place. For example, to keep watch near the scene of the commission of an offence, or to distract someone's attention while an offence is committed,



is aiding and abetting if the aider and abettor knew what was going on. Likewise the supply of a weapon by a person who knew that there was a real possibility it would be used for murder, will make that person an aider and abettor (accessory) to the principal offence. The accused need not know the precise crime that was intended or which was committed: If they realise or contemplate that there is a real possibility that a number of offences may be committed, and one of those offences is committed, the fact that they have lent assistance to the principal to commit the offence will be sufficient.

It is important to note that a person charged with this offence will not be charged under this section, but under the principal offence they are alleged to have aided and abetted or counselled and procured. The distinction between aiding and abetting, counselling and procuring is not significant when it comes to wording the charge.

This section does not apply to criminal conduct offences (section 42 of the Act). Under the criminal law of England and Wales a person who aids, abets, counsels or procures the commission of a criminal offence has their charge found proved of that offence under common law. Where the offence is a criminal conduct offence, consideration should be given to bringing a charge under section 47 of the Act which modifies that common law offence for the purposes of the Act.

## RFA 96<sup>752</sup> Section 96. Failure to attend for service on call out or recall

### 42. RFA 96 Section 96. Failure to attend for service on call out or recall

- (1) A member of a reserve force served with a call-out notice under any provision of this Act who, without leave lawfully granted or reasonable excuse-
  - (a) fails to present himself for service at the time and place specified in the call-out notice under section 32(3)(b), 43(4)(b) or 58(3)(c) (as the case may be);
  - (b) having so presented himself, fails to remain there until accepted into service or informed that he is not to be accepted into service in pursuance of that notice; or
  - (c) where he has for any reason failed to present himself at the time and place so specified or to remain there, fails-
    - (i) to present himself to a person specified in the call-out notice or to any other authorised officer; or
    - (ii) having so presented himself, to remain until accepted into service or informed that he is not to be accepted into service in pursuance of that notice,is guilty of desertion (if section 8(2)(a) or (b) of the Armed Forces Act 2006 applies to him) or absence without leave (if neither of those provisions applies to him).
- (2) Subsection (1) above applies to a person liable to recall as it applies to a member of a reserve force –
  - (a) with the substitution for references to a call-out notice of references to a recall notice; and
  - (b) as if paragraph (a) of that subsection referred to the time and place specified in the recall notice under section 70(3)(c).
- (3) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).

(RFA 96 s.96)

### 1. Type of offence

An offence of desertion under this section (as applied by section 8 of the Act) **may not be** heard summarily<sup>753</sup>, although it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence of absence without leave under this section (as applied by section 9 of the Act) **may be** heard summarily<sup>754</sup> and tried summarily by a civil court.

### 2. Specimen charges

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(a)

<sup>752</sup> Reserved Forces Act 1996 is contained within MSL Volume 3.

<sup>753</sup> Section 53 and Schedule 2 of the Act.

<sup>754</sup> Section 53 of the Act.

[AB] absented himself without leave from [date] to [date] by failing to present himself at the time and place specified [in the call-out/recall notice].

#### FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(b)

[AB] absented himself without leave from [date] to [date] by having presented himself under the terms of the [call-out/recall notice], failed to remain there until accepted into service or on being informed that he was not to be so accepted.

#### FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(c)(i)

[AB] absented himself without leave from [date] to [date] by failing to present himself in accordance with the [call-out/recall] notice or to remain there, failed to present himself to a person specified in the notice or to any other specified officer.

#### FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(c)(ii)

[AB] absented himself without leave from [date] to [date] by failing to present himself in accordance with the [call-out/recall] notice or to remain there, and having so presented himself, to remain until accepted into service or informed that he is not to be accepted for service.

### 3. Ingredients of the offence

#### *Member of the reserve forces*

It must be proved that the accused was a member of a reserve force see [Chapter 3](#) (Jurisdiction and time limits) when served with a call-out notice. For the purposes of the Reserve Forces Act 1996 (RFA 96), reserve forces means the following forces—

- a. The Royal Fleet Reserve, the Royal Naval Reserve and the Royal Marines Reserve (“the reserve naval and marine forces”);
- b. The Army Reserve and the Territorial Army (“the reserve land forces”); and
- c. The Air Force Reserve and the Royal Auxiliary Air Force (“the reserve air forces”).

An accused will also be a member of the reserve forces for the purposes of this offence if they are a person liable to recall<sup>755</sup>.

#### *Service of call-out notice or recall notice*

It must be proved that the accused was served with a call-out notice. For issues concerning service see [Chapter 19](#) (Service of process).

The call-out notice for the purposes of section 96(1) shall be those made under section 32(3)(b), 43(4)(b) or 58(3)(c) of the RFA 96.

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<sup>755</sup> Reserve Forces Act 1996, section 66.

*Fail to present or failure to remain.*

Evidence will be required that the person failed to present himself at the time and place specified in the call-out notice or that they did present himself but then failed to remain at the specified place until accepted for service or informed that they were not to be accepted into service.

Authorised officer

This means an officer authorised by or in accordance with directions of the Defence Council under section 35 of the RFA 96.

*Desertion*

In addition to the ingredients above, the offence of desertion under section 96 of the RFA 96 (as applied by section 8 of the Act) requires proof of the accused's intent either to remain permanently absent without leave, or to avoid relevant service. For intent as it applies to desertion and desertion generally, refer to section 8 of the Act.

*Absence without leave*

It must be proved that the accused was absent from their unit, or other place of duty and that the accused's absence was not authorised. He may either improperly have left their unit or they may have failed to return to it at the required time. The accused would be absent without leave where they had never been granted leave or where they remained absent after authorised leave had expired, or where their leave had been rescinded by a subsequent lawful order to return to their unit. In all cases it would be necessary to prove by evidence that there was no authorised leave in place. Where authorised leave had been rescinded this would require evidence that that fact had been communicated to them.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point they return, or are apprehended. It will be for evidence to establish these points. A Service person who is absent without leave ceases to be absent if they are taken into Service custody, is arrested by a constable as suspected of being an absentee or if they surrender themselves as being illegally absent to a provost officer or to a Service unit or to a constable or at a police station in the UK or consular officer elsewhere.

*Intentionally, recklessly, negligently*

For intention, negligence or recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For intention, negligence or recklessness regarding absence without leave, refer to section 9 of the Act.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For defences regarding absence without leave, see section 9 of the Act. For desertion see section 8 of the Act.

## **5. Notes**

### *Time limits for commencing proceedings*

Section 107 of the RFA 96 (as amended) prescribes time limits for instituting proceedings in the civil courts; reference to proceedings at Court Martial have been deleted from this section. However these time limits are not the same as those established by section 62 of the Act for charging RFA offences. The section 62 time limits prescribed by the Act would apply if an offence under this section is to be prosecuted at Court Martial.

If a person liable to recall is charged under this section, references to 'call-out notices' shall be substituted by the words 'recall notice'.

## RFA96<sup>756</sup> Section 97. Failure to attend for duty or training

### 42. RFA96 Section 97. Failure to attend for duty or training

- (1) A member of a reserve force who has entered into a full-time service commitment or additional duties commitment and, without leave lawfully granted or reasonable excuse, fails to appear at the time and place at which he is required to attend-
  - (a) in the case of a full-time service commitment, to begin the period of full-time service contemplated by the commitment;
  - (b) in the case of an additional duties commitment, to begin a period of service under the commitment, to begin a period of service under the commitment,is guilty of desertion (if section 8(2)(a) or (b) of the Armed Forces Act 2006 applies to him) or absence without leave (if neither of those provisions applies to him).
- (2) A member of a reserve force who -
  - (a) is required to undergo a period of training in accordance with section 22, a special agreement or an employee agreement (or any other requirement applicable to special members), and
  - (b) fails, without leave lawfully granted or reasonable excuse, to appear at any time and place at which he is required to attend, is guilty of absence without leave.
- (3) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).

(RFA 1996 s.97)

### 1. Type of offence

An offence of desertion under this section (as applied by section 8 of the Act) **may not be** heard summarily<sup>757</sup>, although it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence of absence without leave under this section (as applied by section 9 of the Act) may be heard summarily<sup>758</sup> and tried summarily by a civil court.

### 2. Specimen charges

#### FAILURE TO ATTEND FOR DUTY OR TRAINING CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 97(1)(a)

[AB] absented himself without leave from [date] to [date] when he, having entered into a full-time service commitment, failed to appear at a time and place required to begin a period of full-time Service.

<sup>756</sup> Reserve Forces Act 1996 is contained within MSL Volume 3.

<sup>757</sup> Section 53 and Schedule 2 of the Act.

<sup>758</sup> Section 53 and Schedule 2 of the Act.

## FAILURE TO ATTEND FOR DUTY OR TRAINING CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 97(1)(b)

[AB] absented himself without leave from [date] to [date] when he, having entered into an additional duties commitment, failed to appear at a time and place required to begin a period of additional duties service.

All the above offences may be charged as desertion if the criteria under sections 8(2)(a) or (b) of the Act apply (intention to remain permanently absent or intention to avoid a period of active service).

## FAILURE TO ATTEND FOR DUTY OR TRAINING CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 97(2)

[AB] absented himself without leave from [date] to [date] when under a [special/employee agreement/annual training quota requirement (RFA section 22)] failed to appear at any time or place required to carry out a period of training.

### **3. Ingredients of the offence**

#### *Member of the reserve forces*

It must be proved that the accused was a member of a reserve force when they entered into a full-time service commitment or additional duties commitment. For the meaning of reserve forces see paragraph 3 of the commentary on section 96 of the Reserve Forces Act 96 (RFA 96).

#### *Full-time service commitment or additional duties commitment*

It must be proved that such a commitment has been entered into by the accused. For a full-time service commitment, such evidence should be contained in a written document in accordance with section 24 of the RFA 96. For an additional duties commitment, such evidence should be contained in a written document in accordance with section 25 of the RFA 96.

#### *Failure to appear.*

Evidence will be required that the person failed to appear at the time and place at which they were required to attend. In the case of a full-time service commitment (subsection (1)(a)), to begin the period of full-time service contemplated by the commitment. In the case of an additional duties commitment (subsection (1)(b)) to begin a period of service under the commitment.

#### *Desertion*

See section 8 of the Act and section 96 of the RFA 96. If there is no evidence of desertion then the proper charge is one of absence without leave.

#### *Absent without leave*

It must be proved that the accused was absent from their unit, or other place of duty and that the accused's absence was not authorised. He may either improperly have left their unit or they may have failed to return to it at the required time. The accused would be absent without leave where they had never been granted leave or where they remained absent after authorised leave had expired, or where their leave had been rescinded by a subsequent lawful order to return to

their unit. In all cases it would be necessary to prove by evidence that there was no authorised leave in place. Where authorised leave had been rescinded this would require evidence that that fact had been communicated to them.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point they return, or are apprehended. It will be for evidence to establish these points. A Service person who is absent without leave ceases to be absent if they are taken into Service custody, is arrested by a constable as suspected of being an absentee or if he surrenders themselves as being illegally absent to a provost officer or to a Service unit or to a constable or at a police station in the UK or consular officer elsewhere.

#### *Intentionally, negligently or recklessly*

For intention, negligence or recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For intention, negligence or recklessness regarding absence without leave, refer to section 9 of the Act.

#### *Required to attend training*

A person will be required to attend training in accordance with section 22 RFA 96, a special agreement under section 28 of the RFA 96, or an employee agreement under sections 38 and 39 of the RFA 96 (or any other requirement applicable to special members under section 40 of the RFA 96).

#### *Failure to appear.*

Evidence will be required that the person failed to appear at any time and place at which they were required to attend.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

For defences regarding absence without leave, see section 9 of the Act. For desertion see section 8 of the Act.

### **5. Notes**

#### *Time limits for commencing proceedings*

Section 107 of the RFA 96 (as amended) prescribes time limits for instituting proceedings in the civil courts; reference to proceedings at Court Martial have been deleted from this section. However these time limits are not the same as those established by section 62 of the Act for charging RFA offences. The section 62 time limits prescribed by the Act would apply if an offence under this section is to be prosecuted at Court Martial.



## RFA96 Schedule 1 paragraph 5 - False answers in attestation papers

5

(1) Any person appearing before an enlisting officer for the purpose of being attested who knowingly makes a false answer to any question contained in the attestation paper and put to him by or by the direction of the enlisting officer is guilty of an offence.

(2) A person guilty of an offence under sub-paragraph (1) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale (or both); and he may be proceeded against summarily notwithstanding that he has since become a member of the reserve forces.

(3) A person guilty of an offence under sub-paragraph (1) who has since become a member of the reserve forces is liable on conviction by the Court Martial to any punishment mentioned in rows 2 to 12 of the Table in section 164 of the Armed Forces Act 2006.

(4) For the purposes of determining the Court Martial's powers when sentencing an offender to whom Part 2 of Schedule 3 to the Armed Forces Act 2006 (ex-servicemen etc) applies for an offence under sub-paragraph (1), sub-paragraph (3) has effect as if the reference to rows 2 to 12 were to rows 2 to 10.

(5) Where an offence under sub-paragraph (1) is committed by a person within sub-paragraph (3), the time for which he is for the purposes of section 62 of the Armed Forces Act 2006 (time limits for charging) to be regarded as being a relevant reservist (within the meaning of that section) includes the period from (and including) the time he committed the offence to the time he became a member of the reserve forces.

(RFA 1996 Schedule 1)

### 1. Type of Offence

An offence under this section **may not be** heard summarily<sup>759</sup>, though it may be tried summarily by a civil court. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

MAKING A FALSE ANSWER TO AN ATTESTING OFFICER CONTRARY TO SCHEDULE 1 PARAGRAPH 5(1) OF THE RESERVE FORCES ACT 1996

[AB] on ..... knowingly made a false answer to a question put to him by [CD] an attesting officer, in that he stated that he had no previous criminal convictions.

### 3. Ingredients of Offence

*Knowingly*

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<sup>759</sup> Section 53 of the Act

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility). There must be evidence to show that the accused fully knew that what they were saying was false when they made the statement in question.

