

## 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>1</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;

<sup>1</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>2</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>3</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>4</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 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

<sup>2</sup> See article 2(5) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>3</sup> See article 9 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

<sup>4</sup> See article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

must only be charged with the relevant SDA offence where the alleged conduct must have been an offence. The only question is when it was committed, and therefore which offence it was. In the example above, the assault must have been either an offence under section 70 of the AA/AFA55 (or section 42 of the NDA57) or an offence under section 42 of the AFA06. If the alleged conduct amounts to an offence under the SDAs but does not amount to any offence under AFA06, it must be proved to have occurred before commencement. Conversely, if it would be an offence under AFA06 but not under the SDAs, it must be proved to have occurred after commencement<sup>5</sup>.

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<sup>5</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>6</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

[AB] on ....., intentionally and without lawful excuse did give information to an enemy concerning ..... that would or might be useful to the enemy.

<sup>6</sup> Section 53 Schedule 2 of the Act.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(c) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did fail to make known to the proper authorities information concerning ..... received by him from an enemy.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(d) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did provide an enemy with supplies, namely .....

ASSISTING AN ENEMY CONTRARY TO SECTION 1(1)(e) OF THE ARMED FORCES ACT 2006

[AB] on ....., intentionally and without lawful excuse did harbour in ..... an enemy other than a prisoner of war.

ASSISTING AN ENEMY CONTRARY TO SECTION 1(2)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., having been captured by an enemy, intentionally and without lawful excuse, did serve with [or assists] the enemy in the prosecution of hostilities [or of measures likely to influence morale] by .....

ASSISTING AN ENEMY CONTRARY TO SECTION 1(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., having been captured by an enemy, intentionally and without lawful excuse, did serve with [or assists] the enemy in any other manner not authorised by international law by .....

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Without lawful excuse*

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

An accused will have a lawful excuse if a person has authority, or is under orders, to communicate with the enemy or give information to the enemy if for example; 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>7</sup>.

### *Serves with or assists the enemy*

Serving with means taking a direct part, with the enemy, in hostilities or other operations against UK forces or other military or police forces co-operating with them. Assistance includes indirect assistance.

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<sup>7</sup> Section 374 of the Act.

### *Prosecution of hostilities*

This is not limited to actions against UK forces in armed conflict.

### *Measures likely to influence morale*

This can either improve the morale of the enemy or undermine the morale of, for example, UK forces or civilians.

### *Any other manner not authorised by international law*

Thus, for example, the Geneva Conventions permit capturing forces to compel prisoners of war to do certain types of work. Where UK forces are carrying out this sort of work they will not be committing an offence under subsection (2).

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **5. Notes**

### **Subsection (1)**

It would not be an offence under subsection (1)(a) if the accused was required in the course of 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>8</sup>. The offences in subsections 3, 4 and 5 although not Schedule 2 offences **may not** be heard summarily either<sup>9</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.

<sup>8</sup> Schedule 2 of the Act.

<sup>9</sup> Section 53 of the Act.

## 2. Specimen charges

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., without reasonable excuse, when being the officer in command of ....., did surrender the said *place/thing* to an enemy.

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., without reasonable excuse, when it was his duty to defend a ..... against an enemy [or prevent from falling into the hands of an enemy], did abandon the said .....

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(3) OF THE ARMED FORCES ACT 2006

[AB] on ....., being in the presence or vicinity of an enemy [or being engaged in an action or operation against an enemy] [or being under orders to be prepared for any action or operation by or against an enemy] when ordered by ....., his superior officer, to ....., did fail to use his utmost exertions to carry out the said lawful command.

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(4)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., being in the presence or vicinity of an enemy [or being engaged in an action or operation against an enemy] [or being under orders to be prepared for any action or operation by or against an enemy] while on watch [or guard duty and posted [or ordered to patrol]], without reasonable excuse, did sleep.

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(4)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., being in the presence or vicinity of an enemy [or being engaged in an action or operation against an enemy] [or being under orders to be prepared for any action or operation by or against an enemy] while on watch [or guard duty and posted [or ordered to patrol]], namely ....., without having been regularly relieved, did leave the said place where it was his duty to be.

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(5)(a) OF THE ARMED FORCES ACT 2006

[AB] on, ....., being in the presence or vicinity of an enemy [or being engaged in an action or operation against an enemy] [or being under orders to be prepared for any action or operation by or against an enemy], without reasonable excuse, did intentionally communicate with X, a person who was a member of Y, of Her Majesty's forces [or of a force co-operating with Her Majesty's force], by (*saying/shouting etc*) ..... and that communication was likely to cause that person to become despondent or alarmed.

### MISCONDUCT ON OPERATIONS CONTRARY TO SECTION 2(5)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., being in the presence or vicinity of an enemy [or being engaged in an action or operation against an enemy] [or being under orders to be prepared for any action or

operation by or against an enemy], without reasonable excuse, did intentionally communicate with X, a person who was a relevant civilian, by *(saying/shouting etc)* .... and that communication was likely to cause that person to become despondent or alarmed.

A charge under subsection (1) or (3) may affirm an intent to assist.

### **3. Ingredients of the offence**

*A person subject to Service law*

An offence under this section cannot be committed by civilians subject to Service discipline. For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

*Surrenders or abandons*

It is an offence under subsection (1)(a) to surrender a place or a thing to an enemy. This requires a direct surrender to, for example, an enemy unit. Abandoning is not limited in this way, however, the abandoning of places or things is an offence under subsection (1)(b) only if it is the duty of the individual to defend that place or things to prevent it falling into the hands of an enemy.

*An enemy*

For *enemy* see section 374 of the Act.

*Action, Operation*

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

*'duty to defend'* (subsection (1))

The duty to defend a place or thing against the enemy or to prevent it from falling into the hands of the enemy is one which may arise from circumstances where an objective assessment will need to be made from service experience of what course of action is to be expected from a Service person of the accused's rank or experience in the circumstances prevailing at the time.

*Subsection (2): Application of subsections (3), (4) and (5)*

Offences under subsection (3), (4) and (5) can only be committed in the circumstances set out in section 2. That means while the accused was taking part in, or under orders to take part in, operations against an enemy or was in the vicinity of an enemy. If these circumstances do not exist, alternative offences should be considered, such as a charge under section 15 (failure to

attend for or perform duty etc) rather than under subsection (4) where personnel sleep on watch or improperly leave their place of duty.

#### *Fails to use 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>10</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.

#### *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)*

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<sup>10</sup> Section 374 of the Act.

It is not necessary that the words in the communication should be false. It is not necessary to prove that the words actually caused a person to become despondent or alarmed, only that it was likely to do so.

#### **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### **5. Notes**

This offence is only to be charged in relation to misconduct on operations.

## Section 3 - Obstructing operations

### 3 Obstructing operations

- (1) A person subject to service law commits an offence if–
- (a) he does an act that is likely to put at risk the success of an action or operation of any of Her Majesty's forces; and
  - (b) he intends to prevent, or is reckless as to whether he prevents, the success of the action or operation.
- (2) A person subject to service law commits an offence if–
- (a) without lawful excuse, he does an act that delays or discourages an action or operation of any of Her Majesty's forces; and
  - (b) he intends to delay or discourage the action or operation.
- (3) In this section “act” includes an omission and references to the doing of an act are to be read accordingly.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–
- (a) if the offence relates to an action or operation against an enemy, may be for life;
  - (b) otherwise, must not exceed ten years.

(AFA06 s.3)

#### 1. Type of offence

An offence under this section **may not** be heard summarily<sup>11</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 operation or being reckless as to whether the success of the operation would be so prevented.

<sup>11</sup> Section 53 Schedule 2 of the Act.

## OBSTRUCTING OPERATIONS CONTRARY TO SECTION 3(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, (insert details of the act), an act that delayed Operation WOODCUTTER, [an operation against an enemy], intending to delay the operation.

### 3. Ingredients of the offence

*A person subject to Service law (subsection (1) and (2))*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

This offence cannot be committed by civilians subject to Service discipline.

*Likely to put at risk the success (subsection (1)(a))*

Evidence of the purpose of an action or operation may be found in any associated mission directive. This may be relevant to any assessment of its success. It will be for a officer hearing the charge to decide whether the act or omission of the individual was likely to risk the success of the action or operation. This is an objective test.

*Action, operation (subsection (1))*

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

*Intentionally, Recklessly (subsection (1) and (2))*

For intention and recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Even if the act or omission was likely to risk the success of the action or operation, for the offence under subsection (1) to be proved, the individual must have either intended to prevent or been reckless as to whether 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>12</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.

**Only an offence under subsection (3) may be heard summarily<sup>13</sup>**. In all cases, reference should be made to an appropriate staff legal adviser at an early stage.

### 2. Specimen charges

<sup>12</sup> Section 53 Schedule 2 of the Act.

<sup>13</sup> Section 53 of the Act.

#### LOOTING CONTRARY TO SECTION 4(1)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, took a wallet from [CD], a person detained during Operation JUDGE, an operation conducted by Her Majesty's Forces.

#### LOOTING CONTRARY TO SECTION 4(1)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, searched [CD] a person detained during Operation JUDGE with the intention of taking his property, namely his wallet.

#### LOOTING CONTRARY TO SECTION 4(2)(a) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, took a compact disc player, properly left exposed in consequence of Operation JUDGE, an operation conducted by Her Majesty's forces.

#### LOOTING CONTRARY TO SECTION 4(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, searched a house [details] with the intention of taking property which had been left exposed or unprotected as a consequence of Operation JUDGE, an operation conducted by Her Majesty's forces.

#### LOOTING CONTRARY TO SECTION 4(3) OF THE ARMED FORCES ACT 2008

[AB] on ....., otherwise than for the public service, took a vehicle, namely [describe vehicle], property abandoned by an enemy of Her Majesty's forces.

### **3. Ingredients of the offence**

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law/civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Without lawful excuse*

For lawful excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful excuse only applies in relation to offences under subsection (1) and (2).

*Takes*

Takes should be given its normal dictionary meaning. It requires an intention to take, either temporarily or permanently. For an offence under subsection (1)(b) or (2)(b) a search must have been made with the intention of taking property. For an offence under subsection (3), the taking by the accused must have been intended for something other than it being put to the public service.

Unlike the offence of theft, this offence does not require proof of dishonesty or intention to permanently deprive. This offence merely requires a person to take an item without authority.

*Property*

Property should be given its normal dictionary meaning and covers anything which can be taken. It therefore includes, for example, both Service equipment and personal belongings.

*Action, operation*

These words, taken together cover both immediate responses and planned operations of any size of force. They are not limited to actions and operations during armed conflict. Therefore an operation may be conducted by a large-scale force or a smaller force such as a Task or Battle Group or even a Unit. An operation will usually have a designated mission, plan and designated forces. An action may be undertaken within any operation by any smaller unit or force. An action or operation may be conducted whether as part of an armed conflict or not and can include circumstances where forces are involved in the restoration of public order or disaster relief.

*Co-operating force*

This applies to a military force that is co-operating with one of Her Majesty's forces; for example, when the forces are participating together in an exercise or operation under a formal agreement.

*An enemy*

For *enemy* see section 374 of the Act.

**4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

**5. Notes**

Spare.

## Section 5 - Failure to escape etc

### 5 Failure to escape etc

- (1) Subsections (2) and (3) apply to a person subject to service law who has been captured by an enemy.
- (2) A person to whom this subsection applies commits an offence if—
  - (a) he is aware of steps that he could take to rejoin Her Majesty's forces;
  - (b) he could reasonably be expected to take those steps; and
  - (c) without lawful excuse, he fails to take them.
- (3) A person to whom this subsection applies commits an offence if, without lawful excuse, he intentionally prevents or discourages another person subject to service law who has been captured by an enemy from taking any reasonable steps to rejoin Her Majesty's forces.
- (4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years.

(AFA06 s.5)

### 1. Type of offences

Offences under this section **may not** be dealt with summarily<sup>14</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*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

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<sup>14</sup> Section 53 of the Act.

### *Captured by an enemy*

This is not limited only to those UK personnel captured (i.e. fall under the power of enemy combatants) during armed conflict who have Prisoner of War status but will include those captured by any enemy<sup>15</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>15</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>16</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].

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].

<sup>16</sup> Section 53 Schedule 2 of the Act.

## MUTINY CONTRARY TO SECTION 6(2)(b) OF THE ARMED FORCES ACT 2006

[AB] on ....., in agreement with [CD] a person [persons] subject to Service law, agreed to overthrow or resist authority namely by [detail conduct].

## MUTINY CONTRARY TO SECTION 6(2)(c) OF THE ARMED FORCES ACT 2006

[AB] on ....., agreed with [CD] a person [persons] subject to Service law, to disobey authority by [detail conduct] and that agreed disobedience was such as to subvert discipline.

### **3. Ingredients of the offence.**

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *At least one other person*

The offence of mutiny cannot be committed by a single individual acting on 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

<p>7</p> <p><b>Failure to suppress mutiny</b></p> <p>(1) A person subject to service law commits an offence if–</p> <p>(a) he knows that a mutiny is occurring or is intended; and</p> <p>(b) he fails to take such steps as he could reasonably be expected to take to prevent or suppress it.</p> <p>(2) For the purposes of this section a mutiny occurs when a person subject to service law, in concert with at least one other person subject to service law–</p> <p>(a) acts with the intention of overthrowing or resisting authority; or</p> <p>(b) disobeys authority in such circumstances as to subvert discipline.</p> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.</p> <p style="text-align: right;">(AFA06 s.7)</p>
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### 1. Type of offence

This is a Schedule 2 offence and **may not** be heard summarily<sup>17</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.

