

## **ARMED FORCES ACT 2006**

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### **EXPLANATORY NOTES**

#### **COMMENTARY**

##### ***First Group of Parts – Discipline***

##### **Part 1 – Offences**

40. **Part 1** sets out most of the offences which can be committed under service law. All the offences in this Part correspond to existing offences under the SDAs, which have been revised as appropriate. They can only be committed by persons who are subject to service law, i.e. service personnel (or, in some cases, by persons who are “civilians subject to service discipline”: see paragraph 41 below). A member of the reserve forces (such as the Territorial Army) is only subject to service law at certain times (see section 367(2)). Where a section refers to an offence being committed by a person subject to service law, this means that the individual in question must be subject to service law at the time when the offence is committed.
41. Some offences may also be committed by civilians subject to service discipline (defined in section 370), and are identified below.
42. The punishments which can be awarded for service offences are set out in section 164. Unless otherwise stated, the maximum sentence which can be imposed is two years’ imprisonment.

##### **Assisting an enemy, misconduct on operations etc**

##### ***Section 1: Assisting an enemy***

43. This section makes it an offence for a person subject to service law to intentionally assist an enemy in a number of specified ways, such as communicating with an enemy or providing the enemy with supplies. Subsection (2) concerns service personnel who, having been captured, intentionally assist the enemy. Helping the enemy in their war effort is the main way in which an offence under subsection (2) is committed. A defence of lawful excuse applies in all circumstances; for example service personnel might be ordered to communicate with an enemy in order to deceive them. The maximum penalty is life imprisonment.
44. “Enemy” is widely defined in section 374, and includes enemy troops but also, for example, armed mutineers or rioters.

##### ***Section 2: Misconduct on operations***

45. When a person subject to service law is taking part, or under orders to take part, in operations against an enemy, or is in the vicinity of an enemy, he commits an offence if he is found to be guilty of misconduct in the following circumstances. These are:
  - surrendering or abandoning a place when under a duty to defend it (*subsection (1)*)
  - failing to do his utmost to carry out lawful commands (*subsection (3)*)

*These notes refer to the Armed Forces Act 2006 (c.52)  
which received Royal Assent on 8 November 2006*

- when carrying out certain important duties (such as guard duty) sleeping or leaving their place of duty (*subsection (4)*)
  - making statements (or other communications) likely to cause alarm or despondency among HM Forces or allied forces, or among accompanying civilians who are subject to service discipline (*subsection (5)*)
46. In most cases no offence is committed if the person in question has a reasonable excuse for his actions.
47. The maximum penalty for this offence is life imprisonment.

***Section 3: Obstructing operations***

48. Under this section a person subject to service law is guilty of an offence if he
- intentionally or recklessly puts an operation of HM Forces at risk, or
  - intentionally delays or discourages such an operation.
49. There may be a good military reason for delaying, or even for discouraging, an operation, for example because of likely adverse weather conditions or expected enemy strength. Accordingly such conduct is only an offence if there is no lawful excuse.
50. If an offence under this section relates to an action or operation against an enemy, the maximum penalty is life imprisonment; otherwise the maximum penalty is ten years' imprisonment.

***Section 4: Looting***

51. Service personnel and civilians subject to service discipline may be guilty of looting in defined circumstances. The offence recognises that armed conflicts, natural disasters and other situations in which service personnel may be operating can leave people and property unprotected, and provide opportunities to steal or otherwise interfere with property. This section concerns looting in the following circumstances:
- taking property from a person who has been killed, wounded, captured or detained during operations of HM Forces or allied forces, or searching such a person with the intention of taking property from him (*subsection (1)*)
  - taking property which has been left behind as a result of the operations of HM Forces, or allied forces, or as a result of an event (such as social collapse or natural disaster) which has resulted in such forces being present (*subsection (2)*)
  - taking any vehicle or other equipment abandoned by an enemy, unless this is done for the public service (for example taking ammunition or vehicles for use in combat) (*subsection (3)*)
52. For those offences set out in subsections (1) and (2), the maximum penalty is life imprisonment. For an offence within subsection (3) the maximum sentence is seven years' imprisonment.

***Section 5: Failure to escape etc***

53. It is an offence for service personnel who have been captured by an enemy:
- to fail to escape (or otherwise rejoin HM Forces), where they could reasonably be expected to take steps to do so, or
  - to intentionally prevent or discourage a member of HM Forces from taking reasonable steps to do so.

54. Service personnel are not required to take steps which could not reasonably be expected, for example because of the danger involved or the individual's physical condition.
55. The maximum sentence for this offence is ten years' imprisonment.

## **Mutiny**

### ***Section 6: Mutiny***

56. A person subject to service law commits the offence of mutiny if he takes part in concerted action to overthrow or resist the authority of those in command or to disobey authority in such a way as to undermine discipline, or agrees to act in such a manner.
57. The maximum penalty for mutiny is life imprisonment.

### ***Section 7: Failure to suppress mutiny***

58. It is an offence if persons subject to service law fail to do what can reasonably be expected of them to prevent or stop the concerted actions of resisting or overthrowing authority or disobeying authority so as to undermine discipline. It is not an offence to fail to suppress the agreement to take part in such actions. What can reasonably be expected of persons who should act to suppress mutiny will depend on the circumstances, such as any danger involved. The worst cases of this offence could almost amount to complicity in the mutiny itself. For this reason there is a maximum penalty of life imprisonment.

## **Desertion and absence without leave**

### ***Section 8: Desertion***

59. Under this section desertion is committed if a person subject to service law is absent without permission and either intends:
- not to return at all, or
  - to avoid service on operations against an enemy, or service abroad on operations to protect life or property, or service on military occupation of a foreign country or territory.
60. It is an offence if the person has the necessary intention at the time of going absent or if he develops the intention at some point during the period of absence.
61. The maximum sentence for desertion is generally two years' imprisonment. But the maximum is life imprisonment if the offender intended to avoid a period of "active service" as defined in the section.

### ***Section 9: Absence without leave***

62. Persons subject to service law commit an offence if they are absent from duty without permission. The offence may be committed through negligence, or recklessness as to whether the individual's conduct will result in such absence, or where he is intentionally absent without permission.

### ***Section 10: Failure to cause apprehension of deserters or absentees***

63. Under this section it is an offence if a person subject to service law fails to do what can reasonably be expected of him to cause a deserter or absentee without leave (or a person attempting to commit either offence) to be detained.

## **Insubordination etc**

### ***Section 11: Misconduct towards a superior officer***

64. This section penalises misconduct by a person subject to service law towards a superior officer. “Superior officer” is defined by section 374 as an officer, warrant officer or non-commissioned officer of senior rank or rate to the offender or of the same rank or rate but having authority over him. The offender must know or have reasonable cause to believe that his misconduct is directed towards a superior officer. Misconduct means:
- violence against a superior officer (*subsection (1)*)
  - threatening or disrespectful behaviour towards a superior officer (*subsection (2)*)
65. The misconduct referred to in subsection (2) includes sending communications which are threatening or disrespectful (such as by a note or e-mail) to a superior; and threatening behaviour is not limited to threats of violence. It would include, for example, a threat to damage the superior’s property (subsection (3)).
66. The maximum penalty for an offence involving violence or threatening behaviour is ten years’ imprisonment; disrespectful behaviour is punishable with a maximum of two years’ imprisonment.

### ***Section 12: Disobedience to lawful commands***

67. Obedience to lawful commands is central to service discipline. A person who is subject to service law and intentionally or recklessly disobeys a lawful command commits an offence. A command in the armed forces means any order apart from routine and standing orders, which are dealt with in section 13. A person who is negligent in carrying out a command (by failing, for example, to consider what the order really meant) does not commit an offence under this section. There is a separate offence which applies to negligent breaches of duty (section 15).
68. An order must be lawful; an order to do something which would amount to a crime, for example, would not be lawful.
69. The maximum penalty for this offence is ten years’ imprisonment, which reflects the fact that obedience to some commands may be vital to the success of an operation. (This may be contrasted with the maximum penalty of two years’ imprisonment for contravening standing orders, which are more routine in character.)

### ***Section 13: Contravention of standing orders***

70. Standing orders are routine orders, in writing, which are not temporary, and are issued by the services. An example is the routine orders governing conduct on a particular base. Such orders are likely to include rules on such matters as security or conduct. A breach of standing orders by a person subject to service law or a civilian subject to service discipline is an offence, but only if they are aware, or could reasonably be expected to be aware, of the order in question. So, for example, a civilian member of a service family living on a military base abroad could in most circumstances be reasonably expected to know of the standing orders applicable to that base. As with section 12, the order itself must be lawful.

### ***Section 14: Using force against a sentry etc***

71. This section reflects the importance of accepting the instructions of service personnel controlling the movement of members of the armed forces, in particular sentries (whether at a post or patrolling) and those regulating traffic. It is an offence for a person subject to service law to use force against such a member of the armed forces or, by the threat of force, to compel such a member to let him or any other person pass.

## **Neglect of duty and misconduct**

### ***Section 15: Failure to attend for or perform duty etc***

72. Those who are subject to service law commit an offence if they fail to attend for duty, or leave duty before they are permitted to do so, or fail to perform a duty at all. Negligently performing a duty is also penalised.

### ***Section 16: Malingering***

73. This section is aimed at preventing a person who is subject to service law avoiding service either by pretending to be ill or injured or by harming himself (or arranging for someone else to harm him) (subsection (1)). It is also an offence for a person subject to service law to help another person subject to service law to avoid service by harming him (subsection (2)). Harm includes physical injury as well as any disease and any impairment of a person's physical or mental condition.

### ***Section 17: Disclosure of information useful to an enemy***

74. A person who is subject to service law commits an offence if, without lawful authority, he discloses to someone else information which he knows or has reasonable cause to believe might be useful to an enemy. Service personnel might be authorised to make a particular disclosure or have general authority to disclose certain information; an obvious example of authorised disclosure would be to pass necessary information or orders to those in the same command. Conduct by service personnel which, in England and Wales, would be an offence under the Official Secrets Acts 1911 to 1989 will be a criminal conduct offence within section 42 of the Act, and more serious offences relating to disclosure of information are likely to be prosecuted under that section.

### ***Section 18: Making false records etc***

75. Persons subject to service law are required to make financial and other returns, and create documents on a wide range of matters. This section concerns improper conduct in relation to documents to be used for official purposes. Use for official purposes includes use by the armed forces themselves or by Crown servants such as Ministry of Defence officials. "Documents" are not just paper documents, but any record of information in any form, including computer records.
76. Improper conduct is defined as:
- making an official record (knowing or having reasonable cause to believe that it is an official record) and being aware that it is false in a material respect (*subsection (1)*)
  - interfering with or suppressing an official document in any way (for example by removing part of it, or destroying or concealing it), with the aim of deceiving someone else (*subsection (3)*)
  - failing to make a record when under a duty to make one, with the aim of deceiving someone else (*subsection (4)*).
77. The offence under subsection (1) also applies to a person who adopts a record made by someone else which he knows to be false. This would include signing a record made by another so as to confirm its accuracy.

### ***Section 19: Conduct prejudicial to good order and discipline***

78. This section penalises conduct which is prejudicial to good order and service discipline. The offence is the same as that under section 69 of the Army Act 1955 (and similar provisions in other SDAs). Under that section it has been decided judicially that there will be circumstances in which conduct is prejudicial only if it is accompanied by

a particular state of mind (such as dishonesty or an intention to prejudice service discipline).

***Section 20: Unfitness or misconduct through alcohol or drugs***

79. Service personnel who are unfit to be entrusted with their duty or any duty which they might reasonably be expected to perform, or whose behaviour is disorderly or likely to discredit the armed forces, due to the influence of alcohol or any drug, commit an offence.
80. “Drug” is not limited to those drugs whose possession is unlawful. It means any drug. However, an accused may raise a defence that a drug has been properly taken for a medicinal purpose, or taken or administered on the orders of a superior officer (that might, for example, be the case where a drug is taken as a precaution against the effects of a possible chemical or biological attack).

***Section 21: Fighting or threatening behaviour etc***

81. A person subject to service law commits an offence under this section if, without reasonable excuse, he (a) fights another person or (b) deliberately behaves in a way which is threatening, abusive, insulting or provocative. In the latter case his behaviour must also be likely to cause a disturbance.

***Section 22: Ill-treatment of subordinates***

82. This section is concerned with ill-treatment of a person subject to service law by anyone who is his superior in rank or authority (“superior officer” is defined in section 374). It penalises both intentional ill-treatment, and also recklessness on the part of a superior officer where, for example, he enforces excessively harsh discipline on a subordinate. The superior officer must know or have reasonable grounds to believe that the person mistreated is his subordinate. Where others are mistreated, criminal offences (such as assault) or disciplinary offences (such as conduct to the prejudice of good order and discipline) might be appropriate.

***Section 23: Disgraceful conduct of a cruel or indecent kind***

83. Cruel or indecent conduct by service personnel is an offence if the circumstances, motive or other factors render it disgraceful. For example, killing an animal may be cruel but the circumstances, such as obtaining food to survive, may not render the conduct disgraceful, and this section would therefore not apply.

**Property offences**

***Section 24: Damage to or loss of public or service property***

84. The care of government and service property, and the property of fellow members of the armed forces, are significant disciplinary concerns. This section concerns damage or loss caused by service personnel either to public or service property, or to the property of another member of the armed forces. “Public property” is defined in sections 24 and 26, and means tangible property of government departments, and of the devolved administrations of Scotland, Wales and Northern Ireland. It is an offence:
- to damage or cause the loss of public or service property either intentionally, recklessly or negligently (*subsections (1) and (2)*),
  - to do an act that is likely to cause such damage or loss, either negligently or recklessly (*subsection (2)*) (doing this intentionally would be an offence of attempting to commit an offence within subsection (1)),
  - to damage or cause the loss of property belonging to service personnel, either intentionally or recklessly (*subsection (1)*).



85. The main distinctions between the treatment of public and service property on the one hand, and the property of service personnel on the other, are that:
- negligently damaging property belonging to service personnel is not an offence under this section.
  - in relation to public or service property, reckless or negligent acts which are likely to cause damage or loss are an offence, even if no damage is caused.
86. The maximum penalty under this section for intentional or reckless conduct which causes damage or loss, is ten years' imprisonment. For reckless conduct which does not cause damage or loss, and for negligent conduct, the maximum penalty is two years' imprisonment.

***Section 25: Misapplying or wasting public or service property***

87. Service personnel who misapply or waste any public or service property commit an offence. "Public property" and "service property" are defined in section 26.
88. An offence under this section carries any of the punishments in the Table in section 164 except imprisonment.

**Offences against service justice**

***Section 27: Obstructing or failing to assist a service policeman***

89. Each of the services have their own service police who are themselves members of the armed forces. The officers of the service police are called "provost officers".
90. This section provides that persons subject to service law or civilians subject to service discipline may commit an offence if they obstruct, or fail to assist when called upon to do so, a service policeman carrying out his duties or a member of the armed forces acting under the authority of a provost officer (for example, an arrest under section 67 of the Act may be carried out by a person who is acting with a provost officer's authority).
91. To be guilty of an offence under this section:
- the obstruction or failure to assist must be intentional, and
  - the offender must know, or have reasonable cause to believe, that the person he obstructs or fails to assist is a service policeman or a person exercising authority on behalf of a provost officer.

***Section 28: Resistance to arrest etc***

92. **Section 67** (which sets out the main power of arrest provided for in the Act) describes the manner in which an arrest can be carried out. Broadly speaking, under that section a person may simply be arrested, or (if he is a member of the armed forces) be ordered to regard himself as under arrest (and perhaps to report to a certain person or place). Section 28 applies to service personnel who:
- disobey an order which requires them to succumb to arrest, or
  - use or threaten violence towards a person who has ordered them into arrest in the exercise of a power granted under the Act.
93. **Section 28** also penalises service personnel or civilians subject to service discipline who use or threaten violence towards a person who has a duty to apprehend them, and who know or have reasonable cause to believe that the person has a duty to apprehend them. The expression "apprehend" applies both to an arrest (for the purpose of charging an offender or to prevent an offence) and other types of lawful detention, such as capturing an offender who has escaped from custody.

***Section 29: Offences in relation to service custody***

94. It is an offence for a member of the armed forces or a civilian subject to service discipline who is in lawful custody:
- to escape, or
  - to use or threaten violence against a person in whose lawful custody he is (unless the offender has reasonable cause to believe that the custody is unlawful).

***Section 30: Allowing escape, or unlawful release, of prisoners etc***

95. It is an offence for a person subject to service law:
- to allow (either intentionally, recklessly or negligently) the escape of a person in his charge, or whom it is his duty to guard, or
  - to release a person in his charge, when he has no reasonable cause to believe that he has authority to do so.
96. If the offender intentionally allows escape, or knows that he has no authority to make the release, the maximum penalty is ten years' imprisonment. Otherwise the maximum penalty is two years.

**Ships and aircraft**

***Section 31: Hazarding of ship***

97. Causing a naval vessel to be at risk is referred to in the Royal Navy as "hazarding" a ship. In some circumstances, for example when in action against an enemy, it is common for a ship to be put at risk. Taking steps which are bound to damage a ship (by ramming an enemy vessel for instance), or to destroy a ship (to prevent its capture) might in some circumstances be justified.
98. It is an offence under this section for service personnel:
- to cause a ship to be at risk, with the aim of causing damage to or the stranding of the ship, or causing it to sink, without a lawful excuse, or
  - to cause a ship to be at risk through recklessness or negligence.
99. An offender who intends to hazard a ship, or is reckless, may be sentenced to life imprisonment. An offender who is negligent may only be sentenced up to a maximum of two years' imprisonment.

***Section 32: Giving false air signals etc***

100. "Air signals", as defined in subsection (2) of this section, are of great importance for the guidance of aircraft. A false or inaccurate signal may cause loss of life, and this is reflected in the maximum penalty of life imprisonment for an offence under this section. It is an offence for service personnel:
- to give a false air signal intentionally, or
  - to intentionally interfere with an air signal or with equipment used for making air signals.
101. A defence of lawful excuse would apply, for example, where a member of the armed forces has authority to correct an air signal or to adjust air signalling equipment.



### ***Section 33: Dangerous flying etc***

102. Under this section it is an offence for a member of the Armed Forces to do something when flying or using an aircraft, or in relation to an aircraft or aircraft material, which causes, or is likely to cause, death or injury, if he intends to cause, or is reckless or negligent about causing, death or injury. But he is not guilty of the offence if he acts intentionally, but with lawful excuse (for example, to prevent an aircraft falling into the hands of the enemy). Aircraft material includes parts, accessories and armaments.
103. The section is not limited to service aircraft. It applies, for example, to service personnel who fly a private aircraft, possibly for recreation.
104. The maximum penalty is life imprisonment if the offender intended, or was reckless about, death or injury. The maximum is two years' imprisonment if he was negligent.

### ***Section 34: Low flying***

105. The Defence Council makes regulations governing minimum heights for flying (which vary with the type of aircraft and other factors). Service personnel who breach the regulations commit an offence, whether the breach is intentional, reckless or negligent. The offence does not apply to take-off and landing, and to such other circumstances as the Defence Council may prescribe by regulations. As with section 33, this offence is not limited to flying service aircraft.
106. In some situations, such as training, an individual who is flying an aircraft may be under the command of another person. If the person flying an aircraft breaches a minimum height requirement on the orders of such a person, it is the person in command who commits the offence (subsection (2)).

### ***Section 35: Annoyance by flying***

107. This section is intended to prevent flying which is excessively intrusive or otherwise likely to annoy members of the public. It is an offence if service personnel fly an aircraft so as to annoy or be likely to annoy any person, unless they cannot reasonably avoid flying the aircraft in that particular way. The offence is committed regardless of whether the person flying intends to cause annoyance, or is reckless or negligent. As under section 34, if the flying in question is carried out on the orders of a person who is not actually flying, it is the person in command who commits the offence.
108. This offence is not punishable with imprisonment or dismissal with disgrace. The penalties set out in rows 3 to 12 of the table in section 164 may be imposed.

### ***Section 36: Inaccurate certification***

109. The services have systems and equipment which require service personnel to check and certify the safety and working condition of service ships and aircraft, or materials used in connection with aircraft. Under this section it is an offence for a person subject to service law to make or sign a certificate without having first checked that it is correct. In addition the Defence Council is empowered by the section to prescribe by regulations other equipment to which the offence will apply.

### ***Section 37: Prize offences by officer in command of ship or aircraft***

110. During an armed conflict COs are entitled to capture (as "prize") most enemy ships and aircraft, and any goods in them. Under International Law they must bring the captured enemy ship, aircraft or goods to an appropriate place for a proper adjudication on whether they were lawfully seized (and can therefore properly be deemed as "prize"). It is an offence if a person in command of a service ship or aircraft unlawfully fails to:
  - ensure that all papers which identify the captured ship or aircraft are sent to a court which can determine whether the ship, aircraft or goods are prize, and

- bring the ship, aircraft or goods to a convenient place for adjudication.

111. The failure will not be unlawful if caused, for example, by enemy action.

### ***Section 38: Other prize offences***

112. It is an offence to ill-treat, or unlawfully take anything from, a person on board a ship or aircraft captured as prize (see paragraph 110 above). It would not be unlawful, for example, to take a weapon from such a person (subsection (1)).
113. Under subsection (2) it is an offence to interfere with goods found on a ship or aircraft taken as prize. This is to ensure that all goods taken as prize reach a prize court. If goods are held by a prize court to have been captured lawfully they may be removed from the ship or aircraft. Goods may also be removed for safe-keeping, and where they are required for necessary use by the armed forces or their allies.
114. A ship or aircraft may be detained either under legislation which authorises detention, or under international law where the UK is a party to an armed conflict. International law permits the detention of foreign ships and aircraft in certain circumstances other than as prize. Under subsection (3) it is an offence to interfere unlawfully with goods on a detained ship or aircraft. Where interference is permitted under international law it will also be lawful under domestic law in the UK.