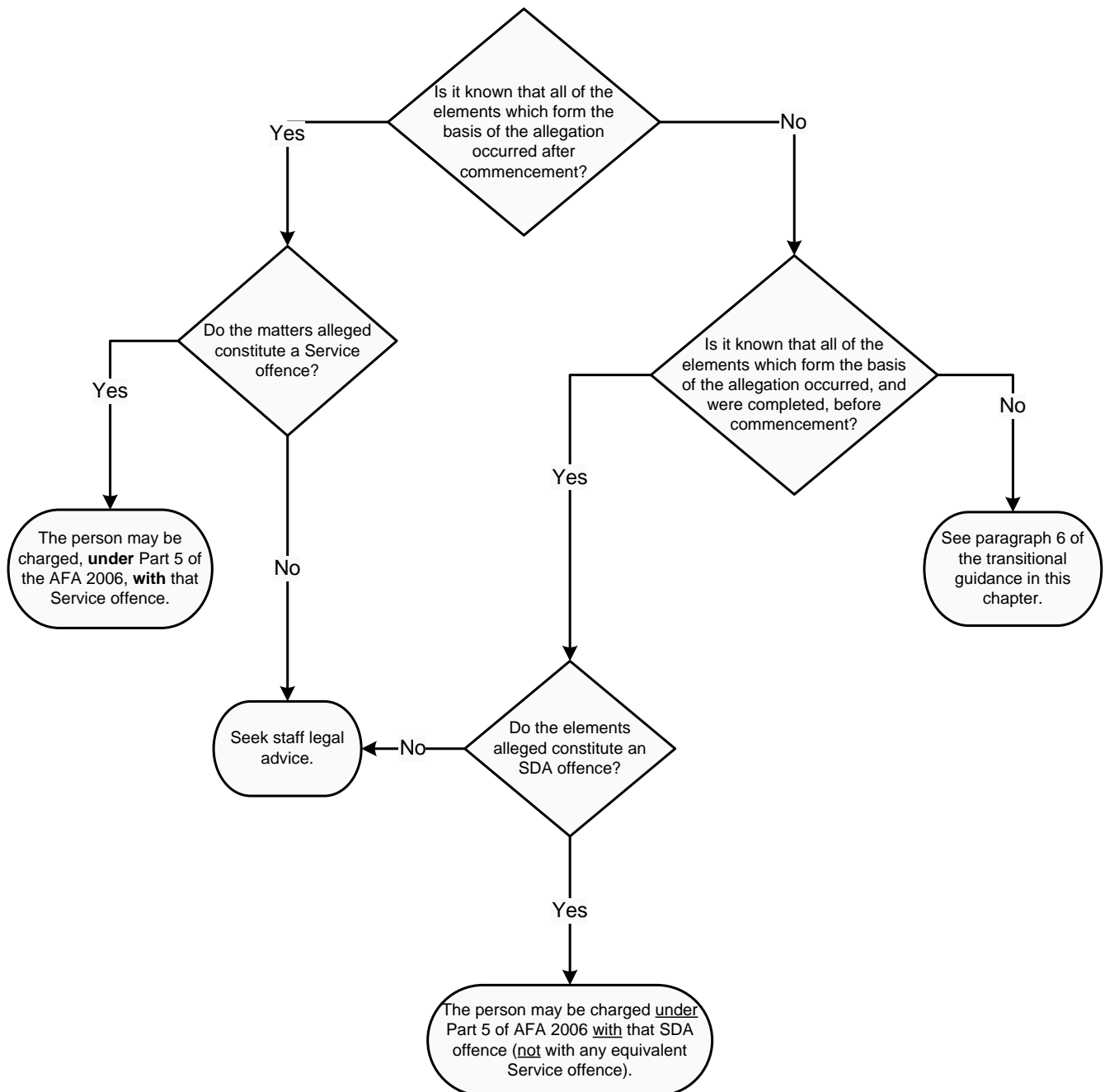
#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

Spare.

## TRANSITIONAL GUIDANCE



# Chapter 8

## Criminal conduct offences

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## **Annex**

A. Transitional guidance flowchart

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## Chapter 8

### Criminal conduct offences

#### Introduction

1. This chapter contains information pertaining to those occasions when Service personnel and/or relevant civilians commit criminal conduct offences which may be dealt with summarily. Some of these offences require prior permission from higher authority before the charge can be heard. However, those of a more serious or complex nature, may be referred for Court Martial trial.

2. Those mentioned below represent some of the most common criminal conduct offences tried within the Service jurisdiction, but do not represent the wide range of offences against the criminal law.

#### Chapter structure

3. This chapter is structured to address each offence in the following format:

<b>Reference to appropriate Act</b>	Offence as detailed within the relevant Act
<b>Type of offence</b>	Details of how the offence should be dealt with
<b>Specimen charges</b>	Provided to assist in drafting of charges but where in doubt the advice of the DSP or staff legal advice should be sought
<b>Ingredients of the offence</b>	Guidance to the meaning of particular elements of the offence
<b>Defences</b>	Contains defences which are particular to the offence. Other defences will be contained within <a href="#">Chapter 12</a> (Defences, mitigation and criminal responsibility)
<b>Notes</b>	Further guidance and alternative charges

#### Transitional guidance

4. Application of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 can be complicated and staff legal advice should always be taken. This guidance is restricted to the more common straightforward cases; however more complex situations will need careful consideration on a case by case basis. In all cases reference should be made to the Order itself, in particular, in the case of charging offences<sup>760</sup>.

5. Where a person commits an offence before commencement (i.e. 31<sup>st</sup> October 09), the suspect cannot be charged with a Service offence (i.e. one of those offences set out in section 50 of the AFA 06). Instead, the suspect must be charged with the relevant SDA offence. For transitional purposes, and for the purposes of the flowchart at [Annex A](#), an 'SDA offence' means any of the following (note that, for those purposes, the expression includes more than just offences under the 1955 and 1957 acts):

- a. Any offence under Part 2 of AA 1955 or AFA 1955;

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<sup>760</sup> See Parts 1 to 3 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

- b. Any offence under Part 1 of NDA 1957;
- c. An offence under section 47K of NDA 1957;
- d. An offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed before commencement;
- e. An offence under section 18 or 20 of AFA 1991 committed before commencement;
- f. An offence under any of sections 95 to 97 of RFA 1996 committed before commencement; or
- g. An offence under paragraph 5(1) of Schedule 1 to RFA 1996 committed before commencement by a person within a specific category<sup>761</sup>.

6. For example, if a soldier steals something on the 29 Sep 09 (whilst subject to military law) but that offence does not come to light until on or after the 31 Oct 09, the soldier must be charged under section 70 of the AA55. They must not be charged with an offence under section 42 of the AFA 06. Where an accused is charged with a SDA offence, the SDA offence can be tried by a Service court or can be dealt with in a summary hearing under the AFA 06 by virtue of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

7. In most cases it will be obvious whether the suspect should be charged with an AFA 06 offence or a SDA offence. There may however be some situations where the matter is not so clear. Where these situations arise COs should seek staff legal advice before bringing a charge. The situations arise where:

- a. **The offence is incomplete at commencement (relevant to offences under paragraphs 5a, b, f or g above).** An offence will be incomplete at commencement if the SDA offence has two or more elements and at least one of the elements occurs prior to commencement and at least one occurs after commencement. Where this occurs the accused can be charged under the relevant SDA offence even though the last element of the offence does not occur until after 31 Oct 09<sup>762</sup>. So for example, if a soldier deliberately leaves the ignition key in a Service vehicle on 30 Oct 09 with the result that the vehicle is stolen on 31 Oct 09, the soldier can be charged under the relevant SDA provision (in this case section 44(1)(b) of the AA55).
- b. **A course of conduct is still ongoing at commencement (relevant to offences under paragraphs 5a, b or f above).** This situation is most likely to occur where a Service person is AWOL. For example, where a soldier goes absent prior to commencement and does not return until after commencement. The effect of article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 is that the whole course of conduct (both before and after commencement) can be charged under section 38 of the AA55. It will also be permissible to charge the accused with two shorter periods of AWOL; one under the AA55 for the period that terminates at commencement and one under section 9 of the AFA 06 which begins at commencement<sup>763</sup>.
- c. **It is not clear when the conduct occurred.** This situation might arise where a suspect is alleged to have committed an offence within a period that began before 31 Oct 09 but finished after this date, but it is unclear exactly when (during the period) that

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<sup>761</sup> See article 2(5) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>762</sup> See article 9 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>763</sup> See article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

alleged offence was committed. For example, in January 2010 a recruit might complain that they were assaulted during training a couple of months earlier, but cannot remember whether the assault occurred before or after 31 Oct 09. Where this occurs the suspect can be charged under the relevant SDA provision. However, the suspect must only be charged with the relevant SDA offence where the alleged conduct must have been an offence. The only question is when it was committed, and therefore which offence it was. In the example above, the assault must have been either an offence under section 70 of the AA/AFA55 (or section 42 of the NDA57) or an offence under section 42 of the AFA06. If the alleged conduct amounts to an offence under the SDAs but does not amount to any offence under AFA06, it must be proved to have occurred before commencement. Conversely, if it would be an offence under AFA06 but not under the SDAs, it must be proved to have occurred after commencement<sup>764</sup>.

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<sup>764</sup> See article 11 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.



## **Criminal conduct - section 42 Armed Forces Act 2006**

### **42. Criminal conduct**

- (1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that-

  - (a) is punishable by the law of England and Wales; or
  - (b) if done in England or Wales, would be so punishable.
- (2) A person may be charged with an offence under this section even if he could on the same facts be charged with a different service offence.
- (3) A person guilty of an offence under this section is liable to—

  - (a) if the corresponding offence under the law of England and Wales is under that law an offence punishable with imprisonment, any punishment mentioned in the Table in section 164;
  - (b) otherwise, any punishment mentioned in rows 5 to 12 of that Table.
- (4) Any sentence of imprisonment or fine imposed in respect of an offence under this section must not exceed—

  - (a) if the corresponding offence under the law of England and Wales is a summary offence, the maximum term of imprisonment or fine that could be imposed by a magistrates' court on summary conviction;
  - (b) if that corresponding offence is an indictable offence, the maximum sentence of imprisonment or fine that could be imposed by the Crown Court on conviction on indictment.
- (5) In subsection (4) “a summary offence” and “an indictable offence” mean, respectively, a summary offence under the law of England and Wales and an indictable offence under that law.
- (6) In this section and sections 45 to 49 “act” includes an omission and references to the doing of an act are to be read accordingly.
- (7) In subsections (1) and (8) and sections 45 to 49 “punishable” means punishable with a criminal penalty.
- (8) In this Act “the corresponding offence under the law of England and Wales”, in relation to an offence under this section, means—

  - (a) the act constituting the offence under this section; or
  - (b) if that act is not punishable by the law of England and Wales, the equivalent act done in England or Wales.

3. The effect of this section is to establish an offence creating provision so that an act or omission done by a person subject to Service law or a civilian subject to Service discipline<sup>765</sup>, see [Chapter 3](#) (Jurisdiction and time limits) anywhere in the world will be an offence under Service law if (a) it is a crime under the law of England and Wales or (b) had it been done in England or Wales would have been a crime under that law.

4. As to (a) this is straightforward: if the act or omission is a crime under English law it will be an offence under Service law. As to (b) this does not mean that every offence under English Criminal law is capable of being translated to apply to acts or omissions abroad, for example a regulatory offence relating solely to conditions in the UK or the EU or a road traffic offence which could only be committed by reference to a place in the domestic jurisdiction.

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<sup>765</sup> Schedule 15 of the Act.

Each instance must be assessed on its own merits and advice from an appropriate staff legal adviser may be sought.

# Violence offences

## Common assault and battery

### Section 39 of the Criminal Justice Act 1988 provides:-

Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>766</sup>.

Section 39 of the Criminal Justice Act 1988 creates two separate offences namely assault and battery (see notes on drafting of charges below).

In all cases before bringing a charge a CO should consider whether the circumstances reveal a prescribed circumstance or whether there is an allegation or circumstances which indicate that a Schedule 2 offence has been committed. These may not be dealt with summarily<sup>767</sup>. For the handling of cases in relation to Schedule 2 offences and prescribed circumstances see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these circumstances they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY COMMON ASSAULT CONTRARY TO SECTION 39 OF THE CRIMINAL JUSTICE ACT 1988

[AB] on ....., assaulted [CD].

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY BATTERY CONTRARY TO SECTION 39 OF THE CRIMINAL JUSTICE ACT 1988

[AB] on ....., assaulted [CD] by beating him.

### 3. Ingredients of the offences

#### *Assault*

Assault is an act by which a person, intentionally or recklessly, causes another person (the victim) to apprehend immediate unlawful personal violence.

#### *An act*

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<sup>766</sup> Section 53 Schedule 1 Part 1 of the Act.

<sup>767</sup> Section 53, section 114 and Schedule 2 of the Act.

It is necessary to show that the accused did something – an assault cannot be committed by omission. Words alone may constitute an assault, or words accompanied by some threatening act. Mere silence can however constitute an assault if the other elements of the offence are present e.g. where an accused makes a threatening action but does not say anything.

In view of the requirement that the victim must be caused to fear immediate unlawful violence (see below) a silent telephone call is unlikely to constitute an assault. Words may also deprive an act such as a gesture of its otherwise threatening character.

#### *Intentionally*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Recklessly*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *To apprehend*

This phrase should be given its normal dictionary meaning and will require the victim to have been aware of the accused's actions at the time.

#### *Immediate unlawful violence*

The threat of violence must be immediate. It is not sufficient for the threat to relate to an occurrence in the future. Therefore a person in Germany who phones a person in the UK and threatens to beat them up when they next meet will not have committed this offence.

The threat must relate to unlawful violence. Thus, it will not be an offence if a person threatens to use force lawfully, for example, where a police officer threatens to lawfully restrain a person who is resisting arrest.

## **Battery**

Battery is the intentional or reckless application of unlawful force by one person upon another, however slight. This offence can be committed intentionally or recklessly.

#### *Intentional*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Recklessly*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Application of unlawful force*

The slightest touch may amount to unlawful force for these purposes. The victim must be subject to the application of direct or indirect force for example, being punched or being struck by a bottle thrown by the accused. It would also be a battery if the accused set a dog upon the victim.

The fundamental principle is that every person's body is inviolate. The effect is that everybody is protected against physical injury and any form of molestation. There are however exceptions to this principle for example, where lawful force is applied to arrest a

suspect. Additionally, a broader exception also exists to cater for the exigencies of everyday life which results in contact between individuals. Thus, jostling in a crowd or touching someone to get their attention, would not normally come within the remit of battery. The test to be applied is whether the physical contact is so persistent in the particular circumstances as to go beyond generally accepted standards of conduct.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

##### *Self defence*

A person may lawfully use force to defend himself (or other people, for guidance on which, see below) from attack or from threatened attack provided that they used force only when it was necessary, and they used no more force than was reasonable in the circumstances.

Although the force used must be reasonable and necessary, it is recognised that a person defending himself cannot always weigh precisely the exact amount of defensive action which is necessary. To be lawful, the amount of force that an accused uses must be proportionate to the immediate threat posed (or that they believe is posed) at the time. This depends on the facts, such as the nature of the attack, whether a weapon was used, and if so what sort of weapon. If it is assessed that an accused did no more than they instinctively thought necessary, that would be very strong evidence that the amount of force used was both necessary and reasonable.

In some cases it may be sensible and possible to take some avoiding action. A failure to retreat from the threat by the accused does not necessarily mean that the accused did not act in self defence. It is simply a factor to take into account when deciding whether it was necessary for the accused to use force and whether the force used was reasonable.