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

<sup>17</sup> Section 53 Schedule 2 of the Act.

for the individual to know that the acts or disobedience legally amount to the technical offence of mutiny.

*Fails to take such steps as 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

<b>8</b>	<b>Desertion</b> <p>(1) A person subject to service law commits an offence if he deserts.</p> <p>(2) For the purposes of this Act a person deserts if he is absent without leave and—</p> <p style="padding-left: 20px;">(a) he intends to remain permanently absent without leave; or</p> <p style="padding-left: 20px;">(b) he intends to avoid a period of active service.</p> <p>(3) In this section “ active service” means service in—</p> <p style="padding-left: 20px;">(a) an action or operation against an enemy;</p> <p style="padding-left: 20px;">(b) an operation outside the British Islands for the protection of life or property; or</p> <p style="padding-left: 20px;">(c) the military occupation of a foreign country or territory.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence—</p> <p style="padding-left: 20px;">(a) if the offender intended to avoid a period of active service, may be for life;</p> <p style="padding-left: 20px;">(b) otherwise, must not exceed two years.</p>
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(AFA06 s.8)

### 1. Type of offence

An offence under **subsection (2)(a) may not** be heard summarily<sup>18</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

[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

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<sup>18</sup>Section 53 Schedule 2 of the Act.

[AB] of [name of unit] absented himself without leave from [date] to [date] with intent to avoid serving in operations outside the British Islands for the protection of life or property, namely [insert details or name of Operation]

or

[AB] of [name of location] when deployed on actions or operations against an enemy namely, [insert name of operation] absented himself without leave from [date] to [date].

### **3. Ingredients of the offence**

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Absence without leave*

For all offences of desertion it must be proved that the accused was in fact absent without leave from 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 absencing oneself without leave with intent to avoid serving in operations against pirates or armed rebels for example in Peace Support Operations or Maritime Interdiction Operations or any particular aspect of such operation.

#### *Outside the British Islands*

The British Islands are Great Britain, Northern Ireland, the Isle of Man and the Channel Islands<sup>19</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*

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>20</sup>.

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

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<sup>19</sup> Interpretation Act 1978.

<sup>20</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).

## 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.

## 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>21</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 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.

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<sup>21</sup> Section 53 of the Act.

The absence will commence from the moment that the individual should have been present on duty, and will cease at the point 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

<p><b>10 Failure to cause apprehension of deserters or absentees</b></p> <p>(1) A person subject to service law commits an offence if–</p> <p>(a) he knows that another person–</p> <p>(i) has committed, is committing or is attempting to commit an offence under section 8 (desertion); or</p> <p>(ii) is committing or attempting to commit an offence under section 9 (absence without leave); and</p> <p>(b) he fails to take such steps as he could reasonably be expected to take to cause that person to be apprehended.</p> <p>(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.10)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>22</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.

*Another person*

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<sup>22</sup> Section 53 of the Act.

This will be a person subject to Service law and therefore capable of offending under Service law.

#### *Desertion*

For desertion see commentary on section 8.

#### *Absence without leave*

For absence without leave see commentary on section 9.

#### *Fails to take steps that 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

<p><b>11</b>      <b>Misconduct towards a superior officer</b></p> <p>(1)      A person subject to service law commits an offence if–</p> <p>          (a)      he uses violence against a superior officer (“ B” ); and</p> <p>          (b)      he knows or has reasonable cause to believe that B is a superior officer.</p> <p>(2)      A person subject to service law commits an offence if–</p> <p>          (a)      his behaviour towards a superior officer (“ B” ) is threatening or disrespectful; and</p> <p>          (b)      he knows or has reasonable cause to believe that B is a superior officer.</p> <p>(3)      For the purposes of this section–</p> <p>          (a)      the behaviour of a person (“ A” ) towards another person (“ B” ) includes any communication made by A to B (whether or not in B's presence);</p> <p>          (b)      “threatening” behaviour is not limited to behaviour that threatens violence.</p> <p>(4)      A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed–</p> <p>          (a)      in the case of an offence under subsection (1), or an offence under subsection (2) of behaviour that is threatening, ten years;</p> <p>          (b)      in any other case, two years.</p> <p style="text-align: right;">(AFA06 s.11)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>23</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

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Uses violence (against)*

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<sup>23</sup> Section 53 of the Act.

For an offence under subsection (1) there must be actual violence used *against* the superior officer and the accused must have intended to use violence. For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a question of fact whether the accused 'used violence' but offering or threatening violence is not sufficient here, nor is any behaviour which falls short of actual violence against 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>24</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 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

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<sup>24</sup> Section 374 of the Act.

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

<b>12</b>	<b>Disobedience to lawful commands</b> <p>(1) A person subject to service law commits an offence if–</p> <ul style="list-style-type: none"><li>(a) he disobeys a lawful command; and</li><li>(b) he intends to disobey, or is reckless as to whether he disobeys, the command.</li></ul> <p>(2) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed ten years.</p> <p style="text-align: right;">(AFA06 s.12)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>25</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>25</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>26</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:

- a. It is within the authority of the person giving it;

<sup>26</sup> Section 53 of the Act.

- b. It is for a proper Service purpose;
- c. It is possible for the command to be carried out; and
- d. It is not contrary to UK domestic law, International Law or relevant local law.

As to the power of British overseas territory force officers to give lawful orders see section 369(2) of the Act.

*Knows or could reasonably be expected to know*

It must be shown that the order contravened was known to the accused, or that 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

<p><b>14</b>      <b>Using force against a sentry etc</b></p> <p><b>(1)</b>      <b>A person subject to service law commits an offence if–</b></p> <p>          <b>(a)</b>      <b>he uses force against a member of any of Her Majesty's forces, or of any force co-operating with them, who is–</b></p> <p>                  <b>(i)</b>      <b>on guard duty and posted or ordered to patrol;</b></p> <p>                  <b>(ii)</b>     <b>on watch; or</b></p> <p>                  <b>(iii)</b>     <b>under orders to regulate traffic by land, water or air; or</b></p> <p>          <b>(b)</b>      <b>by the threat of force he compels such a person to let him or any other person pass.</b></p> <p><b>(2)</b>      <b>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.</b></p> <p style="text-align: right;"><b>(AFA06 s.14)</b></p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>27</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>27</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>28</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....., did negligently perform his duty whilst handling a service rifle by causing the unintended discharge of [a] round[s].

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<sup>28</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 is acting in some specific capacity (e.g., mess treasurer or officer of the watch)
- c. Any duty arising from some order given to the accused or applicable to 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>29</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>30</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.

[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.

<sup>29</sup> Section 53 of the Act.

<sup>30</sup> Section 53 and Schedule 2 of the Act.

[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

<b>17</b>	<b>Disclosure of information useful to an enemy</b> <b>(1) A person subject to service law commits an offence if–</b> <b>(a) without lawful authority, he discloses information that would or might be useful to an enemy; and</b> <b>(b) he knows or has reasonable cause to believe that the information would or might be useful to an enemy.</b> <b>(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.</b> <p style="text-align: right;"><b>(AFA06 s.17)</b></p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>31</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).

*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

<sup>31</sup> Section 53 of the Act.

enemy if it is already within the public domain. The information need not be true or accurate, nor reach the enemy or 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>32</sup>.

### 2. Specimen charges

MAKING A FALSE OFFICIAL RECORD CONTRARY TO SECTION 18(1) OF THE ARMED FORCES ACT 2006.

[AB] on ....., when orderly officer of 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.

<sup>32</sup> Section 53 of the Act.

TAMPERING WITH AN OFFICIAL DOCUMENT CONTRARY TO SECTION 18(3) OF THE ARMED FORCES ACT 2006.

[AB] on ....., with intent to deceive, suppressed the imprest account of A Company, 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>33</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*

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

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<sup>33</sup>Section 53 of the Act.

good order may not necessarily be prejudicial to Service discipline however it is accepted that every act which is prejudicial to Service discipline is also prejudicial to good order.

Any conduct by an individual which breaches good order will adversely affect Service discipline if it has a direct bearing on the unit to which the offender belongs. However, an officer who creates a disturbance when 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>34</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

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<sup>34</sup> Section 15(2) of the Act.

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.

## 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.

(1A) For the purposes of subsection (1) a person is to be taken to be unfit to be entrusted with his duty, or a duty which he might reasonably expect to be called upon to perform, if his ability to carry out the duty in question is impaired.

(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>35</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>35</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 subjective test is applied. There is no requirement for the accused to be in an extreme condition; the officer hearing the charge simply has to be satisfied, by considering the evidence (see notes below), that they were unfit to be *entrusted* with a duty. The amount of alcohol or drug consumed is insufficient on its own to found a charge under subsection (1). The consumption must impair the accused's ability to do their duty.

*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 not a specific one particular to the accused and especially when the CO determines that the duty is safety-critical, 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, Daily Orders, 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)** (see box containing extract from the Act above) 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**

Under section 93A of the Act, where the commanding officer determines that the duty in question is safety-critical, the commanding officer may require the suspect to submit to preliminary tests for alcohol or drugs.

Under section 93E of the Act, where the commanding officer has determined that the duty in question is safety-critical, the suspect may be required by a service policeman<sup>36</sup> to provide an evidential specimen of breath, blood or urine for analysis

Evidential test results will indicate the proportion of alcohol or drugs in the accused's body, and may indicate that the suspect was impaired through alcohol or drugs. This evidence may be used to found a charge under section 20(1)(a), and must be taken into consideration when determining whether a charge under section 20(1)(a) is proven. However, this requirement to take the evidence into account only applies if such evidence is gathered. There is no obligation to take evidential specimens when investigating an offence against section 20(1)(a).

Evidence of the proportion of alcohol or any drug in a specimen of breath, urine or blood may be given by the production of:

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<sup>36</sup> Reference to a service policeman includes a Royal Navy coxswain

- a. *(in the case of a specimen of breath)* a statement automatically produced by the device which took the measurement and a certificate signed by a service policeman that the statement relates to a specimen provided by the accused at that particular date and time.
- b. *(in the case of a specimen of blood or urine)* a certificate signed by an authorised analyst as to the proportion of alcohol or any drug found in a specimen of blood or urine identified in the certificate.

However, if the commanding officer intends to rely on either of the documents mentioned above, he must provide the accused with a copy of the document, at least seven days before the hearing. The accused then has until three days before the hearing to inform the commanding officer whether he requires the attendance at the hearing of the person/s who signed the document/s. If the accused makes such a request, the person/s who signed the document/s has/have to attend the hearing should the commanding officer wish to continue to rely on the evidence contained in the documents. If the accused does not make such a request or remains silent, the commanding officer can rely upon the documents themselves<sup>37</sup>. Legal advice should be sought in these cases.

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. This person should also explain their reasons for holding such an opinion, such as the accused's apparent physical state - e.g. 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. Also, if there is any suggestion that substances, other than alcohol (for example prescription drugs), have caused their condition then medical opinion should be obtained so that expert evidence is available.

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) and regardless whether the duty in question is safety-critical, the Service Police should be called upon to investigate the circumstances further.

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.

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<sup>37</sup> see rule 15B The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

## Section 20A – Exceeding alcohol limit for prescribed safety-critical duties

### 20A Exceeding alcohol limit for prescribed safety-critical duties

- (1) A person subject to service law (“P”) commits an offence if the proportion of alcohol in P’s breath, blood or urine exceeds the relevant limit at a time when P—
- (a) is performing, or purporting to perform, a prescribed duty; or
  - (b) might reasonably expect to be called on to perform such a duty.
- (2) In subsection (1) “prescribed duty” means a duty specified, or of a description specified, by regulations; but a duty or description may be specified only if performing that duty (or a duty of that description) with ability impaired by alcohol would result in a risk of—
- (a) death;
  - (b) serious injury to any person;
  - (c) serious damage to property; or
  - (d) serious environmental harm.
- (3) In this section “the relevant limit”, in relation to a duty specified or of a description specified by regulations, means the limit prescribed by regulations in relation to that duty or duties of that description.
- (4) In this section “regulations” means regulations made by the Defence Council for the purposes of 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 must not exceed two years.”

(AFA06 s.20A)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>38</sup>.

### 2. Specimen charges

EXCEEDING ALCOHOL LIMIT FOR PRESCRIBED SAFETY-CRITICAL DUTIES  
CONTRARY TO SECTION 20A(1)(a) OF THE ARMED FORCES ACT 2006

AB on ..., when performing, or purporting to perform, the duties of the quartermaster of Her Majesty’s Ship DAUNTLESS afloat<sup>39</sup>, exceeded the relevant alcohol limit

EXCEEDING ALCOHOL LIMIT FOR PRESCRIBED SAFETY-CRITICAL DUTIES  
CONTRARY TO SECTION 20A(1)(b) OF THE ARMED FORCES ACT 2006

AB on ..., when he might reasonably expect to be called upon to perform the duties of a person handling a firearm with access to live ammunition capable of being discharged from that firearm, exceeded the relevant alcohol limit

<sup>38</sup> Section 53 of the Act.

<sup>39</sup> “Afloat” means not on shore in accordance with Regulation 2 of The Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see Chapter 3 (Jurisdiction and time limits).

*Prescribed duty*

Only the duties listed in the Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013<sup>40</sup> are subject to alcohol limits.

Where the duty in question is not a prescribed duty but the accused is unfit to be entrusted with that duty, consideration should be given to bringing a charge under section 20(1)(a) (unfitness through alcohol).