## **Attempts, incitement, and aiding and abetting**

### ***Section 39: Attempts***

115. Under this section it is an offence for a person subject to service law to attempt to commit a service offence, or for a civilian subject to service discipline to attempt to commit one of the offences mentioned in subsection (4). The offence is broadly similar to the offence of attempt under the criminal law of England and Wales. Attempting to commit an offence under section 42 (criminal conduct) is not an offence under this section but is itself an offence under section 42 (as modified by section 43).
116. A person convicted of an offence under this section is liable to the same punishment as if he were convicted of the offence he attempts to commit.

### ***Section 40: Incitement***

117. Under this section it is an offence for a person subject to service law to incite another person to commit a service offence, or for a civilian subject to service discipline to incite another person to commit one of the offences mentioned in section 39(4). The offence is broadly similar to the offence of incitement under the criminal law of England and Wales. Incitement to commit an offence under section 42 (criminal conduct) is not an offence under this section but is itself an offence under section 42 (as modified by section 46).
118. A person convicted of an offence under this section is liable to the same punishment as if he were convicted of the offence he incites the other person to commit.

### ***Section 41: Aiding, abetting, counselling or procuring***

119. Under this section it is an offence for a person subject to service law to aid, abet, counsel or procure the commission of a service offence, or for a civilian subject to service discipline to aid, abet, counsel or procure the commission of one of the offences mentioned in section 39(4). Aiding, abetting, counselling or procuring the commission of an offence under section 42 (criminal conduct) is not an offence under this section but is itself an offence under section 42 (as modified by section 47).

120. As under the criminal law of England and Wales, a person convicted of an offence under this section may be charged, tried and punished as if he had personally committed the offence whose commission he aids, abets, counsels or procures.

## **Criminal conduct**

### ***Section 42: Criminal conduct***

121. Under this section it is an offence for a person subject to service law, or a civilian subject to service discipline, to do something which is an offence under the criminal law of England and Wales or would be such an offence if done in England or Wales.
122. The punishments available on conviction of an offence under this section depend on those available for the civilian offence to which the offence corresponds. If the civilian offence is punishable with imprisonment, all the punishments listed in section 164 are available, but a sentence of imprisonment, or a fine, must not exceed the maximum that could be imposed for the corresponding offence. If the civilian offence is not punishable with imprisonment, any punishment listed in section 164 is available except imprisonment, dismissal with disgrace, dismissal and detention, but again the maximum fine is the same as for the corresponding offence.

### ***Section 43: Attempting criminal conduct***

123. Under the Criminal Attempts Act 1981, an attempt is a criminal offence under the law of England and Wales only if it is an attempt to do an act which, if done, would be an indictable offence under that law (other than certain excluded offences). As it stands, this would mean that a person subject to service law commits no offence under section 42 unless his intention is to do an act which, if done, would in fact be an indictable offence under English law. This requirement would not normally be satisfied if the intended act would have been done outside England and Wales. This section modifies the 1981 Act so that it is sufficient for an offence under section 42 if the intended act would be an indictable offence (other than the excluded offences) if it were done in England or Wales. It is immaterial that it would in fact have been done outside England and Wales.

### ***Section 44: Trial of section 42 offence of attempt***

124. This section provides for the manner in which it is to be determined, at the trial of a charge of attempt contrary to section 42, whether the defendant's act was an attempt as distinct from mere preparation for the commission of an offence. If there is sufficient evidence to justify a finding that the act was an attempt, it is a question of fact—and therefore, in a trial by the Court Martial, for the members of the court other than the judge advocate—whether the act was an attempt. The section is in similar terms to section 4(3) of the Criminal Attempts Act 1981. Section 39(8) makes corresponding provision for the trial of a charge of attempt under that section.

### ***Section 45: Conspiring to commit criminal conduct***

125. This section modifies the Criminal Law Act 1977 (which creates the criminal offence of conspiracy to commit an offence) so that an agreement to a course of conduct being pursued outside England and Wales is an offence under section 42 not only if that course of conduct would in fact involve the commission of an offence under English law, but also if the same conduct in England or Wales would involve the commission of such an offence.

### ***Section 46: Inciting criminal conduct***

126. This section similarly modifies the common law offence of incitement so that inciting another to do an act outside England and Wales is an offence under section 42 not only

if that act would in fact be an offence under English law, but also if the same act in England or Wales would be such an offence.

***Section 47: Aiding, abetting, counselling or procuring criminal conduct***

127. This section similarly modifies the law relating to persons who aid, abet, counsel or procure the commission of an offence under English law. The effect is that, for the purposes of section 42, a person is to be regarded as aiding, abetting, counselling or procuring the commission of an offence under English law if he aids, abets, counsels or procures the doing of an act outside England and Wales which would be such an offence if done in England or Wales.

***Section 48: Provision supplementary to sections 43 to 47***

128. Sections 43, 45, 46 and 47 all enable acts (or intended acts) outside England and Wales to be treated as if done (or intended to be done) in England or Wales. But those sections apply only for the purpose of determining whether an offence under section 42 has been committed. This section lays down a similar rule for certain related purposes, such as determining the punishments available for an offence under section 42 committed by virtue of section 43, 45, 46 or 47.

***Section 49: Air Navigation Order offences***

129. The Air Navigation Order, made under the Civil Aviation Act 1982, creates offences of misconduct on or in relation to civil aircraft. These offences do not apply to military aircraft.
130. This section enables the Secretary of State to designate particular offences created by the Air Navigation Order. In the case of any offence so designated, the rule that the offence can only be committed in relation to a *civil* aircraft is to be disregarded for the purposes of section 42. Any act done in relation to a military aircraft will thus be an offence under section 42 if, were the aircraft a civil aircraft, that act would be a designated offence. This is subject to the proviso that, as for any other offence under section 42, the offender must be either subject to service law or a civilian subject to service discipline. But a person in one of Her Majesty's aircraft in flight, if he is not subject to service law, will necessarily be a civilian subject to service discipline under paragraph 1 of Schedule 15.

**Part 2 – Jurisdiction and Time Limits**

***Chapter 1 – Jurisdiction***

131. This Chapter describes the charges that the Court Martial, the SCC and a CO can hear.

**Court Martial**

***Section 50: Jurisdiction of the Court Martial***

132. This section provides that the Court Martial can try any service offence, and defines a “service offence”.

**Service Civilian Court**

***Section 51: Jurisdiction of the Service Civilian Court***

133. Section 277 establishes the SCC. Section 51 sets out the offences as respects which the court has jurisdiction. The court replaces the Standing Civilian Courts that were created by the Armed Forces Act 1976. Essentially the SCC has the same jurisdiction as that of its predecessors, which is in turn similar to the jurisdiction exercised by a magistrates' court in England and Wales.

134. The court may try any service offence (as defined in section 50) committed outside the British Islands by a civilian who was subject to service discipline at the time of the offence, unless a listed exception applies. The most significant exception in relation to an adult is any offence which under the law of England and Wales can be tried only on indictment, that is, only by the Crown Court. However, in relation to juveniles the SCC has the power (akin to that of a youth court in England and Wales) to try offences that in relation to an adult would be indictable only, apart from the listed homicide and firearms offences.

## **Commanding officers**

### ***Section 52: Charges capable of being heard summarily***

135. This section defines what is meant by references in the Act to a charge which is capable of being heard summarily. A charge falls within this category if all the conditions in subsections (2) to (4) are satisfied.
136. Condition A is that the offence charged must be an offence that may be dealt with at summary hearing (i.e. one of those listed in section 53).
137. Condition B prevents a charge from being heard summarily if the accused is an officer above the rank of commander, lieutenant-colonel or wing commander, or a civilian.
138. Condition C relates to the accused's membership of a force (or, in some cases, his liability to recall). In most cases the accused must be subject to service law, or a volunteer reservist or an ex-regular reservist subject to an additional duties commitment, throughout the period between the commission of the offence and the completion of the summary hearing. If the charge is one of absence without leave on the part of a reservist, however, it is sufficient that the accused has been a reservist (whether volunteer or ex-regular) throughout that period. If the charge is one of absence without leave on the part of an ex-regular who is not a reservist but is liable to recall, the accused must either be liable to recall or a member of the regular forces (i.e. actually recalled) throughout that period.

### ***Section 53: Offences that may be dealt with at a summary hearing***

139. This section details those offences that may be heard summarily. It makes it clear that where a criminal conduct offence may be heard summarily an offence of attempting to commit the substantive offence may also be dealt with at a summary hearing.
140. With regard to criminal conduct offences, this section makes it clear that only those offences that are listed in Schedule 1 may be dealt with at a summary hearing. The Secretary of State is given the power to amend Schedule 1 by order made by statutory instrument (subject to the "affirmative resolution" procedure which requires the order to be laid in draft before both Houses of Parliament and be approved by resolution of each House).

### ***Section 54: Charges which may be heard summarily only with permission or by senior officer***

141. This section prevents a CO who is below the rank of rear admiral, major-general or air vice-marshal from hearing a charge of a criminal conduct offence listed in Part 2 of Schedule 1 (or an attempt to commit such an offence) without the permission of higher authority.

## ***Chapter 2 – Time Limits for Commencing Proceedings***

142. This Chapter prescribes time limits for the bringing of charges under the Act. The time limits in sections 55 to 60 are cumulative—that is, a charge cannot be brought outside the period specified by any section that applies, even if another section also applies and

the period specified by that other section has not expired. In the case of a charge under the Reserve Forces Act 1996, however, the time limit is determined by section 62 alone.

### **Time limits for offences other than Reserve Forces Act offences**

#### ***Section 55: Time limit for charging former member of a regular or reserve force***

143. Where a person is alleged to have committed a service offence while a member of a regular or reserve force, this section provides that he cannot be charged with the offence more than six months after he ceased to be a member. This is subject to section 61(2), which allows the charge to be brought if the Attorney General consents.

#### ***Section 56: Time limit for charging certain members or former members of ex-regular reserve forces***

144. Where a person is alleged to have committed a service offence while he was an ex-regular reservist subject to an additional duties commitment under section 25 of the Reserve Forces Act 1996, this section provides that he cannot be charged with the offence more than six months after the end of that commitment. This is subject to section 61(2), which allows the charge to be brought if the Attorney General consents.

#### ***Section 57: Time limit for charging person formerly subject to service law***

145. Where a person is alleged to have committed a service offence while he was subject to service law, and was not a volunteer reservist or an ex-regular reservist subject to an additional duties commitment, this section provides that he cannot be charged with the offence more than six months after he ceased to be subject to service law. This is subject to section 61(2), which allows the charge to be brought if the Attorney General consents.

#### ***Section 58: Time limit for charging civilian formerly subject to service discipline***

146. Where a person is alleged to have committed a service offence while he was a civilian subject to service discipline, this section provides that he cannot be charged with the offence more than six months after he ceased to be a civilian subject to service discipline. This is subject to section 61(2), which allows the charge to be brought if the Attorney General consents.
147. There are two exceptions. First, if the person became subject to service law at the same time as ceasing to be a civilian subject to service discipline, the six month period does not begin to run until he ceases to be subject to service law (when section 57 applies instead). Secondly, under Schedule 15 certain civilians are subject to service discipline only while in certain designated areas or while in any area outside the British Islands. If he ceases to be a civilian subject to service discipline only because he left such an area but was still residing or staying in that area, the six month period does not begin to run.

#### ***Section 59: Time limit for charging offence under section 107***

148. This section sets a time limit for bringing a charge of an offence under section 107 (breach of requirement imposed on release from custody), or adding such a charge in proceedings for another offence. The time limit is six months from the date of the offence or two months from the date of the suspect's apprehension, whichever is the later.

#### ***Section 60: Time limit for charging offence under section 266***

149. This section sets a time limit for bringing a charge of an offence under section 266 (failure to comply with a financial statement order). The time limit is two years from the date of the offence or six months from the date it becomes known to the Service Prosecuting Authority, whichever is the earlier.



***Section 61: Sections 55 to 60: exceptions and interpretation***

150. This section makes general provision in relation to sections 55 to 60. Its effect is mostly explained at paragraph 142 above. Subsection (1) also makes it clear that the time limits imposed by those sections (except section 59) apply only to the commencement of proceedings for the offence, and not to the addition of a charge in proceedings that have already been commenced.

**Time limit for Reserve Forces Act offences**

***Section 62: Time limit for charging Reserve Forces Act offences***

151. This section sets out the time limit for charging a person under the Act with an offence under sections 95 to 97 of the Reserve Forces Act 1996. The time limit is the point at which all the periods specified in subsection (1) have expired. The time limits in sections 55 to 60 do not apply.

***Chapter 3 – Double Jeopardy***

152. This Chapter provides for the barring of service proceedings by the outcome of previous service or civilian proceedings, and the barring of civilian proceedings by the outcome of previous service proceedings.

***Section 63: Service proceedings barring subsequent service proceedings***

153. This section bars the trial or hearing of a charge of a service offence if the accused has previously been convicted or acquitted of the offence charged, or has had it taken into consideration when being sentenced for another offence. The section also applies where the two offences are not identical but are related in one of the ways specified in subsection (3).

***Section 64: Service proceedings barring subsequent civilian proceedings***

154. This section bars the trial of a charge by a civilian court in the UK or the Isle of Man if the accused has previously been convicted or acquitted of an offence under section 42 (criminal conduct) or has had such an offence taken into consideration when being sentenced, and, under the double jeopardy rules of the jurisdiction in which the court sits (i.e. England and Wales, Scotland, Northern Ireland or the Isle of Man, as the case may be), the trial would be barred if he had been convicted or acquitted by an English court of the corresponding civilian offence.

***Section 65: Sections 63 and 64: supplementary***

155. This section provides for the application of sections 63 and 64 where the DSP makes a direction under section 127 barring future proceedings.

***Section 66: Civilian proceedings barring subsequent service proceedings***

156. This section bars the trial or hearing of a charge of an offence under section 42 if, under the double jeopardy rules of England and Wales, a civilian court could not try a charge of the corresponding civilian offence (because the accused has previously been convicted or acquitted of that offence or a related offence). The section similarly bars the trial or hearing of a charge of any other service offence which requires proof of an offence under English law if the accused could not be tried for the civilian offence because he has previously been acquitted of it.

## **Part 3 – Powers of Arrest, Search and Entry**

### ***Chapter 1 – Arrest etc***

157. This chapter defines the power of arrest in relation to service offences and sets out who can be arrested, and who can arrest in relation to service offences. It also provides for a power to search upon arrest and makes further provision permitting the person exercising this power to seize and retain any items found during the search. For the most part, these powers are to be exercised by the service police.

### **Powers of arrest**

#### ***Section 67: Power of arrest for service offence***

158. This section sets out the powers of arrest when it is reasonably suspected that a service offence has been, or is being, committed. It describes who may be arrested and who can exercise the power of arrest. The person making the arrest, or who orders someone else to arrest on his behalf, must reasonably suspect the person to be arrested of being engaged in committing or having committed a service offence. A service policeman may arrest any persons subject to service law, irrespective of rank or rate, and civilians subject to service discipline.
159. Officers, warrant officers or NCOs who are not service policemen may arrest persons of inferior rank or rate who are subject to service law, and officers may arrest civilians subject to service discipline. Officers may also arrest other officers of any rank if they are engaged in a mutiny.
160. Persons who are not service policemen but who are lawfully exercising authority on behalf of a provost officer may arrest persons subject to service law and civilians subject to service discipline. In the maritime environment persons on the staff of the officer of the day (duty officer) may arrest members of a ship's company or embarked force.

#### ***Section 68: Section 67: supplementary***

161. This section makes supplementary provisions relating to the powers of arrest. Subsection (2) ensures that section 67(3) will apply to former members of HM Forces. Such a person will be treated for the purposes of section 67(3) as being of the rank or rate which they held when last a member of the forces. Subsection (3) ensures that section 67(4) will apply to a person who is no longer a civilian subject to service discipline but who is suspected of having committed an offence while a civilian subject to service discipline. Subsection (4) ensures that it is a service policeman who must arrest a person in respect of an offence where the consent of the Attorney General is necessary under section 61 to charge the person with that offence.

#### ***Section 69: Power of arrest in anticipation of commission of service offence***

162. This section provides a service policeman with the power to arrest a person he reasonably suspects of being about to commit a service offence.

### **Search on arrest**

#### ***Section 70: Search by service policeman upon arrest***

163. This section permits a service policeman to search an arrested person who he has reasonable grounds to believe may present a danger to himself or others or who may be concealing anything which might help him escape or (in the case of an arrest under section 67 or 69) which might be evidence relating to a service offence.

***Section 71: Search by other persons upon arrest***

164. This section allows a person (other than a service policeman) who is exercising a power of arrest to search an arrested person who he has reasonable grounds to believe may present a danger to himself or others.
165. It further allows a person other than a service policeman to search an arrested person for anything that the arrested person might use to help him escape or which might be evidence relating to an offence on the direction of the arrested person's CO. The CO can only direct such a search if the assistance of a service policeman or civilian policeman cannot be obtained, and the CO has reasonable grounds to believe that if the search is delayed the arrested person would escape or conceal or damage evidence.

***Section 72: Sections 70 and 71: supplementary***

166. This section provides that a person exercising a power to search under section 70(2) or 71(4) may search an arrested person only to the extent reasonably required to discover anything which might help him escape from custody or which might be evidence relating to a service offence. The search powers may not be used to require an arrested person to remove any clothing in public other than outer clothing, but the search of the person's mouth is allowed.

***Section 73: Seizure and retention after search upon arrest***

167. This section sets out when persons exercising a power of search may seize and retain things they find. Persons who search an arrested person on the grounds that he presents a danger to himself or others and retain things they reasonably believe the person searched may use to injure him or others.
168. Persons who exercise a power to search on the grounds that the arrested person may be concealing anything which might help him to escape or which might be evidence relating to an offence may seize and retain things they have reasonable grounds to believe might be used by the arrested person to escape from custody, or which are evidence of an offence or which have been obtained in consequence of the commission of an offence, unless those items are subject to legal privilege.

***Section 74: Power to make provision conferring power to search premises at which person arrested***

169. This section enables the Secretary of State to make by statutory instrument subject to annulment an order providing for the power to enter and search premises equivalent to the provision of section 32 of PACE.

***Chapter 2 – Stop and Search***

170. This chapter sets out the powers available to stop and search persons and vehicles (which includes ships and aircraft for the purposes of this chapter). The powers available to service policemen are closely based on those available to constables under PACE.

***Section 75: Power of service policeman to stop and search persons, vehicles etc***

171. This section gives a service policeman the power to stop certain persons and vehicles in a place permitted by section 78 to search for specified things such as stolen goods or controlled drugs. The policeman may detain a person for this purpose and seize any of the specified things if he finds them. A list of definitions of words used is presented at section 77.

***Section 76: Stop and search by persons other than service policemen***

172. This section provides for others to have similar powers where a service policeman is not available and the authorising officer has reasonable grounds to suspect that a criminal

conduct offence would be committed, or that a person who has committed such an offence would avoid apprehension, if the powers authorised could not be exercised before it would be possible to have the assistance of a service or UK civilian policeman.

173. The range of persons who may be searched is narrower than that available to service policemen. It is limited (at subsection (2)) to persons subject to service law and civilians subject to service discipline whose CO (in either case) is the authorising officer, plus persons who fall outside that category but are reasonably believed to fall within it.
174. Subsections (3) to (5) make clear that orders may only be for the search of a particular person or vehicle, and may only be given and conducted when the ordering or authorising officer and the person searching have reasonable grounds to suspect that the circumstances at section 75(2) exist. The authorisation may permit the detention of a person or vehicle for the purposes of the search, and seizure by the searcher of the same articles which a service policeman may seize under subsection (1)(b) and (c).

***Section 78: Places in which powers under sections 75 and 76 may be exercised***

175. This section describes the places where powers under sections 75 and 76 may be exercised. These include places to which the public has access, and premises used for official purposes by HM Forces excluding service living accommodation.

***Section 79: Sections 75 and 76: limitation on searching persons or vehicles in certain gardens etc***

176. This section sets out limitations in respect of the search of persons in certain gardens or on certain other land. These limitations apply equally to service policemen and others authorised to stop and search by virtue of sections 75 or 76. In relation to dwellings or service living accommodation, subsections (1) and (2) set out that a person may only be searched there if the authorising officer or service policeman has reasonable grounds to suspect he neither dwells there nor is there with permission from a person who does. Subsections (3) and (4) apply the same approach to the search of vehicles.

***Section 80: Searches under sections 75 and 76: supplementary***

177. This section sets out the safeguards with regard to the conduct of the search. It provides the person may only be detained for the purpose of the search for such time as is reasonably required to permit the search to be carried out. It also places certain limitations on the search of outer garments.

***Section 81: Power to make further provision about searches under sections 75 and 76***

178. This section permits the Secretary of State to make further provision analogous to that in certain sections of PACE dealing with search.

***Section 82: Application of Chapter to ships and aircraft***

179. This section provides that the provisions above which apply to vehicles will also apply to ships and aircraft in the same way.

***Chapter 3 – Powers of Entry, Search and Seizure***

180. This chapter gives powers to judge advocates (and, in limited circumstances, to COs) to authorise the entry, normally by service police, into certain premises, the search of such premises and the seizure and retention of anything in relation to which the search was authorised. The provisions are based on powers in PACE and largely re-enact those in the Armed Forces Act 2001.

## **Entry for purposes of obtaining evidence etc**

### ***Section 83: Power of judge advocate to authorise entry and search***

181. This section is based on section 8 of PACE. It is limited to relevant residential premises and does not apply to other premises occupied by the services. This is because COs and the service police need no statutory power to enter those other areas. A statutory power is only necessary where the occupier would otherwise be entitled to refuse admission.
182. Subsection (1) enables judge advocates, subject to being satisfied on certain matters, to issue warrants authorising the entry and search of relevant residential premises on the application of a service policeman. A warrant cannot be issued for items which are subject to legal privilege, excluded material or special procedure material (which are defined in section 84).
183. Subsection (2) sets out further conditions that must also be met for a warrant to be issued.
184. Subsection (3) authorises a service policeman to seize and retain anything for which the search was authorised.