There is no rule of law which requires that the accused must wait until they are struck before using force in self defence. It is lawful to use reasonable force to deal with a threat that is imminent. Even if the accused appears to have been the initial aggressor, his subsequent acts may have been lawful self-defence to retaliatory violence by the victim.

The burden of disproving that this defence is available does not arise unless some admissible evidence of this defence is presented. This evidence may be presented by the accused, or any other witness in the case. Once this defence has been raised, if the officer hearing the charge is convinced of the accused's innocence or is left in doubt as to whether the accused might have acted in self defence, they should find the charge not proven. It is a defence for an accused to act in self defence even if they were mistaken about being the victim of an attack. Thus, if the accused used force because they mistakenly but honestly and reasonably believed they were the victim of an attack, they should be acquitted as long as the force used was reasonable and necessary in the circumstances as they understood them to be.

##### *Defence of others*

The same principles that apply in relation to self defence apply where the accused acts in the defence of a third party. Thus his actions must be proportionate in the circumstances as they perceived them to be.

##### *Prevention of crime etc*

An accused may also use such force as is reasonable in the circumstances in the prevention of crime or in assisting the lawful arrest of offenders.

### *Defence of property*

An accused may also use force to prevent a person taking his goods or prevent another person trespassing on his property.

### *Consent*

An accused will not commit an offence under section 39 of the Criminal Justice Act 1988 if the alleged victim has consented to the force used against them, for example, where force is used against another when participating in sporting activities. However, conduct that goes beyond what a player can reasonably be regarded as having accepted by his or her participation in the sport can render that conduct sufficiently serious to be categorised as criminal. Additionally, it may be lawful to engage in rough and undisciplined horseplay, provided that there is no intention to injure on the part of any of the participants.

### *Intoxication*

Self-induced intoxication or voluntary drug taking is *not* a defence to either assault or battery. If the intoxication is not self induced, for example where the accused claims that his drink has been spiked, advice should be sought from the staff legal adviser.

### *Lawful correction of a child*

It is a defence to a charge of battery for a parent to inflict upon his child such degree of force as is necessary to correct the child. Such force must however be reasonable and must not exceed the bounds of moderation. Regard must be paid to the manner of the infliction, the quantity inflicted and the instrument used for correction. The age and health of the child will also be relevant.

### *Provocation*

This is not a defence to an offence but may, if raised by an accused, amount to mitigation.

## **5. Notes**

Examples of assaults include:

- a. Drawing a weapon on someone in a threatening manner so as to pose an imminent threat to them.
- b. Striking at someone with a fist or a weapon – even though the blow misses its target.
- c. Any other act similar to a. or b. above which indicates an immediate intention to use violence against another person.
- d. Threatening words or gestures towards a person, or a combination of both.

Despite the terms *assault* and *common assault* having been used generally to cover assault and battery, the two offences are separate and therefore when drawing up a charge it is important that the offence being charged is clearly specified.

### *Joint enterprise*

Incidents of violence or disorder, especially those fuelled by alcohol, may appear to have involved a number of personnel. In cases such as these particular care should be taken. While a number of personnel present may have been drunk within the meaning of section 20, they may only be charged together with, for example Assault if the evidence supports the view that they each participated (for example by punching or kicking the victim) or if it is clear that, regardless who actually struck the blows, it was a group action which they were *all in together*. In all such cases staff legal advice should be sought.

### **Possible alternative non-criminal conduct (disciplinary) offences**

In dealing with violent incidents involving Service personnel, it is likely that Service Police and COs might be able to consider a range of Service disciplinary offences - listed below and covered in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) - as an alternative to the criminal conduct offences dealt with here. The choice of which is appropriate must be an informed one, and staff legal advice should be sought. Each offence contains different points to prove, and staff legal advisers are able to advise on which, in any given case, are capable of proof. They will also provide advice on the consequences of conviction of both disciplinary and criminal conduct offences. Where alternatives are available, consideration should be given to the context in which the offence occurred. This is not just a case of asking whether the offence was committed in a Service establishment, but whether Service issues were a factor.

For example, the ongoing work-related grievance of a Service person which is behind his assault on a superior officer committed in front of other personnel from his unit in a civilian bar could be charged under section 11 (misconduct towards a superior officer) see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). However where actual bodily harm (or greater) is caused, criminal conduct offences would always be appropriate.

Section 14 (using force against a sentry)  
Section 11 (misconduct towards a superior officer)  
Section 20 (misconduct through alcohol or drugs)  
Section 21 (fighting and threatening behaviour)  
Section 22 (ill treatment of subordinates)  
Section 27 (obstructing a Service policeman)  
Section 28 (resisting arrest)

## Assault occasioning actual bodily harm

**Section 47 of the Offences against the Person Act 1861 provides that:**

**Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable...to imprisonment for not more than five years.**

### 1. Type of Offence

This offence **may be** heard summarily **with** permission of higher authority<sup>768</sup>.

In all cases before bringing a charge a CO should consider whether the circumstances reveal a prescribed circumstance or whether there is an allegation or circumstances which indicate that a Schedule 2 offence has been committed. These may not be dealt with summarily<sup>769</sup>. For the handling of cases in relation to Schedule 2 offences and prescribed circumstances see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under prescribed circumstances or Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all cases of assault occasioning actual bodily harm, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY SECTION 47 OF THE OFFENCES AGAINST THE PERSON ACT 1861 NAMELY ASSAULT OCCASIONING ACTUAL BODILY HARM.

[AB] on ....., assaulted [CD], thereby occasioning her actual bodily harm.

### 3. Ingredients of the offences

#### *Assault*

Assault is an act by which a person, intentionally or recklessly, causes another person (the victim) to apprehend immediate unlawful personal violence or to sustain unlawful personal violence. The necessary link between an assault and actual bodily harm must be made so that it must be proved that the assault or battery caused the bodily harm. For example, an assault causing the victim to jump or fall and so injure themselves requires proof that the accused's action or words caused the fall/jump which in turn led to the injury.

#### *An act*

It is necessary to show that the accused did something – an assault cannot be committed by omission. Words alone may constitute an assault, or words accompanied by some threatening act. In view of the requirement that the victim must be caused to fear immediate unlawful violence (see below) a silent telephone call is unlikely to constitute an assault. Words may also deprive an act such as a gesture of its otherwise threatening character.

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<sup>768</sup> Section 54 Schedule 1 Part 2 of the Act.

<sup>769</sup> Section.54, section 114 and Schedule 2 of the Act.



### *Intentionally*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Recklessly*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *To apprehend*

This phrase should be given its normal dictionary meaning and will require the victim to have been aware of the accused's actions at the time.

### *Immediate unlawful violence*

The threat of violence must be immediate. It is not sufficient for the threat to relate to an occurrence in the future. Therefore a person in Germany who phones a person in the UK and threatens to beat them up when they next meet will not have committed this offence.

The threat must relate to unlawful violence. Thus, it will not be an offence if a person threatens to use force lawfully, for example, where a police officer threatens to lawfully restrain a person who is resisting arrest.

### *Actual bodily harm*

This offence is an assault which results in some harm. Although more serious than an assault, the offence of assault occasioning actual bodily harm may be no more complex either legally or factually, and therefore may be appropriate to be dealt with at summary hearing.

The bodily harm need not be permanent, nor need it amount to what would be considered really serious bodily harm, however it must be more than merely transient or trifling. It is appropriate to charge this offence in cases where there is: loss or breaking of a tooth; temporary loss of sensory function (e.g. loss of consciousness); extensive or multiple bruising; minor fractures; minor, but more than superficial, cuts requiring medical treatment. In addition, actual bodily harm is capable of including psychiatric injury. However, it does not include mere emotions such as fear, distress or panic.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Self defence*

A person may lawfully use force to defend himself (or other people, for guidance on which, see below) from attack or from threatened attack provided that they used force only when it was necessary, and they used no more force than was reasonable in the circumstances.

Although the force used must be reasonable and necessary, it is recognised that a person defending himself cannot always weigh precisely the exact amount of defensive action which is necessary. To be lawful, the amount of force that an accused uses must be proportionate to the immediate threat posed (or that they believe is posed) at the time. This depends on the facts, such as the nature of the attack, whether a weapon was used, and if so what sort of weapon. If it is assessed that an accused did no more than they instinctively thought necessary, that would be very strong evidence that the amount of force used was both necessary and reasonable.

In some cases it may be sensible and possible to take some avoiding action. A failure to retreat from the threat by the accused does not necessarily mean that the accused did not act in self defence. It is simply a factor to take into account when deciding whether it was necessary for the accused to use force and whether the force used was reasonable.

There is no rule of law which requires that they must wait until they are struck before using force in self defence. It is lawful to use reasonable force to deal with a threat that is imminent.

Even if the accused appears to have been the initial aggressor, his subsequent acts may have been lawful self-defence to retaliatory violence by the victim.

The burden of disproving that this defence is available does not arise unless some admissible evidence of this defence is presented. This evidence may be presented by the accused, or any other witness in the case. Once this defence has been raised, if the officer hearing the charge is convinced of the accused's innocence or is left in doubt as to whether the accused might have acted in self defence, they should find the charge not proven. It is a defence for an accused to act in self defence even if they were mistaken about being the victim of an attack. Thus, if the accused used force because they mistakenly but honestly and reasonably believed they were the victim of an attack, they should be acquitted as long as the force used was reasonable and necessary in the circumstances as they understood them to be.

#### *Defence of others*

The same principles that apply in relation to self defence apply where the accused acts in the defence of a third party. Thus his actions must be proportionate in the circumstances as they perceived them to be.

#### *Prevention of crime etc*

An accused may also use force as is reasonable in the circumstances in the prevention of crime or in assisting the lawful arrest of offenders.

#### *Defence of property*

An accused may also use force to prevent a person taking his goods or prevent another person trespassing on his property.

#### *Consent*

An accused will not commit an offence under section 39 of the Criminal Justice Act 1988 if the alleged victim has consented to the force used against them, for example, where force is used against another when participating in sporting activities. However, conduct that goes beyond what a player can reasonably be regarded as having accepted by his or her participation in the sport can render that conduct sufficiently serious to be categorised as criminal. Additionally, it may be lawful to engage in rough and undisciplined horseplay, provided that there is no intention to injure on the part of any of the participants. In the absence of a good reason, consent will not be available where the force has caused actual or grievous injury.

#### *Intoxication*

Self-induced intoxication or voluntary drug taking is *not* a defence to assault occasioning actual bodily harm. If the intoxication is involuntary, for example spiking drinks, advice should be sought from the staff legal adviser.

### *Lawful correction of a child*

This can never be a defence to a charge of assault occasioning actual bodily harm.

### **Notes**

#### *Joint enterprise*

Incidents of violence or disorder, especially those fuelled by alcohol, may appear to have involved a number of personnel. In cases such as these particular care should be taken. While a number of personnel present may have been drunk within the meaning of section 20, they may only be charged together with, for example, assault if the evidence supports the view that they each participated (for example by punching or kicking the victim) or if it is clear that, regardless who actually struck the blows, it was a group action which they were *all in together*. In all such cases staff legal advice should be sought.

## Possession in public place of offensive weapon

### Section 1 of the Prevention of Crime Act 1953 provides:

- (1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable –
- (a) on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding the prescribed sum or both;
  - (b) on conviction on indictment to imprisonment for a term not exceeding 4 years or a fine, or both.

### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>770</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY HAVING WITH HIM AN OFFENSIVE WEAPON IN A PUBLIC PLACE CONTRARY TO SECTION 1(1) OF THE PREVENTION OF CRIME ACT 1953.

[AB] on ....., without lawful authority or reasonable excuse, had with him in a public place, namely ....., an offensive weapon, namely .....

### 3. Ingredients of the offence

#### *Has with him*

The words *has with him in any public place* mean *knowingly has with him in any public place* and this must be proved to the satisfaction of the officer hearing the charge. Once a person has something knowingly, merely forgetting they have it is not enough to prevent them from continuing to have it.

#### *Public place*

A public place includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise.

#### *Offensive weapon*

The meaning of offensive weapon can be broken down into two categories:

- a. Those that are offensive *per se*, that is, those either made (e.g. knuckle-duster, dagger, gun) or adapted (e.g. broken bottle) for use for causing injury to the person; and
- b. Weapons not so made or adapted (e.g. kitchen knife, spanner, hammer) but intended by the person having it with them for causing injury to the person.

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<sup>770</sup> Section 54 Schedule 1 Part 2 of the Act.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Without lawful authority or reasonable excuse.

For lawful and reasonable excuse generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful authority would include those people who from time to time carry an offensive weapon as a matter of duty e.g. the soldier and his rifle and the police officer with his baton.

Where the accused carries a weapon as a result of a recent attack which they fear may be repeated it is a question of degree whether they have a reasonable excuse. Carrying the weapon for a day or two after an attack might be reasonable but for a longer period might not. If they arm himself to repel violence which they themselves is about to create they do not establish a reasonable excuse.

An innocent motive for carrying an offensive weapon can sometimes amount to a reasonable excuse.

In the case of weapons which are offensive *per se*, that the accused did not know that the article was made or adapted for causing injury to the person cannot of itself amount to a reasonable excuse for having it in a public place.

#### **5. Notes**

As ships and other Service establishments are not public places for the purpose of an offence under section 1 of the Prevention of Crime Act 1953, Service establishments should promulgate standing orders which prohibit behaviour within their confines, equivalent to that set out in this offence i.e. relating to the possession of offensive weapons. However, on days when ships and establishments are opened to the public e.g. Air displays, Navy Days and Army Open Days, they will be public places.

A lesser charge may be brought under section 139(1) of the Criminal Justice Act 1988 which describes an offence of having an article with a blade or point, in a public place.

## Possession in public place of point or blade

### Section 139 of the Criminal Justice Act 1988 provides:

- (1) Subject to sub-sections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
- (2) Subject to sub-section (3) below, this section applies to any article which has a blade or a sharp point except a folding pocket knife.
- (3) This section applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches.
- (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.
- (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had an article with him –
  - (a) for use at work;
  - (b) for religious reasons; or
  - (c) as part of any national costume.

### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>771</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

The Criminal Justice Act 1988, Section 139A creates a separate offence for a person to have any article to which Section 139 above applies with them on school premises. This offence however cannot be dealt with summarily.

### 2. Specimen charge

COMMITTED A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY HAVING WITH HIM AN ARTICLE WITH A BLADE [POINT] IN A PUBLIC PLACE CONTRARY TO SECTION 139(1) OF THE CRIMINAL JUSTICE ACT 1988.

[AB] at ....., a public place, on ..... without good reason or lawful authority had with him an article with a blade [point] namely .....