*(for s20A(1)(b) only) Might reasonably expect to be called upon to perform*

A subjective test is to be applied. The duty must be a specific one and 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, Daily Orders, Unit Orders or Part One Orders.

*Relevant alcohol limit*

The prosecution must prove that the relevant alcohol limit was exceeded. The Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013 establish two different alcohol limits, depending on the nature of the prescribed duty.

Broadly speaking, offences as regards duties performed on board a ship, driving a vehicle or operating hazardous equipment are subject to the higher limit of 35 microgrammes of alcohol in 100 millilitres of breath<sup>41</sup>, while offences as regards aviation and carrying a loaded weapon are subject to the lower limit of 9 microgrammes of alcohol in 100 millilitres of breath<sup>42</sup>.

### 4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

“Hip Flask” defence. It is a complete defence to the charge if the accused proves that after the time of alleged offence but before the specimen was taken from him, the accused consumed alcohol and that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the relevant limit.

### 5. Notes

There is no requirement for preliminary testing under sections 93A, B or C, to have been conducted before evidential samples are collected. A preliminary test is merely indicative that an offence under s.20A (or s.20(1)(a) in respect of a safety-critical duty) may have been committed.

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<sup>40</sup> See JSP 835 Chapter 6 Annex A for a list of prescribed safety-critical duties or Volume 3 of the MSL for the Regulations.

<sup>41</sup> or, in the case of blood, 80 milligrammes of alcohol in 100 millilitres or, in the case of urine, 107 milligrammes of alcohol in 100 millilitres.

<sup>42</sup> or, in the case of blood, 20 milligrammes of alcohol in 100 millilitres or, in the case of urine, 27 milligrammes of alcohol in 100 millilitres.

Where a Service policeman<sup>43</sup> is investigating an offence under s.20A it is for the Service policeman to choose which type of specimen to take - breath, urine or blood. Failure to provide a specimen, without reasonable excuse, is an offence under s.93E(10).

Whether the evidence of the volume of alcohol is a specimen of breath, blood or urine, it is to be assumed that, at the time the offence was committed, the proportion of alcohol was not less than the specimen revealed.

This means that the accused cannot argue that absorption of alcohol which was present in the stomach continued after the time of the offence but before the specimen was taken, but for which he would have been under the limit. However, this assumption is not to be made if the accused proves that he consumed alcohol after the offence and before the specimen was provided, and that had he not done so he would not have been over the limit<sup>44</sup> (see hip flask defence above). This defence is technical in nature and will require expert evidence. Where this defence is anticipated consideration should be given to referring the charge to the DSP.

Evidence of the proportion of alcohol or any drug in a specimen of breath, urine or blood may be given by the production of:

- a. *(in the case of a specimen of breath)* a statement automatically produced by the device which took the measurement and a certificate signed by a service policeman that the statement relates to a specimen provided by the accused at that particular date and time.
- b. *(in the case of a specimen of blood or urine)* a certificate signed by an authorised analyst as to the proportion of alcohol or any drug found in a specimen of blood or urine identified in the certificate.

However, if the commanding officer intends to rely on either of the documents mentioned above, he must provide the accused with a copy of the document, at least seven days before the hearing. The accused then has until three days before the hearing to inform the commanding officer whether he requires the attendance at the hearing of the person/s who signed the document/s. If the accused makes such a request, the person/s who signed the document/s has/have to attend the hearing should the commanding officer wish to continue to rely on the evidence contained in the documents. If the accused does not make such a request or remains silent, the commanding officer can rely upon the documents themselves<sup>45</sup>. Legal advice should be sought in these cases.

Where the evidence of the volume of alcohol is from a breath testing device, the evidence will not be admissible unless the device is approved by the Secretary of State<sup>46</sup>. Where two samples of breath are provided the one with the lower reading is to be used and the other disregarded<sup>47</sup>. Where the evidence is a sample of blood or urine, if the accused asked for part of the sample at the time it was taken, the evidence will only be admissible if the evidence relied upon is part of that sample and the accused was provided with part of it. Where the evidence is a sample of blood, it must have been taken with the accused's consent by a registered medical practitioner or registered nurse, or, if the accused was

<sup>43</sup> Reference to a service policeman includes a Royal Navy coxswain.

<sup>44</sup> The Armed Forces (Court Martial) Rules 2009, rule 100B and The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009, rule 15A.

<sup>45</sup> see rule 15B The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>46</sup> AFA 06 s.93E(2)(a) and s.93I(1).

<sup>47</sup> AFA 06 s.93F(1).

unable to give consent at the time the specimen was taken, it must have been taken by a registered medical practitioner and analysed with the accused's consent<sup>48</sup>.

When two specimens of breath are provided for analysis, the lower reading of the proportion of alcohol in a suspect's breath is to be used and the other reading is to be disregarded. If the reading of alcohol in a suspect's breath is no more than 50 microgrammes of alcohol in 100 millilitres of breath (for safety-critical duties that fall into the higher alcohol limit) or no more than 15 microgrammes of alcohol in 100 millilitres of breath (for safety-critical duties that fall into the lower alcohol limit) the suspect has the right to provide a specimen of urine or blood to replace the breath specimen<sup>49</sup>.

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<sup>48</sup> The Armed Forces (Court Martial) Rules 2009, rule 100B and The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009, rule 15A.

<sup>49</sup> See Part 6 of the Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013.

## Section 21 - Fighting or threatening behaviour, etc.

<p>21      <b>Fighting or threatening behaviour etc</b></p> <p>(1)      A person subject to service law commits an offence if, without reasonable excuse, he fights another person.</p> <p>(2)      A person subject to service law commits an offence if–</p> <p>          (a)      without reasonable excuse, his behaviour is–</p> <p>                  (i)      threatening, abusive, insulting or provocative; and</p> <p>                  (ii)     likely to cause a disturbance; and</p> <p>          (b)      he intends to be, or is aware that his behaviour may be, threatening, abusive, insulting or provocative.</p> <p>(3)      For the purposes of this section a person's “ behaviour” includes anything said by him.</p> <p>(4)      A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.21)</p>
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### 1.      **Type of offence**

An offence under this section **may be** heard summarily<sup>50</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).

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.

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<sup>50</sup> Section 53 of the Act.

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	<p><b>Ill-treatment of subordinates</b></p> <p>(1) A person subject to service law who is an officer, warrant officer or non-commissioned officer commits an offence if–</p> <ul style="list-style-type: none"><li>(a) he ill-treats a subordinate (“ B” );</li><li>(b) he intends to ill-treat B or is reckless as to whether he is ill-treating B; and</li><li>(c) he knows or has reasonable cause to believe that B is a subordinate.</li></ul> <p>(2) For the purposes of this section a person (“ B” ) is a subordinate of another person (“A” ) if–</p> <ul style="list-style-type: none"><li>(a) B is subject to service law; and</li><li>(b) A is a superior officer of B.</li></ul> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.22)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>51</sup>. However if this offence is committed in circumstances of a prescribed nature<sup>52</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 ....., intentionally or recklessly ill-treated [CD], whom he knew or had reasonable cause to believe was a subordinate.

### 3. Ingredients of offence.

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

As this offence can only be committed by an officer, warrant officer or NCO this means that it cannot be committed by personnel below the ranks of leading rate, lance corporal or corporal (RAF).

*Ill treats*

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<sup>51</sup> Section 53 of the Act.

<sup>52</sup> Section 114 of the Act.

Ill treatment is to be given its normal dictionary meaning of treating badly or cruelly. A series of minor actions against a victim, which would in themselves not amount to offences of assault, might amount to ill treatment. Ill treatment includes but is not limited to physical force. Bullying or frightening may suffice, as may behaviour or treatment that is unnecessarily harsh or which degrades or humiliates another person. Whether conduct amounts to ill-treatment is a question of fact for the person hearing the charge to decide on the circumstances of each case.

#### *A subordinate*

In order to be a subordinate the victim must be subject to Service law and the accused must be their superior officer<sup>53</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 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.

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<sup>53</sup> Section 374 of the Act

Where the subordinate is not known to the accused or was not in uniform it will be necessary to consider whether the accused knew in the circumstances that 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

<p>23      <b>Disgraceful conduct of a cruel or indecent kind</b></p> <p>(1)      <b>A person subject to service law commits an offence if–</b></p> <p>          (a)      <b>he does an act which is cruel or indecent; and</b></p> <p>          (b)      <b>his doing so is disgraceful.</b></p> <p>(2)      <b>In this section “act” includes an omission and the reference to the doing of an act is to be read accordingly.</b></p> <p>(3)      <b>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.</b></p> <p style="text-align: right;"><b>(AFA06 s.23)</b></p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>54</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 occurred. Thus, an act of sexual nature that occurs in private with the consent of persons

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<sup>54</sup> Section 53 of the Act.

present and where such persons are old enough to give consent will not generally be regarded as indecent.

*And ...is disgraceful*

Disgraceful must be given its normal dictionary meaning. It is insufficient to prove that the conduct in question was cruel or indecent. It must also be proved that the circumstances, motive of the accused or other factors make it disgraceful. For example, killing an animal may involve cruelty but the circumstances, such as obtaining food to survive, would prevent the conduct amounting to an offence. Similarly, removing one's clothes would require an objective test to be applied when considering whether the conduct in question is disgraceful.

**4. Defence.**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

**5. Notes.**

Consideration should be given to the professional responsibilities or obligations of the accused i.e. where a soldier has responsibility for the care of animals and 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

<p>24      <b>Damage to or loss of public or service property</b></p> <p>(1)      <b>A person subject to service law commits an offence if–</b></p> <p>          (a)      <b>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></p> <p>          (b) <b>either–</b></p> <p>                  (i)      <b>he intends to cause damage to or the loss of the property, and there is no lawful excuse for his act; or</b></p> <p>                  (ii)      <b>he is reckless as to whether he causes damage to or the loss of the property.</b></p> <p>(2)      <b>A person subject to service law commits an offence if–</b></p> <p>          (a)      <b>negligently, he does an act that causes damage to or the loss of any public or service property; or</b></p> <p>          (b)      <b>he does an act that is likely to cause damage to or the loss of any public or service property and–</b></p> <p>                  (i)      <b>he is reckless as to whether he causes damage to or the loss of the property; or</b></p> <p>                  (ii)      <b>he is negligent.</b></p> <p>(3)      <b>For the purposes of this section–</b></p> <p>          (a)      <b>“act” includes an omission and references to the doing of an act are to be read accordingly;</b></p> <p>          (b)      <b>references to causing include allowing;</b></p> <p>          (c)      <b>“loss” includes temporary loss;</b></p> <p>          (d)      <b>“property” means property of a tangible nature, and references to public or service property are to be read accordingly.</b></p> <p>(4)      <b>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–</b></p> <p>          (a)      <b>in the case of an offence under subsection (1), ten years;</b></p> <p>          (b)      <b>in the case of an offence under subsection (2), two years.</b></p> <p style="text-align: right;"><b>(AFA06 s.24)</b></p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>55</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>56</sup> is listed in Schedule 2 of the Act. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence that the property in question might have been damaged with this intention and may have been committed under this section, 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.

<sup>55</sup> Section 53 Schedule 2 of the Act.

<sup>56</sup> Criminal Damage Act 1971 section 1(2).

## 2. Specimen charges

DAMAGING OR LOSS OF PUBLIC OR SERVICE PROPERTY OR PROPERTY BELONGING TO ANOTHER PERSON SUBJECT TO SERVICE LAW CONTRARY TO SECTION 24(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., damaged a Service vehicle registration number ..... belonging to [name of unit] to the value of £....., by pouring water into the fuel tank of the said vehicle intending to damage or being reckless as to whether such vehicle would be damaged.

DAMAGING PROPERTY BELONGING TO ANOTHER CONTRARY TO SECTION 24(1) OF THE ARMED FORCES ACT 2006

[AB] on ....., threw a glass tankard belonging to [CD], a person subject to Service law, against a wall intending to damage such property or being reckless as to whether such property would be damaged; thereby causing damage to the said tankard to the value of £.....

NEGLIGENTLY DAMAGING PUBLIC PROPERTY CONTRARY TO SECTION 24(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., negligently caused damage to a bivouac, belonging to the Secretary of State for Defence, by lighting a candle inside the bivouac and leaving the bivouac unattended, thereby causing damage to the said bivouac to the value of £.....

## 3. Ingredients of offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Does an act*

It is a question of fact whether the accused *does an act* for the purpose of this offence. By virtue of subsection (3)(a) of the Act *does an act* also includes an omission to act. For example, a person who when legitimately refuelling a vehicle, omits to turn off the pump when the tank is full and instead allows the fuel to overflow will be causing a loss of the fuel.

*Causes*

The loss or damage alleged in the charge must have resulted from the alleged act of the accused. An omission is also capable of causing damage or loss. By virtue of **subsection (3)(b) causes** for these purposes includes *allowing*.

*Damage to*

This will include not only permanent or temporary actual damage but also permanent or temporary impairment of value or usefulness, such as installing a virus on a computer. For the purpose of offences charged under this section, damage also includes destruction of property.

*Loss of*

This will include temporary loss see subsection (4). In some circumstances a loss will be incurred because property has been irreparably damaged.

## *Property*

To show the property belonged to another person who was subject to Service law, evidence must be given as to the identity of the owner and why this person was at the time subject the Service law. This offence cannot be committed where the property in question belongs to civilians subject to Service discipline.