### ***Section 84: Section 83: definitions***

185. This section defines relevant terms used in section 83.
186. The terms “items subject to legal privilege”, “excluded material” and “special procedure material” have the meanings given in PACE. Examples of excluded material include personal records (such as medical records and journalists’ materials), if held in confidence. An example of special procedure material is journalists’ material not held in confidence.

### ***Section 85: Section 83: Power to make supplementary provision***

187. This section enables the Secretary of State by order to make provision for the use of live television links (or similar arrangements) for hearing an application for a warrant, where for example a judge advocate might not be readily available as the applicant is overseas.
188. The Secretary of State may also make provisions equivalent to sections 15 and 16 of PACE. These sections include safeguards relating to the issue and execution of warrants; for example, searches under a warrant must usually be made at a reasonable hour and the policeman intending to search must identify himself to the occupier. The order may make modifications to PACE provisions to ensure that the provisions work effectively within the service system.

### ***Section 86: Power to make provision as to access to excluded material etc***

189. This section enables the Secretary of State by order to establish procedures to enable service policemen investigating a service offence to apply to a judge advocate for a warrant for access to excluded or special procedure material that is held in any relevant residential premises.

### ***Section 87: Power of CO to authorise entry and search by service policeman***

190. This section gives COs a limited power to authorise a service policeman to search relevant residential premises without a warrant. The power may only be exercised where the conditions for obtaining a warrant under section 83 exist and the CO has reasonable grounds for believing that it is likely that the time needed to get a warrant would result in the search being frustrated or seriously prejudiced.

*These notes refer to the Armed Forces Act 2006 (c.52)  
which received Royal Assent on 8 November 2006*

191. Subsection (4) (as read with section 89) provides for the service policeman to seize and retain anything for which the search was authorised, subject to review by a judge advocate as soon as practicable.

***Section 88: Power of CO to authorise entry and search by other persons***

192. This section gives the CO a similar power to that in section 87, to authorise a member of HM Forces who is not a service policeman to conduct the search. This power can only be used to search service living accommodation. Such accommodation might include shared temporary accommodation on operations overseas or on exercise.

***Section 89: Review by judge advocate of certain searches under section 87 or 88***

193. This section requires that where any search authorised by a CO under section 87 or 88 has resulted in anything being seized and retained, a judge advocate must be asked to review the search, seizure and retention as soon as practicable.
194. The section enables the Secretary of State to make provision by order governing the powers of judge advocates in respect of these reviews.

**Entry for purposes of arrest etc**

***Section 90: Entry for purpose of arrest etc by a service policeman***

195. This section sets out the circumstances in which a service policeman can, without a warrant, enter and search service living accommodation or other premises occupied by persons subject to service law or civilians subject to service discipline (or reasonably believed to be such persons) to arrest a person he reasonably believes to be there at the time. The powers of entry and search extend to communal areas of premises in multiple occupation, such as barrack accommodation or blocks of flats.
196. Subsection (4) sets out additional powers for a service policeman to enter the same premises to save life or limb or prevent serious damage to property.
197. Subsection (5) limits the power of search to what is reasonably required for the purpose for which the power of entry is exercised.

***Section 91: Entry for purpose of arrest etc by other persons***

198. This section enables a CO to authorise a person subject to service law (other than a service policeman) to exercise the powers of entry for the purposes of arrest conferred by section 90 on a service policeman.
199. Subsection (3) provides that the CO must only give such authority if he has reasonable grounds for believing that waiting to get the assistance of a service or civilian policeman might result in the person to be arrested evading capture, concealing or destroying evidence or being a danger to himself or others, or result in discipline or morale being undermined.
200. This section also enables a CO to authorise a person subject to service law (other than a service policeman) to exercise the powers of entry mentioned at paragraph 196 above, but only in relation to certain premises and only if it is not practicable to get the assistance of a service policeman in time to prevent the harm occurring.
201. The functions of the CO under this section may be delegated by him in accordance with Regulations made by the Defence Council. This may, for example, allow a more junior officer to exercise the powers in an emergency in the absence of the CO.



## **Additional powers of entry, search and seizure**

### ***Section 92: Power to make provision conferring powers of entry and search after arrest***

202. This section gives the Secretary of State power to make by order provision dealing with the entry and search of premises controlled by a person arrested under section 67 who is being held in service custody without being charged. The provision that may be made would be equivalent to that in section 18 of PACE, subject to such modifications as the Secretary of State thinks appropriate for the service context.

### ***Section 93: Power to make provision conferring power of seizure etc***

203. This section gives the Secretary of State power to make provision by order dealing with seizure and the power to retain property seized. The provision that may be made is equivalent to that set out in sections 19 to 21 of PACE or section 22(1) to (4) of that Act, subject to such modifications the Secretary of State thinks appropriate for the service context.

## ***Chapter 4 – Supplementary***

### ***Section 94: Property in possession of service police or CO***

204. This section enables the Secretary of State to make provision by regulations as to the disposal of property which has come into the possession of a service policeman or a CO in connection with an investigation into a service offence. It is anticipated that the regulations will reflect provisions in the Police Property Act 1897 (as amended) which gives magistrates a wide power to make orders for the disposal of property.
205. Regulations made under this section may enable a service court or judge advocate either to order the return of property to the person appearing to be the owner or, if the owner cannot be found, to order its disposal as they see fit. The regulations may also allow the CO to determine to whom the property is delivered.
206. Regulations may also establish time limits after which a decision on disposal by a service court or judge advocate could not be challenged in civil proceedings. Such limits may not be imposed where a decision on a disposal is made by a CO.

### ***Section 95: Saving provision***

207. This section provides that the power of a CO or service policemen to enter and search service premises (other than service living accommodation) and service vehicles not in anybody's charge at the time are unaffected by the provisions in this Part of the Act.

### ***Section 97: Power to use reasonable force***

208. This section permits the use of reasonable force, if necessary in the exercise of powers authorised in Part 3 which relate to entry, search and seizure.

## **Part 4 – Custody**

209. When a person is arrested under section 67 for a service offence and detained in custody the provisions of this Part of the Act become operative.
210. This Part is divided into three Chapters. The provisions in the first Chapter apply when a person is held in custody when he has not been charged with an offence; the second Chapter applies when a person is held in custody following a charge of an offence; and the third Chapter sets out a power to make rules with regard to custody proceedings.
211. The custody provisions in the Act are broadly similar to those currently operative under the SDAs.

## ***Chapter 1 – Custody without charge***

### ***Section 98: Limitations on custody without charge***

212. This provision states the general principle that a person who is arrested for a service offence may not be kept in custody without charge except in accordance with the provisions of sections 99 to 102.
213. The section sets out the duties of a CO in relation to a person who is held without charge under one of these exceptions: if the CO becomes aware that the grounds for keeping a person in custody have ceased to apply and he is not aware of any other grounds that justify the custody, he must release the arrested person. The only time when the CO does not have to release the arrested person is if he appeared to have been unlawfully at large when he was arrested.

### ***Section 99: Authorisation by commanding officer of custody without charge***

214. This section sets out the circumstances in which a person may be held in custody without charge: as with the current provisions it provides for authorisation of custody without charge by the CO.
215. When a person is arrested for a service offence a report must be given to the CO as soon as practicable. That report must state the fact of the arrest and any reasons for keeping the person in custody without charging him with a service offence. Until the report is made, the arrested person may be kept in service custody without charge if the person who made the arrest has reasonable grounds for believing that to do so is necessary to secure or preserve evidence relating to the service offence for which the person was arrested, or to obtain this evidence by questioning him.
216. When a CO receives the required report he must decide whether he has reasonable grounds for believing that keeping the arrested person in custody without charge is necessary to secure or preserve or obtain evidence relating to a service offence for which the person was arrested; and that the investigation into the alleged offence is being conducted diligently and expeditiously. If the CO is satisfied of these matters he must then decide whether to authorise the continued custody of the arrested person. If the CO does decide that keeping the arrested person in custody without charge is justified he may authorise continued detention for further 12 hour periods up to a maximum of 48 hours after the time of the arrest.
217. If a person who has been arrested for an offence (offence A) is kept in service custody without charge and is subsequently arrested for a further offence (offence B) the authorisation for custody in respect of offence A is terminated and the CO must go through the process again in relation to both offences A and B. Custody needs only to be justified in relation to one offence for an authorisation to be granted, but starting the process again avoids having multiple authorisations for custody in existence. Any authorisation for custody without charge is valid up to 48 hours from the time of the arrest for offence A.

### ***Section 100: Review of custody by commanding officer***

218. This section sets out the duties of a CO who, under section 99, has authorised the continued custody without charge of a person arrested for a service offence.
219. Unless certain conditions exist a CO must review the authorisation for continued custody no later than the end of each period of custody that he has authorised. When conducting such reviews the CO is under a duty to reconsider whether the original grounds for authorising custody without charge remain operative.
220. The section also provides for the limited circumstances in which a review may be postponed. If a review is postponed the CO is under a duty to carry out the review as soon as practicable after the expiry of the last authorised period of custody.

***Section 101: Extension by judge advocate of custody without charge***

221. This section (together with section 102) is concerned with the extension of periods of custody without charge by a judge advocate.
222. The CO of an arrested person who is held in custody without charge may apply to a judge advocate for an extension of the period of custody. The judge advocate may then authorise continued custody without charge if he is satisfied that there are reasonable grounds for believing that keeping the arrested person in custody is necessary to secure or preserve or obtain evidence relating to a service offence for which the person was arrested and the investigation is being conducted diligently and expeditiously. Any authorisation for continued custody may only be for a period up to 96 hours after the original arrest, regardless of whether there was a subsequent arrest for another offence.
223. There are limitations upon a judge advocate hearing an application for extended custody: the arrested person must have been informed of the reasons for the application in writing and he must be brought before the judge advocate. The arrested person is entitled to legal representation at the hearing and if he is not legally represented but wants to be, the judge advocate must adjourn the hearing to allow the arrested person to get legal representation (he may be kept in custody during this time).

***Section 102: Further provision about applications under section 101***

224. The CO may make an application to a judge advocate for continued custody without charge at any time before the expiry of the first 48 hours after the person's arrest, or, if it is not practicable to make the application within this time, as soon as practicable and no later than 96 hours after the arrest. However, if an application is made after the initial 48 hour period and it appears to the judge advocate that it would have been reasonable for the CO to make it before the expiry of that period, he must refuse the application.
225. If the CO does make an application for the continued custody of an arrested person after the expiry of the initial 48 hours, his review of, and authorisation for, continued custody under section 100 may be for a period beyond the initial 48 hours, but cannot be for longer than 6 hour blocks up to a maximum period of 96 hours after the arrest.
226. When a CO has applied to a judge advocate for the continued custody without charge of the arrested person and the judge advocate is not satisfied that there are reasonable grounds for believing that this is justified he must either refuse the application or adjourn the hearing of it until a later time, but not more than 48 hours after the person's arrest (the arrested person may be kept in custody during such an adjournment). If the judge advocate refuses an application for continued custody before the expiry of the initial 48 hour period he has discretion to direct that the arrested person either be charged with a service offence or be released without delay; but if he refuses an application after the initial 48 hour period he must direct that the person either be charged with a service offence or be released without delay.
227. All references to time periods are in relation to the first arrest if the arrested person is subsequently arrested for another offence and held in custody without charge.

***Section 103: Custody without charge: other cases***

228. This section (as with its current counterparts) sets out the circumstances in which the provisions of sections 98 to 102 are to apply other than when a person has been arrested under section 67, namely when a person is transferred to service custody following an arrest by the civilian police pursuant to certain provisions of the Act or in any other case where a person who is arrested by an officer of a UK or British overseas territory police force is transferred into service custody.

***Section 104: Custody without charge: supplementary***

229. This section provides that the Secretary of State may provide in regulations for further matters concerned with custody without charge.

***Chapter 2 – Custody etc after charge***

**Custody after charge**

230. This Chapter deals with post-charge custody, in which case an accused person is to be brought before a judge advocate as soon as practicable.

***Section 105: Custody after charge***

231. This section provides that an accused person must be brought before a judge advocate as soon as practicable (unless he is already in service custody for the purposes of serving a sentence or following a previous authorisation for custody by a judge advocate regarding another charge). At a hearing the judge advocate must decide whether the accused should be released (possibly subject to conditions) or be kept in service custody. The judge advocate is permitted to authorise keeping the accused in service custody only if at least one of the three conditions A to C set out in the following section is satisfied.
232. In deciding whether the conditions are met the judge advocate is under a duty to take into account any of the matters specified that he thinks are relevant to the accused's case. If the judge advocate does consider that one or more of the conditions is met he may authorise keeping the accused in service custody for up to 8 days from the date of the hearing but this authorisation does not allow the accused to be kept in custody if he is subsequently released or sentenced.
233. If the judge advocate, having heard representations in respect of condition A in the following section, decides not to authorise the continued custody of the accused and the offence with which the accused is charged is murder, manslaughter, rape or attempted murder or rape, the judge advocate must state the reasons for his decision and ensure that they are properly recorded.

***Section 106: Conditions A to D***

234. This section sets out conditions A to C that the judge advocate must consider when deciding whether to authorise keeping the accused in custody under section 105; additionally there is a further condition D that applies when a judge advocate is considering whether to remand an accused into service custody during court proceedings.

***Section 107: Release from custody after charge***

235. This section provides for the situation where the judge advocate decides that custody is not appropriate, in which case the accused must be released; however, that release may be subject to conditions if the judge advocate considers them necessary for specified purposes. This is similar to the granting of conditional bail in the civilian system in England and Wales. If the judge advocate does impose conditions upon the release of the accused those conditions may be varied or removed after an application from the accused or his CO. If the accused has been released subject to conditions and then fails without a reasonable excuse to attend any hearing to which the condition relates, he has committed an offence and is liable to be punished with up to a maximum of 2 years' imprisonment.

***Section 108: Review of custody after charge***

236. If a judge advocate has authorised custody a review must be carried out by a judge advocate (not necessarily the same one) no later than the end of the authorised period. However, if at any time the accused's CO considers that the reasons for authorising custody have ceased to exist he is under a duty either to release the accused or request that a judge advocate reviews the matter, and such a review has to be done as soon as practicable.
237. When a judge advocate is conducting such a further review all of the provisions that apply to the initial review are operative except that if the accused is legally represented at a review hearing and gives his consent, the judge advocate may authorise up to 28 days in custody. At his first review hearing the accused is permitted to advance any argument of fact or law to support his application for release but at any further review hearings the judge advocate is not obliged to hear any such arguments that he has already heard.

***Section 109: Custody during proceedings of Court Martial or Service Civilian Court***

238. This section is concerned with keeping an accused in custody during proceedings before the Court Martial or the SCC. If a review under the previous section takes place after the accused has been arraigned before either court (i.e. the charges are put to him and he enters his plea of guilty or not guilty), but before the court's proceedings have been concluded, the provisions that apply to the initial authorisation of custody are to apply with modifications. Those modifications are that, in addition to considering whether conditions A to C described above are met, the judge advocate now also considers condition D; and if the accused has pleaded or been found guilty but is awaiting sentence any references to the offence with which the accused has been charged are to be read as references to the offence for which the accused is waiting to be sentenced (and references to strength of evidence no longer apply).

**Arrest after charge**

***Section 110: Arrest after charge or during proceedings by order of commanding officer***

239. This section provides that where an accused (or offender, if he is awaiting sentence) has not been kept in custody but his CO is satisfied that taking him into custody is justified the CO may order the arrest of the accused and any arrest may be executed using reasonable force. When a person is arrested under this section he must be taken before a judge advocate as soon as practicable for his case to be reviewed.
240. The CO may only order the arrest of the accused if he has reasonable grounds for believing that the accused will do one or more of the things specified or that he has failed to attend a court hearing or there are reasonable grounds for believing that he has or will fail to comply with one of the conditions of his release.

***Section 111: Arrest during proceedings at direction of court***

241. Where an accused who is not in custody has been arraigned before the Court Martial or SCC but the proceedings have not concluded and a judge advocate becomes satisfied that taking the accused into custody is justified (on the same grounds that apply to the CO in the previous section), he may direct that the accused be arrested. The arresting policeman may use reasonable force and exercise the various search provisions as if he was arresting the accused for a service offence under section 67. When an accused is arrested under these provisions he must be brought before a judge advocate as soon as practicable for the purposes of a review.



### ***Chapter 3 – Custody proceedings rules***

#### ***Section 112: Custody proceedings rules***

242. This section sets out power of the Secretary of State to make rules by statutory instrument about proceedings relating to pre- and post-charge custody.

### **Part 5 – Investigation, Charging and Mode of Trial**

#### ***Chapter 1 – Investigation***

243. This Chapter imposes duties on COs with respect to the investigation of allegations of service offences, of circumstances which indicate that a service offence may have been committed and of other circumstances that may be prescribed.
244. It also imposes on members of the service police duties to refer certain cases to the Director of Service Prosecutions (the “DSP”) and certain other cases to a CO. Under Chapter 2 the DSP and the CO each have powers, for example as to the bringing of charges, in respect of cases referred to him under Chapter 1.
245. Some provisions of Part 5 refer to a CO. But the provisions are still capable of applying to civilians subject to service discipline, as a CO may be appointed in respect of such civilians under section 360. The provisions of Part 5 accordingly apply in relation to civilians, except as summarised in the Notes below.

### **Duties of commanding officers**

#### ***Section 113: CO to ensure service police aware of possibility serious offence committed***

246. Under this section, if a CO becomes aware of certain allegations or circumstances, he must ensure that the service police are aware of them. He may find that they are already aware, or he may need to inform them. He must do so as soon as is reasonably practicable. The duty applies to allegations or circumstances which would suggest to a reasonable person that someone (whether or not identified) within the CO’s command may have committed any service offence listed in Schedule 2. The service offences listed in that schedule are all inherently serious, in that it is difficult to envisage a trivial example of any of them.
247. The section gives the Secretary of State power by order to amend Schedule 2. Under section 373, an order under this section must be approved in draft by both Houses of Parliament.

#### ***Section 114: CO to ensure service police aware of certain circumstances***

248. This section requires certain officers to ensure as soon as reasonably practicable that the service police are aware of certain circumstances. The Secretary of State may prescribe the circumstances, and the officers on whom the duty falls, in regulations. The circumstances which may be prescribed are not limited to where there is an indication that an offence has been committed.

#### ***Section 115: Duty of CO with respect to investigation of service offences***

249. This section deals with situations (other than those in which a duty arises under section 113 or 114) in which a CO becomes aware of allegations or circumstances which would suggest to a reasonable person that someone within his command may have committed a service offence. In such cases the CO may ensure that, as soon as reasonably practicable, that the service police know of the matter. Alternatively he may ensure that the matter is appropriately investigated. An investigation other than by the service police will in many cases be appropriate, because service offences (defined in



section 50) include all offences which may be committed by service personnel under the Act, including the less serious disciplinary offences.

## **Duty of service policeman following investigation**

### ***Section 116: Referral of case following investigation by service or civilian police***

250. This section deals with the duties of the service police in relation to a case which they have investigated or which has been referred to them after an investigation by a UK police force (defined in section 375 as including civilian forces in the UK and the Isle of Man) or by an overseas police force (defined in section 375 to include foreign service and civilian forces).
251. Under subsection (2), where a service policeman considers that there is sufficient evidence to charge the person with a Schedule 2 offence (explained in the Note on section 113), he must refer the case to the DSP. The same duty arises where a service policeman considers there is sufficient evidence to charge any other service offence and he is aware of any circumstances prescribed in regulations (these might, for example, be aggravating circumstances).
252. Where the service policeman considers that there is sufficient evidence to charge the person with a service offence, but the circumstances do not require a reference to the DSP, he must refer the case to the person's CO (subsection (3)).
253. Subsection (4) deals with cases where the matter has been referred to the service police either under section 113 (possibility of a Schedule 2 offence) or section 114 (existence of prescribed circumstances) and the service police propose not to refer the case to the DSP under subsection (2). This might be because they propose to refer the case to the CO or because they do not consider that any charge of a service offence should be brought. In those circumstances the service police must consult the DSP as soon as reasonably practicable and in any case before referring the case instead to the CO.

### ***Section 117: Section 116: position where investigation is of multiple offences or offenders***

254. This section applies where a case to which section 116 applies (one investigated by the service police or referred to them by another force) involves more than one incident or more than one suspect (or both).
255. The requirements of section 116 are to apply to each incident and each suspect as if they were separate cases. However the section also empowers the Secretary of State to provide by regulations for circumstances in which, where one case is referred to the DSP, linked cases must also be treated as referred to the DSP.

### ***Section 118: Duty of service policeman to notify CO of referral to DSP***

256. This section applies if under section 116(2) a service policeman refers a case about a person to the DSP. The service policeman must as soon as practicable notify the person's CO of the referral. He must also provide the CO with any documents prescribed in regulation. The notification to the CO must state the service offence of which the service policeman considers there is sufficient evidence to charge the person and (if that offence is not one listed in Schedule 2) the circumstances prescribed in regulations which bring the cases within section 116(2). The policy intention is broadly to ensure that the CO is aware that a case about someone in his command has been referred to the DSP and that the CO is aware what the case is about, so that the CO can provide any relevant information about the person or the case to the DSP.

## **Chapter 2 – Charging and Mode of Trial**

257. Chapter 2 deals with the powers of COs and of the DSP to decide what charges, if any, are to be brought. It also provides for the powers of COs in relation to cases allocated to them for summary hearing and of the DSP in relation to cases allocated for trial by the Court Martial or the SCC.

### **Powers of charging etc**

#### **Section 119: Circumstances in which CO has power to charge**

258. This section specifies the circumstances in which a CO has “initial powers” (specified in section 120) in relation to a case. He has these powers if he becomes aware of anything indicating that someone in his command may have committed a service offence, unless broadly speaking the service police should be involved (under section 113 or 114), are already involved or (in the CO’s view) are likely to be involved by another police force.
259. The CO also has initial powers where a case is referred to him either by a service policeman under section 116 or by the DSP under section 121.