### 3. Ingredients of the offence

*Has with him*

The words *has with him* in any public place mean *knowingly* has with him in any public place and it is proved to the satisfaction of the officer hearing the charge. Once a person knowingly has something, they continue to have it until they do something to rid themselves of it. See however, Defences (below) for circumstances where an accused forgets that they had an article with them. The words *has with him* require proof of contact with the article which will amount to more than mere possession.

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<sup>771</sup> Section 54 Schedule 1 Part 2 of the Act.

### *Public place*

*Public place* for the purposes of this offence includes any place to which at the material time the public have or are permitted to have access, whether on payment or otherwise. It will not be a public place if access is available only to a particular class of the public. For this reason, an offence under this section cannot be committed in ships or Service establishments. See notes (below) on prohibiting similar behaviour through standing orders.

### *Bladed article*

This section applies to any article which has a blade or a sharp point except a folding pocket knife (unless the cutting edge of the pocket knife exceeds 3 inches). A screw-driver is not a bladed article within the meaning of the section.

### *Without good reason, lawful authority etc*

See defences below.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It will be a defence if the accused can prove on a balance of probabilities that they had the article with them for a good reason, with lawful authority or for any of the reasons set out in 139(5) of the Criminal Justice Act 1988 (see above).

Lawful authority refers to the circumstances where a person from time to time as a matter of duty carries an otherwise prohibited article. For example, a soldier performing ceremonial duties who is required to fix a bayonet to his weapon will have a defence on this basis.

### *A good reason*

A good reason will include circumstances such as where a person is travelling home from the shop after purchasing a knife for a legitimate purpose. Forgetfulness alone cannot amount to a good reason but forgetfulness combined with another reason might. For example, where a parent after buying a knife places it in the glove compartment to keep it out of a child's reach and then forgets to retrieve it on arrival at home.

The Criminal Justice Act 1988 section 139 and Criminal Justice Act 1996 sections 3 and 4 allows anyone to carry a blade exceeding the length of 3 inches for religious, cultural or work related reasons. However the defence of having a bladed article for religious, cultural or work reasons is only a defence if this is offered as the predominant motivation for having the bladed article at the time. If the stated use is in itself unreasonable then this will not be a defence.

It is not necessary to prove that the accused did not have a defence (good reason or lawful authority) unless the accused proves on a balance of probabilities that the defence is available. An accused does not discharge the burden of showing a good reason only by providing an explanation that is not contradicted by the evidence in support of the charge. Rather, the officer hearing the case must be satisfied that the reason is a good reason. If however the accused establishes, to the required standard, that they have a defence, the accused cannot be convicted unless it is proven beyond reasonable doubt that the accused did the act complained of and that they did not have a defence.

## **5. Notes**

As ships and other Service establishments are not public places for the purpose of an offence under section 139 of the Criminal Justice Act 1988, where a person is in possession of a pointed blade in a Service establishment it may be appropriate to charge under section 13 (contravention of standing orders).



# Dishonesty offences

## Theft – section 1 Theft Act 1968

### 1. Basic definition of theft

- (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly.
- (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.
- (3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

### 2. Dishonestly

- (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—
  - (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
  - (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
  - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

### 3. Appropriates

- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
- (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

### 4. Property

- (1) Property” includes money and all other property, real or personal, including things in action and other intangible property.
- (2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say—
  - (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or

(b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or

(c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

**For purposes of this subsection “land” does not include incorporeal hereditaments; “tenancy” means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and “let” shall be construed accordingly.**

(3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.

**For purposes of this subsection “mushroom” includes any fungus, and “plant” includes any shrub or tree.**

(4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession.

## **5. Belonging to another**

(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

(2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

(3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

(4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

(5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

## 6. With the intention of permanently depriving the other of it

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

A person guilty of theft shall on conviction on indictment be liable to imprisonment for a term not exceeding [seven years].

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>772</sup>.

The above sections of the Theft Act are self explanatory for most occurrences of the offence; if in doubt seek advice from the appropriate staff legal adviser.

### 2. Specimen Charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968

[AB] on ....., stole £100 belonging to [CD].

### 3. Ingredients of the Offence

#### *Dishonesty*

The accused must have acted dishonestly at the time of the appropriation.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly, two tests must be applied. Firstly, was what the accused did dishonest by ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both these questions is yes, the element of dishonesty should be proved. If the answer to either question is no, the element of dishonesty is not proved and therefore the charge is not proved.

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<sup>772</sup> Section.53 Schedule 1 Part 1 of the Act.

Section 2 provides circumstances when an appropriation by the accused will not be dishonest. See also *defences* at paragraph 4.

### *Appropriation*

Section 3 provides that *appropriation* is any assumption by the accused of the rights of the owner and this includes any later assumption of a right to it (by keeping or dealing with it as the owner) even where the accused has come by the property (innocently or not) without stealing it. See however *defences* below where an accused purchases goods in good faith.

It is not necessary to establish that the appropriation occurred without the authorisation or consent of the owner, although the issue of authorisation or consent may be relevant for the question of dishonesty.

The following serve as examples of an appropriation:

- a. A NAAFI employee makes a sale to a customer and places the money in their pocket with the intention of spending it; that amounts to an act of appropriation because it is an assumption of ownership by the worker.
- b. A Service person finds a wallet on the street containing money and decides to return to the owner whose identity and address is apparent from information contained in the wallet. That does not amount to an appropriation because it is not an assumption of ownership: they intend at that time to give it back. However, if they later change his mind and decides to spend the money contained in the wallet and throw away the wallet away, at that later stage the Service person will have assumed the rights of an owner in respect of the money and the wallet and will therefore have appropriated them.

### *Property*

Property should be given its normal dictionary meaning and section 4 (property) is self explanatory in relation to its meaning. It includes a thing in action, for example the right to payment from a victim's bank account stolen by means of a forged or stolen cheque.

### *Belonging to another*

Section 5 is self explanatory. The person from whom the property is taken need not be the owner; it is sufficient that the victim had possession or control of the property at the time of its appropriation by the accused. For example, x lends y a cycle which is then taken by z; z may stand accused of theft of the cycle from either x or y.

### *With intention of permanently depriving*

Section 6. This, for example, would be evidenced where an accused appropriated a victim's property and then offered to sell it on or put it to his own use with no intention of returning it. An accused disposing of, or destroying a thing they have taken, or converting it into something else will be evidence of such intention.

The appropriation of something with the intention of giving it back is not an intention to permanently deprive the owner of it. However, borrowing of property can amount to theft if it is for such a period of time and in such circumstances as to make it equivalent to an outright taking or disposal: for example where a person takes a concert ticket but returns it after the date of the concert so that its value has gone.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Abandoned property*

Property that is abandoned is not capable of being stolen. If the property had not been abandoned, but the accused believed that it had, then they cannot be guilty of the offence, however unreasonable the belief.

### **5. Notes**

#### *Unknown owner*

Where the owner is unknown, the charge will be proved provided it can be established that the property belonged to someone other than the accused and that the accused knew this.

#### *Mistake*

Property obtained by an accused from a victim as a result of the victim's mistake, or another's mistake may nevertheless constitute a theft. In such circumstances the victim is likely to be regarded as being entitled to restoration of their property. For example failure to repay an overpaid amount in the knowledge of the circumstances of the overpayment may be theft.

#### *Misuse of property given for a particular purpose*

Where a person receives property from or on account of another and is under an obligation to the other person to retain and deal with that property or its proceeds in a particular way, but it is dealt with inconsistently with that purpose may constitute a theft. For example if monies put in the hands of an NCO appointed to organise a Warrant Officers' and Sergeants' Mess Christmas fund are dishonestly misappropriated by the NCO for his own or other purposes, that would be theft. They will have appropriated funds belonging to others.

## Taking a motor vehicle or other conveyance without authority

Section 12 of the Theft Act 1968 provides in so far as is relevant in a service context:

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- (1) Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.
- (2) A person guilty of an offence under subsection (1) above shall ... be liable on summary conviction to a fine not exceeding level 5 [£5000] on the standard scale, to imprisonment for a term not exceeding six months, or to both.
- (3) ...*[Repealed by PACE 1984 Schedule 7]*
- (4) If on the trial of an indictment for theft the jury are not satisfied that the accused committed theft, but it is proved that the accused committed an offence under subsection (1) above, the jury may find him guilty of the offence under subsection (1) and if he is found guilty of it, he shall be liable as he would have been liable under subsection (2) above on summary conviction.  
*[Note: the effect of this is that under the [AFA 2006 the CO can convict of an alternative charge under s12 (1) in the event that they are not satisfied that the accused committed theft but it was proved that he committed an offence under s12(1)]*
  - (4A) Proceedings for an offence under subsection (1) above (but not proceedings of a kind falling within subsection (4) above) in relation to a mechanically propelled vehicle—
    - (a) shall not be commenced after the end of the period of three years beginning with the day on which the offence was committed; but
    - (b) subject to that, may be commenced at any time within the period of six months beginning with the relevant day.  
*[Note: the effect of this is to create a time limit on bringing service proceedings]*
  - (4B) In subsection (4A)(b) above "the relevant day" means—
    - (a) in the case of a prosecution for an offence under subsection (1) above by a public prosecutor[CO], the day on which sufficient evidence to justify the proceedings came to the knowledge of any person responsible for deciding whether to commence any such prosecution;  
*[Note: the effect of this in the service context will be that [public prosecutor] means the CO]*
- (5) Subsection (1) above shall not apply in relation to pedal cycles; but, subject to subsection (6) below, a person who, without having the consent of the owner or other lawful authority, takes a pedal cycle for his own or another's use, or rides a pedal cycle knowing it to have been taken without such authority, shall on summary conviction be liable to a fine not exceeding level 3 [£1000] on the standard scale.
- (6) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

- (7) For purposes of this section—
- (a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and "drive" shall be construed accordingly; and
- (b) "owner", in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the conveyance under that agreement.

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>773</sup>.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY TAKING A CONVEYANCE WITHOUT AUTHORITY CONTRARY TO SECTION 12(1) OF THE THEFT ACT 1968

[AB] on ....., without the consent of the owner or other lawful authority, took a conveyance, namely a Porsche motor car registration number ..... for the use [of himself]

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ALLOWING HIMSELF TO BE CARRIED IN OR ON A CONVEYANCE TAKEN WITHOUT AUTHORITY CONTRARY TO SECTION 12(1) OF THE THEFT ACT 1968

[AB] on ....., knowing that a conveyance, namely a Porsche motor car registration number ....., had been taken without the consent of the owner, allowed himself to be carried in or on the said conveyance.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY TAKING A PEDAL CYCLE CONTRARY TO SECTION 12(5) OF THE THEFT ACT 1968

[AB] on ....., without the consent of the owner or other lawful authority, took a pedal cycle belonging to [CD] for the use [of himself] [of another].

### 3. Ingredients of the offence

Section 12(1) creates three offences:

- a. Taking a conveyance without consent or lawful authority.
- b. Driving a conveyance without consent or lawful authority.
- c. Being carried in a conveyance that has been taken without consent or lawful authority.

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<sup>773</sup> Section 53 Schedule 1 Part 1 of the Act.

Section 12(5) creates two offences:

- a. Taking a pedal cycle without consent or lawful authority.
- b. Riding a conveyance without consent or lawful authority

### *Taking*

To constitute the offence of *taking*, there is no requirement for the conveyance to be driven away.

There must be evidence of more than mere unauthorised taking of possession or control adverse to the rights of the owner. Some element of movement (however small) must have been caused by a voluntary act done with the intention of putting the conveyance in motion. Nevertheless, only the *taking* has to be proved and not a taking and *driving away*. In the absence of any evidence as to movement (however small) in respect of the element of *taking*, there may still be sufficient evidence of an attempt, which is itself an offence.

### *Conveyance*

The definition in subsection (7) is self explanatory. The taking of pedal cycles is not included in the offence under subsection (1), but is included under the offence in subsection (5).

### *Consent*

This is given its normal dictionary meaning. It is necessary to prove that the owner of the conveyance did not consent to its taking by the accused. This may be because the accused did not seek the consent of the owner or because the limitation of the consent to use was exceeded, for example if the owner consents to a vehicle being used for a journey of 10 miles but the accused uses it for a journey of 100 miles. The defence under subsection (6) may be available (belief of lawful authority).

### *Owner*

Owner includes the person who is in possession of a conveyance under a hire or hire purchase contract.

### *Other lawful authority*

This relates to situation where the taker of a conveyance knows it is not his own conveyance, but for some reason nevertheless believes they have lawful authority to take it.

### *Drives*

This is given its normal dictionary meaning in the context of the conveyance concerned, namely that the person driving must be substantially controlling the movement and direction of the conveyance, including having something to do with the conveyance's propulsion. Whether someone is *driving* in the ordinary sense is a question of fact and degree. This involves something more than mere movement of the vehicle (e.g. pushing it), namely that it should be used as a means of transport. An accused cannot be said to be driving a vehicle unless they are in the driving seat or is in control of the steering wheel and also has something to do with the propulsion of the vehicle.



*For his own or another's use*

In relation to an offence under section 12(1) Theft Act 1968, it is necessary to prove that the accused took the conveyance named in the charge for his own use or for the use of another.

*Pedal cycle*

Means a bicycle, tricycle or any cycle having more than four wheels, not being in any case a motor vehicle.

*Taking, consent, owner, other lawful authority, for his own or another's use*

See guidance above under section 12 (1) Theft Act 1968.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A statutory defence is available under section 6 of the Theft Act 1968. As a result, an accused will not commit an offence under this section if they believe they have a lawful authority to do the act alleged or if they believed they would have the owner's consent if the owner knew of his doing it and the circumstances of it.

#### **5. Notes**

Spare.

## Making off without payment

### Section 3 of the Theft Act 1978 provides:

- (1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.
- (2) For purposes of this section "payment on the spot" includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.
- (3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.
- (4) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, committing or attempting to commit an offence under this section.

### 1. Type of offence

This offence **may be** heard summarily **only** where the payment required or expected did not exceed £100. In these circumstances permission from higher authority need not be sought. Where the payment required or expected exceeds £100 the matter must be referred to the DSP<sup>774</sup>.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY MAKING OFF WITHOUT PAYMENT CONTRARY TO SECTION 3(1) OF THE THEFT ACT 1978

[AB] on ....., knowing that payment on the spot for a meal costing £43 was required or expected from him dishonestly made off from the [name] Restaurant, without having paid as required or expected.

### 3. Ingredients of the offence

*Knowing that payment ... is required or expected*

It must be proved that the accused had actual knowledge of the requirement or expectation that payment should be made. It is not an excuse that the accused wilfully shut his eyes to the truth.

*On the spot*

*On the spot* means that payment is to be made *there and then*. This is a question of fact. Section 3(2) of the Theft Act 1978 defines *payment on the spot* as including payment at the time of collecting goods on which work has been done or in respect of which service has been provided.

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<sup>774</sup> Section 53 Schedule 1 Part 1 of the Act.