Two other types of property are mentioned in this section, public property and Service property. Public property and Service property are defined in section 26 of the Act which provides:

26	<p><b>Sections 24 and 25: “public property” and “service property”</b></p> <p>(1) <b>This section applies for the purposes of sections 24 and 25.</b></p> <p>(2) <b>“ Public property” means property belonging to or held for the purposes of–</b></p> <ul style="list-style-type: none"><li>(a) <b>a department of the Government of the United Kingdom;</b></li><li>(b) <b>any part of the Scottish Administration;</b></li><li>(c) <b>a Northern Ireland department; or</b></li><li>(d) <b>the National Assembly for Wales.</b></li></ul> <p>(3) <b>“Service property” means property–</b></p> <ul style="list-style-type: none"><li>(a) <b>belonging to or used for the purposes of any of Her Majesty's forces;</b></li><li>(b) <b>belonging to a Navy, Army and Air Force Institute; or</b></li><li>(c) <b>belonging to an association established, or having effect as if established, under section 110 of the Reserve Forces Act 1996 (c. 14) (reserve associations).</b></li></ul> <p style="text-align: right;"><b>(AFA06 s.26)</b></p>
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## *Intends*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## *Is likely to cause*

An objective test will be applied. It must be shown that it was reasonably foreseeable that damage or loss was likely to occur in the circumstances: It is insufficient to merely show that there was a remote possibility of damage etc. This may be the case if it is the timely intervention of a third party that prevents loss or damage occurring.

## *Reckless*

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## *Negligence*

For negligence generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

## **4. Defences**

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

*Lawful excuse.* An accused will have a lawful excuse if, for example 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

<b>25</b>	<b>Misapplying or wasting public or service property</b> <b>(1) A person subject to service law commits an offence if he misapplies or wastes any public or service property.</b> <b>(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.</b>
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(AFA06 s.25)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>57</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>57</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):

<b>26</b>	<b>Sections 24 and 25: “public property” and “service property”</b> <b>(1) This section applies for the purposes of sections 24 and 25.</b> <b>(2) “ Public property” means property belonging to or held for the purposes of–</b> <b>(a) a department of the Government of the United Kingdom;</b> <b>(b) any part of the Scottish Administration;</b> <b>(c) a Northern Ireland department; or</b> <b>(d) the National Assembly for Wales.</b> <b>(3) “Service property” means property–</b> <b>(a) belonging to or used for the purposes of any of Her Majesty's forces;</b> <b>(b) belonging to a Navy, Army and Air Force Institute; or</b> <b>(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).</b>  <p style="text-align: right;"><b>(AFA06 s.26)</b></p>
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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

<p>27</p> <p><b>Obstructing or failing to assist a service policeman</b></p> <p>(1) A person within subsection (2) commits an offence if–</p> <p>(a) he intentionally obstructs, or intentionally fails to assist when called upon to do so, a person who is–</p> <p style="padding-left: 20px;">(i) a service policeman acting in the course of his duty; or</p> <p style="padding-left: 20px;">(ii) a person subject to service law lawfully exercising authority on behalf of a provost officer; and</p> <p>(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.</p> <p>(2) A person is within this subsection if he is–</p> <p>(a) a person subject to service law; or</p> <p>(b) a civilian subject to service discipline.</p> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.27)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>58</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.

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

<sup>58</sup> Section 53 of the Act.

[AB] on ....., when called upon for assistance by [CD], a person legally exercising authority under, or on behalf of, a provost officer, refused to assist the said non-commissioned officer.

### **3. Ingredients of offence**

*A person subject to Service law/civilian subject to Service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*Intentionally*

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

*Obstructs*

The obstruction must be a positive act. Standing by and doing nothing is not obstruction unless there is a legal duty to do something.

*Fails to assist*

Where a Service policeman actually calls upon a person for assistance and such a person then deliberately refrains from acting, this should be charged as failing to assist under this section. Failing to answer questions is not *failing to assist* or *obstruction*. However, in some circumstances a duty to answer a question or provide information may be imposed by statute e.g. Road Traffic Act 1988 section 174. In such circumstances the offence should be charged under the relevant statute.

*Knows or has reasonable cause to believe*

To find the offence proven, it is necessary for the accused to have known or had reasonable cause to believe that the person 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

<p>28      Resistance to arrest etc</p> <p>(1)      A person subject to service law (“ A ” ) commits an offence if another person (“ B ” ), in the exercise of a power conferred by or under this Act, orders A into arrest and–</p> <p style="padding-left: 20px;">(a)      A disobeys the order;</p> <p style="padding-left: 20px;">(b)      A uses violence against B; or</p> <p style="padding-left: 20px;">(c)      A's behaviour towards B is threatening.</p> <p>(2)      A person subject to service law, or a civilian subject to service discipline, commits an offence if–</p> <p style="padding-left: 20px;">(a)      he uses violence against a person who has a duty to apprehend him, or his behaviour towards such a person is threatening; and</p> <p style="padding-left: 20px;">(b)      he knows or has reasonable cause to believe that the person has a duty to apprehend him.</p> <p>(3)      For the purposes of this section–</p> <p style="padding-left: 20px;">(a)      a person's “ behaviour ” includes anything said by him;</p> <p style="padding-left: 20px;">(b)      “ threatening ” behaviour is not limited to behaviour that threatens violence;</p> <p style="padding-left: 20px;">(c)      a “ duty ” to apprehend a person means such a duty arising under service law.</p> <p>(4)      A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.28)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>59</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.

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].

<sup>59</sup> Section 53 of the Act.

## USING VIOLENCE TOWARDS AN AUTHORISED PERSON WHO HAS A DUTY TO APPREHEND CONTRARY TO SECTION 28(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., on being apprehended used violence towards [CD].

### 3. Ingredients of the offence

*A person subject to service law/civilian subject to service discipline*

For persons subject to Service law and civilian subject to Service discipline see [Chapter 3](#) (Jurisdiction and time limits).

*A person in the exercise of a power conferred by or under this Act*

For those persons who have the power to arrest see [Chapter 4](#) (Arrest and search, stop and search, search, entry and seizure and retention).

*Disobeys*

Disobedience requires awareness of what is being disobeyed, so it must be shown that the order into arrest was clear and that it was received by the person charged. The power to arrest may be exercised personally; by giving orders for the arrest of the person who is to be arrested; or, where that person is subject to Service law, by ordering 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

<p>29      <b>Offences in relation to service custody</b></p> <p>(1)      A person subject to service law, or a civilian subject to service discipline, commits an offence if he escapes from lawful custody.</p> <p>(2)      A person subject to service law, or a civilian subject to service discipline, commits an offence if–</p> <p>          (a)      he uses violence against a person in whose lawful custody he is, or his behaviour towards such a person is threatening; and</p> <p>          (b)      he knows or has reasonable cause to believe that the custody is lawful.</p> <p>(3)      For the purposes of this section–</p> <p>          (a)      references to custody are to service custody;</p> <p>          (b)      a person's behaviour includes anything said by him;</p> <p>          (c)      “threatening” behaviour is not limited to behaviour that threatens violence.</p> <p>(4)      A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.29)</p>
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### 1.      **Type of offence**

An offence under this section **may be** heard summarily<sup>60</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>60</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 be 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

<p>30    <b>Allowing escape, or unlawful release, of prisoners etc</b></p> <p>(1)    <b>A person subject to service law commits an offence if–</b></p> <p>        (a)    <b>he knows that a person is committed to his charge, or that it is his duty to guard a person;</b></p> <p>        (b)    <b>he does an act that results in that person's escape; and</b></p> <p>        (c)    <b>he intends to allow, or is reckless as to whether the act will allow, that person to escape, or he is negligent.</b></p> <p>(2)    <b>A person subject to service law commits an offence if–</b></p> <p>        (a)    <b>he knows that a person is committed to his charge;</b></p> <p>        (b)    <b>he releases that person without authority to do so; and</b></p> <p>        (c)    <b>he knows or has reasonable cause to believe that he has no such authority.</b></p> <p>(3)    <b>In this section “act” includes an omission and the reference to the doing of an act is to be construed accordingly.</b></p> <p>(4)    <b>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–</b></p> <p>        (a)    <b>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></p> <p>        (b)    <b>in any other case, two years.</b></p> <p style="text-align: right;"><b>(AFA06 s.30)</b></p>
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### 1.    **Type of offence**

An offence under this section **may be** heard summarily<sup>61</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.

### 3.    **Ingredients of the offence**

*A person subject to Service law.*

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<sup>61</sup> Section 53 of the Act.

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

### *Knows*

Knows should be given its normal dictionary meaning. Actual knowledge on the part of the accused that the prisoner was committed to 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

<p><b>31 Hazarding of ship</b></p> <p>(1) A person subject to service law commits an offence if he does an act that causes the hazarding of any of Her Majesty's ships and–</p> <p>(a) he intends to cause damage to or the stranding or loss of the ship, and there is no lawful excuse for his act; or</p> <p>(b) he is reckless as to whether he causes damage to or the stranding or loss of the ship.</p> <p>(2) A person subject to service law commits an offence if, negligently, he does an act that causes the hazarding of any of Her Majesty's ships.</p> <p>(3) For the purposes of this section–</p> <p>(a) “act” includes an omission and references to the doing of an act are to be read accordingly;</p> <p>(b) references to causing include allowing;</p> <p>(c) “Her Majesty's ships” means all ships belonging to or used for the purposes of any of Her Majesty's forces.</p> <p>(4) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence–</p> <p>(a) in the case of an offence under subsection (1), may be for life;</p> <p>(b) in the case of an offence under subsection (2), must not exceed two years.</p> <p style="text-align: right;">(AFA06 s.31)</p>
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### 1. Type of offence

An offence under subsection (1) is a **Schedule 2 offence** and **may not be** heard summarily<sup>62</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>63</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

HAZARDING OF ONE OF HER MAJESTY'S SHIPS CONTRARY TO SECTION 31(1) OF THE ARMED FORCES ACT 2006

<sup>62</sup> Section 53 Schedule 2 of the Act.

<sup>63</sup> Section 53 and Schedule 2 of the Act.

[AB] on ....., without lawful excuse, caused Her Majesty's Ship TENACIOUS to become stranded, intending to cause the said vessel to become stranded, or being reckless as to whether the vessel would become so stranded.

#### NEGLIGENTLY HAZARDING OF ONE OF HER MAJESTY'S SHIPS CONTRARY TO SECTION 31(2) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse, negligently did an act, namely, gross deviation from the planned navigational track, that hazarded Her Majesty's Ship TENACIOUS.

### 3. Ingredients of the offence

#### *A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

#### *Does an act*

It is a question of fact whether the accused *does an act* for the purpose of this offence. *Does an act* also includes an omission to act. For example, a ship's captain fails to check a navigation plan which contains an error or danger to navigation, thereby hazarding the ship.

#### *Her Majesty's ship*

Means all ships belonging to or used for the purposes of any of Her Majesty's forces. *Ship* includes a hovercraft and any description of vessel.

#### *Hazarding*

This means unjustifiably exposing the vessel to danger or harm, or to the risk of danger or harm.

#### *Intends*

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Reckless*

For recklessness generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Negligently*

For negligence generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

#### *Causes*

It must be proved that the act or omission to act was at least a contributory factor. Where it was so remote from the hazarding that it could not have contributed to it, the offence will not have been committed, although consideration should be given to a charge contrary to section 15 (failing to perform a duty).

#### *Lawful excuse*

A person will have a lawful excuse if 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

<b>32</b>	<b>Giving false air signals etc</b> <p>(1) A person subject to service law commits an offence if, without lawful excuse, he intentionally–</p> <p>(a) gives a false air signal; or</p> <p>(b) alters or interferes with an air signal or any equipment for giving an air signal.</p> <p>(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.</p> <p>(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, and any sentence of imprisonment imposed in respect of the offence may be for life.</p> <p style="text-align: right;">(AFA06 s.32)</p>
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### 1. Type of offence

An offence under this section **may not be** heard summarily<sup>64</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).

*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

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<sup>64</sup> Section 53 and Schedule 2 of the Act.

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>65</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>65</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>66</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>67</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>66</sup> Section 53 Schedule 2 of the Act.

<sup>67</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

<p><b>34</b>    <b>Low flying</b></p> <p>(1)    <b>A person subject to service law commits an offence if–</b></p> <p>        (a)    <b>he flies an aircraft at a height less than the minimum height, other than–</b></p> <p>                (i)        <b>when taking off or landing; or</b></p> <p>                (ii)       <b>in any other circumstances prescribed by regulations made by the Defence Council; and</b></p> <p>        (b)    <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.</b></p> <p>(2)    <b>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.</b></p> <p>(3)    <b>In this section “ minimum height” means the height prescribed by regulations made by the Defence Council.</b></p> <p>(4)    <b>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.</b></p> <p style="text-align: right;"><b>(AFA06 s.34)</b></p>
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### 1.    **Type of offence**

An offence under this section **may be** heard summarily<sup>68</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*

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

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<sup>68</sup> Section 53 of the Act.

propeller aircraft) will low fly if without authorisation it is flown at a height below 500 feet above the ground or other surface<sup>69</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 flown an aircraft below the minimum height because of adverse weather<sup>70</sup> and has not reported it in accordance with the relevant procedures set out in JSP 550.

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<sup>69</sup> Low Flying Regulations 2009 regulation 3 and JSP 550.

<sup>70</sup> Low Flying Regulations 2009 regulation 4(c).

Before bringing a charge under this section JSP 550 should also be consulted (Military Aviation Policy Regulations and Directives).