#### **Section 120: Power of CO to charge etc**

260. This section provides that the initial powers of a CO in respect of a case are to bring charges (but only charges which can be heard summarily under the Act) or to refer the case to the DSP. The charges capable of being heard summarily are defined in section 52. Two effects of that definition are that a CO has no power under this section to charge an officer above the rank of lieutenant-colonel (or equivalent rank in the Royal Navy or RAF), and no such power to charge a civilian subject to service discipline.
261. One effect of sections 119 and 120 taken together is that a CO cannot use initial powers to bring charges where the service police are, or should be, aware of the case, unless the case has been referred to the CO either by the service police or the DSP.
262. The section also empowers the Secretary of State to provide by regulations for circumstances in which, where a CO refers one case to the DSP, linked cases must also be treated as referred to the DSP.
263. Where a CO brings charges under this section, they are referred to in the Act as “allocated for summary hearing”.

#### **Section 121: Power of DSP to direct bringing of charge etc**

264. This section gives powers to the DSP where he has had a case referred to him by a service policeman (under section 116) or by a CO (under section 120). The powers are:
- to direct a CO to bring specified charges
  - where he gives such a direction, to allocate the case for trial by the SCC if that court has jurisdiction
  - where he decides it would not be appropriate to give such a direction, to refer the case to the CO (in which event, under section 119 the CO has initial powers in relation to the case)
  - to give a direction (under section 127) barring further proceedings for an offence to which the case relates.

#### **Section 122: Charges brought at direction of DSP**

265. This section provides that a CO must bring any charge which he is directed to bring by the DSP under section 121. Unless the DSP allocates the charge to the SCC, the charge is to be regarded as allocated for trial by the Court Martial.

## **Powers of commanding officer or DSP after charge etc**

### ***Section 123: Powers of CO after charge***

266. Where under his initial powers under section 120 a CO charges a person with an offence triable summarily, this section gives the CO certain powers in relation to the charge.
267. The powers are to amend the charge, substitute another charge, bring an additional charge, discontinue proceedings or refer the charge to the DSP. But the charges must still be ones capable of summary hearing, and any additional charge must relate to the same case. The powers may be exercised before or after the start of a summary hearing. The amended, substituted or additional charge is then regarded as “allocated for summary hearing”.

### ***Section 124: CO to hear charge allocated for summary hearing***

268. This section requires an accused’s CO to hear charges which are allocated for summary hearing. This duty ceases to apply to a charge, if the CO substitutes another charge, discontinues proceedings or refers the case to the DSP, or if the accused elects to be tried by the Court Martial. The duty also ceases to apply if either the charge ceases to meet the requirements of section 52 (requirements for charges to be capable of being heard summarily) or the permission of a senior officer (under section 54) is needed for summary hearing and that permission is not obtained.

### ***Section 125: Powers of DSP in respect of charge allocated for Court Martial trial***

269. This section gives the DSP certain powers where a case is allocated for Court Martial trial (under section 122). Some of the powers are broadly similar to those of a CO in respect of a charge allocated for summary hearing. These are powers to amend the charge, substitute another charge, bring an additional charge or discontinue proceedings. Any additional charge must relate to the same case. Any amended, substituted or additional charge is regarded as “allocated for Court Martial trial”, and so remains subject to the DSP’s powers under this section.
270. The DSP also has powers under this section:
- to refer the charge back to the accused’s CO (if the charge can be heard summarily in accordance with section 52),
  - to allocate to the SCC a charge which that court can deal with, and
  - to give a direction (under section 127) barring further proceedings for an offence to which the case relates.
271. The section also gives a power for the making of Court Martial rules (by the Secretary of State under section 163) to restrict the exercise by the DSP of his powers under this section once an accused has been asked by the Court Martial how he pleads or where a charge is referred to the Court Martial by the SCC. Additionally the Court Martial Rules can make provision to restrict the court’s powers when it is dealing with a charge where the accused elected to be tried by the Court Martial. This power will ensure that the Court Martial is restricted in its sentencing powers to those that would be available to a CO if he had dealt with a charge summarily.

### ***Section 126: Powers of DSP in respect of charge allocated for SCC trial***

272. This section gives certain powers to the DSP where a case has been allocated for trial by the SCC. The powers are equivalent to some of those of the DSP under section 125 in relation to charges allocated for Court Martial trial. Accordingly the DSP has powers to amend the charge, substitute another charge, bring an additional charge or discontinue proceedings. Any additional charge must relate to the same case. Any

amended, substituted or additional charge is regarded as “allocated for Service Civilian Court trial”, and so remains subject to the DSP’s powers under this section.

273. The DSP also has powers under this section:
- to allocate the charge for trial by the Court Martial (e.g. if, on reflection, it is thought to be too serious for SCC trial) and
  - to give a direction (under section 127) barring further proceedings for an offence to which the case relates.
274. The section also gives a power for the making of SCC rules (by the Secretary of State under section 288) to restrict the exercise by the DSP of his powers under this section once the SCC has decided (under section 279) whether it should try the charge.

### ***Chapter 3 – Supplementary***

#### ***Section 127: Directions by DSP barring further proceedings***

275. Certain provisions of the Act (sections 121, 125 and 126) empower the DSP to make a direction under this section. This section provides that the directions that may be made are that a person is to be treated as being acquitted of an offence for the purposes of barring either further service proceedings or both service and civilian proceedings.

#### ***Section 128: Regulations for purposes of Part 5***

276. This section empowers the Secretary of State to make regulations for the purposes of any provision of Part 5 of the Act, for example for the delegation by COs of any of their functions under Part 5.

## **Part 6 – Summary Hearing and Appeals and Review**

### ***Chapter 1 – Summary Hearing***

#### **Right to elect Court Martial trial**

##### ***Section 129: Right to elect Court Martial trial***

277. This section requires a CO hearing a charge summarily to give the accused the opportunity to be tried by the Court Martial. If the accused chooses to be tried by the Court Martial, the CO must refer the charge to the DSP for Court Martial trial. Where two or more charges against the same accused are to be heard summarily together and the accused chooses to be tried by Court Martial in respect of one of those charges, all charges are to be referred to the DSP for trial by the Court Martial.
278. If a summary hearing has started and any charge is amended, substituted or added after the start of the proceedings, the accused must be given the opportunity to elect trial by the Court Martial in respect of that charge.

##### ***Section 130: Further consequences of election for Court Martial trial***

279. This section prevents the DSP from taking certain actions where an accused has elected Court Martial trial, without the written consent of the accused. The section prevents an accused finding himself facing a charge of a type which the CO could not have heard (which will often be a more serious charge) as a result of his decision to be tried by the Court Martial.
280. The section also prevents an accused electing to be tried by the Court Martial in respect of a charge which he previously consented to the DSP referring back to the CO for a summary hearing following a previous election.

## **Summary hearing**

### ***Section 131: Summary hearing***

281. This section gives the CO certain powers in respect of summary hearings. It allows him to dismiss the charge at any time and requires him to do so if he determines that it has not been proved. Where he determines that charge has been proved he must record that finding and award one or more of the authorised punishments. In the case of findings that more than one charge has been proved, a single award of punishment is to be made in respect of all those charges. With the exception of “minor punishments” (which may be listed in regulations) and service compensation orders only one punishment of each kind may be awarded in respect of a hearing.

## **Punishments available to commanding officer**

### ***Section 132: Punishments available to commanding officer***

282. This section lists the punishments which are available to a CO who has found a charge proved. It also places restrictions in relation to the rank or rate of a person who may receive certain punishments from the CO.
283. Under regulations, a CO may decide the details of a minor punishment, and this provision allows for the different circumstances COs find themselves in. A CO is also permitted to delegate functions under minor punishment regulations.

### ***Section 133: Detention: limits on powers***

284. This section places limits on the amount of detention a CO may award and the circumstances in which he may do so. A CO may award up to 28 days without extended powers and 90 days with extended powers to servicemen of the lowest non-commissioned rank. However, he must have extended powers before awarding a punishment of detention of any period to a leading rate, lance corporal, lance bombardier or corporal in the RAF (or other air force). A CO has extended powers where he has applied for them and had them granted by higher authority. COs of 2\* rank have inherent extended powers.

### ***Section 134: Forfeiture of seniority: requirement for approval***

285. This section requires a CO to have extended powers before awarding forfeiture of seniority. A CO has extended powers where he has applied for them and had them granted by higher authority. COs of 2\* rank have inherent extended powers.

### ***Section 135: Reduction in rank: limits on powers***

286. This section deals with COs’ powers to disrate naval ratings and reduce army and RAF non-commissioned servicemen in rank. A CO requires extended powers to reduce in rank, save where he proposes to reduce a lance corporal or lance bombardier (who have no equivalent ranks in the Royal Navy or RAF and are lower than the first non-commissioned rank in those forces). A CO may remove the acting rank of a non-commissioned service person that holds such a rank or one substantive rank from any other non-commissioned serviceman. A CO has extended powers for these purposes where he has applied for them and had them granted by higher authority; COs of 2\* rank or above have inherent higher authority.
287. The section makes particular provision in respect of airmen. The term “airman” covers four ranks: aircraftman, leading aircraftman, senior aircraftman and junior technician. Whilst these four ranks do form a hierarchy, for some branches of the RAF a junior technician might be the lowest trained rank for his specialisation. A CO is not able to reduce a person in rank within the category of airman, so, for example, a junior technician may not be reduced to a senior aircraftman. For an RAF corporal any



reduction in rank would be to the next highest rank applicable to his trade, and for which he is qualified, but still within the “catch all” category of airman.

288. The Defence Council may make regulations restricting the power to reduce in rank or disrate certain persons whose branch or trade requires them to hold a minimum rank or rate.

### ***Section 136: Fine: maximum amount***

289. This section deals with a CO’s powers to fine. A CO may fine, without extended powers, an officer or warrant officer 14 days’ pay and any other person 28 days’ pay (the section explains how a day’s pay is to be calculated). With extended powers he can fine an officer or warrant officer up to 28 days’ pay. A CO has extended powers where he has applied for them and had them granted by higher authority. COs of 2\* rank have inherent extended powers.

### ***Section 137: Service compensation orders: maximum amount***

290. This section sets out the maximum amount for a service compensation order (or a combination of them) that may be awarded by a CO. The maximum is currently set at £1,000. The section also provides that the Secretary of State may substitute for the sum specified another appropriate sum. However, the Secretary of State may only alter the specified sum in order to stay in line with changes to the value of money.

### ***Section 138: Prohibited combinations of punishments***

291. This section prohibits the award of certain punishments in combination with each other. It also provides that regulations may make provision about minor punishments.

### ***Section 139: Savings for maximum penalties for offences***

292. This section places restrictions on the punishments which can be awarded by a CO when he is hearing a criminal conduct charge either alone or in combination with a non-criminal conduct offence. Where a CO is hearing a criminal conduct charge on its own, he may only award detention if the Court Martial would be able to do so for that offence and any fine must not exceed that which the Court Martial could have awarded for that offence.
293. Where the CO makes an award of punishment relating to more than one offence he may not award detention unless the Court Martial could have done so for at least one of the offences; and, where the offences are criminal conduct offences, he may not award a fine greater than the total of the fines that the Court Martial could have awarded under section 42.

## ***Chapter 2 – The Summary Appeal Court***

294. The Act establishes the Summary Appeal Court (“SAC”) for the Armed Services which will replace the single-service Summary Appeal Courts that were established under the Armed Forces Discipline Act 2000. The tri-service SAC will operate in a similar manner to the single-service Summary Appeal Courts.
295. The SAC is a standing court, which means the court will exist continuously, may consider more than one case at any one time and may sit in more than one place at any one time.
296. A judge advocate presides at sittings of the SAC. The SAC hears appeals against findings made and punishments awarded at summary hearings. There is a universal right to appeal to the SAC which supplements an accused person’s right to elect trial by the Court Martial before the start of a summary hearing. This offers those who have been dealt with summarily the opportunity to appeal to a court that is compliant with the



European Convention on Human Rights, thereby making the entirety of the summary process ECHR-compliant.

297. An appeal against a finding takes the form of a re-hearing and is conducted in a similar manner as an appeal that is made to the Crown Court from a decision in the magistrates' court in England and Wales. The respondent (the other party to the appeal) is the DSP. Consequently, the rules of evidence, with appropriate modifications, mirror those in the civilian system. Where the appeal relates to punishment alone the re-hearing is only in relation to sentence.

#### ***Section 140: The Summary Appeal Court***

298. This section establishes the SAC and specifies that there are no geographical constraints on where it may sit. This means it could sit in the UK or, for example, in Germany or Iraq.

#### ***Section 141: Right of appeal***

299. This section provides that anyone who has had a charge against him proven at a summary hearing can appeal to the SAC. The appeal can be in respect of the finding or the punishment. The section imposes an initial 14-day time limit for bringing an appeal, starting from the day on which the punishment is awarded. The Court may extend this time limit if an application to extend it is made within the initial fourteen days. The Court may also give permission to appeal to the SAC at any time after the 14-day time limit has expired.

#### ***Section 142: Constitution of the SAC for appeals***

300. This section provides that for the purpose of an appeal the SAC will be made up of a judge advocate and two other members. The second member must be a commissioned officer but the third member can be either a warrant officer or a commissioned officer. The second and third members must be qualified and eligible to sit as members of the Court in accordance with sections 143 and 144.
301. The judge advocate hearing the appeal will be specified for the hearing by or on behalf of the Judge Advocate General and the other two members will be selected by the court administration officer.

#### ***Section 143: Officers and warrant officers qualified for membership of the SAC***

302. This section provides that, subject to certain exceptions, an officer is qualified to act as a member if he has held a commission in HM Forces for at least 3 years (or for periods totalling 3 years) or he was a warrant officer in HM Forces immediately before receiving his commission. There is no length of service requirement for a warrant officer as a non-commissioned officer who has attained this rank has considerable service experience (an acting warrant officer is not qualified to sit). The exceptions to these general qualifications are listed and include lawyers and service policemen; this is in order to prevent any actual or perceived bias that could arise if a person connected with the service disciplinary process is appointed as a member.

#### ***Section 144: Officers and warrant officers ineligible for membership in particular circumstances***

303. This section sets out the categories of officers and warrant officers who, by virtue of any involvement in the case which is the subject of the appeal or any command relationship with the accused person, may not be members of the court for that particular appeal, despite being otherwise qualified to sit as members of the SAC.

***Section 145: Open court***

304. This section establishes the general principle that the SAC must sit in open court. Exceptions to this principle may be provided for in SAC rules.

***Section 146: Hearing of appeals***

305. This section provides that an appeal against finding will be a complete rehearing of the charge so that all of the evidence in the case will be heard again. If the SAC does not quash the finding (or every finding in a case where there is more than one finding being appealed against) it will go on to rehear the evidence relevant to punishment. However, appeals against sentence alone will be by way of a rehearing only of the evidence relevant to punishment.
306. Questions of law, procedure and practice will be decided by the judge advocate and will be binding on the court.

***Section 147: Powers of the SAC***

307. At an appeal against finding the SAC can confirm the finding, quash it or substitute it with a finding that another charge has been proved. Where the Court quashes the finding, it must also quash the accompanying punishment. SAC rules may set down the circumstances in which a Court may substitute a finding that another charge is proved.
308. After rehearing the evidence in respect of punishment, the SAC can confirm the punishment or quash it and substitute another punishment. A court cannot substitute a punishment unless the substituted punishment could have been awarded by the CO who awarded the original punishment at the summary hearing and the court considers that it is no more severe than the original punishment.

***Section 148: Effect of substituted punishment***

309. This section provides that unless the SAC directs otherwise, any punishment that it substitutes is deemed to have been awarded on the day that the CO awarded his punishment. The exception to this general rule is when the SAC awards a punishment of detention, in which case it may either direct that the punishment is to take effect at the end of any other period of service detention that has been awarded to the accused on a previous occasion, or it takes effect from the day on which the SAC awards it.

***Section 149: Making of, and appeals from, decisions of the SAC***

310. This section provides for decisions of the SAC to be made on the basis of a majority of the votes of the members of the court. An appellant or a respondent may apply to the High Court to have a case stated to challenge a decision of the SAC on the ground that it is wrong in law or in excess of its jurisdiction. Under the SDAs, such an application could only be made by an appellant.

***Section 150: Privileges of witnesses and others***

311. This section provides that a witness (or anyone else who has a duty to attend the SAC) will have the same immunities and privileges as he would have had if called before the High Court in England and Wales.

***Section 151: SAC rules***

312. This section provides that the Secretary of State may make rules with respect to the SAC. Such rules can apply any domestic legislation, with or without modification. They are to be made by statutory instrument, subject to the “negative resolution” procedure.

### ***Chapter 3 – Review of Summary Findings and Punishments***

#### ***Section 152: Review of summary findings and punishments***

313. This section provides that a finding or a punishment awarded at a summary hearing can be reviewed at any time. The review can be carried out by the Defence Council or by any officer appointed by it to perform those functions.
314. In cases where the person to whom the finding or punishment has been awarded has not lodged an appeal to the SAC within the time limits set out in section 141(2), the reviewing authority can (with the SAC's permission) refer a finding or punishment to the court for consideration by it as on appeal. Where the person to whom the finding or punishment has been awarded has appealed to the SAC and the hearing has not been completed, the reviewing authority may notify the court of any matter arising from the summary hearing which he considers should be brought to the notice of the court.
315. Where the person to whom the finding or punishment has been awarded has appealed to the SAC and the court hearing has been completed, the reviewing authority may with the court's permission refer the finding or punishment to the court to be considered by it as on appeal. This may happen if the reviewing authority considers that the court should be aware of a matter arising from the summary hearing. It may happen even if the court substituted a different finding or punishment when the appeal was heard.
316. Where the reviewing authority refers a matter to the SAC for consideration the matter will be treated as if it is an appeal brought by the person to whom the finding or punishment relates. This means that the person and not the reviewing authority will be the appellant.

### ***Chapter 4 – Summary Hearings etc Rules***

#### ***Section 153: Summary hearings etc rules***

317. This section provides that the Secretary of State may make regulations (by statutory instrument) with respect to the summary hearing of charges by COs and hearings as regards the making of orders activating suspended sentences of service detention passed on an offender by a CO.

## **Part 7- Trial by Court Martial**

### ***Chapter 1 – The Court Martial***

#### ***Section 154: The Court Martial***

318. This section establishes the Court Martial as a standing court which may sit anywhere within or outside the UK. This is a departure from the present situation where courts-martial are convened on an ad hoc basis.

#### ***Section 155: Constitution of the Court Martial***

319. This section provides for the membership of the court for Court Martial proceedings. In proceedings before the Court Martial there is to be a judge advocate, who shall be specified by or on behalf of the Judge Advocate General, and lay members who will be specified by or on behalf of the court administration officer. In most proceedings the required minimum number of lay members will be three. This is in recognition of the fact that the majority of cases that are dealt with by the Court Martial equate to those heard in the magistrates' courts in England and Wales where the Bench is comprised of three lay members. However, for more serious cases the minimum required will be five. When the minimum is to increase to five will be set down in rules made under section 163. This section also provides for rules to be made that will set out when a judge advocate may direct the court administration officer to specify up to two additional

members of the court. This will help to avoid trials collapsing if a lay member dropped out for some reason. Finally the rules will also be able to set down when a judge advocate may sit alone, for example, when arraigning a person or hearing arguments on the law.

***Section 156: Officers and warrant officers qualified for membership of the Court Martial***

320. This section provides for the general principle that officers and warrant officers may be members of the Court Martial. Officers must have held their commission for at least three years (or periods totalling 3 years), or have been warrant officers immediately prior to their commission. Only substantive, not acting, warrant officers are qualified to be members of the Court Martial. There are exceptions to these general qualifications for membership, and these are listed in the section. The purpose of these exceptions is to avoid the potential of any real or perceived bias through, for example, the involvement of persons connected to the service disciplinary system in a trial.

***Section 157: Officers and warrant officers ineligible for membership in particular circumstances***

321. This section provides for the circumstances in which officers and warrant officers who are otherwise qualified are nevertheless ineligible for membership of the Court Martial for a particular trial because of their involvement in investigating the charge or a command relationship with the accused.

***Chapter 2 – Court Martial Proceedings***

***Section 160: Decisions of Court Martial: finding and sentence***

322. This section provides that the finding of the Court Martial on a charge and any sentence passed by it must be determined by a majority of the members of the court. However, the judge advocate is not entitled to vote on the finding but if there is an equality of votes on sentence, he has a casting vote. This provision ensures that (as in the Crown Court) the judge advocate is not involved in the “verdict”, which is a matter for the tribunal of fact, but his expertise in sentencing matters is given weight.
323. If there is an equal vote on finding, the person must be acquitted.

***Section 161: Power of Court Martial to convict of offence other than that charged***

324. This section provides that when the Court Martial finds a person not guilty of an offence but the allegations on the charge sheet amount to allegations of another service offence, including an attempted offence, the court may convict him of that offence.

***Section 163: Court Martial rules***

325. This section provides a power for the Secretary of State to make rules (by statutory instrument) with respect to the Court Martial. These rules may govern matters such as the administration, conduct and procedure of the Court Martial and may also create offences in respect of certain evidence provisions and provide for powers of arrest in relation to witness summonses. The rules may apply any enactment or subordinate legislation whenever passed or made, with or without modifications. The rules may also provide for a “slip rule” to allow for the correction of sentencing errors, and may provide for appeals against certain matters such as reporting restrictions that may be ordered by a judge advocate.

### **Chapter 3 – Punishments available to Court Martial**

#### **Section 164: Punishments available to Court Martial**

326. The Table in subsection (1) specifies the punishments that may be awarded by the Court Martial. Some of these punishments are available only for certain categories of offender or only in certain circumstances. The Table is also subject to other provisions of the Act which impose restrictions on the court's choice of punishments.
327. Subsection (4) enables regulations to provide that persons in specified categories (for example, specified trades or branches) cannot be reduced or disgraced below a particular rank or rate.
328. Subsection (7) gives effect to modifications made to this section by Schedule 3. That Schedule provides an alternative Table of punishments for civilians subject to service discipline, and another for persons previously subject to service law. The Table in section 164 applies only to offenders to whom neither of the Tables in Schedule 3 applies.