### *Dishonestly*

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

### *Making off*

These words should be given their normal dictionary meaning in relation to the facts of the particular case. *Making off* involves a departure from the spot where payment is required or expected.

### *Intended to avoid payment*

There must be an intention to permanently avoid payment. An intention to merely delay or defer payment is not sufficient to constitute the offence. However, the length of time that has passed since payment on the spot was required, in the absence of any reasonable excuse by the accused as to the delay or deferment in payment, will be of relevance to the question of whether or not there is in fact any likelihood of the accused making payment at all.

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A person may be able to prove that they had no intention to permanently avoid payment and was merely deferring or delaying it for some reason. The reasonableness or otherwise of any reasons put forward by that person will be a question for the officer hearing the charge to decide.

There is a statutory defence under section 3(3) of the Theft Act 1978. Where the supply of goods or services is contrary to the law, or where a service done is such that payment is not legally enforceable, making off without payment on the spot does not constitute the offence, even if there was no intention of paying. For example, failure by a taxi to drop a person where they requested means the taxi driver is in breach of contract and cannot lawfully demand the fare at any time thereafter.

## **5. Notes**

This section applies where goods or services have been supplied and the person leaves without paying when they know they should have paid. If the goods have not been supplied (e.g. if they are taken from a supermarket shelf) this section does not apply but consideration should be given to a charge of theft.

If a person is stopped before passing the *spot* where payment is expected or required, this may constitute an attempt to commit the offence, provided the other ingredients are established.

## Abstraction of electricity

### Section 13 of the Theft Act 1968 provides:

A person who dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity shall be guilty of an offence.

#### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>775</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

#### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ABSTRACTING ELECTRICITY CONTRARY TO SECTION 13 OF THE THEFT ACT 1968.

[AB] on ....., dishonestly used without due authority [or dishonestly caused to be wasted or diverted] a quantity of electricity.

#### 3. Ingredients of the offence

##### *Dishonestly*

This should be given its normal dictionary meaning. The officer hearing the charge must first decide whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest. If it was not dishonest by those standards the charge must be dismissed. However, if it was dishonest by those standards the officer hearing the charge must then further consider whether the accused himself realised that what they were doing was dishonest by the standards of ordinary people, whatever his own moral principles or standards might be.

##### *Use, waste or diversion*

Any use, waste or diversion of electricity will suffice, so a meter does not have to be tampered with. Electricity is abstracted where the electricity supply to a house is reconnected without the consent of the electricity supplier. It is also abstracted where the electricity supply to a house is caused not to be registered by the meter. It may well be an abstraction of electricity to make a call from a telephone that belongs to another person.

#### 4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Mechanical defect in the meter or associated equipment.

#### 5. Notes

Spare.

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<sup>775</sup> Section 54 Schedule 1 Part 2 of the Act.

## Dishonestly obtaining electronic communications services

Section 125 of the Communications Act 2003 provides:-

- (1) A person who:
  - (a) dishonestly obtains an electronic communication service, and
  - (b) does so with intent to avoid payment of a charge applicable to the provision of that service, is guilty of an offence.

### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>776</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DISHONESTLY OBTAINING ELECTRONIC COMMUNICATIONS SERVICES CONTRARY TO SECTION 125(1) OF THE COMMUNICATIONS ACT 2003.

[AB] on ....., dishonestly obtained an electronic communications service namely .....  
[give details] ..... with intent to avoid payment of a charge applicable to the provision of that service.

### 3. Ingredients of the offence

#### *Dishonestly*

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

#### *Obtains*

*Obtains* means *gets*. Therefore, the offence will apply to a situation where the accused taps into another person's telephone or internet connection in order to communicate at the other's expense e.g. using a computer to communicate via another's wireless connection. This may cause further problems for the authorised user of the wireless connection because the authorised user is potentially liable for the unauthorised use of illegal websites.

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<sup>776</sup> Section 54 Schedule 1 Part 2 of the Act.

### *Electronic communication service*

The service must be one where the principal feature is the conveyance by means of an electronic communications network of signals. This offence therefore relates primarily to telephones but covers broadband and internet services. It is not an offence under section 125(5) Communications Act 2003 to obtain a broadcasting or cable programme - see notes below. In cases of doubt, advice should be sought from a staff legal adviser.

### *With intent*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused must have intended to avoid payment of a charge applicable to the provision of that service.

It is necessary to prove that the accused acted with the purpose of evading any or all of the costs that would have been charged for the electronic service had those services been properly obtained.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

Regard should be had to section 126 of the Communications Act 2003 (see below) which makes it an offence for a person to possess or supply apparatus for the contravention of section 125 of the Communications Act 2003.

The offence under section 125 does not apply to the interception of a *content service* – for example a radio or television programme broadcasting service which is covered by section 297 of the Copyright, Designs and Patents Act 1988 – for meaning of electronic communication networks and service see section 32(7) of the Communications Act 2003.

### *Broadcasting and cable services*

It is not an offence under section 125 of the Communications Act 2003 to obtain a service mentioned in section 297 of the Copyright, Designs and Patents Act 1988 (i.e. dishonestly obtaining a broadcasting or cable programme service provided from a place in the UK).

## Possession or supply of apparatus which may be used for obtaining an electronic communications service

### Section 126 Communications Act 2003 provides:

- (1) A person is guilty of an offence if –  
with an intention falling within sub-section (3) he has in his possession or under his control anything that may be used –
  - (a) for obtaining an electronic communications service; or
  - (b) in connection with obtaining such a service.
- (2) A person is guilty of an offence if –
  - (a) he supplies or offers to supply anything which may be used as mentioned in sub-section (1); and
  - (b) he knows or believes that the intentions in relation to that thing of the person to whom it is supplied or offered fall within sub-section (3).
- (3) A person's intentions fall within this sub-section if he intends –
  - (a) to use the thing to obtain an electronic communications service dishonestly;
  - (b) to use the thing for a purpose connected with the dishonest obtaining of such a service;
  - (c) dishonestly to allow the thing to be used to obtain such a service; or
  - (d) to allow the thing to be used for a purpose connected with the dishonest obtaining of such a service.
- (4) An intention does not fall within subsection (3) if it relates exclusively to the obtaining of a service mentioned in section 297(1) of the *Copyright, Designs and Patents Act 1988*. (see notes)
- (5) A person guilty of an offence under this section shall be liable –
  - (a) on summary conviction, to imprisonment for term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;
  - (b) on conviction on indictment to imprisonment for a term not exceeding five years or to imprisonment, or to both.
- (6) In this section, references in the case of a thing used for recording data, to the use of that thing include references to the use of the data recorded by it.

### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>777</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY POSSESSION / SUPPLY OF APPARATUS WITH THE INTENTION OF DISHONESTLY OBTAINING AN ELECTRONIC COMMUNICATIONS SERVICE CONTRARY TO SECTION 126(1)(a) OF THE COMMUNICATIONS ACT 2003.

[AB] on ....., had in his possession [name/describe the device] with the intention of using the said [name/description of device] to dishonestly obtain an electronic communication service.

### 3. Ingredients of the offence

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<sup>777</sup> Section 54 Schedule 1 Part 2 of the Act.

### *Intention*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The effect of the offence is that if someone has a computer with the intention of using it to use another's wireless connection to gain access to the internet, they will be in breach of this section. When they start so using it they will be guilty of an offence under section 125 of the Communications Act 2003 (see page 1-8-32).

### *In his possession or under his control*

This means they must know that they have the apparatus in his possession or knowledge that they can gain access to it.

### *Obtaining*

This means *gets*. This offence will have been committed where an accused has in his possession equipment capable of tapping into someone's telephone or internet connection to communicate at another's expense. An example would be possessing a computer capable of communicating via another's wireless connection.

### *Electronic communications service*

This covers a wide range of such services and includes telephone, broadband, and other internet services etc.

### *Supplies or offers to supply*

It is sufficient to be guilty of this offence that a person merely offers to supply such apparatus to another person who they know or believe intends to use it dishonestly. They do not actually have to supply the other person with the apparatus.

### *Knows or believes*

Knows or believes should be given their normal dictionary meaning. Actual knowledge or belief on the part of the accused that the apparatus they supplied or offered to supply were intended to be used for one of the dishonest purposes in subsection (3) must be proved. This is a subjective test. This is proved directly by the evidence of the person to whom the apparatus was either supplied or offered to, and/or through circumstantial evidence from which the accused's knowledge or belief can be inferred, see [Chapter 11](#) (Summary hearing – dealing with evidence).

Suspicion that the accused knew or believed that the intention of the person to whom they supplied or offered to supply the apparatus was to use it for one of the dishonest purposes set out in subsection (3) is not enough. It is always open to the officer hearing the charge however, to base a finding of knowledge on evidence that the accused had deliberately shut his eyes to the obvious or refrained from inquiry because they suspected the truth but did not want to have his suspicion confirmed. It is vital therefore that the officer hearing the charge takes all the surrounding circumstances into account when deciding whether or not the necessary knowledge or belief existed.

### *Dishonestly*

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.



The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

#### *To allow*

This means the person to whom the apparatus is supplied or offered to intends to give access to it to others to use it for dishonest purposes.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Honest mistake/error of judgment*

An honest but mistaken belief by the accused that they had used or applied the thing in a proper manner. Additionally, an accused will have a defence if they acted on the order of a superior and they honestly believed the order was lawful.

## **5. Notes**

Section 297(1) of the *Copyright, Designs and Patents Act 1988* states that a person who dishonestly receives a programme included in a broadcasting or cable programme service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable to conviction. That is to say a person, for example, who is receiving a broadcast but has not obtained a TV licence, does not fall under subsection (3) and therefore could not be prosecuted under this section.

# Fraud

## 1. Section 1 of the Fraud Act 2006 provides:-

- (1) A person is guilty of fraud if he is in breach of any of the sections listed in sub-section (2) (which provide for different ways of committing the offence).
- (2) The sections are -
  - (a) section 2 (fraud by false representation),
  - (b) section 3 (fraud by failing to disclose information), and
  - (c) section 4 (fraud by abuse of position).
- (3) A person who is guilty of fraud is liable - This is relevant in the context of Section 42(3) and (4) of the Act.
  - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).
- (4) Sub-section (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

## 2. Fraud by false representation:-

- (1) A person is in breach of this section if he -
  - (a) dishonestly makes a false representation, and
  - (b) intends, by making the representation -
    - (i) to make a gain for himself or another, or
    - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A representation is false if -
  - (a) it is untrue or misleading, and
  - (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of -
  - (a) the person making the representation, or
  - (b) any other person.
- (4) A representation may be express or implied.
- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

## 3. Fraud by failing to disclose information:-

- (1) A person is in breach of this section if he -
  - (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
  - (b) intends, by failing to disclose the information -
    - (i) to make a gain for himself or another, or
    - (ii) to cause loss to another or to expose another to a risk of loss.

#### 4. Fraud by abuse of position:-

(1) A person is in breach of this section if he -

- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
- (b) dishonestly abuses that position, and
- (c) intends, by means of the abuse of that position -
  - (i) to make a gain for himself or another, or
  - (ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

#### 5. “Gain” and “loss”:-

(1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.

(2) “Gain” and “loss”—

- (a) extend only to gain or loss in money or other property;
  - (b) include any such gain or loss whether temporary or permanent; and
- “property” means any property whether real or personal (including things in action and other intangible property).

(3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.

(4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>778</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY FALSE REPRESENTATION CONTRARY TO SECTION 1 OF THE FRAUD ACT 2006.

[AB] on ....., dishonestly obtained from an employee of ..... (give details) ..... goods to the value of eighty pounds (£80.00) belonging to ..... by falsely representing that he, the accused, was then entitled and authorised to use ..... bank card serial number .....in breach of section 2 of the Fraud Act 2006.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY FAILING TO DISCLOSE INFORMATION CONTRARY TO SECTION 1 OF THE FRAUD ACT 2006.

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<sup>778</sup> Section 54 Schedule 1 Part 2 of the Act.

[AB] on ....., at ....., dishonestly failed to disclose to the Abbey Bank that he had debts of £50,000 and thereby obtained for himself an overdraft of £5,000, in breach of section 3 of the Fraud Act 2006.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY ABUSE OF POSITION CONTRARY TO SECTION 4 OF THE FRAUD ACT 2006.

[AB] on ....., when he was pay clerk at ..... with access to the bank account (give details) of [CD], dishonestly abused his position by removing monies to the value of four hundred and fifty pounds (£450) for his own personal use in breach of section 4 of the Fraud Act 2006.

### **3. Ingredients of the offence**

#### *Dishonestly*

The term *dishonestly* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly, two tests must be applied. Firstly, was what the accused did dishonest by the ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either question is no, the element of dishonesty is not proved.

#### *Intends*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Gain and loss*

Gain includes obtaining a pecuniary or financial advantage such as an overdraft that they would not otherwise have received. It does not have to be proved in such a case that the person actually drew on this facility. It would also include the salary of a post the accused would not otherwise have been appointed to, but for his dishonest act.

Loss includes the victim not receiving property they did not previously have but might have later received had it not been for the accused's actions. For example, where a victim lost his likely entitlement to a dividend on shares as a result of the accused's dishonest disposal of them in his capacity as the victim's stockbroker, before the dividend was due to be paid to the victim.

#### *Property*

Property includes money and all other property whether real or personal, including *things in action* (e.g. a bank balance) and other intangible property (e.g. stocks and shares). It does not extend to, for example, under these sections, obtaining a service, which is dealt with separately under section 11 of the Fraud Act 06.

#### *False representation*

The accused must make the representation with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place. A representation is false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading. A representation can be stated in words or communicated by conduct, for example by presenting a cheque which is not the good and valid order for the

amount entered on the cheque that it is represented to be. A representation can be written or spoken or posted on a website.

#### *Express or implied*

An express representation means simply an unequivocal or direct representation as to something. Rather than concerning oneself as to what may amount to an implied representation, the officer hearing the charge should instead simply consider whether the accused *by words or conduct* induces a false belief in the other person's mind.

#### *Failing to disclose*

There must be a legal duty to disclose information and the accused must know they have such a duty. For example in an application form for credit, insurance or for an employment post.

#### *Abuse of position*

This applies where the accused has been put in a position, for example because of his rank they holds certain responsibilities, or because of his post as a pay clerk or a person's accountant, and by virtue of this position is expected to safeguard another's financial interest or not act against those interests. The offence is committed when the accused abuses his position by dishonestly acting against the victim's financial interest, either for his own personal gain or that of another, and/or in order to cause loss or the risk of loss to the victim.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused may seek to show that they did not act intentionally but that his conduct was accidental or mistaken and that they were not acting dishonestly.