## Section 35 - Annoyance by flying

### 35 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>71</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>71</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>72</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.

<sup>72</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>73</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

[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.

<sup>73</sup> Section 53 Schedule 2 of the Act.

### 3. Ingredients of the offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*While in command of Her Majesty's ships or aircraft*

The responsibilities in relation to prize relate to the person who is in command of the ship or aircraft at the time the prize is taken. It is this person who will commit any offence under these sections.

*Her Majesty's ships and Her Majesty's aircraft*

For definition of ship and aircraft see section 374 of the Act.

Her Majesty's ships and aircraft means not only those ships or aircraft that belong to the armed forces but extends to those that are being *used for the purposes of* either the Royal Navy, Army or Royal Air Force.

*Fails to ensure*

It will need to be shown that the person in command of the ship or aircraft did not take all reasonable steps to ensure the necessary actions under each of the sections where taken. This will be a question of fact for the Court Martial.

*Papers*

The term *ship papers* includes all books, passes, sea briefs, charter parties, bills of lading, letters, and other documents and writings delivered up or found on board a captured ship.

The term *aircraft papers* includes all books, passes, charter parties, bills of lading, manifests, certificates, licences, lists, tickets, notes, letters and other documents and writings delivered up or found on board a captured aircraft.<sup>74</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.

### 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

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<sup>74</sup> Naval Prize Act 1864 section 2.

prize to an appropriate place for a proper adjudication on whether they were lawfully taken as prize.

*Prize* is a term used in international law to refer to equipment, vehicles, vessels and aircraft captured *during* armed conflict. The most common use of prize in this sense is the capture of an enemy ship and its cargo. Once the ship is secured on friendly territory, it will be made the subject of *a case before a prize court which would* then go on to determine the status of the property and the manner in which it was to be disposed of.

The offences under this section all relate to the law of prize and breaches of the responsibilities imposed on those in command under international law. These offences can only be tried at the Court Martial. For full details of the law in relation to prize reference should be made to specialist publications such as Halsbury's Laws and the Naval Prize Act 1864.

## Section 38 - Other prize offences

### 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>75</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.

INTERFERENCE WITH GOODS BELONGING TO A SHIP OR AIRCRAFT TAKEN AS  
PRIZE CONTRARY TO SECTION 38(2) OF THE ARMED FORCES ACT 2006

<sup>75</sup> Section 53 Schedule 2 of the Act.

[AB] on ..... ,unlawfully unloaded / unpacked / interfered with (delete as appropriate or specify) ..... (specify the nature of the goods) that were onboard ....., the said [ship/aircraft] having been taken as prize.

#### INTERFERENCE WITH GOODS BELONGING TO A SHIP OR AIRCRAFT DETAINED IN EXERCISE OF A BELLIGERENT RIGHT OR UNDER AN ENACTMENT CONTRARY TO SECTION 38(3) OF THE ARMED FORCES ACT 2006

[AB] on ....., without lawful excuse unloaded/unpacked/otherwise interfered with (delete as appropriate or specify) ..... goods ..... [specify the nature of the goods) that were on board ..... , [specify the name the ship or aircraft) a ship/aircraft that was detained in exercise of a belligerent right/under an enactment [specify the nature of authority to detain).

### 3. Ingredients of the Offence

*A person subject to Service law*

For persons subject to Service law see [Chapter 3](#) (Jurisdiction and time limits).

*Ill-treats*

Ill treatment is to be given its normal dictionary meaning of treating badly or cruelly. A series of minor actions against a victim, which would in itself not amount to an offence of assault, might amount to ill treatment. Ill treatment includes but is not limited to physical force. Bullying or frightening may suffice, as may behaviour or treatment that is unnecessarily harsh or which degrades or humiliates another person. Whether conduct amounts to ill-treatment is a question of fact for the officer hearing the charge to decide on the circumstances of each case.

*Unlawfully takes anything in the possession*

It is not generally lawful to remove personal belongings of those on board ships or aircraft taken as prize. However, it would be lawful to remove and temporarily retain their weapons for force protection. The taking of any items should be officially recorded and the property retained within authorised secure facilities.

Unlike the offence of theft, this offence does not require proof of dishonesty or intention to permanently deprive. This offence merely requires a person to take an item without authority. Takes should be given its normal dictionary meaning. It requires an intention to take, either temporarily or permanently.

*Unloads or unpacks or otherwise interferes with*

It is only permissible to unload, unpack or otherwise interfere with the goods described in subsection (2) if:

- a. A prize court has determined the prize to be lawful; or
- b. It is necessary for safekeeping or for use by Her Majesty's or co-operating forces.

For the purposes of this subsection interfering with goods may include disabling and/or destroying.

## *Goods*

*Goods* covers any cargo on board a ship or aircraft.

## *Safekeeping*

Means such steps as are necessary to prevent loss or protect others. In extreme circumstances this may permit dangerous goods to be destroyed.

## *Necessary use by any of Her Majesty's and co-operating forces*

This means the goods can be used to enhance the existing Service resources where this would assist the undertaking of their mission. For example, where weapons are the goods, this will allow the weapons to be used where they are needed to protect Her Majesty's or co-operating forces. It could also include a situation where such weapons were used to enhance the offensive or defensive capability of the force.

## *Co-operating force*

This applies to a military force that is co-operating with one of Her Majesty's forces. This will occur, for example, when the forces are participating together in an exercise or operation under an agreement.

## *Without lawful excuse*

A lawful excuse may arise under **subsection (3)** for example where a person demonstrates that 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>76</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

<sup>76</sup>Section 53 Schedule 2 of the Act.

CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section (offences within paragraphs 1-9 of Schedule 2 as referred to above) they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not a Schedule 2 offence but nevertheless may not be dealt with summarily, 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>77</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>77</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 insufficient is not a defence to an offence under this section of the Act.

#### *Attempting the impossible*

If the facts are such that the commission of the offence is impossible but the accused is not aware of this, the accused may still commit an offence under this section.

#### *Mistaken belief of facts*

If the accused is mistaken about the facts of the case, where the accused has the necessary intent to commit the full offence, the accused may still be regarded as having committed the offence, if the facts of the case had been as 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>78</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.

<sup>78</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>79</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>79</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>80</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>80</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>81</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>81</sup> Section 53 of the Act.

## Section 93A – Failing to comply with preliminary tests

<p><b>93A</b> Commanding officer's power to require preliminary tests</p> <p>(1) This section applies where the commanding officer of a person subject to service law has reasonable cause to believe that that person—</p> <p>(a) is committing a relevant offence; or</p> <p>(b) has committed a relevant offence and still has alcohol or a drug in the body or is still under the influence of a drug.</p> <p>(2) In this section “relevant offence” means—</p> <p>(a) an offence under section 20A; or</p> <p>(b) an offence under section 20(1)(a) in respect of a safety-critical duty (as defined by section 93I).</p> <p>(3) This section also applies where the commanding officer of a person who is a civilian subject to service discipline has reasonable cause to believe that that person—</p> <p>(a) is committing an offence under section 42 as respects which the corresponding offence under the law of England and Wales is an offence under section 78, 79, 92 or 93 of the Railways and Transport Safety Act 2003 (maritime and aviation offences); or</p> <p>(b) has committed such an offence under section 42 and still has alcohol or a drug in the body or is still under the influence of a drug.</p> <p>(4) The commanding officer may require the person mentioned in subsection (1) or (3) (“the suspected person”) to co-operate with any one or more of—</p> <p>(a) a preliminary breath test (see section 93B);</p> <p>(b) a preliminary impairment test (see section 93C);</p> <p>(c) a preliminary drug test (see section 93D).</p> <p>(5) The Defence Council may by regulations provide for the delegation by a commanding officer of the commanding officer's functions under this section.</p> <p>(6) A person who, without reasonable excuse, fails to comply with a requirement imposed under subsection (4) commits an offence.</p> <p>(7) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.</p> <p>(8) For the purposes of this section, a person does not co-operate with a preliminary test unless the person's co-operation—</p> <p>(a) is sufficient to enable the test to be carried out; and</p> <p>(b) is provided in such a way as to enable the objective of the test to be satisfactorily achieved.</p> <p style="text-align: right;">(AFA06 s.93A)</p>
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### 1. Type of offence

An offence under this section **may be** heard summarily<sup>82</sup>.

### 2. Specimen charges

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<sup>82</sup> Section 53 of the Act.

## FAILING TO COMPLY WITH A REQUIREMENT FOR PRELIMINARY TESTS CONTRARY TO SECTION 93A OF THE ARMED FORCES ACT 2006

AB on ..., without reasonable excuse failed to comply with a requirement imposed by his commanding officer to co-operate with a preliminary [breath / impairment / drug] test

### 3. Ingredients of the offence

*A person subject to Service law or a civilian subject to Service discipline*

For persons subject to Service law and civilians subject to Service discipline see Chapter 3 (Jurisdiction and time limits).

*Preliminary test*

The preliminary tests are a preliminary breath test, a preliminary impairment test and a preliminary drug test. The requirement may be to comply with one or more of those tests.

*Reasonable cause to believe*

The prosecution must prove that the CO had reasonable cause to believe that the person was committing a relevant offence or had committed a relevant offence and still had alcohol or a drug in the body or was still under the influence of a drug.

The term "reasonable cause to believe" is not defined in the legislation. It clearly means something more than suspicion and the belief must be rational and based on adequate supporting material. Reasonable cause to believe should be based on evidence, which need not be entirely first hand evidence; a CO could base his belief on what others had reported to him about the condition of the accused. See also "relevant offence" below.

*A relevant offence*

The next ingredient of the offence differs depending upon whether the accused is a person subject to Service law or a civilian subject to Service discipline.

In respect of a person subject to Service law the relevant offences, which the CO has reasonable cause to believe that person is committing or has committed and still has alcohol or a drug in the body or is still under the influence of a drug, are:

- a. an offence under section 20A(1)(a) or 20A(1)(b) (exceeding the alcohol limit for prescribed safety-critical duties<sup>83</sup>)

OR

- b. an offence under section 20(1)(a) (unfitness through alcohol or drugs) in respect of a safety-critical duty<sup>84</sup>. "Safety critical duty" means a duty the CO reasonably believes is such that performing it with ability impaired by alcohol or drugs would result in a risk of death or serious injury to any person or serious damage to property or serious environmental harm. The CO must reasonably believe performing the duty with ability impaired by drugs or alcohol would result in the risk.

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<sup>83</sup> The duties and alcohol limits are prescribed in the Armed Forces (Alcohol Limits for Prescribed Safety-Critical Duties) Regulations 2013.

<sup>84</sup> As defined by section 93I.

In respect of civilians subject to Service discipline the relevant offences are offences under the Railways and Transport Safety Act 2003:

- a. section 78 (professional master or pilot of a ship or a seaman in a ship while on duty, whose ability to carry out his duties is impaired because of drink or drugs),
- b. section 79 (professional seaman in a ship at a time when not on duty, but in the event of an emergency he would or might be required by the nature or terms of his engagement or employment to take action to protect the safety of passengers),
- c. section 92 (a person who performs an aviation function at a time when his ability to perform the function is impaired because of drink or drugs or carries out an activity which is ancillary to an aviation function at a time when his ability to perform the function is impaired because of drink or drugs), or
- d. section 93 (or a person who performs an aviation function at a time when the proportion of alcohol in his breath, blood or urine exceeds the prescribed limit or carries out an activity which is ancillary to an aviation function at a time when the proportion of alcohol in his breath, blood or urine exceeds the prescribed limit).

#### *Failure to co-operate*

Having established the requirement to co-operate with a preliminary breath, impairment or drug test, the person must not, without reasonable excuse, fail to comply with that requirement.

A person only co-operates with a preliminary test if their co-operation is sufficient to enable the test to be carried out and is provided in such a way as to enable the objective of the test to be satisfactorily achieved<sup>85</sup>.

The objective of a preliminary breath test is to provide an indication whether the proportion of alcohol in a person's breath or blood is likely to be such as is necessary for the commission of the suspected offence. This is done by breathing into an approved breath testing device.

A preliminary impairment test involves a Service Policeman observing the suspect performing specified tasks and the Service Policeman making other observations of his physical state so as to indicate whether he might be unfit through drink or drugs.

A preliminary drugs test involves giving a sample of saliva or sweat which is tested by an approved device to indicate whether drugs are present.

There is no right to see a legal advisor before providing a specimen, and the requirement to provide a specimen need not be delayed pending legal advice.

#### *Without reasonable excuse*

Whether facts are capable of amounting to a reasonable excuse is a matter of law, and legal advice should be sought where the accused raises the issue. If it is capable in law of amounting to a reasonable excuse, then it becomes a matter of fact and degree whether it does so or not, to be decided by the officer hearing the charge.

## **4. Defences**

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<sup>85</sup> AFA 06 s.93A(8).

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

It is a defence that the accused had a reasonable excuse for failing to co-operate with the test.

In addition, it is also a defence that the requirement to co-operate with the test was not based on reasonable cause to believe a relevant offence was being or had been committed.

If the relevant offence was one under section 20(1)(a), it is a defence that the CO did not have a reasonable belief that performing the duty in question while impaired through drugs or alcohol would result in a real risk of death, serious injury, serious damage to property or serious environmental harm.

It is not a defence that the accused was fit to perform the relevant duty, or did perform the relevant duty safely.

## 5. Notes

The requirement to co-operate with a preliminary test may be imposed after the suspect has ceased to perform or purports to perform the relevant duty, as well as before commencing or during the duty. It is not necessary that an incident has occurred in order to impose the requirement<sup>86</sup>.

