

Chapter 5

Custody

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Chapter 5

Custody

Part 1 - Introduction

General principles

1. This chapter provides guidance on the rules governing Service custody under the relevant provisions of the Act. These rules concern both custody without charge (pre-charge custody) and custody after charge (post-charge custody). They do not relate to an offender serving a custodial sentence at MCTC Colchester¹ (or other Service detention facility) or a sentence of imprisonment in one of Her Majesty's prisons having been convicted of a Service offence. Also included is an overview of the transitional arrangements regarding the authorisation of pre-charge custody and custody without charge without charge applying to circumstances which occur wholly or partly before the commencement of the Regulations (31 October 2009).
2. Service custody in this context means the physical deprivation of a person's liberty either following arrest on suspicion of having committed a Service offence see [Chapter 6](#) (Investigation, charging and mode of trial) or following charge. This chapter does not deal with the arrest of a person by a Service policeman in anticipation of the commission of a Service offence under section 69 of the Armed Forces Act 2006 (the Act), which is covered in [Chapter 4](#) (Arrest and search, stop and search, entry search and seizure and retention). In those circumstances, the arrest must be reported as soon as practicable to the arrested person's commanding officer (CO), but the CO and 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 the legislation as the 'relevant time'², see also paragraph 79), subject to a regime of periodic reviews which must be conducted at no more than 12 hourly intervals. Thereafter, an

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

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

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

Pay and allowances

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

Part 2 – Custody without charge

The arresting officer's decision and reporting action

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

- a. To secure or preserve evidence relating to a Service offence for which the suspect is under arrest; or
- b. To obtain such evidence by questioning the suspect (in accordance with JSP 397 (The Service Police Codes of Practice)).

The decision as to whether either of these conditions exists lies with the arresting officer who should complete the Record of arrest by Service Police under Section 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 practicable⁵ (see [Chapter 2](#) (Meaning of commanding officer) for the meaning of CO in relation to Service custody).

9. 'As soon as practicable' is not defined in the Act. It will depend upon all the circumstances prevailing at the time but will generally mean at the first reasonable opportunity. Until the report is made to the CO the arresting officer may keep the person in Service custody⁶. The Record of arrest and custody decision/review (T-SL-CUS03(1)) ([Appendix 1 to Annex A](#)) form should be used for reporting the fact of a person's arrest and any grounds on which 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).

11. The report that a person is being held in Service custody may be made to and received by a CO or the officer to whom the CO's functions have been delegated in respect of custody without charge (see paragraphs 28 to 31 below).

³ Section 67 of the Act also see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

⁴ Section 99(2) of the Act.

⁵ Section 99(1) of the Act.

⁶ Section 99(2) of the Act.

The rights of a person placed in Service custody

12. Where the intention is to retain the person in Service custody, the arresting officer should as soon as practicable notify the person in custody of the following matters:

- a. The offence (or anticipated offence if arrested under section 69 of the Act) for which 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 custody⁷. 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 met⁸:

- a. The keeping of the person in Service custody without being charged is necessary to:
 - (1) Secure or preserve evidence relating to the offence for which 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

⁷ Section 99(3) of the Act.

⁸ Section 99(4) of the Act.

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 decision⁹.

15. Where a CO decides to authorise custody, that authorisation may not be for any longer than 12 hours at a time, subject to the maximum of 48 hours custody¹⁰. However, a CO should not authorise the maximum period of 12 hours unless there is good reason to do so. Twelve hours is an absolute limit and a CO should not routinely authorise such a period of custody. When considering an application, a CO should be prepared to question the reasons given for custody and authorise only such period as appears to 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 must¹¹ 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 arrest¹². In such circumstances they should review the matter in light of all the available information. For example, if the person in custody had been apprehended after escaping from custody it may be unwise to release 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 documents¹³:

- a. The name and rank or rate of the authorising officer;

⁹ Section 99(3) of the Act.

¹⁰ Section 99(5) of the Act.

¹¹ Section 98(2) of the Act.

¹² Section 98(3) of the Act.

¹³ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 6(1).

- b. The reason why the person was arrested (the offence or anticipated offence if arrested under section 69 of the Act for which 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 nominated¹⁴; 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 custody¹⁵. The person in custody is also to be handed a copy of 'Your rights if you are accused of an offence under the Service justice system' booklet – Annex G to [Chapter 6](#) (Investigation, charging and mode of trial)¹⁶. Sub-paragraph 17g above sets out the right of the person in custody to appoint an assisting officer who will, amongst other things, assist 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 noted¹⁷. 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 custody¹⁸, 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

¹⁴ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 7(4)(a).

¹⁵ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(5).

¹⁶ This can be found at Annex F to [Chapter 6](#) (Investigation, charging and mode of trial).

¹⁷ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 6(4).