No dishonesty on the part of the accused in these circumstances would entail:

- a. A belief by the accused that they had a right in law to the gain made on behalf of himself or a third party, or to the incurring of the loss or risk of loss to the victim; or
- b. A belief by the accused that they would have had the victim's consent for the gain made on behalf of himself or a third party, or loss or risk of loss caused to the victim, had the victim known of the transaction and the circumstances surrounding it; or
- c. A belief when making the representation that it was true; or
- d. A belief that the actions they took were designed to safeguard, and not to act against, the financial interests of the victim.

## **5. Notes**

If it is alleged that the accused dishonestly made a number of false representations with an intent to make a gain or cause a loss or risk of loss to another, then in order to find the charge proved the officer hearing the charge must either be sure as to the falsity of at least one of those representations (unless they are sure that at least some of the representations were false but is not sure which ones), or that their effect taken together was misleading.

A person may be convicted of an offence contrary to subsections (2) – (4) inclusive although the accused either intended to make or made a gain on behalf of another.

## Dishonestly obtaining services

### Section 11 of the Fraud Act 2006 provides:-

- (1) A person is guilty of an offence under this section if he obtains services for himself or another -
  - (a) by a dishonest act, and
  - (b) in breach of subsection (2).
- (2) A person obtains services in breach of this subsection if -
  - (a) they are made available on the basis that payment has been, is being, or will be made for or in respect of them,
  - (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and
  - (c) when he obtains them, he knows -
    - (i) that they are being made available on the basis described in paragraph (a), or
    - (ii) that they might be, but intends that payment will not be made, or will not be made in full.
- (3) A person guilty of an offence under this section is liable -
  - (a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);
  - (b) on conviction on indictment to imprisonment for a term not exceeding 5 years or to a fine (or to both).
- (4) Sub-section (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

### 1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority<sup>779</sup>.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY OBTAINING SERVICES DISHONESTLY CONTRARY TO SECTION 11(1) OF THE FRAUD ACT 2006.

[AB] on ....., dishonestly obtained certain services from ..... Limited, namely the hire of a Ford Mondeo motor vehicle by falsely representing that he was in lawful possession of a credit card in the name of [CD] (give details) .....

### 3. Ingredients of the offence

#### *Obtains*

The offence requires the actual obtaining of the service. Therefore there must be evidence to prove that the accused did obtain the service alleged.

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<sup>779</sup> Section 54 Schedule 1 Part 2 of the Act.

## *Services*

The meaning is wide enough to embrace professional services, commercial services and financial services. The essential conditions are that a service must confer a benefit and be rendered on the understanding that it has been or will be paid for. It can therefore include the dishonest obtaining of a bank or building society account, or the dishonest use of a credit card. It could also include the obtaining of a hire purchase agreement, since the finance company confers some benefit by agreeing to enter into such an agreement with the accused on the understanding that this benefit had been or would be paid for.

## *Dishonest act*

The term *dishonest* bears its normal dictionary meaning, but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either question is no, the element of dishonesty is not proved.

## *Intends*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## *Knows*

Knows should be given its normal dictionary meaning. Actual knowledge on the part of the accused that the service was being made available to them on the basis that payment had been, was being, or would be made for or in respect of it must be proved, and the officer hearing the charge must be satisfied so that they are sure that this is so, before finding the charge proved. This question is a subjective one. This is proved, either directly, by the evidence of the principal accused, and/or through circumstantial evidence, see [Chapter 11](#) (Summary hearing – dealing with evidence).

Suspicion that the accused knew the basis on which the service was being provided to them is not enough. It is always open to the officer hearing the charge however, to base a finding of knowledge on evidence that the accused had deliberately shut his eyes to the obvious or refrained from inquiry because they suspected the truth but did not want to have his suspicion confirmed. It is vital therefore that the officer hearing the charge takes all the surrounding circumstances into account when deciding whether or not the necessary knowledge or belief existed.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused may seek to show that they did not act intentionally but that his conduct was accidental or mistaken and that they were not acting dishonestly.

No dishonesty on the part of the accused in these circumstances would entail:

- a. A belief by the accused that they had a right in law to the service provided; or
- b. A belief by the accused that they would have had the victim's consent for the provision of the service to himself; or

- c. A belief that full payment for the service had been or would be made.

## **5. Notes**

Where the accused uses a cheque, cheque card or credit card to obtain the service and it subsequently proves to be the case that the accused had no such account, insufficient funds in his account or had exceeded his credit limit, it is perfectly reasonable for the officer hearing the charge to assume that by using these purported means of payment, the accused was representing both that they had an account with the bank or credit card company concerned, and that in the ordinary course of events the cheque, cheque card or credit card would be honoured.

A person may be convicted of an offence contrary to subsections (2) – (4) inclusive although the accused either intended to make or made a gain on behalf of another.

### *Alternative charges*

In certain circumstances, consideration may be given to alternative charges. For example, where an accused's obtaining of a service appears to be motivated more by inexperience or a lack of knowledge of the correct procedures or borne out of naivety, so that his conduct only borders on being dishonest, (in respect of a Service person only) a charge contrary to section 19 (conduct prejudicial to good order and discipline) of the Act may be more appropriate - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). Alternatively where there is doubt of guilty intention administrative action may be considered.



## Miscellaneous offences

### Unlawful possession of a controlled drug

**Section 5 of the Misuse of Drugs Act 1971 provides: -**

- (1) Subject to any regulations under section 7 (relating to authorisation of activities otherwise unlawful) for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.
- (2) Subject to section 28 (relating to proof of lack of knowledge) of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.
- (3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.
- (4) [Defence to s5(2)] In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove [on the balance of probabilities]—
  - (a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or
  - (b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.[4(a) only relevant to an offence under s. 5(3) which may not be heard summarily]
- (5) . . .[*Repealed by the Criminal Attempts Act 1981*]
- (6) Nothing in subsection (4) ... above shall prejudice any defence which it is open to a person charged with an offence under this section to raise apart from that subsection.

**Section 28 applies to s5(2): -**

**28 Proof of lack of knowledge etc to be a defence in proceedings for certain offences**

- (1) [Defence to s5(2)]
- (2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove [on the balance of probabilities] that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

- (3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove [on the balance of probabilities] that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—
- (a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
  - (b) shall be acquitted thereof—
    - (i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or
    - (ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.
- (4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.

## 1. Type of offence

The offence under subsection (2) (possession of a controlled drug) of the Misuse of Drugs Act 1971 **may be** heard summarily **without** permission of higher authority<sup>780</sup>.

The offence under subsection (3) (possession of a controlled drug with intent to supply) of the Misuse of Drugs Act 1971 is a Schedule 2 offence and may not be heard summarily<sup>781</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

## 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY UNLAWFUL POSSESSION OF A CONTROLLED DRUG CONTRARY TO SECTION 5(2) OF THE MISUSE OF DRUGS ACT 1971

[AB] on ....., unlawfully had in his possession a controlled drug of Class ....., namely ....., in contravention of section 5(1) of the Misuse of Drugs Act 1971.

<sup>780</sup> Section 53 Schedule 1 Part 1 of the Act.

<sup>781</sup> Section 53 Schedule 2 of the Act.

### **3. Ingredients of the offence**

#### *Controlled drug*

A controlled drug is defined by section 2 of the Misuse of Drugs Act 1971(c.38). These include for example; Cannabis, Cocaine, Ecstasy and Heroin. Further guidance on controlled drugs may be found in JSP 835 (Alcohol and Substance Misuse and Testing).

#### *Possession*

A person is in possession of a drug if they have both control over it and the knowledge that it was under his control. Knowledge is an essential element for an offence under this section and a person cannot be said to be in possession of something without his knowledge. For example an offence would not be made out where drugs are put by another into an accused's house or pocket and the accused had no knowledge that they were there. However, a mistake as to the nature of the substance under the accused's control is not enough to prevent them being in possession, for example, believing heroin to be a lesser class of drug such as cannabis or a legal substance such as aspirin does not prevent the offence.

The possession of a package or a box leads to a strong inference of possession of the contents. However, if the contents are quite different in kind from what the accused believed them to be then they may not be in possession of them. In this case the accused must prove that either:

- a. They had no right to open the package and no reason to suspect that its contents were drugs; or
- b. They had no knowledge of, or had made a genuine mistake as to the nature of the contents even though they were the owner, and they had received the package innocently and had no opportunity to acquaint himself with the contents.

A person will not be out of possession merely because the drug concerned is not physically held by them or about his person. They will remain in possession even when it is in the custody of another (e.g. in the accused's locker or elsewhere) if they have effective control over it.

A person will not be in possession of a controlled drug if at the material time they had consumed it, although traces were found in their urine. This is because, when consumed, the drug's character will change and as such is not then in a person's possession.

#### *Quantity*

It is not necessary to prove possession of a usable quantity of the drug; possession of any quantity, provided it is measurable, will suffice. However, a mere droplet which can only be seen under a microscope is not sufficient. Quantity may also be relevant to the issue of evidence. For example where the issue is the accused's knowledge and the amount of the illegal drug found is minute (grains of heroin powder on clothing) this may support the accused's defence that they did not know they possessed it.

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Defences are provided by section 5(4) and section 28 of the Misuse of Drugs Act 1971. Section 5(4) is subject to section 28.

## **5. Notes**

Spare.

## **Criminal damage**

### **Section 1 of the Criminal Damage Act 1971 provides: -**

- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

  - (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
  - (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

### **Section 2**

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried, -

- (a) To destroy or damage any property belonging to that other or a third person; or
- (b) To destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person; shall be guilty of an offence.

### **Section 3**

**A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it-**

- (a) To destroy or damage any property belonging to some other person; or
- (b) To destroy or damage his own or the users property in a way which he knows is likely to endanger the life of some other person; shall be guilty of an offence.

*(Section 4 (omitted))*

### **Section 5**

- (1) This section applies to any offence under section 1(1) ...(remainder of this subsection is omitted).
- (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

- (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; or
- (b) if he destroyed or damaged ..... the property in question ..... in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—
  - (i) that the property, right or interest was in immediate need of protection; and
  - (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
- (3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.
- (4) For the purposes of subsection (2) above a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.
- (5) This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

*(Section 6-9 omitted)*

## **Section 10**

- (1) In this Act “property” means property of a tangible nature, whether real or personal, including money and—
  - (a) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but
  - (b) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.

For the purposes of this subsection “mushroom” includes any fungus and “plant” includes any shrub or tree.
- (2) Property shall be treated for the purposes of this Act as belonging to any person—
  - (a) having the custody or control of it;
  - (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
  - (c) having a charge on it.
- (3) Where property is subject to a trust, the persons to whom it belongs shall be so treated as including any person having a right to enforce the trust.
- (4) Property of a corporation sole shall be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.
- (5) For the purposes of this Act a modification of the contents of a computer shall not be regarded as damaging any computer or computer storage medium unless its effect on that computer or computer storage medium impairs its physical condition.

*(Subsequent sections omitted)*

## 1. Type of offence

An offence under section 1(1) may be heard summarily without permission of higher authority<sup>782</sup>.

An offence under section 1(2) of the Criminal Damage Act 1971 i.e. damaging or destroying property with the intent to endanger life is listed in Schedule 2 of the Act and may not be heard summarily<sup>783</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate a Schedule 2 offence may have been committed they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under section 1(3), section 2 or section 3 may not be heard summarily. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these sections they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

## 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DAMAGING PROPERTY CONTRARY TO SECTION 1(1) OF THE CRIMINAL DAMAGE ACT 1971

[AB] on ....., did without lawful excuse damage a caravan belonging to [CD], intending to damage such property or being reckless as to whether such property would be damaged, thereby occasioning a loss to [CD] of £300.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DESTROYING PROPERTY CONTRARY TO SECTION 1(1) OF THE CRIMINAL DAMAGE ACT 1971

[AB] on ....., did without lawful excuse destroy a Sparto Airjet pair of skis belonging to [CD], intending to destroy such property or being reckless as to whether such property would be destroyed, thereby occasioning a loss to [CD] of £500.

## 3. Ingredients of the offence

### *Destroys or damages*

Damage is interpreted widely to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness. Destroy goes beyond damage and has its normal dictionary meaning, including total demolition.

### *Property*

See section 10 (above) of the Criminal Damage Act 1971.

### *Belonging to another*

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<sup>782</sup> Section 53 Schedule 1 Part 1 of the Act.

<sup>783</sup> Section 53 Schedule 2 of the Act.

For the purposes of this offence, property *belongs* to any person who has custody or control of it, has any proprietary right or interest in it or has a charge on it.

### *Intending*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Recklessness*

An accused acts recklessly with respect to:

- a. A circumstance when they are aware of a risk that it exists or will exist; and
- b. A result when they are aware of a risk that it will occur and it is, in the circumstances known to them, unreasonable to take the risk.

For example, if an accused throws a stone at a person walking past a glass window and the stone breaks the window. Assuming the accused is aware that there is a risk that given the circumstances the result will be that the window will shatter, they will be reckless if, in the circumstances, it was unreasonable for them to throw the stone.

### *Without lawful excuse*

For lawful excuse generally see [Chapter 12](#) (Defences, Mitigation and Criminal Responsibility).

See section 5 (above) of the Criminal Damage Act 1971 and comments under defences below.

## **4. Defences**

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Intoxication*

The statutory defence under section 5(2) can be applicable to an accused even if they were voluntarily intoxicated at the time. Therefore an accused may have a defence if through drink they mistakenly but honestly believed that they owned the property that they damaged or destroyed.

Where the defence under section 5(2)(b)(i) of the Criminal Damage Act 1971 is raised by an accused, the requirement of immediacy is satisfied if the threat to the accused's property etc is already happening.

## **5. Notes**

Where the destruction or damage of the property appears to be racially or religiously motivated (see section 30 Crime and Disorder Act 1998), the advice of a staff legal adviser should be sought.



## Interference with vehicles

### Section 9 of the Criminal Attempts Act 1981 provides:

- (1) A person is guilty of the offence of vehicle interference if he interferes with a motor vehicle or trailer or with anything carried in or on a motor vehicle or trailer with the intention that an offence specified in subsection (2) below shall be committed by himself or some other person.
- (2) The offences mentioned in subsection (1) above are—
  - (a) theft of the motor vehicle or trailer or part of it;
  - (b) theft of anything carried in or on the motor vehicle or trailer; and
  - (c) an offence under section 12(1) of the Theft Act 1968 (taking and driving away without consent);and, if it is shown that a person accused of an offence under this section intended that one of those offences should be committed, it is immaterial that it cannot be shown which it was.

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>784</sup>.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY INTERFERENCE WITH VEHICLES CONTRARY TO SECTION 9 OF THE CRIMINAL ATTEMPTS ACT 1981

[AB] on ....., at ..... interfered with the front passenger window of a motor vehicle registration HC98 XCB with intent to steal from that vehicle.

### 3. Ingredients of the offence

#### *Interferes with*

*Interferes* has no statutory definition and should be construed using the normal dictionary meaning as it relates to the facts of the particular case. For example, looking into a vehicle is not interference, but looking in and applying pressure to the door handle may constitute interference.