Preliminary testing may only be required by the commanding officer or a person to whom he has delegated that power<sup>87</sup>. However, the tests themselves may only be carried out by Service Police or Royal Navy coxswains.

The CO who formed the belief and imposed the requirement must not hear the charge against the accused as this would lead to that CO deciding the case on their own evidence; in those circumstances an alternative CO must be appointed to hear the charge.

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<sup>86</sup> This is a departure from the former Post-Incident Drugs and Alcohol Testing ("PIDAT") regime that existed prior to 1 Nov 13  
<sup>87</sup> Armed Forces (Delegation of Commanding Officer's Power to Require Preliminary Tests) Regulations 2013.

## Section 93E – Failing to provide a specimen

### 93E Provision of specimens for analysis

- (1) This section applies in relation to an investigation into whether a person has committed—
- (a) an offence under section 20A;
  - (b) an offence under section 20(1)(a) in respect of a safety-critical duty (as defined by section 93I); or
  - (c) an offence under section 42 as respects which the corresponding offence under the law of England and Wales is an offence under section 78, 79, 92 or 93 of the Railways and Transport Safety Act 2003.
- (2) In the course of the investigation a service policeman may require the person—
- (a) to provide two specimens of breath for analysis by means of an approved device;
  - (b) to provide a specimen of blood or urine for a laboratory test.
- (3) A requirement under this section may be imposed only at a service police establishment or a medical establishment.
- (4) For the purposes of this section and section 93F, a person does not provide a specimen of breath for analysis unless the specimen—
- (a) is sufficient to enable the analysis to be carried out; and
  - (b) is provided in such a way as to enable the objective of the analysis to be satisfactorily achieved.
- (5) For the purposes of this section and section 93F, a person provides a specimen of blood if and only if—
- (a) he consents to the taking of such a specimen from him;
  - (b) the specimen is taken from him by a registered medical practitioner or registered nurse; and
  - (c) the specimen is of sufficient quantity to enable it to be divided into two parts for the purposes of analysis.
- (6) For the purposes of this section and section 93F, a person provides a specimen of urine if and only if the specimen—
- (a) is provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine; and
  - (b) is of sufficient quantity to enable it to be divided into two parts for the purposes of analysis.
- (7) Where the provision of a specimen may be required under this section, the question of whether it is to be breath, blood or urine, and in the case of blood the question of who is to be asked to take it, is to be decided by the service policeman imposing the requirement.
- (8) But where a service policeman decides for the purposes of subsection (7) to require the provision of a specimen of blood, there shall be no requirement to provide such a specimen if—
- (a) the registered medical practitioner who is asked to take the specimen is of the opinion that, for medical reasons, it cannot or should not be taken; or
  - (b) the registered nurse who is asked to take it is of that opinion and there is no contrary opinion from a registered medical practitioner;
- and where by virtue of this subsection there can be no requirement to provide a specimen of blood, the service policeman may require a specimen of urine instead.
- (9) A service policeman must, on requiring a person to provide a specimen in

pursuance of this section, warn the person that a failure to provide it may render the person liable to proceedings for a service offence.

(10) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence.

(11) 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.93E)

### 1. Type of offence

An offence under this section **may be** heard summarily<sup>88</sup>.

### 2. Specimen charges

FAILING TO PROVIDE A SPECIMEN FOR ANALYSIS CONTRARY TO SECTION 93E(10) OF THE ARMED FORCES ACT 2006

AB on ..., without reasonable excuse failed to provide a specimen of [breath/blood/urine] when required to do so by a service policeman.

### 3. Ingredients of the offence

*A person subject to Service law or a civilian subject to service discipline*

For persons subject to Service law and civilians subject to Service discipline see Chapter 3 (Jurisdiction and time limits).

*Failed to provide a specimen*

The specimen may be two specimens of breath or a specimen of blood or urine. The Service policeman<sup>89</sup> investigating the offence decides which specimen to take<sup>90</sup>, and may change his mind at any time up to the point at which the required specimen is given. Thus, if a suspect fails to provide two specimens of breath, the Service policeman may require a specimen of blood or urine. Likewise, if the suspect refuses to give a blood sample, or the vein collapses such that blood cannot be extracted, the Service policeman may require a specimen of urine instead. If a particular breath testing device is not working properly, Service police may require the accused to provide the specimens of breath using a different approved device or require blood or urine instead. However, once the chosen type of specimen has been provided, Service police should not then require a further specimen of a different type.

A specimen of breath must be sufficient to enable analysis to be carried out and provided in such a way as to enable the objective of the analysis to be satisfactorily achieved, which in practice means complying with the process applicable to the testing device used. The suspect must give consent for a specimen of blood to be taken.

Provision of a specimen of urine is a two stage process. Within an hour of the requirement being imposed, the suspect must provide one sample, which is then discarded, and then a second sample which is of sufficient quantity to be divided into two parts for analysis. Failure

<sup>88</sup> Section 53 of the Act.

<sup>89</sup> Reference to a service policeman includes a Royal Navy coxswain

<sup>90</sup> AFA 06 s.93(E)(7)

to provide the second sample within the hour constitutes failure to provide a specimen, even if the accused later produces a sufficient sample.

#### *Without reasonable excuse*

Whether facts are capable of amounting to a reasonable excuse is a matter of law, and legal advice should be sought where the accused raises the issue. If it is capable in law of amounting to a reasonable excuse, then it becomes a matter of fact and degree whether it does so or not, to be decided by the officer hearing the charge.

There is no right to see a legal advisor before providing a specimen, and the requirement to provide a specimen need not be delayed pending legal advice.

#### *Required to do so in pursuance of section 93E*

The requirement for the accused to provide a specimen must be in relation to an investigation into whether the accused has committed, in the case of persons subject to Service law an offence under section 20A (exceeding the alcohol limit for prescribed safety-critical duties) or an offence under section 20(1)(a) in respect of a safety-critical duty, and, in the case of civilians subject to Service discipline and persons subject to Service Law, an offence under sections 78, 79, 92 or 93 of the Railways and Transport Safety Act 2003.

As regards an offence under section 20(1)(a) in respect of a safety-critical duty, the commanding officer of the person must reasonably believe the duty is such that performing it with ability impaired by alcohol or drugs would result in risk of death, serious injury, serious damage to property or serious environmental harm.

## **4. Defences**

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

Procedural errors may found a defence. In particular, omission of the statutory requirement<sup>91</sup> to warn the accused that failure to provide a specimen may render him liable to proceedings for a Service offence will be fatal to successful prosecution.

## **5. Notes**

There is no requirement for preliminary tests to have been carried out before a requirement for evidential testing can be imposed. However, as regards an offence under section 20(1)(a) the commanding officer of the suspect should have made the determination that the duty is safety-critical before the requirement to provide a specimen is imposed.

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<sup>91</sup> AFA 06 s.93E(9).

## Section 93G – Failing to give permission for a laboratory test

### 93G Specimens of blood from persons incapable of consenting

- (1) A service policeman may request a registered medical practitioner to take a specimen of blood from a person (“the person concerned”), irrespective of whether that person consents, if—
  - (a) the service policeman would (in the absence of any incapacity of the person concerned and of any objection under section 93H) be entitled under section 93E to require the person concerned to provide a specimen of blood for a laboratory test;
  - (b) it appears to the service policeman that the person concerned has been involved in an accident that constitutes or is comprised in the matter that is under investigation or the circumstances of that matter;
  - (c) it appears to the service policeman that the person concerned is or may be incapable of giving a valid consent to the taking of a specimen of blood (whether or not consent has purportedly been given); and
  - (d) it appears to the service policeman that that person’s incapacity is attributable to medical reasons.
- (2) It is lawful for a registered medical practitioner to whom a request is made under this section, if that practitioner thinks fit—
  - (a) to take a specimen of blood from the person concerned irrespective of whether that person consents; and
  - (b) to provide the specimen to a service policeman.
- (3) The specimen must be of sufficient quantity to enable it to be divided into two parts for the purposes of analysis.
- (4) If a specimen is taken in pursuance of a request under this section, it must not be subjected to a laboratory test unless the person concerned—
  - (a) has been informed that it was taken;
  - (b) has been required by a service policeman to give permission for a laboratory test of the specimen; and
  - (c) has given permission.
- (5) A service policeman, on requiring a person to give permission for the purposes of this section for a laboratory test of a specimen, must warn the person that a failure to give the permission may render the person liable to proceedings for a service offence.
- (6) On a request made at the time a person gives permission under this section for a laboratory test of a specimen, that person must be given a part of the specimen sufficient for the purposes of analysis.
- (7) A person who, without reasonable excuse, fails to give permission for a laboratory test of a specimen taken from the person under this section is guilty of an offence.
- (8) 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.93G)

## 1. Type of offence

An offence under this section **may be** heard summarily<sup>92</sup>.

## 2. Specimen charges

FAILING TO GIVE PERMISSION FOR A LABORATORY TEST OF A SPECIMEN  
CONTRARY TO SECTION 93G OF THE ARMED FORCES ACT 2006

AB on ..., without reasonable excuse failed to give permission for a laboratory test of a specimen of blood when required to do so by a service policeman

## 3. Ingredients of the offence

*A person subject to Service law or a civilian subject to service discipline*

For persons subject to Service law and civilians subject to service discipline see Chapter 3 (Jurisdiction and time limits).

*Without reasonable excuse*

Whether facts are capable of amounting to a reasonable excuse is a matter of law, and legal advice should be sought where the accused raises the issue. If it is capable in law of amounting to a reasonable excuse, then it becomes a matter of fact and degree whether it does so or not, to be decided by the officer hearing the charge.

*Fails to give permission for a laboratory test*

Prior to failing to give his permission, the accused must have been informed that a sample has been taken and required by a service policeman<sup>93</sup> to give his permission for a laboratory test of that specimen. At the time of the request, the service policeman must have warned the accused that a failure to give permission may render him liable to proceedings for a service offence.

## 4. Defences

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

Procedural errors may found a defence. In particular, omission of the statutory requirement<sup>94</sup> to warn the accused that failure to give permission may render him liable to proceedings for a service offence will be fatal to successful prosecution.

## 5. Notes

A specimen of blood taken from an accused who was incapable of consenting at the time it was taken, can only be subject to a laboratory test with the permission of the accused. This section is designed to impose a sanction should the accused, without reasonable excuse, fail to give such permission.

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<sup>92</sup> Section 53 of the Act.

<sup>93</sup> Reference to a service policeman includes a Royal Navy coxswain

<sup>94</sup> AFA 06 s.93G(5).

## 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>95</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).

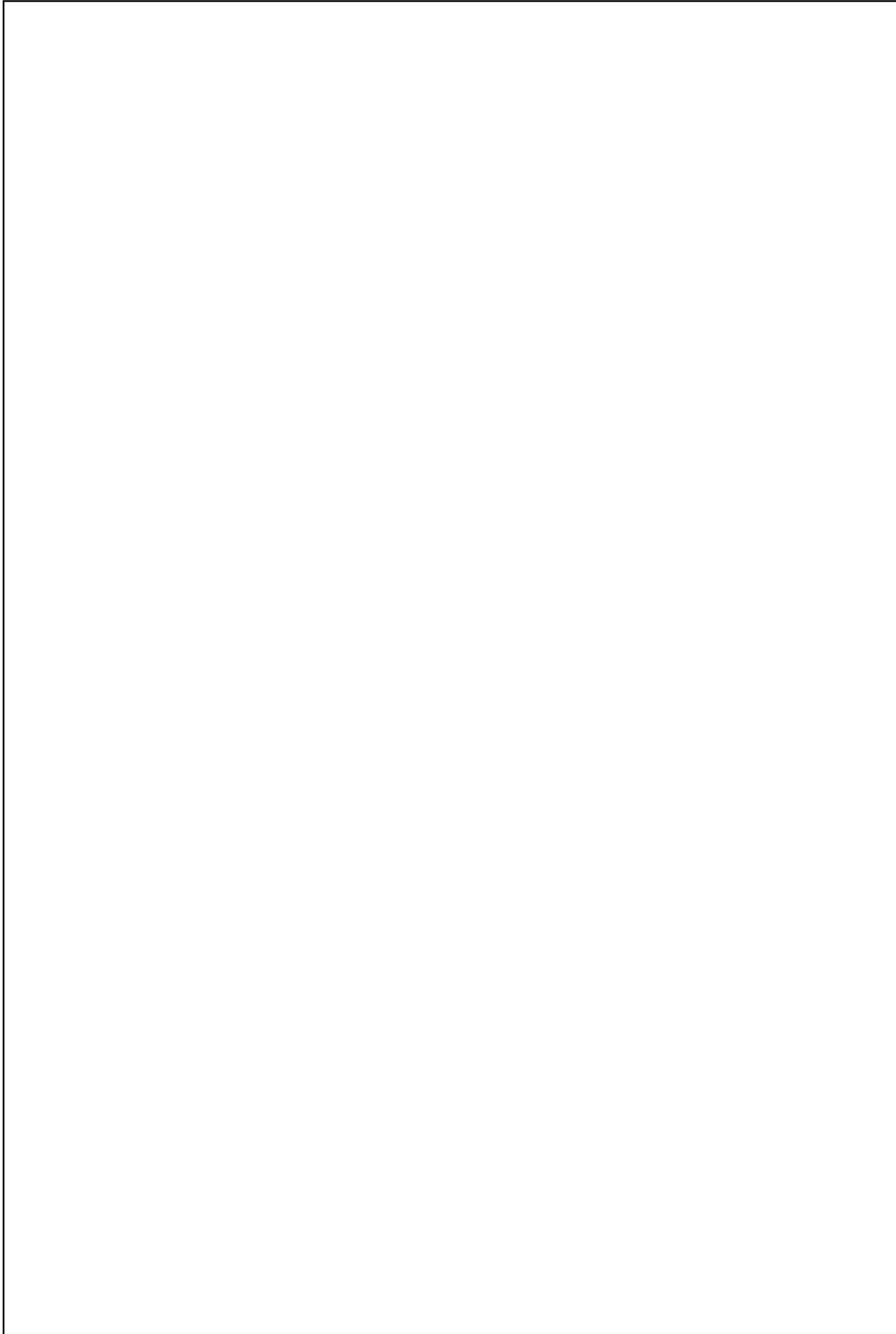
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<sup>95</sup> Section 53 of the Act.