¹⁸ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(2)(k).

been authorised¹⁹. However, the person in custody must be afforded the means and opportunity to make any representations²⁰ and where a person in custody makes representations to an arresting officer, the arresting officer must immediately forward those representations to the CO. In these circumstances the CO may decide to conduct an early review of custody. In any event, the review must be conducted before the expiry of the period of custody already authorised. When conducting a review of whether a person is to remain in Service custody without charge, the same test as that set out in paragraph 13 above is to be applied²¹ and any representations of the person in custody should be taken into consideration. The person in custody is to be notified of the CO's decision about any representations made to 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 custody²². 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 arrest²³. The Record of arrest and custody decision/review (T-SL-CUS03(2)) ([Appendix 2 to Annex A](#)) form should be completed for each review.

22. To accommodate the exigencies of Service life, and also the requirements of the investigative process, there are certain limited circumstances²⁴ in which the review may be temporarily delayed. A review may be postponed at the expiry of an authorised period of Service custody if:

- a. In all the circumstances prevailing at that time, it is not practicable to conduct a review at that time;
- b. The person in custody is being questioned, and the CO is satisfied that an interruption of questioning in order to carry out a review would prejudice the investigation; or
- c. The CO is not readily available.

23. However, whilst recognising that there are circumstances where it may not be practicable to carry out the review at the nominated time, the review must be carried out as soon as practicable thereafter²⁵. It is permissible for the person to be held in custody until such time as the postponed review is conducted²⁶.

24. Where a person, whilst being kept in Service custody without charge for a Service offence (offence A), is arrested²⁷ for another Service offence (offence B), the process described at paragraphs 7 to 11 above must be followed afresh in relation to offence B²⁸. That said, in applying to offence B the test laid down at paragraph 13, the CO is also entitled to take into account any continuing need to secure or preserve evidence, or to question the person, in relation to offence A²⁹. Where a person is arrested for offence B whilst in custody without charge for offence A, the original time limit of 48 hours in respect of offence A will stand³⁰. This means that, on the CO's authorisation, a person may be held in custody

¹⁹ Section 100(1) of the Act.

²⁰ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 8.

²¹ Section 100(2) of the Act.

²² Section 100(2) of the Act.

²³ Section 99(6) of the Act.

²⁴ Sections 100(3) and (4) of the Act.

²⁵ Section 100(6)(a) of the Act.

²⁶ Section 100(6)(b) of the Act.

²⁷ In accordance with section 67 of the Act.

²⁸ Section 99(7)(a) of the Act.

²⁹ Section 99(7)(b) of the Act.

³⁰ Section 99(7)(c) of the Act.

without charge for offence B only within the 48 hour maximum permitted from the time of arrest for offence A.

25. The CO's authorisation of custody without charge in respect of offence B does not trigger a new 48 hour cycle of custody without charge. Where a CO decides to authorise custody without charge in respect of offence B, any previous authorisations in respect of offence A cease to have effect³¹. Thus, the next review of the person's custody will fall due at a time not later than 12 hours after custody without charge for offence B has been authorised, depending on the period of custody without charge which has been authorised. When the 48 hour point is reached after the person's arrest for offence A, the person must be released unless 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 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 delegation³²:

- a. The delegation (including any variation or revocation) must, wherever practicable, be in writing, such as unit routine orders, or on the Delegation of custody powers (T-SL-CUS02) ([Annex E](#)) form designed for this purpose;
- b. The delegate must be:
 - (1) An officer under the CO's command and who is not below the rank of naval lieutenant, military or marine captain or flight lieutenant who is not the arresting officer;
 - (2) A Service policeman of no lower rank than naval lieutenant, military or marine captain or flight lieutenant who is not the arresting officer; or

³¹ Section 99(7)(d) of the Act.

³² The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 3.

(3) If an officer at (1) or (2) is not reasonably available, a Service policeman of any rank/rate who is not the arresting officer.

29. To whom delegation under paragraph 28b(1) may be appropriate will vary from unit to unit and is entirely at the discretion of the CO. Subject to the rank restriction it would, for example, be appropriate for a delegation to be made to a person exercising a command function on behalf of the CO: in Royal Navy units delegation may be to the Executive Officer, Duty CO or Officer of the Day; in Army units delegation may be to the 2IC, sub-unit commanders and duty field officers; and in RAF units delegation may be to the Orderly Officer or one of the station executives.

30. In addition to the general restrictions on delegation at paragraph 28 above as to person, the CO may impose further restrictions as to the limits of delegation having regard to the rank or rate and experience of the person to whom the power has been delegated³³. For example, a CO may limit a delegated officer's power to authorise custody without charge to, say, 12 hours and state that retention in custody beyond this period must be authorised by the CO personally.

31. Where a person with delegated powers exercises any of those powers 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 charge³⁴. This report should be made on the Commanding officer's decision on custody without charge (T-SL-CUS03(2)), [Appendix 2 to Annex A](#).

Extension by judge advocate of custody without charge

32. A person should not be kept in Service custody for a period over 48 hours unless 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 made³⁵:

- a. At any time before the end of 48 hours after arrest; or
- b. If not practicable before the end of the 48 hour period, as soon as practicable thereafter but not more than 96 hours after arrest.

33. In those rare circumstances in which sub-paragraph 32b above applies (eg. it is not practicable for an application to be heard by a judge advocate because of the unit's involvement in operations), a CO may authorise continued custody himself³⁶. However, 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 time³⁷. In any event, custody without charge cannot be authorised for a period

³³ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 4.