#### *Motor vehicle*

This is defined as *a mechanically propelled vehicle intended or adapted for use on roads*<sup>785</sup>. Whether a vehicle is intended for use on roads does not depend on the intent of the user or manufacturer. It is a question of fact for the officer hearing the charge to determine from the evidence whether a vehicle is intended or adapted for use on roads. In most cases this will be obvious.

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<sup>784</sup> Section 53 Schedule 1 Part 1 of the Act.

<sup>785</sup> Road Traffic Act 1988 section 185(1).

### *Trailer*

This is defined as *a vehicle drawn by a motor vehicle*<sup>786</sup>. To be drawn, a trailer must be attached to a motor vehicle.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Lack of intention*

Mere recklessness on the part of the accused as to whether they are committing an offence under section 9 of the Criminal Attempts Act 1981 is not sufficient.

The accused may assert that they intended to interfere with a vehicle, but not with the intention of committing one of the stipulated offences, for example, due to some reason of necessity.

## **5. Notes**

This offence is not applicable to pedal cycles, however, a pedal cycle fitted with an engine is a motor vehicle as would be a motor cycle<sup>787</sup>.

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<sup>786</sup> Road Traffic Act 1988 section 185(1).

<sup>787</sup> Road Traffic Act 1988 section 185(1).

# Road traffic offences

## Careless and inconsiderate driving

### Section 3 of the 1988 Road Traffic Act provides:

- (1) If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.<sup>788</sup> A person convicted of an offence under this section shall be liable to a fine not exceeding level 5 on the standard scale (£5000).

### 1. Type of offence

An offence under section 3 of the Road Traffic Act 1988 (c.52) **may be** heard summarily **without** permission of higher authority<sup>789</sup>.

Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42 because they are not public roads. Where local orders or standing orders create driving offences a charge of contravening standing orders drawn under section 13 of the Act may be preferred see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., drove a mechanically propelled vehicle on a road [or other public place] namely ..... without due care and attention.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY INCONSIDERATE DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988.

[AB] on ....., drove a mechanically propelled vehicle on a road [or other public place] namely ..... without reasonable consideration for other persons using the said road [or place].

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., drove a mechanically propelled vehicle, namely a Red Vauxhall Astra Vehicle Registration Number HV52 HOT1 on a road [or other public place] without due care and attention.

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<sup>788</sup> This section is printed as substituted by Road Traffic Act 1991, section 2.

<sup>789</sup> Section 53 Schedule 1 Part 1 of the Act.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITHOUT REASONABLE CONSIDERATION CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., drove a mechanically propelled vehicle, namely a Red Vauxhall Astra Vehicle Registration Number HV52 HOT1 on a road [or other public place] without reasonable consideration for other persons using the road [or place].

### 3. Ingredients of the offence

The offence may take one of two forms:

*Careless driving* ('driving without due care and attention')

The test is whether the accused was exercising the degree of care and attention that a reasonable, competent and prudent driver would exercise in the circumstances. If the conduct was not inconsistent with that of a reasonably prudent driver, the offence is not proved. Therefore the test is an objective one where the safety of other road users should be considered. The police and CPS have issued an agreed Driving Offences Charging Standard in which the following are given as examples which may support an allegation of careless driving: overtaking on the inside, driving too close to another vehicle, driving through a red light, reading a map, nodding off etc.

*Driving without reasonable consideration*

The test is whether other road users were actually inconvenienced by the accused's inconsiderate driving. Therefore if no one was actually inconvenienced the offence will not be made out. While such driving will usually also constitute driving without due care and attention (described in (a) above) this is not necessarily the case. For example a motorist who jumps a queue of vehicles in order to force his way to the head of a line of waiting vehicles; such behaviour might constitute driving without reasonable consideration, depending on the evidence available from other road users. Other examples include: flashing of lights to force drivers in front to give way, braking without good cause, or driving through a puddle causing pedestrians to be splashed. The *other persons using the road or place* will include the accused's own passengers.

The facts of a particular case (e.g. failing to negotiate a curve in the road and hitting a telegraph pole) may be such that, in the absence of any explanation (e.g. skidding on a patch of oil that was impossible to foresee), the only proper inference is that the driving was careless.

*Drives*

The test of whether a person is driving a vehicle is whether they are controlling the movement and direction of the vehicle. A passenger could be said to be driving a vehicle if they take control of the steering wheel, but the determinant as to whether someone is driving a vehicle is a question of fact and degree. The word *drives* must be construed in accordance with its normal dictionary meaning.

*Mechanically propelled vehicle*

Whether a vehicle is mechanically propelled is a question of fact and is for the prosecution to prove, but has a broad meaning and can cover mopeds and motorcycles.

### *Road or other public place*

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*<sup>790</sup>. There is no separate definition of public place and this should be given its normal dictionary meaning.

Although there may be exceptional circumstance in which roads on Service establishments can be regarded as accessible to the public, this will rarely be the case. Where an accused has driven carelessly on a road within a Service establishment, consideration should be given to charging them under section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline) of the Act. MOD property will not generally qualify as a public place.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Automatism*

In an ordinary case, once it has been shown that the accused was in the driver's seat of a vehicle, there is a strong inference that they were the driver. The accused may have a defence if they can bring evidence that tends to support his contention that they were rendered incapable of controlling the car, e.g. by being knocked unconscious. Falling asleep at the wheel may constitute reckless driving.

### *Mechanical defect*

Where the apparently careless driving was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the driver.

No offence is committed under section 3 where the driving took place in the course of an authorised motoring event<sup>791</sup> under regulations made from time to time by the Secretary of State by Statutory Instrument.

## **5. Notes**

Spare.

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<sup>790</sup> Road Traffic Act 1988, section 192(1).

<sup>791</sup> Road Traffic Act 1988, section 13A..

## Driving or being in charge with excess alcohol

### Section 5 of the Road Traffic Act 1988 provides:

- (1) A person is guilty of the offence of driving or being in charge of a motor vehicle if:
  - (a) drives or attempts to drive a motor vehicle on a road or other public place, or
  - (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.
- (2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.
- (3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle.

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>792</sup>. Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42 because they are not public roads. Where local orders or standing orders create driving offences a charge under section 13 (contravention of standing orders) of the Act may be preferred - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITH EXCESS ALCOHOL CONTRARY TO SECTION 5(1)(a) OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., [drove] [attempted to drive] a motor vehicle on [a road][at ....., a public place] having consumed alcohol in such a quantity that the proportion thereof in his [blood][urine][breath] exceeded [80 milligrammes of alcohol in 100 millilitres of blood][107 milligrammes of alcohol in 100 millilitres of blood][35 microgrammes of alcohol in 100 millilitres of breath] the prescribed limit.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITH EXCESS ALCOHOL CONTRARY TO SECTION 5(1)(b) OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., was in charge of a motor vehicle on [a road][at ....., a public place] having consumed alcohol in such a quantity that the proportion thereof in his [blood][urine][breath]

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<sup>792</sup> Section 53 Schedule 1 Part 1 of the Act.

exceeded [80 milligrammes of alcohol in 100 millilitres of blood][107 milligrammes of alcohol in 100 millilitres of blood][35 microgrammes of alcohol in 100 millilitres of breath] the prescribed limit.

### **3. Ingredients of the offence**

#### *Drives*

The test of whether a person is driving a vehicle is whether they are in a substantial sense controlling the movement and direction of the vehicle. Where a passenger intentionally grabs the wheel, they are not driving, but interfering with the driving of the vehicle.

#### *Attempts*

See notes under Sections 39, 43, 44 and 48 for offence of Attempt.

#### *Mechanically propelled vehicle*

Whether a vehicle in question is mechanically propelled is a question of fact and it is for the prosecution to prove that it was.

#### *Road or other public place*

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*<sup>793</sup>. The question of whether or not a particular road is one to which the public has access is one of fact and degree. There is no separate definition of public place, this should be given its normal dictionary meaning. For example, if a restricted class of person only is permitted or invited to have access, the place is a private place, whereas if only a restricted class of person is excluded, the place is a public place. For a dual use place – sometimes with private access, sometimes with public access – the offence can only be committed during the time there is public access.

#### *In charge*

A person is in charge of a vehicle if they act in a manner which shows that they assume control or intends to assume control of the vehicle preparatory to driving it. A person can be in charge of a vehicle that is immobile, e.g. through clamping. It is not necessary for the person to be in the vehicle to be in charge of it. The circumstances to be taken into account for determining whether a person is in charge will vary infinitely, but the following will be relevant: (a) whether and where the accused is in the vehicle or how far they are from it; (b) what they are doing at the relevant time; (c) whether they are in possession of a key that fits the ignition; (d) whether there is any evidence of an intention to take or assert control of the car by driving it or otherwise; and (e) whether any other person is in, at or near the vehicle and, if so, the like particulars in respect of that person.

#### *The prescribed limit*

The prescribed limits are (a) 35 microgrammes of alcohol in 100 millilitres of breath; (b) 80 milligrammes of alcohol in 100 millilitres of blood; (c) 107 milligrammes of alcohol in 100 millilitres of urine.

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<sup>793</sup> Road Traffic Act 1988 section 192(1).

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There is a statutory defence at subsection (2) above to the offence of being in charge. The burden of proof is on the accused and it is for them to prove on the balance of probability that there was no likelihood of them driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

#### **5. Notes**

The charge must state which specimen (breath/blood/urine) is to be relied on for the purposes of proving the charge.



## Tampering with motor vehicles

### Section 25 of the Road Traffic Act 1988 provides:

If, while a motor vehicle is on a road or on a parking place provided by a local authority, a person—

- (a) gets on to the vehicle, or
- (b) tampers with the brake or other part of its mechanism,

without lawful authority or reasonable cause he is guilty of an offence.”

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>794</sup>. Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create driving offences a charge under section 13 (contravention of standing orders) of the Act may be preferred, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas cannot be charged under this section.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY [GETTING ON TO] [TAMPERING WITH] A MOTOR VEHICLE WITHOUT LAWFUL AUTHORITY OR REASONABLE CAUSE CONTRARY TO SECTION 25 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., without lawful authority or reasonable cause [got on to a motor cycle] [released the handbrake of motor vehicle], registered number in [Victory Road] [Hardy municipal car park].

### 3. Ingredients of the offence

#### *Road*

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*<sup>795</sup>. The question of whether or not a particular road is one to which the public has access is one of fact and degree.

#### *A parking place provided by a local authority*

The parking place must have been provided by a recognised local authority, and in connection with avoiding congestion etc. on a road. Car parks will not generally qualify as parking places. May not include a parking place provided by a local authority abroad.

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<sup>794</sup> Section 53 Schedule 1 Part 1 of the Act.

<sup>795</sup> Road Traffic Act 1988 section 192(1).

Legal advice should be sought as to whether a parking space is a qualifying parking space for the purposes of RTA 88 s.25.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a defence that the person had lawful authority or reasonable excuse. For example, a person would not be liable to be convicted of the offence if they had the authority of the owner or released the hand brake of the vehicle in order to move it when it was causing an obstruction.

#### **5. Notes**

Spare.

## Dangerous cycling

### Section 28 of the Road Traffic Act 1988 provides:

- (1) A person who rides a cycle on a road dangerously is guilty of an offence.
- (2) For the purposes of subsection (1) above a person is to be regarded as riding dangerously if (and only if) —
  - (a) the way he rides falls far below what would be expected of a competent and careful cyclist, and
  - (b) it would be obvious to a competent and careful cyclist that riding in that way would be dangerous.
- (3) In subsection (2) above ‘dangerous’ refers to danger either of injury to any person or of serious damage to property; and in determining for the purpose of that subsection what would be obvious to a competent and careful cyclist in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to be in the knowledge of the accused.

### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>796</sup>.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create cycling offences a charge under section 13 (contravention of standing orders) of the Act may be preferred, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DANGEROUS CYCLING CONTRARY TO SECTION 28 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., rode a cycle dangerously on a road.

### 3. Ingredients of the offence

#### *Rides*

This term is to be given its normal dictionary meaning but an offence will not be committed where the accused is merely *wheeling* the cycle.

#### *Cycle*

*Cycle* means a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle.

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<sup>796</sup> Section 53 Schedule 1 Part 1 of the Act.

## *Road*

*Road* for the purposes of this offence means any highway and any other road to which the public has access, and includes bridges over which a road passes.

In this context, *the public* means the general public and not members of a limited class and access must be lawful access. In many instances therefore this will exclude roads that go through a Service establishment.

Whether a particular area of land is a road is a matter of fact but guidance might be found by considering its physical character and function. The proper function of a road is to enable traffic to move along it to a destination. Therefore a car park does not qualify as a road as its primary function is to enable vehicles to stop and wait within it.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

### *Automatism*

The accused may have a defence if they can bring evidence that tends to support his contention that they were rendered incapable of controlling the cycle, e.g. by being distracted by a swarm of bees.

### *Mechanical defect*

Where the apparently dangerous cycling was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the cyclist.

## **5. Notes**

This offence takes no account of the accused's personal circumstances, for example his age, proficiency or experience as a cyclist. For this charge to be proved, the accused must ride a cycle in a manner that falls below the standards that would be expected of a competent and careful cyclist. This is an objective test. It focuses on the manner that a bicycle is ridden and not on the accused's state of mind. It is however also necessary to prove that in riding the bicycle in the manner alleged it would have been obvious to a competent and careful cyclist that riding in the way alleged was dangerous. In determining this matter, the officer hearing the charge must therefore take into account the circumstances at the time of the incident.

Minor cycling errors would not amount to an offence under this section of the Road Traffic Act 1988 but might amount to careless or inconsiderate cycling, see Careless and Inconsiderate Cycling.

## Careless and inconsiderate cycling

### Section 29 of the Road Traffic Act 1988 provides:

**If a person rides a cycle on the road without due care and attention, or without reasonable consideration for other persons using the road, he is guilty of an offence.**

#### 1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority<sup>797</sup>.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create cycling offences a charge under section 13 (contravention of standing orders) of the Act may be preferred - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

#### 2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS CYCLING CONTRARY TO SECTION 29 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., rode a cycle on a road without due care and attention.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY RIDING A CYCLE WITHOUT CONSIDERATION FOR OTHER ROAD USERS CONTRARY TO SECTION 29 OF THE ROAD TRAFFIC ACT 1988

[AB] on ....., rode a cycle on a road without reasonable consideration for other persons using the road.

#### 3. Ingredients of the offence

##### *Cycle*

*Cycle* means a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle.

##### *Road*

*Road* for the purposes of this offence means any highway and any other road to which the public has access, and includes bridges over which a road passes. In this context, 'the public' means the general public and not members of a limited class and access must be lawful access. In many instances therefore this will exclude roads that go through a Service establishment.