#### **Section 165: Sentencing powers of Court Martial where election for trial by that court instead of CO**

329. This section limits the powers of punishment of the Court Martial where it tries a person as the result of his electing to be tried by that court. In these circumstances the Court Martial may award a punishment up to the maximum punishment that the CO could have awarded if he had dealt with the person summarily. Where the Court Martial convicts a person who elected trial by it of two or more offences, the punishments it awards for both or all of them taken together must not exceed the maximum that the CO could have awarded if he had heard them summarily. These limitations on the powers of punishment of the Court Martial are to ensure that there is no disincentive to a person electing trial by the Court Martial (which is an ECHR-compliant court) instead of having his charge heard summarily.

### **Chapter 4 – Findings of Unfitness to Stand Trial and Insanity**

#### **Introduction**

330. Sections 166 to 172 enable the Court Martial to consider and determine issues of unfitness to stand trial and insanity and make appropriate orders in relation to persons who are unfit to stand trial or not guilty by reason of insanity. These provisions are similar to the relevant sections of the Criminal Procedure (Insanity) Act 1964 ("the 1964 Act"), as amended by the Domestic Violence, Crime and Victims Act 2004.

#### **Section 166: Fitness to stand trial**

331. Subsections (1) to (4) provide that on a trial by Court Martial the issue of whether the defendant is fit to stand trial must, subject to subsections (5) and (6), be decided as soon as it arises, and is an issue to be determined by the judge advocate alone. For the purposes of the Act, a person is unfit to stand trial if he is suffering from such a disability that apart from the provisions of the 1964 Act, it would preclude his being tried on indictment in England and Wales.
332. Subsection (5) provides that the judge advocate may postpone consideration of the defendant's fitness to stand trial to the opening of the defence case if it is expedient to do so and in the defendant's interest, and subsection (6) provides that if the defendant is found not guilty before that issue is considered, it shall not be determined.
333. Subsection (7) provides that a judge advocate may only determine whether a defendant is fit to stand trial after having considered the written or oral evidence of two or more registered medical practitioners, at least one of whom must be duly approved for the purposes of section 12 of the Mental Health Act 1983 ("the 1983 Act").



***Section 167: Finding that defendant did the act or made the omission charged***

334. Subsections (1) and (2) provide that where a judge advocate has determined that a person is unfit to stand trial, the trial shall not proceed further but the court must determine whether it is satisfied that the defendant did the act, or omission, which constitutes the offence with which he is charged. Subsections (3) and (4) provide that if the court determines that he did the act or omission, it must make a finding that he did the act or omission in respect of that charge, and that if it determines that he did not do the act or omission, it must find him not guilty of that charge.
335. Subsection (5) specifies the evidence on which a determination under subsection (2) must be made.
336. Subsection (6) provides that section 160 (Court Martial decisions) does not apply to a determination or finding under this section. It also provides that the question of whether the court is satisfied that the defendant did the act or omission charged against him is to be determined by the lay members alone, and an affirmative answer to that question may be given by a majority of those members.

***Section 168: Findings of insanity***

337. This section provides that if on a trial by the Court Martial the court is satisfied that the defendant did the act charged against him, and that at the time of that act he was insane, then the court must find the defendant not guilty of that offence by reason of insanity.
338. Subsection (3) specifies the medical evidence required before a finding under this section may be made.
339. Subsection (4) provides that a determination or finding under this section is to be made in the same way as a finding under section 167 is to be made. Only the lay members of the court have a vote; and the court is satisfied that the defendant did the act charged, and was insane, if a majority of those members vote to that effect.

***Section 169: Powers where person unfit to stand trial or not guilty by reason of insanity***

340. This section provides a range of disposals when there is a finding of unfitness to stand trial or not guilty by reason of insanity. The powers under this section may only be exercised by a judge advocate, the lay members having no role.
341. Subsection (2) sets out the court's options on a finding of unfitness or insanity. The first is to make a hospital order under section 37 of the 1983 Act, which can also be accompanied by a restriction order; the second is to make a service supervision order (defined by section 170), which is analogous to a supervision order under Schedule 1A to the 1964 Act; and the third is to order the person's absolute discharge.
342. Subsection (3) specifies that a hospital order means an order under section 37 of the 1983 Act and that a restriction order means an order under section 41 of that Act, both as modified by Schedule 4 to the Act. Subsection (4) provides that the criteria for imposing a hospital order, with or without a restriction order, are those in the 1983 Act as modified.
343. Subsection (5) provides that where the sentence for the offence in question is fixed by law, and the relevant criteria for making a hospital order are satisfied, then the court must make a hospital order with a restriction order.

***Section 170: Service supervision orders***

344. This section defines service supervision orders, and sets out the conditions that must be satisfied for them to be made. It also empowers the Secretary of State to make further provisions in regulations in respect of them.



345. Subsection (1) provides that a “service supervision order” means an order whereby the person in respect of whom it is made is subject to the supervision of a specified person (the “supervising officer”) for a specified period. Under subsection (2) that period must not exceed the maximum period of a civilian supervision order set out in the 1964 Act (currently two years).
346. Subsection (3) specifies the criteria that the court must be satisfied are met before making a service supervision order.
347. Subsection (4) provides that a service supervision order may require, in accordance with the regulations made pursuant to subsection (5), a supervised person to submit to medical treatment.

### ***Section 171: Remission for trial***

348. Subsection (1) empowers the Secretary of State to remit for trial by the Court Martial a person who is the subject of a hospital order with a restriction order under section 169 if, after having consulted the medical practitioner in charge of the person’s treatment, he is satisfied that the person is no longer unfit to stand trial.
349. Subsection (2) provides that where a person is remitted for trial under this section he must be transferred to service custody (at which point, under subsection (3), the hospital order and restriction order cease to have effect) and be brought as soon as practicable before a judge advocate for a review of whether he should continue to be kept in service custody. Subsection (2)(b) provides that on such a review he shall be treated as on a review of custody after charge under section 108.

### ***Section 172: Provision supplementary to sections 166 and 168***

350. Subsection (1) defines “duly approved” as approved by the Secretary of State for the purposes of section 12 of the 1983 Act as having special experience in the diagnosis or treatment of mental disorder as defined within that Act.
351. Subsection (2) provides that, subject to subsection (4), a report written by a registered medical practitioner may be received in evidence without further proof of the signature or the professional qualifications of the author of the report. Subsection (4) specifies certain protections for the defendant where it is not the defence that has put the report in evidence, including a requirement to have such a report disclosed to him (or his representative, or parent or guardian), and a right to have the report’s signatory called to give evidence.
352. Subsection (3) provides that the court may call the author of such a report to court to give evidence.

## **Part 8 – Sentencing Powers and Mandatory Etc Sentences**

### ***Chapter 1 – Definition etc of Certain Sentences***

353. This chapter defines, and makes further provision in relation to, some of the sentences that are available to the Court Martial for adult offenders (all of which are set out in the Table in section 164). Some of the sentences dealt with in this Chapter are also available to a CO (see section 132), the SCC (see section 282) or both. One of them (the service supervision and punishment order) is unique to service law and may be imposed only on an able rate, marine, soldier or airman. The rest are modelled on equivalent sentences available to civilian courts in England and Wales.

## **Service supervision and punishment orders**

### ***Section 173: Service supervision and punishment orders***

354. This section defines the service supervision and punishment order. This order is based on the minor punishment of reduction to the second class for conduct, currently available only under the Naval Discipline Act 1957. However, it is more flexible in that it may be imposed for a period of 90, 60 or 30 days, whereas the current punishment can only be imposed for 90 days. As at present, the offender's CO is required to review the punishment at intervals and has power to terminate it before the expiry of the period for which it was made.
355. While the order is in force, it has two elements. First, the offender is subject to requirements prescribed in regulations made by the Defence Council. These requirements can include (for example) extra work and drill, or a restriction on the taking of leave. The regulations may give the CO, or another officer to whom he has delegated his functions in this respect, a discretion to determine the details of the activities that the offender must perform. Secondly, the offender forfeits 1/6th of his gross pay.

### ***Section 174: Review of service supervision and punishment orders***

356. This section requires a CO to review a service supervision and punishment order made in respect of a person under his command. The times at which such a review must be carried out are to be specified in Defence Council regulations. On a review, the CO must consider whether the order should remain in force. If he decides that it should not, he must order that it shall immediately cease to have effect.
357. Subsection (3) enables the Defence Council to make regulations about the criteria that a CO must apply when reviewing an order.
358. Subsection (4) ensures that, even if the CO terminates the order, the offender will still forfeit 1/6th of his gross pay for the period when the order was in force.

## **Service compensation orders**

### ***Section 175: Service compensation orders***

359. One of the punishments available under the SDAs is "stoppages". This is an order to pay compensation for personal injury, loss or damage resulting from the offence, and is enforced by deductions from the offender's pay. A court-martial or Standing Civilian Court can also make a compensation order against a civilian offender. The Act replaces stoppages and the compensation order with the service compensation order, which is available for both service and civilian offenders and closely resembles the compensation order available to civilian courts in England and Wales. The order is enforceable in the same way as a fine, which in the case of serving personnel may include deductions from pay under regulations made by virtue of section 342.
360. This section defines the service compensation order and provides for the circumstances in which it can be made. The section is modelled on section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the Sentencing Act").

### ***Section 176: Service compensation orders: appeals etc***

361. This section corresponds to section 132 of the Sentencing Act. Subsection (1) ensures that compensation awarded in favour of a person need not be paid to him until the expiry of the period allowed for an appeal.
362. Subsection (2) enables the Supreme Court to make a service compensation order if a conviction is quashed by the CMAC and restored by the Supreme Court.

363. Subsection (3) ensures that, where a service compensation order is made in respect of an offence taken into consideration when sentencing a person for an offence of which he has been convicted, and the conviction is quashed on appeal, the order ceases to have effect. It also enables the offender to appeal against such an order.

***Section 177: Review of service compensation orders***

364. This section corresponds to section 133 of the Sentencing Act. It enables a service compensation order to be reviewed, on application by the person against whom it is made, by the Court Martial or (in the case of an order made at a summary hearing) by the person's CO. The court or CO can discharge the order or reduce the amount payable, but only on the grounds specified in subsection (3).

**Service community orders (civilians and dismissed servicemen only)**

***Section 178: Service community orders***

365. This section defines the service community order. This punishment is available only for offenders aged 18 or over on conviction who are civilians, or will be civilians when the punishment takes effect because they are also being sentenced to dismissal, and are expected to live in the UK. It is broadly equivalent to a community order made under section 177 of the Criminal Justice Act 2003 ("the 2003 Act"), and most of the provisions that apply to such orders are extended to service community orders.
366. A court making a service community order must impose requirements of the kind that can be included in a community order under the 2003 Act, and must specify the local justice area (in England and Wales), locality (in Scotland) or petty sessions district (in Northern Ireland) where the offender lives or will live.
367. Subsection (2) makes the power to include requirements in a service community order subject to broadly the same restrictions as the power to include them in a community order under the 2003 Act.
368. Subsections (3) to (6) apply further provisions of the 2003 Act on community orders to service community orders.

***Section 179: Periodic review etc of service community orders***

369. Section 210 of the 2003 Act enables, and in some cases requires, a community order imposing a drug rehabilitation requirement to provide for that requirement to be periodically reviewed by a court. This is one of the provisions extended to service community orders by section 178, but subsection (1) of this section modifies it so that the court required to review the requirement is the Crown Court.
370. Section 211 of the 2003 Act provides for the powers of a court reviewing a drug rehabilitation requirement under a community order. After considering the responsible officer's report, the court can amend the requirement. It can do so only if the offender agrees to the amendment, but if he does not agree to it the court can re-sentence him for the original offence. This section is extended to service community orders by section 178, but subsection (2) of this section modifies it so that the Crown Court can exercise its ordinary sentencing powers rather than those of the service court that made the order.
371. Subsection (3) ensures that an offender re-sentenced by the Crown Court under these provisions can appeal against the sentence.

***Section 180: Transfer of service community order to Scotland or Northern Ireland***

372. Parts 1 and 2 of Schedule 9 to the 2003 Act enable a civilian court in England and Wales to make a community order where the offender lives or will live in Scotland or

Northern Ireland. This section extends those provisions so that in these circumstances a service court can make a service community order.

373. Part 3 of Schedule 9 to the 2003 Act provides for the operation of a community order which requires compliance in Scotland or Northern Ireland. In some circumstances a court in Scotland or Northern Ireland can send the offender back to be dealt with by a court in England and Wales, which might be either the Crown Court or a magistrates' court. In the case of a service community order, however, the effect of subsection (3) is that the court dealing with the matter in England and Wales will always be the Crown Court.

### ***Section 181: Breach, revocation or amendment of service community order***

374. Schedule 8 to the 2003 Act sets out the procedures relating to the enforcement, revocation and amendment of community orders. This section gives effect to Part 1 of Schedule 5 to the Act, which extends Schedule 8 to the 2003 Act so that, with some modifications, the procedures for a service community order are the same as those for a community order under the 2003 Act.

### **Overseas community orders (civilians only)**

#### ***Section 182: Overseas community orders***

375. This section defines the overseas community order, which is available only for civilian offenders living overseas. Like the service community order, it is broadly equivalent to a community order made under section 177 of the 2003 Act; but, whereas the service community order is enforceable through the civilian courts in the UK, the overseas community order is enforceable only through service courts.
376. An overseas community order made in respect of an offender aged 18 or over on conviction can include any of the requirements that can be included in a community order under the 2003 Act (except an electronic monitoring requirement, which is excluded by section 183). In the case of an offender aged under 18 on conviction, the requirements available are modified by Schedule 6 to the Act.

#### ***Section 183: Overseas community orders: modifications of 2003 Act***

377. Chapter 4 of Part 12 of the 2003 Act contains general provisions applicable to (among other sentences) community orders. This section modifies that Chapter in its application to overseas community orders.
378. Subsection (1) prevents certain provisions of the 2003 Act from applying to an overseas community order. These provisions include one which prevents a court from imposing a mental health requirement where the offender's mental condition would warrant the making of a hospital order or guardianship order (which are not available on conviction by a service court), those relating to periodic review of a drug rehabilitation requirement, and the power to impose an electronic monitoring requirement.
379. Subsection (2) modifies certain provisions of the 2003 Act under which the offender can be required to attend at premises approved by the local probation board for the area in which the premises are situated, so that, in the case of a requirement under an overseas community order, the approval of any local probation board will suffice.
380. Subsection (3) requires a court making an overseas community order to provide a copy of the order to specified persons, in addition to those specified in section 219 of the 2003 Act.
381. Subsection (4) provides a definition of the "responsible officer", for the purposes of an overseas community order, which is broadly similar to that in section 197 of the 2003 Act, but omits the reference to the officer being appointed for or assigned to a local

justice area. Subsection (5) enables the Secretary of State to amend this definition in the same way as he can amend the definition in the 2003 Act.

***Section 184: Breach, revocation or amendment of overseas community order***

382. Schedule 8 to the 2003 Act sets out the procedures relating to the enforcement, revocation and amendment of community orders. This section gives effect to Part 2 of Schedule 5, which extends Schedule 8 to the 2003 Act so that, with some modifications, it applies to overseas community orders.

**Conditional or absolute discharge (civilians only)**

***Section 185: Conditional or absolute discharge***

383. This section defines a conditional discharge and an absolute discharge. Conditional discharge is available only for civilian offenders (see Schedule 3, paragraph 1(1) for the sentencing powers of the Court Martial in relation to civilians, and section 282 for those of the SCC). Absolute discharge is available for civilians and also for persons previously subject to service law (under Schedule 3, paragraph 3(1)).
384. Subsection (1) defines a conditional discharge as an order discharging the offender on condition that he commits no further service offence during a specified period. Under subsection (2) the maximum period that can be specified is the same as that for which a civilian court in England and Wales can impose a conditional discharge (currently three years).
385. An absolute discharge is defined in subsection (3) as an order that discharges the offender absolutely (i.e. without conditions).
386. Subsection (4) prohibits a conditional or absolute discharge from being combined with any other punishment, except a service compensation order.

***Section 186: Commission of further offence by person conditionally discharged***

387. Where an offender has been conditionally discharged, and is then convicted by the Court Martial or the SCC of another offence committed during the period of discharge, this section enables the court to re-sentence him for the original offence. It corresponds to section 13 of the Sentencing Act.
388. Where the original conviction was by the SCC and the second conviction is by the Court Martial, under subsection (2) the sentence passed by the Court Martial for the original offence must be one that the SCC could pass. Where the second conviction is by the SCC, under subsection (3) the sentence passed by the SCC must be one that it could have passed if it had just convicted the offender of the original offence (even if it was in fact the Court Martial that convicted him of that offence).
389. Subsection (5) ensures that the offender can appeal against a sentence passed under this section by the Court Martial where the original conviction was by the SCC, or vice versa.

***Section 187: Effect of discharge***

390. This section corresponds to section 14 of the Sentencing Act. Under subsection (1), an offender who is conditionally or absolutely discharged is deemed not to have been convicted of an offence, except for the purposes of the proceedings in which the order was made and any re-sentencing of the offender under section 186. Under subsection (2) this rule ceases to apply if the offender is later re-sentenced under section 186 (provided that he was aged 18 or over when he was convicted of the original offence).

391. Under subsection (3), where a conditional or absolute discharge is imposed the conviction is also to be disregarded for the purposes of legislation imposing a disqualification or disability.
392. Subsection (5) ensures that the section does not affect the offender's rights of appeal, his right not to be tried again for the same offence, or an order to restore property.

## ***Chapter 2 – Consecutive Sentences***

### ***Section 188: Consecutive custodial sentences***

393. This section enables a service court, when passing a custodial sentence for a fixed period, to make it consecutive to another sentence. The other sentence may be one that the court passes on the same occasion, or one previously passed on him by any service court or a civilian court (including a court outside England and Wales).

### ***Section 189: Consecutive sentences of service detention***

394. This section enables a court or CO, when passing a sentence of service detention, to make it consecutive to another sentence of service detention passed on a previous occasion (or, in the case of the Court Martial or the CMAC, the same occasion), provided that this does not take the total period above two years (see section 244).

## ***Chapter 3 – Suspended Sentence of Service Detention***

### ***Section 190: Suspension of sentence of service detention***

395. This section enables a court or CO, when passing a sentence of service detention, to suspend the sentence. In that case the sentence does not come into effect unless "activated" following the offender's conviction of another offence committed during a period of three to twelve months ("the operational period") specified when the sentence is passed. This is distinct from the rule that a sentence of detention passed by a CO (even if not suspended) does not take effect until the offender has had a chance to appeal: see sections 290 and 291.

### ***Section 191: Activation by Court Martial of suspended sentence of service detention***

396. Subsection (1) enables the Court Martial to activate a suspended sentence of service detention, including one passed at a summary hearing, if it convicts the offender of another offence committed during the operational period.
397. Subsection (2) further enables the Court Martial to activate a suspended sentence of service detention passed by, or on appeal from, that court if the offender commits another service offence or a civilian offence during the operational period and is convicted of that offence. In this case the Court Martial may issue a summons requiring him to appear before it, or a warrant for his arrest.
398. Where the Court Martial activates a suspended sentence, under subsection (3) it can order that the offender must serve the entire period of the original sentence or some shorter term. Under subsection (4) it can also make the sentence consecutive to another sentence of service detention passed on the same or a previous occasion, provided that this does not take the total period of the sentences above two years (see section 244).
399. Where the Court Martial activates a suspended sentence on the basis of a conviction by a CO or the SAC, and the punishment awarded by the CO or the SAC was a service supervision and punishment order or a minor punishment, under subsection (5) any outstanding part of that punishment is cancelled.



***Section 192: Activation by Court Martial: appeals***

400. Where the Court Martial makes an order under section 191 activating a suspended sentence of service detention, this section enables the offender to appeal against the order. The CMAC can substitute an order activating the sentence for a shorter period, or can quash the Court Martial's order altogether.

***Section 193: Activation by CO of suspended sentence of service detention***

401. This section enables a CO to activate a suspended sentence of service detention passed at a summary hearing or by the SAC (but not by the Court Martial), where he finds the offender to have committed a further service offence during the operational period or the offender has been convicted of a civilian offence committed during that period.
402. Where a CO activates a suspended sentence, under subsection (3) he can order that the offender must serve the entire period of the original sentence or some shorter term. Under subsection (4) he can also make the sentence consecutive to another sentence of service detention passed on the same or a previous occasion. But these powers are subject to the restrictions in sections 194 and 244, and subsection (5) provides that any provision in an order included by virtue of subsection (4) has effect subject to section 292.

***Section 194: Activation by CO: maximum term***

403. This section prevents a CO from activating a suspended sentence of service detention for more than 28 days, or making it consecutive to another sentence so that the total term exceeds 28 days, unless he has been granted extended powers by higher authority or is of senior rank. He cannot in any event make the activated sentence consecutive to another sentence passed by him so that the total term exceeds 90 days.

***Section 195: Suspended sentences: powers of SAC***

404. This section applies where a CO has activated a suspended sentence of service detention under section 193. Its effect is that the offender can appeal against the order activating the sentence, and the order can be reviewed under section 152, as if the order were a punishment awarded for the original offence.
405. Where the CO activated the suspended sentence upon finding the offender guilty of another offence, under subsection (2) an appeal against that finding or the punishment awarded for that offence counts as an appeal against the activation order, and an appeal against the order counts as an appeal against the punishment. Under subsection (4) the SAC can quash the activation order or substitute an order activating the sentence for some other period, whether shorter or longer than that for which the CO activated the sentence; but the orders made and punishments awarded by the SAC, in combination, must be no more severe than those made or awarded by the CO.
406. If a CO finds an offence proved and has power to activate a suspended sentence but does not do so, and the offender appeals, subsection (5) enables the SAC to activate the suspended sentence—but only if the activation order, in combination with the punishments awarded by the SAC, is no more severe than the punishments awarded by the CO.
407. If a CO activates a suspended sentence on the basis that the offender has been convicted of a civilian offence, and the offender appeals, subsection (8) enables the SAC to quash the order or to substitute another order under section 193 which is no more severe. Subsection (9) provides that when substituting such an order, the SAC must take account of any period of the suspended sentence already served by the offender.