³⁴ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 5.

³⁵ Section 102(1) of the Act.

³⁶ Section 102(2) of the Act.

³⁷ Section 102(2)(a) of the Act.

in excess of 96 hours from the time of arrest³⁸. Should the 96-hour mark be reached, a person in custody must either be charged or released.

34. The ability of the CO to exceptionally authorise continued custody himself does not relieve 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 application³⁹. It is therefore particularly important for Service Police investigating offences to keep the timelines for custody under review.

35. Under normal circumstances, where an application can be made within the timescale prescribed and a CO considers that further custody is required, 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 above⁴⁰. See also paragraphs 67 to 95 below for procedural matters for hearings before a judge advocate.

36. A judge advocate may either refuse custody or authorise custody up to a maximum period of 96 hours after the time of arrest⁴¹. Where a person is kept in custody without charge for a Service offence (offence A) and is then arrested for another offence (offence B), the original custody without charge time limit of 96 hours running from the time of arrest for offence A will stand⁴². This means that a person may be held in custody without charge for offence B only within the 96 hour maximum permitted from the time of arrest for offence A.

37. A judge advocate is not permitted to hear an application for continued custody without charge unless the person in custody has been informed in writing of the grounds of the application⁴³. The person in custody must also be brought before the judge advocate⁴⁴. This need not be in person; it may be by means of live link. The person in custody is also entitled to legal representation (see sub-paragraph 75a) and to an adjournment to seek such representation⁴⁵. During such an adjournment, they may continue to be kept in Service custody⁴⁶. The CO is also entitled to legal representation (see paragraph 75b). It is the responsibility of the CO, or 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 circumstances⁴⁷:

³⁸ Section 102(2)(b) of the Act.

³⁹ Section 102(3) of the Act.

⁴⁰ Section 101(6) of the Act.

⁴¹ Section 101(4) of the Act.

⁴² Section 101(5) of the Act.

⁴³ Section 101(2)(a) of the Act.

⁴⁴ Section 101(2)(b) of the Act.

⁴⁵ Section 101(3) and the Armed Forces (Custody Proceedings) Rules 2009/1098, regulations 18 and 36(1).

⁴⁶ Section 101(3)(b) of the Act.

⁴⁷ Section 103 of the Act.

- a. Where a person is transferred to or taken into Service custody:
 - (1) Having been arrested by the civilian police under a warrant issued by a judge advocate⁴⁸;
 - (2) Having surrendered himself to the civilian police as a deserter or absentee without leave⁴⁹;
 - (3) Having appeared in proceedings before a civilian court where they are suspected of illegal absence⁵⁰; 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 appeared⁵¹; or
- b. In any other case where a person arrested by a member of a UK police force or overseas police force is transferred into Service custody⁵².
- c. Where a judge advocate issues a warrant for the arrest of a witness, where a witness summons would probably not procure witness attendance or the witness has failed to comply with a witness summons. See [Chapters 29](#) (Court Martial proceedings) and [32](#) (Service Civilian Court).

40. There is, however, one exception where the CO takes no part in the authorisation of custody without charge. This concerns section 69 of the Act; arrest in anticipation of a commission of a Service offence. In these circumstances the test that needs to be applied by the Service Police is that the person in Service custody can be kept in custody until such time as the policeman is satisfied that the risk of 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 custody⁵³. The commanding officer's decision on custody without charge (T-SL-CUS03(2)) at Appendix 2 to [Annex A](#) should be used for this purpose where authorisation for custody is given by the CO or someone acting on 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 release⁵⁴ and a copy must be given to the

⁴⁸ Section 313 of the Act.

⁴⁹ Section 315 of the Act.

⁵⁰ Section 316 of the Act.

⁵¹ Section 317 of the Act.

⁵² Section 103(b) of the Act.

⁵³ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(2)(i).

⁵⁴ 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 court⁵⁵.

⁵⁵ The Armed Forces (Custody Without Charge) Regulations 2009/1097, regulation 10(4).
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Part 3 - Custody after charge

42. Once a person has been charged the CO may decide that 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 charged⁵⁶ with a Service offence, the CO is to ensure that the accused is brought before a judge advocate as soon as practicable⁵⁷ for authorisation (Using T-SL-CAO03 [Annex I](#)).

43. Where the accused is brought before a judge advocate 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 met⁵⁸:

a. There are substantial grounds for believing that the accused, if released from Service custody, would:

- (1) Fail to attend any hearing in the proceedings against 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.

46. When deciding whether or not any of the conditions set out at sub-paragraph 43a are met, the judge advocate is required⁵⁹ to take into account any of the following conditions which appear to be relevant:

⁵⁶ For these purposes a person is to be treated as charged with an offence when a charge is brought by the CO in accordance with section 120(2) of the Act (at his own discretion) or section 122(1) (on the direction of the DSP). See the Armed Forces (Custody Proceedings) Rules 2009/1098, rule 25(3). For conditions required in order to bring a charge see [Chapter 6](#) (Investigation, charging and mode of trial).

⁵⁷ Section 105(1) of the Act.

⁵⁸ Section 106 of the Act.