Whether a particular area of land is a road is a matter of fact but guidance might be found by considering its physical character and function. The proper function of a road is to enable

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<sup>797</sup> Section 53 Schedule 1 Part 1 of the Act.

traffic to move along it to a destination. Therefore a car park does not qualify as a road as its primary function is to enable vehicles to stop and wait within it.

#### *Due care and attention*

It must be proven that the accused's standard of cycling fell below that which could be expected of a reasonable, prudent and competent cyclist in all the attendant circumstances and that his actions were voluntary. An objective standard is applied and so the, proficiency or experience of the cyclist is irrelevant. However, the officer hearing the charge may take into account local factors for example the level of traffic, the conditions of the road etc.

#### *Inconsiderate cycling*

In order to prove that an accused cycled in an inconsiderate manner, it must be proven that some other persons on the road were inconvenienced.

#### *Other persons on the road*

This will include other road users and might also include pedestrians who are affected by the manner of cycling. It refers to persons actually on the road at the material time and not those who might reasonably be expected to be there

### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Automatism*

The accused may have a defence if they can bring evidence that tends to support his contention that they were rendered incapable of controlling the cycle, e.g. by being distracted by a swarm of bees.

#### *Mechanical defect*

Where the apparently careless and inconsiderate cycling was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the cyclist.

### **5. Notes**

Careless cycling and inconsiderate cycling are distinct offences and therefore when drafting the charge, it is necessary to indicate which form of misconduct the accused is alleged to have carried out. A charge which alleges that an accused has cycled on a road without due care and attention and without reasonable consideration for other road users is bad for duplicity.

The officer hearing the charge may find a charge proven if in the absence of a satisfactory explanation, and in the absence of a reasonable explanation to the contrary, the facts point inferentially to carelessness beyond reasonable doubt.

## Section 43 – 48 offences (Armed Forces Act 2006)

### Attempting criminal conduct

#### 43. Attempting Criminal Conduct

- (1) Subsection (2) applies for the purpose of determining whether an attempt is an offence under section 42.
- (2) For that purpose section 1(4) of the Criminal Attempts Act 1981 (c. 47) (offences that it is an offence to attempt) has effect as if for the words from “offence which” to “other than” there were substituted “offence under section 42 of the Armed Forces Act 2006 consisting of an act punishable by the law of England and Wales as an indictable offence or an act that, if done in England or Wales, would be so punishable by that law; but “indictable offence” here does not include”.
- (3) Section 42(6) applies for the purposes of section 1(4) of the Criminal Attempts Act 1981 as modified by this section.

#### 1. Type of offence

An offence under this section **may be** heard summarily **as long as** the full offence may also be heard summarily<sup>798</sup>.

Where the offence appears in Schedule 2 (paragraphs 12 and 13(a)) of the Act, or an offence which has been committed in prescribed circumstances, it may not be heard summarily<sup>799</sup>. For the handling of cases in relation to Schedule 2 and prescribed circumstances offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed in prescribed circumstances or be a Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence attempted is not in Schedule 2 or committed in prescribed circumstances but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An attempt to commit an offence which is listed at Schedule 1 Part 1 of the Act may be dealt with summarily. Permission is required from HA to deal summarily with an attempt to commit an offence set out in Schedule 1 Part 2 of the Act.

#### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ATTEMPTING TO COMMIT [state crime e.g. THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968 CONTRARY TO SECTION 1(1) OF THE CRIMINAL ATTEMPTS ACT 1981]

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<sup>798</sup> Section 53 of the Act.

<sup>799</sup> Section 53, section 114 and Schedule 2 of the Act.

[AB] on ....., did attempt to steal a watch, the property of.....

### 3. Notes

The effect of this section substitutes the words in section 1 of the Criminal Attempts Act 1981, so that it reads:

- (1) If, with intent to commit an offence to which this Attempting section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.**
- (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.**
- (3) In any case where—**
  - (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but**
  - (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.**
- (4) This section applies to any offence under section 42 of the AFA 06 consisting of an act punishable by the law of England and Wales as an indictable offence or an act that, if done in England and Wales, would be so punishable by that law; but “indictable offence” here does not include-**
  - (a) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment);**
  - (b) aiding, abetting counselling and procuring or suborning the commission of an offence;**
  - (c) offences under section 4(1) and 5(1) of the Criminal Law Act 1967.**

**(s.1 CAA 1981)**

This section applies to any attempt to commit a civil offence under section 42 of the Act. An attempt is where an accused has embarked upon an offence but where the offence has not been completed. To be guilty of this offence an accused must intend to commit the offence and in relation to that offence, they must have done acts which are more than merely preparatory. For example, if an accused arms himself with a gun and forces his way into an office block and subsequently draws his gun towards his intended victim but is disarmed before they could shoot his victim, they would be charged with attempted murder. An accused who uses a crow bar to prise a window but is arrested before they can enter the building could be charged with attempted burglary.

The case can be found proved even where the accused was attempting the impossible. For example, if an accused attempted to sell what they believed to be ecstasy tablets, however they were in fact paracetamol, although it would be impossible for them to supply a class A drug contrary to section 4(3) of the Misuse of Drugs Act 1971, the case would be found proved in respect of attempting to supply a controlled drug.

Any attempt to commit a non-criminal conduct (disciplinary) offence as detailed in section 53(2) is dealt with under section 39 above.



## **Trial of section 42 offence of attempt**

### **44. Trial of section 42 offence of attempt**

- (1) Where, in proceedings for a section 42 offence of attempt, there is evidence sufficient in law to support a finding that the defendant did an act falling within subsection (1) of section 1 of the Criminal Attempts Act 1981, the question whether his act fell within that subsection is a question of fact.**
- (2) In this section “a section 42 offence of attempt” means an offence under section 42 consisting of an act that is, or that would be if done in England or Wales, an offence under section 1(1) of the Criminal Attempts Act 1981 (c. 47).**
- (3) References in subsections (1) and (2) to section 1(1) of the Criminal Attempts Act 1981 are to that provision as it has effect by virtue of section 43 above.**

### **1. Notes**

See the notes at section 43 of this chapter for further information on the offence of attempt.

Where there is evidence to support a finding that the accused did an act which amounted to an attempt contrary to section 42, it is a question for the officer hearing the charge or the CM as to whether the act was an attempt, as distinct from mere preparation for the commission of an offence.

## Conspiring to commit criminal conduct

### 45. Conspiring to commit criminal conduct

- (1) **For the purpose of determining whether an agreement that a course of criminal conduct be pursued is an offence under section 42—**
- (a) sections 1(1) and 2 of the Criminal Law Act 1977 have effect as if any reference to an offence included a reference to an act that, if done in England or Wales, would be punishable by the law of England and Wales; and
  - (b) section 1(2) of that Act has effect as if it read—
- “(2) **Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of it, a person is nevertheless not guilty by virtue of subsection (1) above of conspiracy to commit—**
- (a) that offence, or
  - (b) an act that would amount to that offence if done in England or Wales, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence, or the act, is to take place.”
- (2) **Section 42(6) applies for the purposes of section 1(2) of the Criminal Law Act 1977 as substituted by this section.**

### 1. Type of offence

An offence under this section **may be** heard summarily **as long as** the full offence may also be heard summarily<sup>800</sup>.

Where the offence appears in Schedule 2 (paragraphs 12 and 13(b)) of the Act, or an offence which has been committed in prescribed circumstances, it may not be heard summarily<sup>801</sup>. For the handling of cases in relation to Schedule 2 and prescribed circumstances offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed in prescribed circumstances or be a Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not in Schedule 2 nor committed in prescribed circumstances but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter.

In all cases, legal advice should be sought at an early stage. Framing of conspiracy charges is especially complex and COs should not bring a conspiracy charge without legal advice. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Notes

In an offence of conspiracy agreement is essential. The agreement must propose a course of action that results in one of the parties to the agreement committing an offence.

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<sup>800</sup> Section 53 of the Act.

<sup>801</sup> Section 53, section 114 and Schedule 2 of the Act.

The effect of the above section amends the Criminal Law Act 1977 to read:

- |           |            |  |
|-----------|------------|--|
| <b>1.</b> | <b>(1)</b> | <b>Subject to the following provisions of this Part of this Act if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.</b>  |
|           | <b>(2)</b> | <b>Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of it, a person is nevertheless not guilty by virtue of subsection (1) above of conspiracy to commit—</b><br><b>(a)</b> <b>that offence, or</b><br><b>(b)</b> <b>an act that would amount to that offence if done in England or Wales, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence, or the act, is to take place.</b> |
| <b>2.</b> | <b>(1)</b> | <b>A person shall not by virtue of section 1 above be guilty from liability of conspiracy to commit any offence if he is an intended victim for conspiracy of that offence.</b>  |
|           | <b>(2)</b> | <b>A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say—</b><br><b>(a)</b> <b>his spouse;</b><br><b>(b)</b> <b>a person under the age of criminal responsibility; and</b><br><b>(c)</b> <b><i>an intended victim of that offence or of each of those offences.</i></b>  |
|           | <b>(3)</b> | <b>A person is under the age of criminal responsibility for the purposes of subsection (2)(b) above so long as it is conclusively presumed, by virtue of section 50 of the Children and Young Persons Act 1933, that he cannot be guilty of any offence</b>  |

## Encouraging or assisting criminal conduct

### 46. Encouraging or assisting criminal conduct

- (1) Subsection (2) applies if a person subject to service law, or a civilian subject to service discipline, encourages or assists the doing of an act (or one or more of a number of acts) that, if done in England or Wales would be punishable by the law of England and Wales.
- (2) Regardless of where that act (or those acts) might be done and of his state of mind with respect to that question, his encouragement or assistance shall be treated for the purposes of section 42(1) as an act that is punishable by the law of England and Wales (so far as it is not such an act in any event).
- (3) Reference in this section to encouraging or assisting is to an act that would constitute an offence under Part 2 of the Serious Crime Act 2007 disregarding any provision in that Part about the place where the act (or acts) being encouraged or assisted might be done or the accused's state of mind with respect to that question.

(AFA06 s.46)

### 1. Type of offence

Encouragement and assistance to commit an offence which is listed at Schedule 1 Part 1 **may be** heard summarily. Encouragement and assistance to commit an offence which is listed at Schedule 1 Part 2 of the Act may be dealt with summarily with permission from HA. Given the nature of this offence, legal advice should be sought from a staff legal adviser.

Encouragement and assistance to commit an offence which is listed in Schedule 2 (paragraph 12 and 13(c)) may not be heard summarily<sup>802</sup>. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate a Schedule 2 offence may have been committed they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

### 2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ENCOURAGING OR ASSISTING THE COMMISSION OF [state crime e.g. THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968 CONTRARY TO SECTION 44(1) OF THE SERIOUS CRIME ACT 2007].

[AB] on ....., did unlawfully encourage or assist ..... to steal ....., property belonging to .....

### 3. Notes

A charge of encouraging or assisting may be found proved if:

- a. They encourage or assist another to do or cause to be done an act or acts which would amount to an offence by the other; and

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<sup>802</sup> Section 53 Schedule 2 of the Act.

- b. They intend or believe that the other, if they acts as encouraged or assisted, shall or will do so with the fault required for the offence or offences.

This is not limited to urging or spurring on with advice or persuasion but includes encouraging or assisting another to do an act by threats or by pressure or by bribing a person to commit an offence.

## Aiding, abetting, counselling or procuring criminal conduct

### 47. Aiding, abetting, counselling or procuring criminal conduct

- (1) **Subsection (2) applies if—**
  - (a) any person (“A”) does an act that is punishable by the law of England and Wales or would be so punishable if done in England or Wales; and
  - (b) a person subject to service law, or a civilian subject to service discipline, aids, abets, counsels or procures A’s doing of that act.
- (2) **Regardless of where the act aided, abetted, counseled or procured was done, the aiding, abetting, counseling or procuring shall be treated for the purposes of section 42(1) as an act that is punishable by the law of England and Wales.**
- (3) **For the purpose of determining whether an attempt is an act that falls within subsection (1)(a) above, section 1(4) of the Criminal Attempts Act 1981 (c. 47) has effect with the modification made by section 43.**

#### 1. Type of offence

An individual who aids, abets, counsels or procures the commission of any criminal conduct offence (section 42) is treated under section 47 as though they committed the offence himself (as a principal offender) and charged with the principal offence. Therefore the guidance for the principal offence in this chapter applies.

#### 2. Specimen charges

No offence will be charged under this section. The accused will always be charged as the principal offender under the section of the principal offence.

#### 3. Notes

A person may be responsible for criminal action, either as the person who commits the offence or as an accessory. An accessory may aid, abet counsel or procure the commission of the offence.

The words *aid* or *abet* describe the action of a person who is present at the time of the commission of the offence and takes some part in it. However it could include, for example, providing equipment to use in a burglary, which has already been decided upon. In these circumstances a person is aiding and abetting even though they are not present at the scene of the offence. Therefore, where a person (the principal offender) damages Service property (section 24) then an accused who has aided or abetted the damaging of the property would also be charged with the same offence, a person who aids and abets a theft under section 1 of the Theft Act 1968 will be charged as committing an offence contrary to section 42 of the Act, that is to say theft under that section. If a person is present at the scene and has the right and ability to control the person committing the offence, if they fail to exercise that control, it could make them an accomplice to the offence.

*Counselling* relates to advice to the offender which takes place before the commission of the offence, and *procuring* means to produce by endeavour.

An example of procuring is the *spiking* of drinks following which the victim drives and commits the offence of driving a motor vehicle with an alcohol concentration above the prescribed limit.

## Provisions supplementary to sections 43 to 47

### 48. Provisions supplementary to sections 43 to 47

- (1) This section applies where—

  - (a) an attempt, agreement or encouragement or assistance, or a person's aiding, abetting, counselling or procuring, is an offence under section 42 by reason of section 43, 45, 46 or 47; and
  - (b) the act to which it relates ("the contemplated act") is not an act that is (or that if done would have been) punishable by the law of England and Wales.
- (2) For the following purposes it shall be assumed that the contemplated act amounted to the offence under the law of England and Wales that it would have amounted to if it had been the equivalent act in England or Wales.
- (3) Those purposes are—

  - (a) the purpose of determining what punishment may be imposed for the offence under section 42;
  - (b) the purpose of determining for the purposes of any of the following provisions of this Act whether the act constituting the offence under section 42, or the equivalent act done in England or Wales, is or would be—
    - (i) an offence under the law of England and Wales;
    - (ii) any particular such offence;
    - (iii) such an offence of any particular description.

### 1. Notes

The effect of this section is that for the purposes set out in section 48(3) it is assumed that a contemplated act (as defined) amounted to an offence in England and Wales, it would have been equivalent to had it occurred there. It means that an offence can be committed under section 42 by virtue of an attempt, agreement or encouragement or assistance, or a person's aiding, abetting, counselling or procuring even though the contemplated act was outside of the jurisdiction.

## TRANSITIONAL GUIDANCE