#### ***Chapter 4 – Imprisonment for Term of Under 12 Months***

408. This chapter deals with the powers of service courts to pass sentences of imprisonment for less than 12 months. It applies, with modifications, provisions of the 2003 Act which enable civilian courts in England and Wales to pass sentences of “custody plus” and to suspend a sentence of imprisonment.

#### **Application of provisions in the 2003 Act**

##### ***Section 196: Term of sentence etc***

409. Under section 181 of the 2003 Act, a sentence of imprisonment for less than 12 months passed by a civilian court in England and Wales must include an order requiring the offender to comply, after his release from custody, with one or more of the requirements listed in section 182 (a “custody plus” order), unless the sentence is one of intermittent custody or is suspended in accordance with section 189 (as to which, see section 200 below). This section extends these provisions (except those relating to intermittent custody) to service courts, subject to modifications made by the rest of this Chapter.

#### **Imprisonment with or without “custody plus” order**

##### ***Section 197: Imprisonment with or without a custody plus order***

410. This section modifies section 181 of the 2003 Act so as to enable a service court to pass an immediate (i.e. non-suspended) sentence of imprisonment for less than 12 months which does not include a custody plus order. An offender on whom such a sentence is passed will serve a period of custody determined by the court in accordance with section 181 of the 2003 Act, and following his release will be on licence and subject to licence conditions for the remainder of the sentence (the “licence period”), but will not be subject to any of the requirements in section 182 of the 2003 Act.
411. Subsection (3) prohibits a court from including in a custody plus order a requirement to be complied with outside the UK. So, if the court passes an immediate sentence of imprisonment for less than 12 months and expects the offender to reside outside the UK during the licence period (e.g. because he is not being sentenced to dismissal from HM service, and is likely to be posted overseas following his release from custody), the court cannot include a custody plus order in the sentence.

##### ***Section 198: Transfer to Scotland or Northern Ireland of custody plus order***

412. Paragraphs 2 and 9 of Schedule 11 to the 2003 Act enable a civilian court in England and Wales to make a custody plus order in respect of an offender who resides or will reside in Scotland or Northern Ireland. Subsections (1) and (2) of this section enable service courts to do the same.
413. Schedule 10 to the 2003 Act enables a civilian court in England and Wales to amend or revoke a custody plus order. Part 4 of Schedule 11 modifies Schedule 10 in relation to a custody plus order which requires compliance in Scotland or Northern Ireland (either because it was originally made so as to require such compliance or because it has been amended to that effect under Schedule 10). In certain circumstances the court that can exercise functions in relation to such an order is a court in England and Wales (rather than one in Scotland or Northern Ireland), which might be a magistrates’ court. Where the order was originally made by a service court, however, subsection (3) ensures that the civilian court in England and Wales responsible for exercising these functions is the Crown Court.

##### ***Section 199: Revocation and amendment of custody plus orders***

414. This section modifies Schedule 10 to the 2003 Act (which enables a civilian court in England and Wales to amend or revoke a custody plus order) so that, in the case of a

custody plus order made by a service court, the civilian court in England and Wales with power to amend or revoke the order is the Crown Court.

## **Suspended sentences of imprisonment**

### ***Section 200: Suspended sentence orders with or without community requirements***

415. Section 189 of the 2003 Act allows a civilian court in England and Wales, when passing a sentence of imprisonment for less than 12 months, to make an order (a “suspended sentence order”) that the sentence is not to take effect immediately, but can be brought into effect if the offender commits a further offence within a specified period (the “operational period”) or fails to comply with one or more requirements (“community requirements”) which the order must impose. The requirements available for this purpose include all those available for inclusion in a custody plus order, plus some additional options. This section modifies section 189 so that a service court can not only make a suspended sentence order including community requirements, but (unlike a civilian court) can also make one without such requirements.
416. Subsection (5) further modifies section 189 of the 2003 Act so that a suspended sentence order made by a service court can take effect not only if the offender fails to comply with the community requirements (if any) or commits a civilian offence during the operational period of the order, but also if he commits another service offence during that period.
417. Subsection (6) prohibits a court from including a community requirement to be complied with outside the UK. So, if the court passes a suspended sentence of imprisonment and expects the offender to reside outside the UK, the order must be one without community requirements.

### ***Section 201: Order without community requirements: provisions not applying***

418. This section ensures that the provisions of the 2003 Act relating to community requirements do not apply to a suspended sentence order without such requirements.

### ***Section 202: Order with community requirements: disapplication of certain provisions***

419. This section prevents certain provisions of the 2003 Act, which would not make sense in relation to a suspended sentence order made by a service court, from applying to such an order.

### ***Section 203: Review of order with community requirements***

420. Section 191 of the 2003 Act enables a suspended sentence order to provide for the order to be periodically reviewed by a court. Subsection (1) of this section modifies section 191 so that, where a service court makes a suspended sentence order which includes community requirements and provides for periodic review, the court required to review the order is the Crown Court.
421. Section 210 of the 2003 Act enables, and in some cases requires, a suspended sentence order imposing a drug rehabilitation requirement to provide for that requirement to be periodically reviewed by a court. Subsection (2) modifies section 210 so that, where a service court makes a suspended sentence order which includes a drug rehabilitation requirement and provides for its periodic review, the court required to review it is the Crown Court.
422. Section 211 of the 2003 Act provides for the powers of a court reviewing a drug rehabilitation requirement imposed under a suspended sentence order. In certain circumstances the court can re-sentence the offender for the original offence. Subsection (3) modifies section 211 of the 2003 Act so that the Crown Court can exercise its

ordinary sentencing powers rather than those of the service court that made the order. Subsection (4) enables an offender re-sentenced by the Crown Court to appeal to the civilian Court of Appeal.

***Section 204: Transfer to Scotland or Northern Ireland of order with community requirements***

423. Paragraphs 1 and 6 of Schedule 13 to the 2003 Act enable a civilian court in England and Wales to make a suspended sentence order in respect of an offender who resides or will reside in Scotland or Northern Ireland. Subsections (1) and (2) of this section extend this power to service courts.
424. Schedule 12 to the 2003 Act enables a civilian court in England and Wales to make further orders in relation to a suspended sentence order where the offender has failed to comply with its requirements or has been convicted of a further offence, or to amend the order. Part 3 of Schedule 13 to the 2003 Act modifies Schedule 12 to the 2003 Act in relation to a suspended sentence order which requires compliance in Scotland or Northern Ireland. In certain circumstances the court that can exercise functions in relation to such an order is a court in England and Wales, which might be a magistrates' court. Where the order was originally made by a service court, however, subsection (3) ensures that the civilian court in England and Wales responsible for exercising these functions is the Crown Court.

***Section 205: Amendment of order with community requirements***

425. This section modifies Part 3 of Schedule 12 to the 2003 Act (which enables a civilian court in England and Wales to amend a suspended sentence order) so that, if the order was made by a service court and includes community requirements, the court with power to amend it is the Crown Court. When there is power to re-sentence the offender for the original offence, the Crown Court has its ordinary sentencing powers (subject to the limits on the powers of the SCC, if it was the SCC that made the order). Subsection (4) enables an offender re-sentenced by the Crown Court to appeal to the civilian Court of Appeal.

***Section 206: Suspended sentence: further conviction or breach of community requirement***

426. This section gives effect to Schedule 7, which modifies Part 2 of Schedule 12 to the 2003 Act, which provides for the activation of a suspended sentence following a breach of the community requirements or a conviction of a further offence.

***Chapter 5 – Young Offenders: Custodial Sentences Available to Service Courts***

427. This Chapter provides for the custodial sentences that are available to service courts (instead of imprisonment) for offenders aged under 18.

**Restriction on imposing imprisonment on persons under 18**

***Section 208: Prohibition on imposing imprisonment on persons under 18***

428. This section ensures that service courts cannot pass a sentence of imprisonment on an offender who is aged under 18 at the date of conviction. This mirrors the equivalent provision for criminal courts in section 89(1) of the Sentencing Act. The minimum age set by that section is currently 21. It is reduced to 18 by the Criminal Justice and Court Services Act 2000, but that amendment is not yet in force. Section 373 allows transitory provision to be made for offenders aged between 18 and 20 if the amendment to the Sentencing Act is still not in force when the Act comes into force.

## **Detention for certain serious offences**

### ***Section 209: Offenders under 18 convicted of certain serious offences: power to detain for specified period***

429. Where a person aged under 18 is convicted by the Court Martial of an offence under section 42 (criminal conduct), this section enables the court in certain circumstances to pass a sentence of detention for any period up to the maximum term of imprisonment that would have been available in the case of an adult. This power is available if the offence is punishable with at least 14 years' imprisonment, or the corresponding civilian offence is one of certain specified offences under the Sexual Offences Act 2003 or an offence under the Firearms Act 1968 to which a minimum sentence applies. The power cannot be exercised unless the court considers that no other available sentence is suitable.
430. A sentence under this section corresponds broadly to the civilian sentence of detention under section 91 of the Sentencing Act.

### ***Section 210: Detention under section 209: place of detention etc***

431. This section allows a person sentenced under section 208 to be detained in a place determined by, or under the authority of, the Secretary of State.

## **Detention and training orders**

### ***Section 211: Offenders under 18: detention and training orders***

432. This section enables the Court Martial and the SCC to pass a sentence resembling the detention and training order available to civilian courts under section 100 of the Sentencing Act. This sentence consists of a period of detention and training followed by a period of supervision. It replaces the "custodial order" which is available under the SDAs for offenders aged 17 (and at present also for offenders aged between 18 and 20, though in their case it will no longer be available when the Criminal Justice and Court Services Act 2000 is fully in force). A detention and training order can be made only if the court considers that the offence is so serious that only a custodial sentence can be justified, or the offender will not agree to a requirement which the court had proposed to include in a community punishment.
433. If the offender is aged under 15 when convicted, the court cannot make an order under this section unless it is of the opinion that he is a persistent offender.
434. If the offender is under 12 when convicted, no order can be made until provision has been made under section 100(2) of the Sentencing Act enabling civilian courts to make orders for offenders of that age. The court must also be of the opinion that only a custodial sentence would be adequate to protect the public from the offender.

### ***Section 212: Term of detention and training order: general***

435. This section restricts the period for which a detention and training order can be made under section 211. The period must be 4, 6, 8, 10, 12, 18 or 24 months, and cannot exceed the maximum term of imprisonment that would be available in the case of an adult. Where the offence is under section 42 (criminal conduct) and the corresponding civilian offence is a summary offence punishable with 51 weeks' imprisonment, the order can only be for 4 or 6 months.

### ***Section 213: Application of provisions relating to civilian detention and training orders***

436. This section applies to orders made under section 211 many of the provisions governing detention and training orders made by civilian courts under section 100 of the



Sentencing Act, so that both kinds of order work in much the same way. In particular, the section enables a civilian court in the UK (but not a service court) to deal with an offender who, following his release from custody, fails to comply with the supervision requirements imposed by the order.

***Section 214: Offences during currency of detention and training order***

437. Where a person is convicted by a civilian court in England and Wales of an offence punishable with imprisonment which he committed during the supervision period of a detention and training order made by a civilian court, section 105 of the Sentencing Act enables the court convicting him to make an order for his detention for a further period, up to the period of supervision that remained outstanding at the date of the new offence. One effect of section 213 is that a civilian court in England and Wales has the same powers in the case of a person subject to a detention and training order made by a service court. Section 214 confers similar powers on the Court Martial and the SCC where they convict a person of a service offence punishable with imprisonment and committed during the supervision period of a detention and training order made by a service court.
438. The Court Martial can also exercise these powers if the offender was convicted of the new offence by a civilian court anywhere in the British Islands, or at a summary hearing. In this case the court can issue a summons or a warrant for the offender's arrest, so that it can consider whether to exercise its powers.

***Section 215: Section 214: definitions etc***

439. This section enables two or more detention and training orders made under section 211 to be treated as a single order for the purpose of determining whether a further offence by the offender was committed during the term of such an order, and an order can therefore be made under section 214. It also ensures that the accommodation in which a person can be detained under section 214 is the same as that in which he could be detained under section 105 of the Sentencing Act.

***Section 216: Appeals against orders under section 214***

440. This section enables the offender to appeal against an order for his detention under section 214 as if it were a new sentence for the original offence.

***Chapter 6 – Mandatory etc Custodial Sentences for Certain Offences***

441. The sections in Chapter 6 of Part 8 require the Court Martial to impose certain custodial sentences where a person is convicted of a criminal conduct offence and a civilian court convicting him of the corresponding offence would be required to impose such a sentence.

**Mandatory sentences**

***Section 217: Mandatory life imprisonment***

442. This section requires the court to pass a sentence of life imprisonment where such a sentence would be mandatory in the case of the corresponding civilian offence. One such offence is murder. If the offender was under 18 at the time of the offence, however, section 218 applies instead.

***Section 218: Offenders who commit murder etc when under 18: mandatory detention at Her Majesty's pleasure***

443. Where life imprisonment is mandatory in the case of the corresponding civilian offence but the offender was under 18 at the time of the offence, under this section the court must sentence him to be detained during Her Majesty's pleasure.



## **Required sentences**

444. Under each of sections 219 to 222 the Court Martial must pass a particular sentence where a civilian court convicting the offender of the corresponding offence would be required by Chapter 5 of Part 12 of the 2003 Act to pass such a sentence. These provisions apply where the conviction is for one of certain violent or sexual offences and in the court's view there is a significant risk of the offender's causing serious harm by committing more such offences.

### ***Section 219: Dangerous offenders aged 18 or over***

445. Where the corresponding offence is one of those listed in Schedule 15 to the 2003 Act and carries at least 10 years' imprisonment, and the offender is aged 18 or over when convicted, this section requires the court to pass a sentence either of life imprisonment or of imprisonment for public protection (which is another form of indeterminate sentence, defined by section 225(4) of the 2003 Act). Life imprisonment is mandatory if the conditions in section 225(2) of the 2003 Act (which determine when a civilian court would be required to pass such a sentence) are met.

### ***Section 220: Certain violent or sexual offences: offenders aged 18 or over***

446. Where the corresponding offence is listed in Schedule 15 to the 2003 Act but carries less than 10 years' imprisonment, and the offender is 18 or over, this section requires the court to pass an extended sentence of imprisonment. This sentence is defined by section 227 of the 2003 Act. It consists of an appropriate custodial term of at least 12 months, plus an extension period (of up to 5 years in the case of a violent offence, or 8 years in the case of a sexual offence) during which the offender is on licence.

### ***Section 221: Dangerous offenders aged under 18***

447. Where section 219 would apply but for the offender being under 18, this section requires the court to pass a sentence of detention for life under section 209 if the conditions in section 226(2) of the 2003 Act (which determine when a civilian court would be required to pass such a sentence under section 91 of the Sentencing Act) are met. If they are not met, the court must pass a sentence of detention for public protection (another form of indeterminate sentence, defined by section 226(4) of the 2003 Act), unless the court considers that an extended sentence of detention under section 228 of the 2003 Act (as required by section 222) would be adequate for the protection of the public.

### ***Section 222: Offenders aged under 18: certain violent or sexual offences***

448. Where section 220 would apply but for the offender being under 18, or section 221 applies but the court does not think that a sentence of detention for public protection is necessary, this section requires the court to pass an extended sentence of detention. This sentence is defined by section 228 of the 2003 Act. It consists of an appropriate custodial term of at least 12 months, plus an extension period (of up to 5 years in the case of a violent offence, or 8 years in the case of a sexual offence) during which the offender is on licence.

### ***Section 223: "The required opinion" for purposes of sections 219 to 222***

449. This section requires the Court Martial, in determining what sentence is required by sections 219 to 222, to apply criteria similar to those that a civilian court would be required to apply for the purposes of sections 225 to 228 of the 2003 Act. But, as well as assessing the risk of the offender's committing further specified offences in the UK, the Court Martial must also consider the risk of his doing things elsewhere that would be specified offences if done in England or Wales. If he is an adult and has previous convictions for specified offences, the court must assume that there is a significant risk unless it considers that this would be an unreasonable conclusion.

***Section 224: Place of detention under certain sentences***

450. This section applies section 235 of the 2003 Act, which provides for the place in which a person sentenced under section 226 or 228 of that Act may be detained, to a sentence under either of those sections passed by the Court Martial as a result of section 221 or 222.

***Section 225: Third drug trafficking offence***

451. Section 110 of the Sentencing Act requires an adult convicted of a third class A drug trafficking offence to be sentenced to at least seven years' imprisonment unless there are particular circumstances which would make this unjust. Subject to that exception, this section requires the Court Martial to impose such a sentence where it convicts an adult of a criminal conduct offence and section 110 of the Sentencing Act would apply if he were convicted by a civilian court of the corresponding offence.

***Section 226: Third domestic burglary***

452. Section 111 of the Sentencing Act requires an adult convicted of a third domestic burglary to be sentenced to at least three years' imprisonment unless there are particular circumstances which would make this unjust. Subject to that exception, this section requires the Court Martial to impose such a sentence where it convicts an adult of a criminal conduct offence and section 111 of the Sentencing Act would apply if he were convicted by a civilian court of the corresponding offence.

***Section 227: Firearms offences***

453. Section 51A of the Firearms Act 1968 requires an adult convicted of certain offences under that Act to be sentenced to at least five years' imprisonment if he was an adult when he committed the offence, or three if he was aged 16 or 17, unless there are exceptional circumstances which justify not passing such a sentence. Subject to that exception, this section requires the Court Martial to impose such a sentence where it convicts an adult of a criminal conduct offence and section 51A of the Firearms Act 1968 would apply if he were convicted by a civilian court of the corresponding offence.
454. If the offender is aged under 18 when convicted, the minimum sentence required by section 51A of the Firearms Act 1968 (in the absence of exceptional circumstances) is one of three years' detention under section 91 of the Sentencing Act. Where a person under 18 is convicted by the Court Martial and section 51A of the Firearms Act 1968 would apply if he were convicted by a civilian court of the corresponding offence, the minimum sentence required by this section (in the absence of exceptional circumstances) is one of three years' detention under section 209.

***Section 228: Appeals where previous convictions set aside***

455. This section allows an offender extra time to appeal against his sentence if, for the purpose of the sections in this Chapter, the court took account of a previous conviction of his which has since been set aside on appeal.

***Chapter 7 – Court Orders Other Than Sentences***

456. This Chapter provides for certain orders which the Court Martial and the SCC may make on convicting a person of an offence, but which are not punishments within the meaning of the Act. One of these orders, the service restraining order, is available even if the defendant is acquitted.

## **Service restraining orders**

### ***Section 229: Service restraining orders***

457. This section enables the Court Martial and the SCC to make an order similar to a restraining order under the Protection from Harassment Act 1997, on convicting or acquitting a person of an offence. The order prohibits the defendant from doing specified things for a fixed period or until further order. It can only be made for the purpose of protecting a person from harassment. Breach of the order (without reasonable excuse) is a service offence punishable with five years' imprisonment.

### ***Section 230: Service restraining orders: supplementary***

458. Subsection (1) applies the interpretation provisions of the Protection from Harassment Act 1997 for the purposes of section 229.
459. Subsection (2) applies section 12 of that Act, which prevents conduct from being treated as a breach of a restraining order if it is certified to have related to national security, the UK's economic well-being or the prevention or detection of serious crime. "Serious crime" is extended for this purpose so as to include serious service offences and serious crime under the law of other countries.
460. Subsection (3) enables the CMAC, on allowing an appeal against conviction, to send the case back to the Court Martial so that that court can consider whether to make a restraining order.

### ***Section 231: Service restraining orders: appeals***

461. This section enables a person to appeal against the making of a service restraining order where he was acquitted, or where the order was made after he had successfully appealed against conviction. The section does not deal with cases where the order is made on conviction, since there is a right of appeal in such cases in any event.

### ***Section 232: Service restraining orders: variation and revocation***

462. This section enables the Court Martial to vary or revoke a service restraining order on an application, and enables the Court Martial or the SCC to do so on convicting the person against whom it was made of an offence under section 229.

## **Order for parent or guardian to enter into recognizance**

### ***Section 233: Order for service parent or service guardian to enter into recognizance***

463. This section enables, and in some cases requires, the Court Martial or the SCC to exercise powers similar to those conferred on civilian courts by section 150 of the Sentencing Act. These powers can be exercised where a person is convicted of an offence when aged under 18, is a civilian subject to service discipline, and has a parent or guardian who is subject to service law or is a civilian subject to service discipline. The court can ask the parent or guardian to enter into a recognizance to take proper care of the offender and exercise proper control over him. This involves undertaking to pay a specified sum if the offender commits another offence within a specified period. If the parent or guardian unreasonably refuses to enter into a recognizance, the court can fine him.
464. If the offender is under 16 when convicted, the court must exercise these powers if satisfied that this would be desirable in the interests of preventing him from committing more offences, and must state its reasons if it does not do so.

***Section 234: Recognizances and fines under section 233: further provision***

- 465. Subsection (1) restricts the amount for which a parent or guardian may be required to enter into a recognizance, and subsection (2) restricts the period for which he may be entered to do so.
- 466. Subsection (3) requires the court to take into account the parent or guardian's means, in the same way as when imposing a fine (see section 249).
- 467. If the court has also passed an overseas community order on the offender, subsection (4) allows the recognizance to require his parent or guardian to ensure that he complies with that order.
- 468. Subsection (5) applies other provisions of the Act, relating to fines imposed on offenders, to a fine imposed on a parent or guardian for refusing to enter into a recognizance.

***Section 235: Recognizances: appeals, variation and revocation***

- 469. Subsections (1) and (2) enable a parent or guardian to appeal against an order requiring him to enter into a recognizance or to pay a fine for refusing to do so.
- 470. Subsection (4) enables the Court Martial to vary or revoke such an order.

***Section 236: Forfeiture of recognizance***

- 471. This section allows a recognizance to be forfeited if the offender commits another service offence during the period of the recognizance. Provided that the parent or guardian is still subject to service law or a civilian subject to service discipline, the Court Martial or the SCC on convicting the offender of the new offence can require the parent or guardian to pay any sum up to the full amount of the recognizance, or remit that amount.
- 472. When declaring that a recognizance is to be forfeited, the court can make an order under section 251 allowing the parent or guardian time to pay, or directing that he pay in instalments.