- a. The nature and seriousness of the offence with which the accused is charged (and the probable method of dealing with 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 made⁶⁰. 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 proceedings⁶¹.

49. An order made by a judge advocate authorising the keeping of the accused in Service custody will cease to have effect⁶²:

- a. If the accused is subsequently released from Service custody; or
- b. Once the accused has been sentenced in respect of the offence with which 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 authorised⁶³. However, at all times, including between reviews by a judge advocate, it is incumbent upon the accused's CO to consider whether the continuation of custody is necessary. If at any time it appears to the accused's CO that the grounds on which an order authorising custody was made no longer exist, they must either release the accused from Service custody or request a review⁶⁴. 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

⁵⁹ Section 105(4) of the Act.

⁶⁰ Section 105(3) of the Act.

⁶¹ Section 105(5) of the Act.

⁶² Section 105(6) of the Act.

⁶³ Section 108(1) of the Act.

⁶⁴ Section 108(2) of the Act.

request a review by a judge advocate using the Request for a review of Service custody after charge (T-SL-CAO04) ([Annex G](#)) form. The CO should make any representations about the review hearing on the Representations to judge advocate about the requirement for a review of custody after charge by way of a hearing (T-SL-CAO05) ([Annex H](#)) form. If a CO makes such a request the review must be carried out as soon as practicable⁶⁵. In reviewing the continuing need for custody, the judge advocate is required to apply the same test as that set out at paragraph 43 above⁶⁶.

51. At the first review in front of a judge advocate following the authorisation of custody after charge, the accused or their legal representative may advance any argument of fact or law against their continuing custody, whether or not that argument has been advanced previously⁶⁷. At the second and subsequent reviews, the judge advocate need not hear arguments as to fact or law which have been heard previously⁶⁸.

52. When conducting a review of custody after charge, a judge advocate will normally be able to authorise a period not exceeding 8 days after the day on which the order is made⁶⁹. However, at a review conducted as a hearing, the judge advocate may authorise the keeping of the accused in Service custody for a period not exceeding 28 days⁷⁰, but only if:

- a. The accused consents; and
- b. The accused is legally represented.

Release from custody after charge

53. If at an initial hearing of an application for custody after charge (see paragraph 43 above), or at a subsequent review, a judge advocate does not authorise the keeping of the accused in Service custody, the accused must be released from Service custody without delay⁷¹. This release may be unconditional or subject to requirements (see paragraph 54 below).

Release from custody subject to requirements

54. In the civilian courts where a defendant is not remanded in custody 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 necessary⁷²:

- 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

⁶⁵ Section 108(3) of the Act.

⁶⁶ Section 108(4) of the Act.

⁶⁷ Section 108(5) of the Act.

⁶⁸ Section 108(6) of the Act.

⁶⁹ Section 108(4) of the Act.

⁷⁰ Section 108(7) of the Act.

⁷¹ Section 107(2) of the Act.

⁷² Section 107(3) of the Act.

d. for 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 arrest⁷³ (see paragraph 61 below).

58. There is no equivalent provision for the imposition of conditions where a person is released from custody without charge.

59. An accused, anyone acting on 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 advocate⁷⁴ using the Request for judge advocate to review release conditions (T-SL-CA007) at [Annex K](#). An accused who is the subject of such a requirement commits an offence if, without reasonable excuse, they fail to attend any hearing to which the requirement relates⁷⁵. In the event the accused commits one of these offences the advice of a staff legal adviser is to be sought, both as to charge and procedure.

⁷³ Section 110(3)(c) of the Act.

⁷⁴ Section 107(4) of the Act.

⁷⁵ Section 107(5) of the Act.

Part 4 - Custody during proceedings of Court Martial or Service Civilian Court

60. During the proceedings of the Court Martial (CM) or the Service Civilian Court (SCC), the grounds for custody and method of review are, in essence, unchanged from the pre-trial procedures which are applicable to an accused considered for custody after charge⁷⁶. However, the judge advocate has an additional power in these circumstances. As well as the grounds on which 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 custody⁷⁷.

Arrest after charge or during proceedings

61. **By order of commanding officer.** The CO of an accused who has been charged with, or is awaiting sentence for, a Service offence and is not in Service custody, may order the arrest of that accused if they are satisfied that taking the accused into custody is justified⁷⁸. Taking an accused into custody is justified⁷⁹ if there are reasonable grounds for suspecting that, if not taken into Service custody, 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, if⁸⁰:

- a. The accused has failed to attend any hearing in the proceedings against them (but see below); or
- b. There are reasonable grounds for suspecting that they should be taken into Service custody:
 - (1) For their own protection; or

⁷⁶ Section 109(1) of the Act.

⁷⁷ Section 109(2) and section 106(4) of the Act.

⁷⁸ Section 110(1) of the Act.

⁷⁹ Section 110(2) of the Act.

⁸⁰ Section 110(3) of the Act.

(2) Where the accused is under the age of 17, for 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 custody⁸¹. The review in these circumstances should be carried out in accordance with the procedure for reviewing custody after charge (see paragraph 43 above)⁸². Application for the review should be made using the Application for authorisation for keeping an accused in custody after charge (T-SL-CAO03) ([Annex I](#)) form.