## 5. Notes

Spare.

**Section 163 A and Schedule 2A paragraph 2 – Offences Relating to Members of the Court Martial - Research by lay members**



## 1. Type of offence

An offence under this section **may not** be heard summarily<sup>96</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this paragraph 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 charge

RESEARCH BY LAY MEMBERS CONTRARY TO SECTION 163A AND PARAGRAPH 2 OF SCHEDULE 2A TO THE ARMED FORCES ACT 2006

[AB] on ....., while a lay member of the Court Martial for proceedings, and during the trial period, researched the case that was the subject of the proceedings by intentionally seeking information when he knew or ought reasonably to have known that the information was or may have been relevant to the case.

## 3. Ingredients of offence.

### *Lay member of the Court Martial for Proceedings*

This is a person other than the judge advocate, specified as a lay member of the Court Martial for proceedings, whether or not that lay member is a person subject to service law or a civilian subject to service discipline (see the Interpretation provisions in Schedule 2A, paragraph 1).

### *The trial period*

The trial period is the period beginning when the lay member was sworn to try the case and ending when the proceedings terminated or, if earlier, when the lay member was discharged by the judge advocate (see Schedule 2A, paragraph 1(3)).

### *Researches the case*

A lay member researches a case where they intentionally seek information (which includes asking a question, searching an electronic database, visiting or inspecting a place or object, conducting an experiment or asking another person to seek the information), and when doing so, knows or ought reasonably to know that the information is or may be relevant to the case.

### *Intentionally*

For intention generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

For an offence under this section to be proved the accused must have intentionally sought information which he knew or ought reasonably to have known was relevant to the case.

### *Knows or ought reasonably to know*

It must be shown that the accused knew or ought reasonably to have known that the information sought was or may have been relevant to the case. If the accused claims that he did not know the information was relevant to the case it will need to be determined whether in

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<sup>96</sup> Section 53 of the Act

the circumstances the accused did know or ought reasonably to have known that the information sought was relevant to the case.

*Relevant to the case*

Information relevant to the case includes information about: a person involved in events relevant to the case; the judge advocate for proceedings; any other person involved in the trial, whether as a lawyer, a witness, or otherwise; the law relating to the case; the law of evidence; and Court Martial procedure (see paragraph 2(4)).

**4. Defences**

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

In accordance with paragraph 2(5) it would be a defence if the accused was seeking information because he needed it for a reason that was not connected with the case, for example where he was also a law student and had to research the law of evidence for the purpose of his legal studies during the trial period.

It would be a defence if the alleged conduct fell exclusively within paragraph 2(6), including for example where the accused seeks information from the judge advocate or a member of the Military Court Service.

**5. Notes**

Nothing in paragraph 2 affects what constitutes contempt of court at common law or what may be certified under section 311 of the Act.

## Section 163 A and Schedule 2A paragraph 3 – Offences Relating to Members of the Court Martial - Sharing Research with other lay members

### Schedule 2A Offences Relating to Members of the Court Martial

#### Sharing research with other lay members

3. (1) It is an offence for a lay member of the Court Martial for proceedings intentionally to disclose information to another lay member of that court for the proceedings during the trial period if -
- (a) the lay member contravened paragraph 2 in the process of obtaining the information, and
  - (b) the information has not been provided to the Court Martial during the course of the proceedings.
- (2) Information has been provided to the Court Martial during the course of the proceedings if (and only if) it has been provided as part of -
- (a) evidence presented in the proceedings,
  - (b) information provided to a lay member or the lay members during the trial period by the court administration officers or a member of the Military Court Service, or
  - (c) other information provided to a lay member or the lay members during the trial period by, or with the permission of, the judge advocate dealing with the issue.
- (3) A person guilty of an offence under this paragraph is liable to any punishment mentioned in the Table in section 164, but a sentence of imprisonment imposed in respect of the offence must not exceed two years.

AFA 06, Schedule 2A, para 3

### 1. Type of offence

An offence under this section may not be heard summarily<sup>97</sup>. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under paragraph 3 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 charge

SHARING RESEARCH WITH OTHER LAY MEMBERS CONTRARY TO SECTION 163A AND PARAGRAPH 3 OF SCHEDULE 2A TO THE ARMED FORCES ACT 2006

[AB] on ....., while a lay member of the Court Martial for proceedings, intentionally disclosed to another lay member of that court for the proceedings, during the trial period, information obtained by him in contravention of paragraph 2 of Schedule 2A to the Armed Forces Act 2006 which was information not provided to the Court Martial during the course of the proceedings.

<sup>97</sup> Section 53 of the Act

### **3. Ingredients of offence.**

#### *Lay member of the Court Martial for Proceedings*

This is a person other than the judge advocate, specified as a lay member of the Court Martial for proceedings, whether or not that lay member is a person subject to service law or a civilian subject to service discipline (see the Interpretation provisions in Schedule 2A, paragraph 1).

#### *Intentionally*

For intention generally see Chapter 12 (Defences, mitigation and criminal responsibility).

For an offence under this section to be proved, the disclosure by the accused must have been intentional.

#### *Disclose*

Disclose should be given its ordinary and natural (dictionary) meaning; it is not defined for the purposes of this offence.

#### *The trial period*

The trial period is the period beginning when the lay member was sworn to try the case and ending when the proceedings terminated or, if earlier, when the lay member was discharged by the judge advocate (see Schedule 2A, paragraph 1(3)).

#### *Obtaining information in contravention of paragraph 2*

The offence requires it to be proved that the information disclosed was obtained in contravention of paragraph 2 of Schedule 2A to the Armed Forces Act 2006 and had not been provided to the Court Martial during the course of the proceedings. This means that the accused must have researched the case by intentionally seeking the information when he knew or ought reasonably to have known that the information was or may be relevant to the case. See the entry for the Schedule 2A, paragraph 2 offence for further detail.

### **4. Defences**

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

It would be a defence if the information disclosed to another lay member had been provided to the Court Martial during the course of the proceedings. Information will have been so provided if it was provided as part of: evidence presented in the proceedings; information provided to a lay member or the lay members during the trial period by the court administration officer or a member of the Military Court service; or other information provided to a lay member or the lay members during the trial period by, or with the permission of, the judge advocate dealing with the issue (See paragraph 3 (1)(b)).

### **5. Notes**

Nothing in paragraph 3 affects what constitutes contempt of court at common law or what may be certified under section 311 of the Act.

## Section 163 A and Schedule 2A paragraph 4 – Offences Relating to Members of the Court Martial - Engaging in Other Prohibited Conduct

### Schedule 2A Offences Relating to Members of the Court Martial

#### Engaging in other prohibited conduct

4. (1) It is an offence for a lay member of the Court Martial for proceedings intentionally
- to engage in prohibited conduct during the trial period, subject to the exceptions in sub- paragraphs (4) and (5).
- (2) “Prohibited conduct” means conduct from which it may reasonably be concluded that the person intends to make a finding on a charge or a decision about a sentence otherwise than on the basis of the evidence presented in the proceedings.
- (3) An offence under this paragraph is committed whether or not the person knows that the conduct is prohibited conduct.
- (4) It is not an offence under this paragraph for a person to research the case that is the subject of the proceedings (as defined in paragraph 2(2) to (4)).
- (5) It is not an offence under this paragraph for a person to disclose information to another lay member of the Court Martial.
- (6) A person guilty of an offence under this paragraph is liable to any punishment mentioned in the Table in section 164, but a sentence of imprisonment imposed in respect of the offence must not exceed two years.

### 1. Type of offence

This is a Schedule 2 offence and **may not** be heard summarily<sup>98</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 paragraph 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

ENGAGING IN OTHER PROHIBITED CONDUCT CONTRARY TO SECTION 163A OF AND PARAGRAPH 4 OF SCHEDULE 2A TO THE ARMED FORCES ACT 2006

[AB] on ....., while a lay member of the Court Martial for proceedings intentionally engaged in prohibited conduct during the trial period.

<sup>98</sup> Section 53 of and Schedule 2 to the Act

### **3. Ingredients of offence.**

#### *Lay member of the Court Martial for Proceedings*

This is a person other than the judge advocate, specified as a lay member of the Court Martial for proceedings, whether or not that lay member is a person subject to service law or a civilian subject to service discipline (see the Interpretation provisions in Schedule 2A, paragraph 1).

#### *Intentionally*

For intention generally see Chapter 12 (Defences, mitigation and criminal responsibility).

For an offence under this section to be proved, the accused must have intentionally engaged in the prohibited conduct.

#### *Prohibited Conduct*

Prohibited conduct is defined in paragraph 4(2) as “conduct from which it may reasonably be concluded that the person intends to make a finding on a charge or a decision about a sentence otherwise than on the basis of the evidence presented in the proceedings”. If a person engages in prohibited conduct, an offence is committed, whether or not the person knows that the conduct is prohibited conduct.

#### *Trial Period*

The trial period is the period beginning when the lay member was sworn to try the case and ending when the proceedings terminated or, if earlier, when the lay member was discharged by the judge advocate (see Schedule 2A, paragraph 1(3)).

### **4. Defences**

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

It is not an offence under this paragraph for a person to research the case that is the subject of the proceedings (as defined in paragraphs 2(2) to (4) of Schedule 2A). Such conduct could however be prosecuted under paragraph 2 to Schedule 2A of the Act.

It is not an offence under this paragraph that the alleged conduct was disclosure of information to another lay member of the Court Martial. Such conduct could however be prosecuted under paragraph 3 to Schedule 2A of the Act.

The idea is that the paragraph 4 offence is reserved for prohibited conduct other than researching the case or sharing that research with other lay members – they should be charged under, respectively, paragraphs 2 and 3 of Schedule 2A.

### **5. Notes**

Nothing in paragraph 2 affects what constitutes contempt of court at common law or what may be certified under section 311 of the Act.

## Section 163 A and Schedule 2A paragraph 5 – Offences Relating to Members of the Court Martial – Disclosing Information about members’ deliberations

### Schedule 2A Offences Relating to Members of the Court Martial

Disclosing information about members’ deliberations etc.

5. (1) It is an offence for a person intentionally—
- (a) to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of the Court Martial
  - (b) proceedings in the course of their deliberations, or to solicit or obtain such information,
- for
- subject to the exceptions in paragraphs 6 to 8.
- (2) Where a person guilty of an offence under this paragraph—
- (a) was a member of the Court Martial for the proceedings, or
  - (b) at the time the offence was committed, was a person subject to service law or a civilian subject to service discipline,
- the person is liable to any punishment mentioned in the Table in section 164, but a sentence of imprisonment imposed in respect of the offence must not exceed two years.
- (3) Where any other person is guilty of an offence under this paragraph—
- (a) the person is liable, on conviction on indictment, to imprisonment for a
  - (b) term not exceeding two years or a fine (or both), and
- proceedings for the offence may not be instituted except by or with the consent of the Attorney General.
- (4) The Crown Court has jurisdiction to try an offence under this paragraph committed in England and Wales other than by a person described in sub-paragraph (2), including an offence committed in respect of deliberations of members of the Court Martial sitting outside England and Wales.

### 1. Type of offence

This offence, if committed by a member of the Court Martial for the proceedings (whether or not they are a person subject to service law or a civilian subject to service discipline); or any other person who, at the time that the offence was committed, was a person subject to service law or a civilian subject to service discipline is a Schedule 2 offence and **may not be heard summarily**<sup>99</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 paragraph 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.

<sup>99</sup> Section 53 of and Schedule 2 to the Act

## 2. Specimen charge

DISCLOSING INFORMATION ABOUT MEMBERS' DELIBERATIONS ETC CONTRARY TO SECTION 163A OF AND PARAGRAPH 4 OF SCHEDULE 2A TO THE ARMED FORCES ACT 2006

[AB] on ....., intentionally disclosed information about [statements made] [opinions expressed] [arguments advanced] [votes cast] by members of the Court Martial for proceedings in the course of their deliberations.

DISCLOSING INFORMATION ABOUT MEMBERS' DELIBERATIONS ETC CONTRARY TO SECTION 163A OF AND PARAGRAPH 4 OF SCHEDULE 2A TO THE ARMED FORCES ACT 2006

[AB] on ....., intentionally [solicited] [obtained] information about [statements made] [opinions expressed] [arguments advanced] [votes cast] by members of the Court Martial for proceedings in the course of their deliberations.

## 3. Ingredients of offence.

### *Intentionally*

For intention generally see Chapter 12 (Defences, mitigation and criminal responsibility).

For an offence under this paragraph to be proved, the conduct of the accused in disclosing, soliciting or obtaining information about statements made, opinions expressed, arguments advanced or votes cast by members of the Court Martial for proceedings in the course of their deliberations, must have been intentional.