**Part 9 – Sentencing: Principles and Procedures**

***Chapter 1 – Principles and Procedures applying to Service Courts and Summary Hearings***

**General sentencing principles**

***Section 237: Duty to have regard to purposes of sentencing etc***

- 473. Subsection (1) requires a service court or CO to have regard to the purposes of sentencing when dealing with an offender for a service offence. These considerations are the same as those set out in section 142 of the Criminal Justice Act 2003 (“the 2003 Act”), with an additional factor: the maintenance of discipline.
- 474. If the offender is under 18, subsection (2) also requires the court or CO to have regard to his welfare. This corresponds to section 44 of the Children and Young Persons Act 1933.
- 475. Subsection (3) dispenses with these requirements where the sentence is fixed by law, and where Chapter 6 of Part 8 requires a particular sentence to be imposed.

***Section 238: Deciding the seriousness of an offence***

476. A court or CO is required to take into account certain matters when determining the seriousness of an offence. These matters are essentially the same as those set out in section 143 of the 2003 Act.

***Section 239: Reduction in sentences for guilty pleas***

477. This section concerns the sentencing of offenders who have pleaded guilty (or, at a summary hearing, admitted the offence). It reflects section 144 of the 2003 Act.
478. Subsections (1) to (3) require the court or CO to take account of how early in the proceedings the offender indicated his intention to admit the offence, and the circumstances in which he did so.
479. Where the offender pleaded guilty to an offence to which section 225 or 226 applies (third drug trafficking and third domestic burglary offences), subsections (4) and (5) allow the court to reduce by up to 20 per cent the minimum sentence that would otherwise be required.

***Section 240: Increase in sentence for racial or religious aggravation***

480. Where a court or CO is considering the seriousness of an offence when sentencing an offender, the court or CO must treat the fact that the offence was racially or religiously motivated as an aggravating factor—except where the offence is one of those under the Crime and Disorder Act 1998 which are defined in terms of such aggravation, and carry a heavier sentence for that reason. The court or CO must state in open court (or, at a summary hearing, in the offender’s presence) that the offence was so aggravated. This section reflects section 145 of the 2003 Act.

***Section 241: Increase in sentence for aggravation related to disability or sexual orientation***

481. This section requires a court or CO to treat as an aggravating factor the fact that the offender demonstrated hostility based on the victim’s sexual orientation or disability, or that the offence was motivated by hostility towards persons of a particular sexual orientation or persons with a disability, and to state in open court (or, at a summary hearing, in the offender’s presence) that this is the case. The section reflects section 146 of the 2003 Act.

**Service detention and custodial sentences**

***Section 242: Service detention: general restriction***

482. Subsection (1) prohibits a court (except the SAC) from passing a sentence of service detention unless the offence is serious enough to warrant such a sentence. If the offender is also convicted of other offences in the same proceedings, or is sentenced for other offences at the same time, or other offences are taken into consideration when sentencing him, those offences are “associated” with the offence for which he is sentenced; and a sentence of service detention can be passed if the combination of the offence for which he is sentenced and the associated offences is serious enough to warrant it. Subsection (4) similarly prohibits a CO or the SAC from awarding service detention unless the offence or offences for which the offender is being sentenced is or are serious enough to warrant it. These provisions apply to service detention a principle laid down in relation to custodial sentences by section 152 of the 2003 Act.
483. Subsections (2) and (5) require a court or CO, when deciding whether an offence or combination of offences is serious enough to warrant a sentence of service detention, or how long a sentence it warrants, to take into account all available information about the

circumstances of the offence or offences. These provisions apply to service detention a principle laid down in relation to custodial sentences by section 156(1) of the 2003 Act.

***Section 243: Length of term of service detention: general provision***

484. Where a sentence of service detention is passed by a court (except the SAC), subsection (2) requires it to be for the shortest term commensurate with the seriousness of the offence and any associated offences (see paragraph 483 above). Where such a sentence is passed by a CO or the SAC, subsection (3) similarly requires it to be for the shortest term commensurate with the seriousness of the offence or offences for which the offender is sentenced. The section applies to service detention a principle laid down in relation to custodial sentences by section 153 of the 2003 Act.

***Section 244: Limit on combined term of sentences of service detention***

485. This section prohibits a court or CO from sentencing an offender, or activating a suspended sentence previously imposed on him, if it would result in the offender being subject to sentences of service detention amounting to more than two years in total. If a court or CO purports to do this, the excess period is remitted.

***Section 245: Section 244: supplementary***

486. This section supplements section 244. Subsection (2) provides that where an offender has been released from a sentence of service detention, the sentence does not count towards the two-year maximum.
487. Subsection (3) ensures that a suspended sentence of detention does not count for the purposes of the two-year limit unless it has been activated under section 191 or 193.
488. Subsection (4) ensures that a sentence of detention passed by a CO counts for the purposes of the two-year limit even if the offender is not currently in custody because of the rules in section 290 or 291 (which allow him to delay starting the sentence until he has had a chance to appeal).
489. Subsection (5) ensures that, where a person has been detained continuously under two or more sentences of detention (because one was made consecutive to another, or they were concurrent but one was for a longer period than another), both or all of those sentences count for the purposes of the two-year limit.

***Section 246: Crediting of time in service custody: terms of imprisonment and detention***

490. Where a term of imprisonment for a fixed term or a sentence of service detention is passed on an offender who has been kept in service custody for any period since he was charged, this section requires the court or CO to direct that time spent in custody by the offender in connection with the offence in question or any related offence should count towards the sentence, unless the court or CO thinks it just not to do so. This requirement may be relaxed by rules made by the Secretary of State in certain circumstances. A court or CO deciding not to make such a direction must state in open court why it has decided to do so. This section reflects section 240 of the 2003 Act.

***Section 247: Crediting of time in service custody: supplementary***

491. This section supplements section 246. Subsection (1) has the effect that section 246 applies not only where the offender has been kept in service custody when charged with the offence for which he is being sentenced, but also where he has been kept in service custody in connection with a different charge based on the same facts or evidence.
492. Subsection (2) provides that if the offender has been kept in service custody or detained in connection with other charges (which are not founded on the same facts or evidence), the fact that he has been detained is to be ignored for the purposes of section 246.



493. Subsection (3) ensures that section 246 does not apply when a suspended sentence is passed, but does apply if the sentence is activated.
494. Subsections (4) to (7) enable consecutive and concurrent sentences, in specified circumstances, to be treated as a single sentence for the purposes of section 246(2).

### **Forfeiture of seniority and reduction in rank**

#### ***Section 248: Forfeiture of seniority and reduction in rank or disrating: general restriction***

495. Subsection (1) prohibits a court (except the SAC) from passing a sentence of forfeiture of seniority, reduction in rank or disrating unless the offence and any associated offences are serious enough to warrant such a sentence. Subsection (4) similarly prohibits a CO or the SAC from passing such a sentence unless the offence or offences for which the offender is sentenced are serious enough to warrant it.
496. Subsections (2) and (5) require a court or CO, when deciding whether an offence or combination of offences is serious enough to warrant such a sentence, to take into account all available information about the circumstances of the offence or offences.

### **Financial punishments**

#### ***Section 249: Fixing of fines***

497. This section requires a court or CO, when fixing a fine in respect of a service offence, to inquire into the offender's financial circumstances; to determine what those circumstances are; to take account of those circumstances (whether that means increasing or reducing the fine) and the circumstances of the case; and to ensure that the amount of the fine reflects the seriousness of the offence. Section 249 reflects section 164 of the 2003 Act.

#### ***Section 250: Determination of service compensation order***

498. A court or CO is required to have regard to the offender's financial circumstances when deciding whether to make a service compensation order, and, if so, for what amount. If the offender cannot afford to pay both a fine and compensation, compensation must be given priority. The section reflects part of section 130 of the Sentencing Act.

#### ***Section 251: Power to allow payment of fine or service compensation order by instalments***

499. This section allows a court or CO imposing a fine or a service compensation order to make a further order allowing time to pay, or directing payment by instalments. If no order is made when the fine or compensation order is imposed, the offender can apply to the Court Martial for such an order at a later date. An offender can also apply to the Court Martial for the variation of such an order. But, where the fine or compensation order was awarded by a CO and the offender is a regular serviceman, a volunteer reservist or an ex-regular subject to an additional duties commitment, applications must be made instead to his CO.

### **Reasons**

#### ***Section 252: Duty to give reasons and explain sentence***

500. **Section 252** requires a court or CO passing sentence to explain the reasons for the sentence (except where the sentence is fixed by law, or is required under Chapter 6 of Part 8) and the effect of the sentence and of failing to comply. The court must also explain any power to vary or review the sentence on application. The Secretary of State

may relax these requirements in specified cases. The section reflects part of section 174 of the 2003 Act.

***Section 253: Duties in complying with section 252***

501. This section specifies particular matters which a court or CO must mention or explain in complying with the duty imposed by section 252. The section reflects part of section 174 of the 2003 Act.

**Savings**

***Section 254: Savings for powers to mitigate sentence etc***

502. Subsection (1) ensures that the sections there mentioned do not affect a court or CO's power to mitigate a sentence by taking account of anything that the court or CO thinks relevant.
503. Subsection (2) allows one punishment within a sentence to be mitigated by another.
504. Subsection (3) allows a court passing two or more sentences to apply the principle that the totality of the sentences properly reflects the overall seriousness of the offender's behaviour—for example, that the total length of consecutive sentences is not disproportionate.
505. The section reflects section 166 of the 2003 Act.

***Chapter 2 – Principles and Procedures applying to Service Courts only***

**General**

506. **Chapter 2** of Part 9 sets out the sentencing principles and procedures which apply to service courts but not to summary hearings.

***Section 255: Individual sentence for each offence***

507. At present, a court-martial (unlike a civilian court) passes a single sentence on an offender, even if he is convicted of two or more offences. A Standing Civilian Court, on the other hand, passes a separate sentence for each offence. This section requires both the Court Martial and the SCC to pass a separate sentence for each offence. (A CO and the SAC, by contrast, pass a single sentence for all the offences proved: see sections 131 and 147.)

***Section 256: Pre-sentence reports***

508. This section requires a service court to obtain and consider a pre-sentence report when considering whether to pass a discretionary custodial sentence, a sentence of dismissal, dismissal with disgrace or service detention, or a community punishment; for how long a custodial sentence, or one of service detention, should be passed; or whether there is a significant risk of the offender causing serious harm by committing further offences, so that sections 219 to 222 apply. The pre-sentence report is based on an interview and analysis of the defendant and his offending history and needs. It will contain advice about what punishment might be appropriate, and what rehabilitative work would be likely to prove effective in reducing the risk of re-offending. The section reflects section 156 of the 2003 Act.
509. Subsection (2) allows the court to dispense with the requirement to obtain a pre-sentence report if it considers that it does not need one. But, if the offender is under 18, under subsection (3) the court must not do this unless there is already a report on the offender and the court has considered that.

510. Under subsection (4), no sentence is invalidated by a court's failure to obtain and consider a pre-sentence report, even where the court was required to do so.
511. If the defendant appeals to the CMAAC or the Court Martial against a custodial sentence, a sentence of dismissal, dismissal with disgrace or service detention, or a community punishment, and the lower court did not obtain a pre-sentence report, subsections (5) and (6) require the appellate court to obtain and consider a report unless it thinks that the original court was justified in not obtaining one, or that a report is not now needed. If the offender is under 18, however, subsection (7) requires the appellate court to obtain a report unless it has considered a report previously obtained.

***Section 257: Pre-sentence reports: supplementary***

512. This section applies the definition of a "pre-sentence report" in the 2003 Act for the purposes of section 256, but allows reports to be prepared for service courts by social workers as well as probation officers.
513. Subsection (4) applies the relevant provisions of section 159 of the 2003 Act, which requires copies of a written report to be given to the offender or his legal representative and the prosecutor. If the offender is under 18 a copy must also be given to any parent or guardian of his who is in court; but a complete copy need not be given to such an offender, or to his parent or guardian, if this would create a risk of significant harm to the offender. The prosecutor must not use the report for any purpose except making representations to the court about the contents of the report.

***Section 258: Mentally disordered offenders: requirement for medical report***

514. This section requires a service court to obtain and consider a medical report before passing a custodial sentence (other than one fixed by law) on an offender who is, or appears to be, mentally disordered, unless the court considers that no such report is needed. The court must consider any information before it relating to the offender's mental condition, and the likely effect of a custodial sentence on that condition and on any treatment which may be available for it. If the court does not obtain a medical report this does not invalidate the sentence, but on an appeal against sentence the appellate court must obtain and consider a medical report. The section reflects section 157 of the 2003 Act.

***Section 259: Sentencing guidelines***

515. This section requires a service court to have regard to any relevant guidelines issued by the Sentencing Guidelines Council under section 170(9) of the 2003 Act, but provides that it may depart from such guidelines if it thinks this is justified by any relevant features of service life or the service disciplinary system.

**Custodial sentences and service detention**

***Section 260: Discretionary custodial sentences: general restrictions***

516. This section prohibits a service court from passing a custodial sentence (except one fixed by law, or required under Chapter 6 of Part 8) unless it thinks the offence, or the combination of the offence and any associated offences (see paragraph 483 above), was so serious that no less severe sentence can be justified. The court can also pass a custodial sentence if it would have awarded a community punishment but cannot impose a particular requirement because the offender will not agree to it. The section reflects section 152 of the 2003 Act.

***Section 261: Length of discretionary custodial sentences: general provision***

517. Where a service court passes a custodial sentence (other than one fixed by law, or one required by section 219(2) or 221(2)), this section requires the sentence to be for the

shortest term commensurate with the seriousness of the offence, or the combination of the offence and any associated offences (see paragraph 483 above), unless Chapter 6 of Part 8 requires a longer term. The section reflects section 153 of the 2003 Act.

***Section 262: Power to recommend licence conditions***

518. This section enables a service court (like a civilian court) to recommend, when passing a sentence of imprisonment for 12 months or more, particular conditions that in its view should be included in the offender's licence when he is released. Section 238 of the 2003 Act requires the Secretary of State to have regard to any such recommendation when setting the licence conditions.

***Section 263: Restriction on imposing custodial sentence or service detention on unrepresented offender***

519. This section prohibits a service court from passing a sentence of imprisonment, a sentence of detention under section 209 or 218, a detention and training order or a sentence of service detention on an offender who is not legally represented. But this does not apply if the offender refused or failed to apply for representation after being informed of his right to apply for it, or was aged 21 or more when convicted and has previously been sentenced to imprisonment (not counting a suspended sentence which has not been activated). The section reflects section 83 of the Sentencing Act.

***Section 264: Effect of duties to pass custodial sentences on other powers of punishment***

520. This section makes it clear that, where any provision of the Act requires a court to pass a particular custodial sentence, the court can also include in its sentence any another punishment, except those listed in subsection (2).

**Dismissal**

***Section 265: Dismissal: general restrictions***

521. Subsections (1) and (2) prohibit a court from passing a sentence of dismissal, or dismissal with disgrace, unless it considers that the offence (or the combination of the offence and any associated offences: see paragraph 483 above) was serious enough to warrant such a sentence.
522. Subsections (3) to (5) prohibit the Court Martial from passing such a sentence on an offender who is not legally represented, unless he refused or failed to apply for representation after being informed of his right to apply for it.

**Financial punishments**

***Section 266: Financial statement orders***

523. This section enables a service court (other than the SAC) to order an offender to give the court a statement of his financial circumstances before it passes sentence. The offender commits a further offence (punishable with a fine) if he fails to comply, or provides false or incomplete information. This section reflects section 162 of the 2003 Act.

***Section 267: Power of court to remit fine***

524. This section enables a service court to reduce or remit a fine if it did not have full information about the offender's financial circumstances when it imposed the fine. The section reflects section 165 of the 2003 Act.

***Section 268: Order for service parent or service guardian to pay fine or compensation***

525. Where the offender was convicted aged under 18, is a civilian subject to service discipline, and has a parent or guardian who is subject to service law or who is a civilian subject to service discipline, this section enables the court to order that parent or guardian to pay any fine or compensation awarded against the offender. If the offender is under 16 on conviction, the court must do so unless satisfied that this would be unreasonable, or that the parent or guardian cannot be found. The court must give the parent or guardian an opportunity to be heard. The parent or guardian can appeal against the order as if it were a sentence, except that the appellate court can quash the order without substituting another. The section reflects section 137 of the Sentencing Act.

***Section 269: Fixing of fine or compensation to be paid by parent or guardian***

526. Under this section, various provisions of the Act relating to the fixing of fines and compensation orders are modified in relation to an order under section 268 that the offender's parent or guardian must pay a fine or compensation.

**Community punishments**

***Section 270: Community punishments: general restrictions***

527. Under subsections (1) and (2)(b) a service court must not award a community punishment unless it thinks the offence (or the combination of the offence and any associated offences: see paragraph 483 above) was serious enough to warrant one, and the restrictions imposed must be commensurate with the seriousness of the offence (or offences). This reflects part of section 148 of the 2003 Act. Subsection (3) requires the court to take into account all available information about the offence in forming an opinion on these matters. But under subsection (7) (which applies section 151 of the 2003 Act) the court can also award a community punishment if the offender has at least three times been fined for service or civilian offences committed when he was aged 16 or over, and the court considers that this would be in the interests of justice.
528. Subsection (2)(a) further provides that the requirements included in the order must be such as the court considers the most suitable for the offender. This reflects part of section 148 of the 2003 Act. For this purpose subsection (4) allows the court to take into account any information about the offender that it may have.
529. Subsections (5) and (6) allow the court, in determining what restrictions a community punishment should impose, to have regard to any period for which the offender has been kept in service custody since being charged with the offence or any other offence the charge for which was founded on the same facts or evidence. This reflects section 149 of the 2003 Act.

***Chapter 3 – Supplementary***

***Section 271: Civilian courts dealing with service offences***

530. This section makes it clear that Part 9 does not apply where a civilian criminal court is dealing with a person convicted of a service offence (e.g. an offence under section 95 of the Reserve Forces Act 1996) or re-sentencing under the 2003 Act an offender who has, for example, breached an order imposed by a service court. The principles in the Sentencing Act and the 2003 Act will apply instead.

## **Part 10 – Court Martial Decisions: Appeal and Review**

### ***Chapter 1 – Appeals from Court Martial***

#### ***Section 272: Appeals to the Court Martial Appeal Court***

531. This section renames the Courts-Martial Appeal Court as the Court Martial Appeal Court (“CMAC”), in consequence of the creation of the Court Martial by section 154.
532. The section also gives effect to Schedule 8. That Schedule makes a number of amendments to the Courts-Martial (Appeals) Act 1968, including renaming it as the Court Martial (Appeals) Act 1968.

### ***Chapter 2 – Review of Court Martial Sentence***

#### ***Section 273: Review of unduly lenient sentence by Court Martial Appeal Court***

533. This section gives the Attorney General the power, equivalent to that which he has in respect of sentences passed by the Crown Court, to refer a case to the CMAC if he considers that the sentence passed by the Court Martial in respect of the offence is unduly lenient. This power is exercisable only in relation to criminal conduct offences and is subject to the leave of the CMAC. One of two conditions must be satisfied: either the corresponding offence under civilian law would, if committed by an adult, be capable of being tried only on indictment; or the offence is one specified in an order made by the Secretary of State.
534. On such a reference the CMAC may quash the original sentence and substitute for it another sentence that would have been available to the Court Martial.
535. The section specifies certain circumstances in which the Attorney General may consider the original sentence to have been unduly lenient; and it provides that, where the reference to the CMAC relates to an order setting a minimum term for a life sentence, the CMAC may not, in deciding what order is appropriate, allow for the fact that the offender is being sentenced for the second time.

#### ***Section 274: Reference of point of law to Supreme Court***

536. This section applies where the CMAC has concluded its review of a case under section 273 (1). It allows the Attorney General or the offender to refer to the Supreme Court a point of law involved in any sentence passed in the proceedings. The reference cannot be made without leave of the CMAC or the Supreme Court and the conditions for granting leave are specified. When the Supreme Court has given its opinion on the point of law referred to it, it may then refer the case back to the CMAC to be dealt with, or deal with the case itself, in which case it may exercise any of the powers that would have been available to the CMAC.

#### ***Section 275: Power to make supplementary provision about review of sentence***

537. This section enables the Secretary of State to make provision by regulations with respect to references under sections 273 and 274, including provision on applications and procedure.

### ***Chapter 3 – Compensation for Miscarriages of Justice***

#### ***Section 276: Compensation for miscarriages of justice***

538. This section makes provision for the payment of compensation to a person who has been subject to a miscarriage of justice by the Court Martial. It mirrors the civilian equivalent in section 133 of the Criminal Justice Act 1988.



539. Compensation payments are made by the Secretary of State, but this is subject to subsections (2) and (3). Subsection (2) provides that if the conviction was the result of the applicant failing to disclose, wholly or in part, the “unknown fact” which led to the miscarriage of justice, he is not entitled to compensation under this section. Subsection (3) provides that compensation is not payable under this provision unless an application for such compensation has been made to the Secretary of State.
540. The Secretary of State has the power to determine whether there is a right to compensation under subsection (4). Where he determines that there is such a right, subsection (5) provides that the amount of compensation is to be assessed by an assessor (appointed by the Secretary of State).
541. Subsection (6) requires the assessor to have regard to certain factors in assessing the amount of compensation, and subsection (7) explains what constitutes a “conviction having been reversed” for the purpose of this section. This will include a case in which the CMAC quashes a conviction following a reference by the Criminal Cases Review Commission (which is given power to make such references by section 321 and Schedule 11).
542. Subsection (8) gives effect to Schedule 9, which deals with the appointment of assessors etc.