65. **At the direction of a court.** If a judge advocate is satisfied that taking an accused into custody is justified, 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 court⁸³. Any person with the power to arrest the accused for a Service offence may also arrest an accused in pursuance of such a direction from a judge advocate⁸⁴.

66. Where a judge advocate exercises the power described at paragraph 65 above, they must apply the same test as that which a CO is required to apply at paragraphs 61 and 62 above⁸⁵. An accused who is arrested and kept in custody under the power outlined at paragraph 65 above must be brought before a judge advocate as soon as is practicable for a review of whether they should remain in Service custody⁸⁶. The review in these circumstances should be carried out⁸⁷ in accordance with the procedure for reviewing custody after charge (see paragraph 43 above).

⁸¹ Section 110(4)(a) of the Act.

⁸² Section 110(4)(b) of the Act.

⁸³ Section 111(1) of the Act.

⁸⁴ Section 111(2) of the Act.

⁸⁵ Section 111(3) of the Act.

⁸⁶ Section 111(4)(a) of the Act.

⁸⁷ Section 111(4)(b) of the Act.

Part 5 - Custody hearings before judge advocates

Matters applying to all custody hearings

67. There are broadly six situations in which a custody hearing before a judge advocate is required:

- a. On application of the CO for an extension of custody without charge;
- b. On application for authorisation of custody after charge;
- c. Where an accused has been arrested and taken into custody after charge;
- d. Where an accused has been arrested and taken into custody during proceedings;
- e. On request by the CO for a review of custody after charge; and
- f. On an application for variation of the 'release' conditions (see paragraph 59).

68. Each separate situation attracts varying notification and request requirements to the court administration officer (CAO), person in custody (or 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 by⁸⁸:

- 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.

71. On receipt of the relevant notification the CAO will arrange a custody hearing⁸⁹ before a judge advocate, appointing a court recorder and interpreter (if required) for the hearing and

⁸⁸ The Armed Forces (Custody Proceedings) Rules 2009/1098, rules 4 to 7.
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notifying the CO and the person to whom the proceedings relate. If a court reporter is not appointed the judge advocate will keep a written record of the proceedings⁹⁰. The time and place of the hearing will be determined after consultation with the Office of the Judge Advocate General.

Live link

72. Custody hearings may be conducted by live link⁹¹. Such a live link will usually be a television link, but may be by telephone or similar e.g. IP, as long as the judge advocate, the accused and the CO (or their legal representatives), any interpreter and any witness giving evidence can both hear and be heard by one another.

73. In addition to this general ability to conduct custody hearings by live link, witnesses may with the permission of the judge advocate give evidence through a live link where it is not reasonably practicable for the witness to attend the hearing or if it is in the interests of justice⁹². An application for permission for a witness to give evidence by live link must be made by the person wishing to call 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 hearing⁹³. The application must be made in writing, copied to the CO or the person to whom the proceedings relate⁹⁴. The application must be served on the CAO and state:

- a. The grounds of the application;
- b. The name and, where applicable, the Service number, rank or rate and unit of the witness;
- c. Where the witness is under 18, the date of birth of the witness;
- d. The country and place from where the witness will be giving evidence; and
- e. The name, occupation and relationship to the witness of any person proposed to accompany the witness and the grounds for believing that person should accompany the witness whilst giving evidence.

74. The judge advocate must not decide whether the application should be granted without first giving the opposing party (CO or accused as the case may be) an opportunity to make representations about the application⁹⁵, and may give permission for the live link subject to conditions such as to place of giving evidence and presence of anyone with the witness when giving evidence⁹⁶.

Legal representation

75. Both the accused and the CO have the right to be legally represented at a custody hearing⁹⁷. Broadly speaking 'legal representative' means a practising barrister or solicitor⁹⁸.

⁸⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 14.

⁹⁰ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(5).

⁹¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 16.

⁹² The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 16(1).

⁹³ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁵ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 19.

⁹⁷ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 18(1).

⁹⁸ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 2(1).

- a. **Legal representation of person held in custody.** The person may wish to be represented by a civilian lawyer and legal aid or the duty solicitor scheme may be available to the accused for this purpose. Alternatively the accused may choose to be represented by a Service lawyer where one is available. For legal aid, see JSP 838 (Armed Forces Legal Aid Scheme). The right to be legally represented imposes no obligation on the accused to instruct a lawyer and an accused may represent himself.
- b. **Legal representation of the commanding officer.** It will be normal for the CO to be represented at a custody hearing by a Service lawyer.

Procedure

76. The strict rules of evidence do not apply to custody hearings⁹⁹. Both the CO and the accused (or their legal representatives) must be heard, but otherwise the judge advocate can use any procedure that appears to them best to serve the interests of justice¹⁰⁰. Where oral evidence is given it must be given on oath or affirmation¹⁰¹. Proceedings may be adjourned in order for an unrepresented accused to seek legal representation¹⁰².