### *Disclose*

Disclose should be given its ordinary and natural (dictionary) meaning; it is not defined for the purposes of this offence.

### *Information about members' deliberations*

The can be information about statements made, opinions expressed, arguments advanced or votes cast by members of the Court Martial for proceedings in the course of their deliberations. The type of information must be specified in the charge.

### *Solicit or obtain*

The offence can also be committed by soliciting or obtaining information about members' deliberations. Neither solicit nor obtain are defined and should be given their ordinary and natural (dictionary) meaning.

## 4. Defences

For defences generally, see Chapter 12 (Defences, mitigation and criminal responsibility).

Paragraphs 6 to 8 of Schedule 2A to the Act provide a series of "exceptions" (or defences) to the paragraph 5 offence.

Paragraph 6 provides for the "initial exceptions" which largely cover excepted disclosures during the trial period. These permitted disclosures are allowed for the purposes of enabling

the Court Martial to proceed and for the purpose of investigating a possible offence under paragraph 5. The disclosures may be made to a number of defined “relevant investigators”, such as a police force.

Paragraph 7 provides for “further exceptions” which are focused on post-trial disclosures to, in the first instance, the Court Martial Appeal Court, the Court of Appeal or other named persons, where the person making the disclosure believes that an irregularity has occurred in relation to a lay member. Sub-paragraphs (3) to (10) then make detailed provision for further disclosure to specified persons for particular purposes so as to ensure that a proper investigation can be conducted into any alleged irregularity.

Paragraph 8 provides for “exceptions for soliciting disclosures or obtaining information” which are further exceptions relating to the permitted disclosures provided for in paragraphs 6 and 7 of new Schedule 2A.

Accordingly it is a defence to the offence under paragraph 5 if the alleged conduct falls exclusively within the exceptions in Paragraphs 6 to 8 set out below.

#### **Schedule 2A Offences Relating to Members of the Court Martial**

##### **Disclosing information about members’ deliberations etc: initial exceptions**

- 6. (1) It is not an offence under paragraph 5 for a person to disclose information in the proceedings mentioned in paragraph 5(1)-**
  - (a) for the purposes of enabling the Court Martial to make a finding on a charge or pass a sentence, or**
  - (b) in connection with the delivery of the findings or sentence.**
- (2) It is not an offence under paragraph 5 for the judge advocate for those proceedings to disclose information**
  - (a) for the purposes of dealing with the proceedings, or**
  - (b) for the purposes of an investigation by a relevant investigator into whether an offence or contempt of court has been committed by or in relation to a lay member in the proceedings mentioned in paragraph 5(1).**
- (3) It is not an offence under paragraph 5 for a person who reasonably believes that a disclosure described in sub-paragraph (2)(b) has been made to disclose information for the purposes of the investigation.**
- (4) It is not an offence under paragraph 5 to publish information disclosed as described in sub-paragraph (1) or (2)(a) in the proceedings mentioned in paragraph 5(1).**
- (5) In this paragraph—**  
**“publish” means make available to the public or a section of the public;**  
**“relevant investigator” means—**
  - (a) a police force listed in section 375;**
  - (b) the Attorney General;**
  - (c) any other person or class of person specified by the Lord Chancellor for the purposes of this paragraph by regulations.**
- (6) The Lord Chancellor must obtain the consent of the Lord Chief Justice of England and Wales before making regulations under this paragraph.**

##### **Disclosing information about members’ deliberations etc: further exceptions**

- 7. (1) It is not an offence under paragraph 5 for a person to disclose information to a person listed in sub-paragraph (2) if-**
  - (a) the disclosure is made after the proceedings mentioned in paragraph 5(1) terminate, and**

- (b) the person making the disclosure reasonably believes that—
- (i) an offence or contempt of court has been, or may have been, committed by or in relation to a lay member in connection with those proceedings, or
  - (ii) conduct of a lay member in connection with those proceedings may provide grounds for an appeal against conviction or sentence.

(2) Those persons are—

- (a) a member of a police force listed in section 375;
- (b) a judge of the Court of Appeal;
- (c) a judge of the Court Martial Appeal Court;
- (d) the registrar of criminal appeals;
- (e) the judge advocate who dealt with the proceedings mentioned in paragraph 5(1);
- (f) the court administration officer for the Court Martial;
- (g) a member of the Military Court Service who would reasonably be expected to disclose the information only to a person mentioned in paragraphs (b) to (f).

(3) It is not an offence under paragraph 5 for a member of a police force listed in section 375 to disclose information for the purposes of obtaining assistance in deciding whether to submit the information to—

- (a) a judge of the Court of Appeal,
  - (b) a judge of the Court Martial Appeal Court, or
  - (c) the registrar of criminal appeals,
- provided that the disclosure does not involve publishing the information.

(4) It is not an offence under paragraph 5 for a judge of the Court of Appeal, a judge of the Court Martial Appeal Court or the registrar of criminal appeals to disclose information for the purposes of an investigation by a relevant investigator into—

- (a) whether an offence or contempt of court has been committed by or in relation to a lay member in connection with the proceedings mentioned in paragraph 5(1), or
- (b) whether conduct of a lay member in connection with those proceedings may provide grounds for an appeal against conviction or sentence.

(5) It is not an offence under paragraph 5 for a judge of the Court of Appeal, a judge of the Court Martial Appeal Court or the registrar of criminal appeals to disclose information for the purposes of enabling or assisting—

- (a) a person who was the defendant in the proceedings mentioned in paragraph 5(1), or
- (b) a legal representative of such a person,

to consider whether conduct of a lay member in connection with those proceedings may provide grounds for an appeal against conviction or sentence.

(6) It is not an offence under paragraph 5 for a person who reasonably believes that a disclosure described in sub-paragraph (4) or (5) has been made to disclose information for the purposes of the investigation or consideration in question.

(7) It is not an offence under paragraph 5 for a person to disclose information in evidence in—

- (a) proceedings for an offence or contempt of court alleged to have been committed by or in relation to a lay member in connection with the proceedings mentioned in paragraph 5(1),
- (b) proceedings on an appeal, or an application for leave to appeal, against a decision in the proceedings mentioned in paragraph 5(1) where an allegation relating to conduct of or in relation to a lay member forms part of the grounds of appeal, or
- (c) proceedings on any further appeal or reference arising out of proceedings mentioned in paragraph (a) or (b).

- (8) It is not an offence under paragraph 5 for a person to disclose information in the course of taking reasonable steps to prepare for proceedings described in sub-paragraph (7)(a) to (c).
- (9) It is not an offence under paragraph 5 to publish information disclosed as described in sub-paragraph (7).
- (10) In this paragraph—
  - “publish” means make available to the public or a section of the public;
  - “relevant investigator” means—
    - (a) a police force listed in section 375;
    - (b) the Attorney General;
    - (c) the Criminal Cases Review Commission;
    - (d) the Crown Prosecution Service;
    - (e) the Service Prosecuting Authority;
    - (f) any other person or class of person specified by the Lord Chancellor for the purposes of this paragraph by regulations.
- (11) The Lord Chancellor must obtain the consent of the Lord Chief Justice of England and Wales before making regulations under this paragraph.

**Disclosing information about members’ deliberations: exceptions for soliciting disclosures or obtaining information**

- 8. (1) It is not an offence under paragraph 5 to solicit a disclosure described in paragraph 6(1) to (4) or paragraph 7(1) to (9).
- (2) It is not an offence under paragraph 5 to obtain information—
  - (a) by means of a disclosure described in paragraph 6(1) to (4) or paragraph 7(1) to (9), or
  - (b) from a document that is available to the public or a section of the public.

5. Notes

This offence can be committed by any person. It will only be tried by Court Martial if the person was a member of the Court Martial for the proceedings (whether or not a person subject to service law or a civilian subject to service discipline), or someone other than a member of the Court Martial for the proceedings who at the time the offence was committed, was a person subject to service law or a civilian subject to service discipline. Any other person could be tried by the Crown Court if the offence was committed in England and Wales.

## Section 229 – Breach of a Service Restraining Order

<p>229    <b>Service Restraining Orders</b></p> <p>(1)    The Court Martial or the Service Civilian Court may make an order under this section where-</p> <p>        (a) it convicts or acquits a person (“the defendant”) of an offence; and</p> <p>        (b) the defendant is subject to service law or is a civilian subject to service discipline.</p> <p>(2) An order under this section-</p> <p>        (a) prohibits the defendant from doing anything proscribed in the order; and</p> <p>        (b) has effect for a fixed period specified in the order or until further order.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p style="text-align: right;">(AFA 06 s.229)</p>
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### 1.    **Type of Offence**

An offence under section 229 **may not be** heard summarily<sup>100</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>100</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>101</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

[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 .....

<sup>101</sup> Section 53 Schedule 2 of the Act.

FAILURE TO COMPLY WITH A FINANCIAL STATEMENT ORDER CONTRARY TO SECTION 266(4) OF THE ARMED FORCES ACT 2006

[AB] being a person on whom a financial statement order has been imposed under section 266 of the Armed Forces Act 2006, knowingly failed to disclose a material fact, namely .....

**3. Ingredients of Offence**

*Without reasonable excuse*

For reasonable excuse generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The duty to ensure a person complies with any financial statement order made by a Judge Advocate remains with 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>102</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>102</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 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>103</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>103</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>104</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

<sup>104</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>105</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>105</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>106</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>106</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>107</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.

#### *Obstructs*

<sup>107</sup> Section 53 Schedule 2 of the Act.

Obstruction need not involve physical violence; anything which makes it more difficult for a person to carry out 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>108</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*

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

<sup>108</sup> Section 53 Schedule 2 of the Act.

intention of obstructing. Provided that the person charged intended to do an act which amounted to obstruction, it is immaterial that 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>109</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>109</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>110</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*

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.

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<sup>110</sup> Section 53 of the Act

### *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>111</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 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

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<sup>111</sup> Section 367 of the Act.

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>112</sup> Section 96. Failure to attend for service on call out or recall

<p>42. RFA 96 Section 96. Failure to attend for service on call out or recall</p> <p>(1) A member of a reserve force served with a call-out notice under any provision of this Act who, without leave lawfully granted or reasonable excuse-</p> <p>(a) fails to present himself for service at the time and place specified in the call-out notice under section 32(3)(b), 43(4)(b) or 58(3)(c) (as the case may be);</p> <p>(b) having so presented himself, fails to remain there until accepted into service or informed that he is not to be accepted into service in pursuance of that notice; or</p> <p>(c) where he has for any reason failed to present himself at the time and place so specified or to remain there, fails-</p> <p>(i) to present himself to a person specified in the call-out notice or to any other authorised officer; or</p> <p>(ii) having so presented himself, to remain until accepted into service or informed that he is not to be accepted into service in pursuance of that notice,</p> <p>is guilty of desertion (if section 8(2)(a) or (b) of the Armed Forces Act 2006 applies to him) or absence without leave (if neither of those provisions applies to him).</p> <p>(2) Subsection (1) above applies to a person liable to recall as it applies to a member of a reserve force –</p> <p>(a) with the substitution for references to a call-out notice of references to a recall notice; and</p> <p>(b) as if paragraph (a) of that subsection referred to the time and place specified in the recall notice under section 70(3)(c).</p> <p>(3) An offence under this section is triable summarily by a civil court (as well as being triable by the Court Martial).</p> <p style="text-align: right;"><b>(RFA 96 s.96)</b></p>
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### 1. Type of offence

An offence of desertion under this section (as applied by section 8 of the Act) **may not be** heard summarily<sup>113</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>114</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)

[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].

<sup>112</sup> Reserved Forces Act 1996 is contained within MSL Volume 3.

<sup>113</sup> Section 53 and Schedule 2 of the Act.

<sup>114</sup> Section 53 of the Act.

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(b)

[AB] absented himself without leave from [date] to [date] by having presented himself under the terms of the [call-out/recall notice], failed to remain there until accepted into service or on being informed that he was not to be so accepted.

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(c)(i)

[AB] absented himself without leave from [date] to [date] by failing to present himself in accordance with the [call-out/recall] notice or to remain there, failed to present himself to a person specified in the notice or to any other specified officer.

FAILURE TO ATTEND FOR SERVICE ON CALL OUT OR RECALL CONTRARY TO THE RESERVE FORCES ACT 1996 SECTION 96(1)(c)(ii)

[AB] absented himself without leave from [date] to [date] by failing to present himself in accordance with the [call-out/recall] notice or to remain there, and having so presented himself, to remain until accepted into service or informed that he is not to be accepted for service.

### 3. Ingredients of the offence

#### *Member of the reserve forces*

It must be proved that the accused was a member of a reserve force see [Chapter 3](#) (Jurisdiction and time limits) when served with a call-out notice. For the purposes of the Reserve Forces Act 1996 (RFA 96), reserve forces means the following forces—

- a. The Royal Fleet Reserve, the Royal Naval Reserve and the Royal Marines Reserve (“the reserve naval and marine forces”);
- b. The Army Reserve and the Territorial Army (“the reserve land forces”); and
- c. The Air Force Reserve and the Royal Auxiliary Air Force (“the reserve air forces”).

An accused will also be a member of the reserve forces for the purposes of this offence if they are a person liable to recall<sup>115</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>115</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>116</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>117</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>118</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>116</sup> Reserve Forces Act 1996 is contained within MSL Volume 3.

<sup>117</sup> Section 53 and Schedule 2 of the Act.

<sup>118</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 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, 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

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(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>119</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>119</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