Witnesses and summonses¹⁰³

77. A judge advocate may issue a witness summons requiring the witness to attend before a judge advocate and give evidence or produce a document or thing, the Summons to witness (T-SL-CUS06) ([Annex J](#)) form is to be used for this purpose. Any party may apply for a witness summons and must do so as soon as practicable after becoming aware of the grounds for doing so. Judge advocates may also issue witness summonses of their own motion. Special rules apply to applications for a witness to produce a document or give evidence about information apparently held in confidence where the document or information relates to another person. Such applications must be in writing and contain the same declaration of truth as a witness statement. In such circumstances all parties must have at least 7 days to make representations as to whether the issue of the summons is appropriate, and a hearing to determine the application may be ordered¹⁰⁴.

Application for an extension of custody without charge

78. An application for an extension of custody without charge may be made by the CO¹⁰⁵ or someone acting on their behalf using the Application for a custody hearing – person arrested and in custody after charge (T-SL-CAO02) ([Annex F](#)) form. This form is to be sent to the CAO as soon as possible and this may be carried out by fax or e-mail, or by delivering it to 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 representative¹⁰⁶;
- or

⁹⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(1).

¹⁰⁰ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 35(2).

¹⁰¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 21.

¹⁰² The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 36(1).

¹⁰³ The Armed Forces (Custody Proceedings) Rules 2009/1098, Schedule 1.

¹⁰⁴ Detailed provisions are in the Armed Forces (Custody Proceedings) Rules 2009/1098, Schedule 1.

¹⁰⁵ CO for this purpose includes a person with delegated authority to authorise custody in accordance with paragraphs 27 to 30.

¹⁰⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 4(1).

c. Fax or e-mail unless the accused or 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 appropriate¹⁰⁷.

79. The information to be provided to the CAO is¹⁰⁸:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the person arrested and, where applicable, 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.

80. On receipt of this notification the CAO will arrange a custody hearing in accordance with the Armed Forces (Custody Proceedings) Rules 2009, rule 19.

Notification to the person arrested

81. The person arrested must be notified¹⁰⁹:

- a. That an application for an extension of custody without charge¹¹⁰ is to be made;
- b. Of the matters at sub-paragraphs 79 f to h above; and
- c. If the person arrested has not appointed a legal representative, of the entitlement to legal representation at the hearing of the application.

¹⁰⁷ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 4(1).

¹⁰⁸ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 24(2).

¹⁰⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 24(1)(b).

¹¹⁰ Section 101(1) of the Act.

The Application for a custody hearing – person arrested and in custody without charge (T-SL-CAO02) ([Annex F](#)) form should be used for this purpose.

Notification to CAO of custody after charge

82. Where an accused is being kept in custody after charge the CO or someone acting on 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 advocate¹¹¹.

Notification that the accused has been arrested and taken into custody after charge or during proceedings

84. Where an accused has been arrested on the orders of the CO¹¹² or on the order of the judge advocate during proceedings,¹¹³ the CO or someone acting on 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 follows¹¹⁴:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, their rank or rate, Service number and ship/unit/establishment;
- c. The name and address of the accused's legal representative, if known;

¹¹¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 25(4).

¹¹² Section 110(1) of the Act (Arrest on the orders of the CO).

¹¹³ Section 111(1) of the Act (arrest on the order of the judge advocate during proceedings).

¹¹⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(2).

- d. The charge(s);
- e. The date, time and place that the accused was arrested pursuant to the order or direction; and
- f. If the arrest was made¹¹⁵, the CO's reasons for believing that the keeping of the accused in custody is justified.

This provision as to notification does not apply where the accused is arrested in the presence of a judge advocate¹¹⁶.

85. On receipt of this notification the CAO will arrange a custody hearing before a judge advocate¹¹⁷. If the accused is already before a judge advocate when arrested, the judge advocate will usually immediately carry out a review of the necessity for custody.

Request by CO for a review of custody after charge

86. Where a CO considers that the grounds for keeping an accused in custody after charge have ceased to apply, and they decide to seek a review by a judge advocate rather than immediately releasing the accused¹¹⁸, the CO should request for such a review to the CAO. Where such a request for review is made, the CO or someone acting on 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 after charge (T-SL-CAO04) ([Annex G](#)) form should be used. The information to be supplied with the application for review is as follows¹¹⁹:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, 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 advocate¹²⁰.

87. If such a situation arises during the accused's trial by the court and on a day when the court is sitting, the request must be made to the judge advocate at the trial. The application should be made in writing (but may be done initially orally) and this will be done by the DSP, at the request of the CO.

¹¹⁵ Section 110(1) of the Act.

¹¹⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(3).

¹¹⁷ In accordance with the Armed Forces (Custody Proceedings) Rules 2009/1098, rule 26(4).

¹¹⁸ Section 108(2) of the Act.

¹¹⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 27(1).

¹²⁰ Section 107(3) of the Act.

Application for variation of release conditions

88. Where the accused or a CO wishes to apply to vary the requirements placed upon the accused when released from custody after charge (see paragraph 59 above), the person applying for a variation must make an application to the CAO, supported by the following information¹²¹:

- a. The name, rank, ship/unit/establishment and location of the CO;
- b. The name, date of birth and location of the accused and, where applicable, 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 hearing¹²²;
- f. The circumstances which have caused the applicant to consider that any such requirement should be varied or discharged; and
- g. The variation or discharge sought.

89. Where the application is made by the CO, 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 above¹²³. Likewise, if the accused is the applicant then they or someone acting on their behalf (usually their legal representative) must inform the CO¹²⁴. If the application for review is made orally (eg. over the telephone in order to expedite a hearing) written notification must follow¹²⁵ using the Request to judge advocate to review release conditions (T-SL-CUS07) ([Annex K](#)) form.

90. If such a situation arises during the accused's trial by a court and at a time when the court is sitting, the request must be made to the judge advocate at the trial. The application should be made in writing (but the initial request may made orally) and this will be done by the Director of Service Prosecutions (DSP), at the request of the CO.

Reviews

91. Where a judge advocate makes an order for custody after charge¹²⁶ reviews of custody by a judge advocate are required¹²⁷. The judge advocate when making the initial order for custody will specify the date for review, but may decide to carry out a review on a different date when requested to do so by the CO¹²⁸ (in which case, if it is reasonably practicable to do so, the review will take place before the previously determined date) or it is not practicable or in the interests of justice for the review to take place on the previously determined date¹²⁹.

¹²¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(1).

¹²² Section 105(1) and any requirements imposed under Section 107(3) of the Act (including any such requirement as previously varied or discharged under s 107(4)).

¹²³ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(2).

¹²⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(3).

¹²⁵ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 29(4).

¹²⁶ Section 105(2) of the Act.

¹²⁷ Under sections 108(1), 110(4), 111(4) and 171(2) of the Act.

¹²⁸ Under section 108(2) of the Act.

¹²⁹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 30(2).

92. A judge advocate may dispense with the requirement for a hearing to review custody, but the review must take place at a hearing if:

- a. It is the first review in relation to the accused;
- b. It has been requested by the CO because it appears to the CO that the grounds on which the order for custody was made have ceased to exist¹³⁰; or
- c. The review takes place at any time whilst the accused is before the CM (i.e. during the trial)¹³¹.

93. Other than the mandatory requirements for a hearing in paragraph 92 above, reviews may be conducted on the basis of written representations by the CO or the accused where¹³²:

- a. The judge advocate is satisfied on the basis of representations made by the CO that the grounds on which the order for custody after charge was made continue to exist;
- b. Any representations by the accused do not advance any arguments of fact or law on 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 to¹³³:

- a. The need for a hearing to carry out the review; and
- b. Whether the judge advocate should make an order authorising the continued keeping of the accused in custody.

Where the CO and/or accused makes representations as to review they must serve a copy on the other party and on the CAO. When the judge advocate reviews custody without a hearing they will notify the CAO of their decision, who will in turn notify the CO and the accused¹³⁴.

95. A judge advocate may not on a review impose any 'release conditions'¹³⁵ (see paragraph 54 above) other than at an oral hearing¹³⁶.

¹³⁰ Section 108(2)(b) of the Act.

¹³¹ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(2).

¹³² The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(3).

¹³³ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 32(2).

¹³⁴ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 34(2).

¹³⁵ Section 107(3) of the Act.

¹³⁶ The Armed Forces (Custody Proceedings) Rules 2009/1098, rule 31(4).

Part 6 - Custody - Miscellaneous matters

General procedures

96. Persons authorised to be held in Service custody should normally be kept in licensed custodial facilities where the provisions of JSP 837 (Code of Practice for the Management of Personnel in Service Custody) apply and, where applicable, the Service Custody and Service of Relevant Sentences Rules 2009 are observed. Where, due to the exigencies of Service life, such custodial facilities are not available (for example, onboard Her Majesty's ship/submarine away from base port) other secure accommodation may be used, preferably in Service premises. In these circumstances, close supervision will be required to reduce the risk of self-harm and escape, and JSP 837 (Service Code of Practice for the Management of Personnel in Service Custody and Committal to Service Custody Premises and Civil Prisons) is to be followed as far as practicable. Where licensed Service custody facilities are not used, it is advisable to keep a record of what efforts were made to secure such facilities and why they were not available.

Personnel taken into Service custody abroad

97. Reference should be made to JSP 837 (Code of Practice for the Management of Personnel in Service Custody) in all situations in which personnel are held in custody abroad.

Individuals under medical care

98. When an individual who it is necessary to retain in custody is sent to a Service hospital or other establishment within the Defence Secondary Care Agency as a patient, 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 Act¹³⁷ (custody without charge).

105. Where authorisation of custody has been made under the Custody and Summary Dealing (Army) Regulations 2006, the Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000 or Naval Custody Regulations 2000, that authorisation remains valid on commencement¹³⁸ and a delegation of a CO's powers and functions under the previous regulations will be treated as a valid delegation under the 2009 Regulations¹³⁹.

106. Any further periods of custody without charge must be granted in accordance with the 2009 Regulations and care should be taken to ensure that a person who was a delegated officer under the old regulations remains so under the new. It should also be noted that the coming into force of the Armed Forces (Meaning of Commanding Officer) Regulations 2009 may, in certain very limited circumstances, mean that the CO has changed on commencement.

107. The maximum periods of custody without charge that may be authorised remain the same. A judge advocate has the power under section 101(1) of the 2006 Act to extend custody without charge of a person arrested under the SDAs in the same way that they can for a person arrested after commencement¹⁴⁰.

108. The flow diagram below should provide assistance and in cases of doubt, staff legal advice should be sought.

Applications to a judge advocate

109. Where, after commencement, it is necessary to apply to a judge advocate (previously a judicial officer) for an extension of custody without charge or for post charge custody, this should be done in accordance with the Armed Forces (Custody Proceedings) Rules 2009 (SI 2009/1098), irrespective of whether the individual was arrested under the 2006 Act or the SDAs.

Authorisation of post charge custody and custody after charge

110. Any order by a judicial officer under sections 75F(2) of AA 1955 or AFA 1955 or section 47G(2) of NDA 1957 authorising post charge custody remains valid on

¹³⁷ Article 35 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

¹³⁸ Article 36(2) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

¹³⁹ Paragraph 3 to the Schedule to the Armed Forces (Custody Without Charge) Regulations 2009/1097.

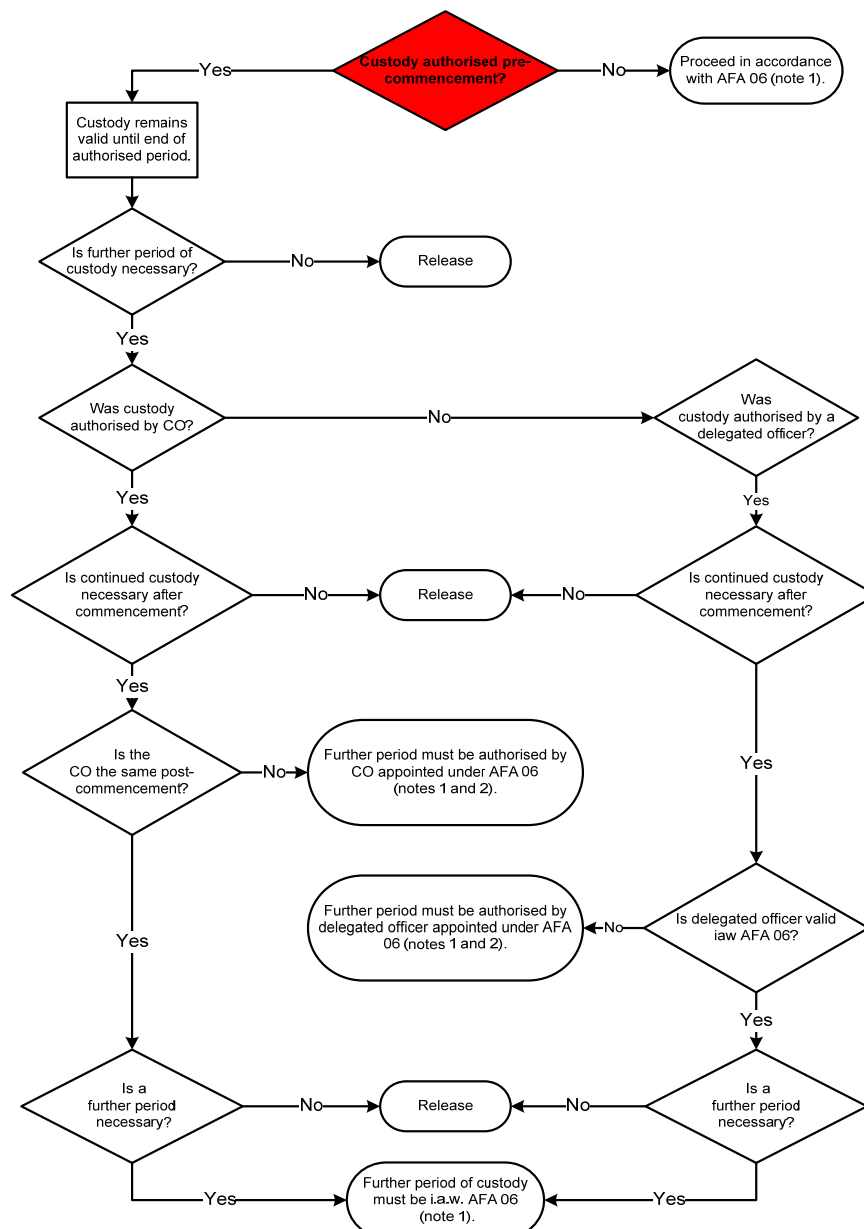
¹⁴⁰ Article 37 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

commencement and will be treated as an order under section 105(2) of the 2006 Act¹⁴¹ (custody after charge).

Certificates of transfer from civilian authorities

111. A certificate issued under section 187(4A) of the Army Act 1955 or the Air Force Act 1955 or section 109(4) of the Naval Discipline Act 1957([3]) will be valid as if made under the 2009 Regulations¹⁴².

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.

¹⁴¹ Article 40(2) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

¹⁴² Regulation 4 of the Armed Forces (Evidence of Illegal Absence and Transfer to Service Custody) Regulations 2009/1108.

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.