### **Part 11 – the Service Civilian Court**

543. At present civilians subject to service law who commit offences under the SDAs may be dealt with summarily by an officer (the appropriate superior authority), who has very limited powers of punishment, or by court-martial. In addition, the Armed Forces Act 1976 established Standing Civilian Courts for the trial, outside the UK, of civilians under the Army and Air Force Acts 1955 (but not the Naval Discipline Act 1957). The Secretary of State can direct areas outside the UK where trials may take place. Two such areas have been established: Germany, Belgium and Holland (as the first area); and the republic of Cyprus and the Sovereign Base Areas of Dhekelia and Akrotiri (as the second area) on the island of Cyprus. A judge advocate is appointed as magistrate to sit in a Standing Civilian Court.
544. Standing Civilian Courts generally have jurisdiction to try civilians for offences committed outside the UK where the offence is one for which a court-martial can try a civilian. The exceptions are offences under section 57 of the Army and Air Force Acts 1955 (offences in relation to courts, including contempt) and civil offences under the law of England and Wales that are triable only in the Crown Court.
545. Standing Civilian Courts act in similar ways to a magistrates’ court in England and Wales. They have similar powers of punishment: they can award a maximum sentence of imprisonment for a term not exceeding six months (12 months if consecutive sentences are awarded) but cannot award imprisonment or a fine for a civil offence where a magistrates’ court in England and Wales would not have power to make such an award.
546. The sections in this Part create the Service Civilian Court to replace the Standing Civilian Courts and make provision for the court and its proceedings. The main changes are the replacement of the power to direct areas where trial can take place with provisions for the court to sit anywhere outside the British Islands; and the creation of a power, analogous to the power of a magistrates’ court, for the court to decide whether it or the Court Martial should try a charge.

## **The Service Civilian Court: court and proceedings**

### ***Section 277: The Service Civilian Court***

547. This section establishes a court to be known as the Service Civilian Court (“SCC”) which may sit anywhere outside the British Islands.
548. **Section 278:** Constitution and proceedings of the Service Civilian Court
549. This section provides that the SCC is to consist of a single judge advocate, to be specified by or on behalf of the Judge Advocate General. Unlike the present situation, the judge advocate will not be called a “magistrate” when he sits on the SCC. The section also introduces Schedule 10, which contains provision about proceedings of the SCC.

### ***Section 279: Court must consider whether trial by Court Martial more appropriate***

550. This section provides that, before the charge is put and a plea entered, the SCC must decide whether it or the Court Martial should try the charge. Before making this decision the SCC must give the prosecution the opportunity to inform it of any previous convictions the defendant has, and it must give the prosecution and the defendant an opportunity to make representations about which court should try the charge; this corresponds to the position to be introduced in the civilian system pursuant to amendments to the Magistrates’ Courts Act 1980 made by the Criminal Justice Act 2003.
551. The matters that the SCC must take into account in making a decision are specified in this section and mirror those matters that the magistrates’ court must take into account when deciding whether to decline jurisdiction. Where the SCC declines jurisdiction it must refer the charge to the Court Martial.

### ***Section 280: Right to elect trial by Court Martial instead of by SCC***

552. This section provides that where the SCC decides that it should try a charge, the defendant must be given the opportunity before arraignment to elect to be tried by the Court Martial. If the defendant (or any defendant if a charge is charged jointly) elects to be tried by the Court Martial, the charge must be referred to the Court Martial (and where there are two or more charges against the defendant, an election in respect of one or more of the charges is deemed to be an election for all of them). Otherwise the SCC must try the charge. The practical effect of this section, section 279 and Part 5 is that the SCC will try a charge only where the DSP, the court and the defendant are content that it should do so.

### ***Section 281: Power of SCC to convict of offence other than that charged***

553. This section applies to the SCC the provisions of section 161 which provides the Court Martial with a power to convict a person of an offence other than the one charged, where it finds the person not guilty of the charge in the charge sheet and where the allegations in the charge sheet amount to or include an allegation of another service offence.

## **Punishments available to Service Civilian Court**

### ***Section 282: Punishments available to Service Civilian Court***

554. This section provides that the punishments available to the Court Martial when it is dealing with civilians are also available to the SCC subject to some restrictions. The restrictions that apply are listed in section 282, for example, the SCC’s power to make a service community order is restricted in the same way that section 164(5) restricts the corresponding power of the Court Martial. It is supplemented by Chapters 4 and

5 of Part 8, which respectively provide for sentences of imprisonment for less than 12 months and custodial sentences for young offenders.

***Section 283: Imprisonment: maximum term***

555. This section prevents the SCC from passing a sentence of imprisonment for more than 12 months in respect of a single offence, or consecutive sentences for a total of more than 65 weeks.

***Section 284: Fines and compensation orders: maximum amounts***

556. Subsection (1) prevents the SCC from imposing a fine of more than the prescribed sum (currently £5,000) for any one offence. In the case of a criminal conduct offence, subsection (2) further prevents the court from imposing a fine greater than that which a magistrates' court could impose for the corresponding offence under the law of England and Wales.

557. Under subsection (3) the SCC cannot make a service compensation order for an amount greater than the maximum compensation that a magistrates' court can award (currently £5,000). In the case of offences taken into consideration, under subsection (4) the amount awarded must not exceed the difference between the maximum that the court could have awarded (for the offences of which the offender is convicted) and the amount that it does in fact award.

**Appeals from Service Civilian Court**

***Section 285: Right of appeal from SCC***

558. This section provides that a person convicted by the SCC may appeal to the Court Martial. Appeal may be against sentence if the person pleaded guilty, or against conviction or sentence if he did not plead guilty. The respondent to any appeal is the DSP.

559. An appeal must be brought within an initial period of 28 days, beginning on the date the person was sentenced, or within such longer period as the Court Martial may allow. For these purposes "sentence" includes any order made by a court when dealing with an offender.

***Section 286: Hearing of appeals from SCC***

560. An appeal against conviction is to be by way of rehearing of the charge (including a rehearing in respect to sentence), so that all of the evidence is reheard by the Court Martial. An appeal against sentence is to be by way of a rehearing as respects sentence, so that only evidence relevant to sentencing will be reheard. The section stipulates which judge advocates are not permitted to be a member of the court hearing an appeal because of prior involvement in a case.

561. The section also provides that those parts of the Act that are concerned with Court Martial trial and sentencing apply to appeals as they do to trials by the Court Martial, subject to any modification contained in Court Martial rules. Furthermore, the Court Martial may only pass a sentence that the SCC had the power to pass in respect of the offence, although this may be a more severe sentence than that actually imposed by the SCC. This power mirrors that of the Crown Court on appeal from a magistrates' court.

***Section 287: Findings made and sentences passed by Court Martial on appeal from SCC***

562. This section provides that any finding made or sentence passed by the Court Martial on an appeal replaces the finding or sentence of the SCC. It also provides that a sentence passed on an appeal runs from the time from which it would have run if it had been

imposed by the SCC, unless the Court Martial directs otherwise. Where a sentence is passed on an appeal against sentence, the person is to be treated (for the purposes of enabling him to appeal against sentence) as if he had been convicted by the Court Martial of the offence for which the sentence was passed. This is because there is a right of appeal against sentence under the 1968 Act only for persons convicted by the Court Martial.

## **SCC Rules**

### ***Section 288: SCC rules***

563. This section gives the Secretary of State power to make rules in relation to the SCC. These rule-making powers are broadly similar to those for the SAC and the Court Martial.

## **Part 12 – Service and Effect of Certain Sentences**

### **Commencement of sentence**

#### ***Section 289: Commencement of sentences of the Court Martial and Service Civilian Court***

564. This section provides that a sentence passed by the Court Martial or the SCC takes effect from the beginning of the day on which it is passed, unless some other provision enables the court to direct otherwise. The rule does not apply to suspended sentences (which take effect only when subsequently activated) or to sentences passed by the Court Martial on appeal from the SCC (which under section 287(2) take effect from the beginning of the day on which the SCC passed sentence, unless the Court Martial otherwise directs).

#### ***Section 290: Commencement of term of service detention awarded by CO***

565. This section postpones the point at which an award of service detention made by a CO takes effect (even if the CO does not suspend the award under section 189(3)). Unless the offender elects to start the sentence immediately, it does not take effect until the time allowed for bringing an appeal (the “appeal period”) expires or, if an appeal is brought, the appeal is disposed of (unless the SAC disposes of it by quashing the award or substituting another punishment).
566. Even if the offender does elect to start the sentence immediately, he can withdraw the election during the appeal period. In that case the sentence ceases to have effect, and resumes only when the appeal period expires or any appeal is disposed of. Similarly, if the sentence has already come into effect and an appeal is brought, the sentence ceases to have effect and resumes only when the appeal is disposed of.

#### ***Section 291: Commencement of consecutive term of service detention awarded by CO***

567. This section adapts the rules in section 189 for the case where a CO makes an award of service detention consecutive to an existing award. Unless the offender elects to start the new sentence as soon as the old one expires, the new one does not take effect until the old one has expired and the appeal period has expired or any appeal has been disposed of.
568. If the offender does elect to start the new sentence at the end of the old one, he can withdraw the election during the appeal period. If he withdraws the election before the end of the old sentence, the new one does not take effect until the old one has expired and the appeal period has expired or any appeal has been disposed of. If he withdraws the election when the old sentence has expired and the new one has begun, the new one

ceases to have effect, and resumes only when the appeal period expires or any appeal is disposed of.

569. If an appeal is brought before the old sentence expires, the new one does not take effect until the old one has expired and the appeal has been disposed of. If an appeal is brought after the old sentence has expired and the new one has taken effect, the new one ceases to have effect and resumes only when the appeal is disposed of.

### ***Section 292: Commencement of suspended sentence activated by CO***

570. This section provides that the rules in sections 290 and 291 shall apply (with modifications) where an officer makes an order activating a suspended sentence of service detention under section 193. Unless the officer orders that the suspended sentence is to take effect from the end of another sentence, the rules in section 290 apply; if the order does provide that the suspended sentence is to take effect from the end of another sentence, then the rules in section 291 apply.

### **Effect of custodial sentence or detention on rank or rate**

#### ***Section 293: Effect on rank or rate of WOs and NCOs of custodial sentence or sentence of service detention***

571. Under this section, where a warrant officer or NCO is given a custodial sentence for a service offence or is sentenced to service detention, his rank or rate is automatically reduced as far as the Court Martial could reduce it under section 164. The extent to which the Court Martial could reduce it will depend whether any relevant restrictions are imposed by regulations made under section 164(4).
572. If the offender is also sentenced to dismissal or dismissal with disgrace, this section does not apply: section 295(4) applies instead.

#### ***Section 294: Rank or rate of WOs and NCOs while in custody pursuant to custodial sentence etc***

573. Under this section, a warrant officer or NCO serving a custodial sentence (including one passed by a civilian court) or a sentence of service detention is to be treated as holding the lowest rank or rate for the Service to which he belongs—or, if he belongs to the air forces, the highest rank he has held as an airman (see the note on section 135 (paragraph 287)).

### **Effect of dismissal**

#### ***Section 295: Effect of sentence of dismissal***

574. This section applies where an offender is sentenced to dismissal or dismissal with disgrace. If he is an officer, his commission is forfeit and he automatically ceases to be a member of the forces. Otherwise, the competent authority must discharge him (but may delay doing so until any sentence of service detention has been served). If he is a warrant officer or NCO, his rank or rate is reduced to the lowest in his Service, or, if he belongs to the air forces, the highest rank he has held as an airman.

### **Service of sentence**

#### ***Section 296: Service detention***

575. This section applies where a person is sentenced to service detention. It provides that he may be detained in service custody (but not in a prison) for the duration of his sentence, and that during that period he shall be deemed to be in legal custody.

576. Service detention is carried out either at the Military Corrective Training Centre (MCTC) at Colchester in Essex or in licensed unit facilities. There are no longer any service prisons.
577. The MCTC is an Army unit, but it accommodates people from all three Services and has some naval and RAF personnel on its staff. It provides a dedicated facility which holds three different classes of people:
- people who are serving a sentence of service detention. Within this category, those who are to return to normal duty undergo a regime of service training designed to improve their service efficiency, discipline and morale and make them better service personnel. Those who are dismissed from the service undergo a separate regime of corrective training designed to enhance their potential for self-sufficiency and responsible citizenship.
  - people who are in service custody pre-trial and pre-sentence.
  - people who have been sentenced to imprisonment or, in the case of young people, a custodial sentence, while their transfer to the civilian institution in which they will serve their sentence is arranged.
578. Unit detention facilities are for those who are in custody pre-charge or pre-sentence or for persons who have been sentenced to a short period of service detention (typically less than 14 days).

***Section 297: Detention in service custody following passing of custodial sentence etc***

579. This section applies where a person is sentenced to a custodial sentence for a service offence, or an order has been made in respect of him under section 214 (the detention of an offender who has committed an offence during the currency of a detention and training order). Such a person must serve his sentence in a civilian institution; this section makes lawful his detention in service custody until he is committed to the appropriate civilian institution in which he will serve his sentence.

***Section 298: Removal to England and Wales following passing of custodial sentence etc***

580. Currently persons sentenced to custodial sentences under the SDAs may be committed to a civilian institution in England and Wales, Scotland or Northern Ireland. Under the Act (and rules made under it) all persons sentenced to custodial sentences, or subject to orders under section 213, will be committed into an institution in England and Wales (via the MCTC). Like other prisoners, they may after committal be transferred to institutions in other parts of the UK under the Crime (Sentences) Act 1997.
581. This section provides that if a person is outside the UK when a custodial sentence is passed against him, or when an order under section 214 made in respect of him, he must be removed to England and Wales as soon as practicable.

***Section 299: Duty to receive prisoners***

582. This section confers a duty upon the governor of a civilian prison in England or Wales to receive and confine, for the duration of their sentence, any person who has been sent to the prison in accordance with the service custody rules to be made under section 300.

***Section 298: Service custody etc rules***

583. This section empowers the Secretary of State to make rules about service custody and the service of sentences imposed by service courts.



584. The section specifies certain matters in particular for which these rules may contain provision. They include:
- the provision, classification, regulation and management of service custody premises (which will include both the MCTC and smaller facilities, such as guardrooms, which are used for the temporary accommodation of persons in service custody);
  - the creation of disciplinary offences, and the award of additional days to be served by a person guilty of such an offence;
  - the determination of any matter by a judge advocate, and appeals against such determinations; and
  - the application (with or without modifications) of those sections of the Prison Act 1952 dealing with offences by persons other than prisoners, and those sections of the Criminal Justice Act 1961 dealing with the harbouring of escaped prisoners.
585. Subsection (3) provides that the rules may confer on any person a power to use reasonable force where necessary for the purpose of searching a service custody establishment or a person in service custody, and a power to seize and detain unauthorised property.

***Section 301: Duration of sentences: persons unlawfully at large or on temporary release***

586. This section provides for the duration of a sentence to be adjusted where the sentenced person spends any period of the sentence unlawfully at large or on temporary release. It provides that any period during which the person is unlawfully at large or has been temporarily released on compassionate grounds shall not count against sentence.
587. This provision applies to sentences of service detention and applies to custodial sentences where the period of absence occurs before the person arrives at the custodial establishment. The effect of the section is to extend the period of the sentence by the number of days that the person is absent, calculated according to the rules in subsection (5).

***Section 302: Remission of certain sentences on passing of custodial sentence etc***

588. This section applies where a person is already serving a relevant sentence (defined as a sentence of service detention, a service supervision and punishment order or a minor punishment) and, during that sentence, is sentenced in separate proceedings to a custodial sentence, either in respect of a service offence or by a civilian criminal court. Where this occurs, the unserved balance of the relevant sentence is to be remitted. This means that the person will cease to serve the relevant sentence and will instead immediately commence the new custodial sentence in the appropriate establishment. The person does not remain liable to serve any unserved part of their sentence, which is effectively cancelled.

***Section 303: Power of service policeman to arrest person unlawfully at large***

589. This section empowers a service policeman to arrest a person sentenced to service detention who is unlawfully at large, and provides that the arrested person may be taken to the place where he is required to be detained (subsection (1)).
590. Subsection (2) applies the definition of “unlawfully at large” at section 299(4) for the purposes of this section. Subsection (3) permits the use of reasonable force when arresting a person, or taking him to the place where he is to be detained, under subsection (1).

## **Supplementary**

### ***Section 304: Sentences passed by civilian courts***

591. This section makes clear that references in Part 12 of the Act to custodial sentences, and the references in sections 297(2) and 298(2) to orders activating suspended sentences of imprisonment, apply only to sentences and orders of service courts, not civilian courts.

## **Part 13 – Discipline: Miscellaneous and Supplementary**

### ***Chapter 1 – Testing for Alcohol and Drugs***

592. These sections authorise testing for drugs and alcohol to be carried out in specified circumstances on persons who are subject to service law, and, in some cases, on civilians subject to service discipline. The results of such tests are not admissible as evidence in proceedings for a service offence. These sections do not limit the statutory powers to test for alcohol and or drugs under PACE or the Road Traffic Act 1988; nor do they affect the admissibility of evidence obtained under those statutes in any proceedings.

### ***Section 305: Testing for drugs***

593. Subsection (1) enables a drug testing officer to require a person subject to service law to provide a sample of his urine to test for controlled drugs. This creates a statutory power to underpin the operation of a random drug testing programme under which all members of HM Forces, regardless of rank or rate, are subject to periodic random testing. There is no requirement for a person to be suspected of drug misuse before a urine sample can be demanded.
594. Subsection (2) provides that the power may not be exercised in connection with the investigation of an offence or of an incident giving rise to the power in section 306, nor where the drug testing officer (or his CO) is the CO of the person to be tested.
595. Subsection (3) makes it an offence to fail to comply with a requirement to provide a urine sample under this section.

### ***Section 306: Testing for alcohol and drugs after a serious incident***

596. This section provides a power to require a person who is subject to service law, or a civilian who is subject to service discipline, to provide a sample for alcohol or drugs testing where there has been a serious incident and where, in the opinion of the person exercising the power, the person to be tested may have caused or contributed to it. This power enables evidence of drug or alcohol consumption to be obtained in order to assist a service inquiry (section 343) to determine whether such consumption or use might have been a factor in the incident. “Drug” and “sample” are defined in section 307.
597. Subsection (1) specifies that an incident falls within this section if in the opinion of the officer it resulted in, or created a risk of, death or serious injury, or of serious damage to property.
598. Subsection (3) specifies that the power is exercisable by the CO of the person to be tested, and subsection (6) provides that the Defence Council may make regulations providing for its exercise to be delegated.
599. Subsection (4) provides that it is an offence for a person to fail to comply with a requirement imposed under this section without reasonable excuse.

### ***Section 307: Definitions etc for purposes of section 306***

600. This section defines certain expressions used in section 306. Subsection (2) defines “drug” to mean either a controlled drug (within the meaning of the Misuse of Drugs Act 1971) or any other drug specified by the Secretary of State.

*These notes refer to the Armed Forces Act 2006 (c.52)  
which received Royal Assent on 8 November 2006*

601. Subsection (3) provides that “sample” means a sample of urine or breath where it is required to test for alcohol; that it means a sample of urine where it is required to test for drugs; and that, in either case, it includes any other sample specified by the Secretary of State by order.
602. Subsections (4) and (5) provide that the Secretary of State may not specify an invasive sample, such as blood or semen, under subsection (3), and that the person being tested must consent to the taking of any sample so specified by the Secretary of State.

***Section 308: Sections 305 and 306: supplementary***

603. This section authorises the Defence Council to make regulations governing the obtaining and analysis of samples under this Chapter. It provides that such regulations may deal with a number of procedural matters such as the number of times a person may be required to provide a sample, the procedures employed to analyse samples, and the training and qualifications of those persons carrying out such analysis.

***Chapter 2 – Contempt of Court***

604. This Chapter enables service courts to deal with misbehaviour at court or in relation to proceedings before those courts. Such misbehaviour is otherwise known in civilian courts as contempt of court. In all cases the powers are exercised by the judge advocate.
605. The judge advocate’s powers are broadly the same as those of a magistrate in England and Wales under the Magistrates’ Courts Act 1980 and the Contempt of Court Act 1981. Existing powers under the SDAs are replaced with a single set of rules regardless of the rank or rate of the offender. In the UK, these powers may be exercised against any person; outside the UK they may be exercised only against persons subject to service law or civilians subject to service discipline.
606. If an offender is subject to service law, or a civilian subject to service discipline, the judge advocate may commit him to service custody. This punishment may be carried out at any service custody premises, including the MCTC. It is not a sentence of service detention, and so it will be administered by the MCTC in their remand wing where officers and civilians subject to service law may be held prior to their trial by the Court Martial.
607. Civilians who are not subject to service discipline under the Act may not be committed to service custody, but may instead be fined up to a maximum of level 4 on the standard scale (currently £2,500).
608. The powers provided in this Chapter are intended to deal with misbehaviour in the face of the court. Other acts that constitute contempt of court but which fall outside these powers may be referred to a civilian court under section 311.

***Section 309: Offences of misbehaviour in court etc***

609. Subsection (1) specifies the misbehaviour that constitutes the offence. This includes disruptive behaviour in court, failure of a party or witness to assist the court, and intimidation of witnesses or court members.
610. Subsections (2) and (3) specify the punishments which may be awarded (summarily) by the judge advocate.
611. Subsection (4) provides that the court may revoke an order committing the offender to service custody and, if he is already in custody, to discharge him. This allows the judge advocate to bring a punishment under this section to an end if the offender gives an appropriate apology.
612. Subsection (5) specifies the service courts that have jurisdiction under this section.

***Section 310: Power to detain before dealing with section 309 offence***

613. Subsection (1) gives the court power to order that an offender under section 309 should be taken into service custody and detained there until the court rises.
614. Subsections (2) and (3) provide that if the court considers that it should not exercise its powers under section 309 without a further hearing, then in certain circumstances the offender may be detained for a further period, provided that his total period of detention does not exceed 48 hours in total.
615. Subsection (4) specifies criteria, one or more of which must be met if a person is to be held in service custody after the court rises.

***Section 311: Certification to civil courts***

616. Subsection (1) provides that this section applies where a person does an act in relation to proceedings before a qualifying service court which would constitute contempt of court if the court were a civilian court with power to commit for contempt. This could include act which amounts to an offence under section 309, if the court chooses not to deal with the matter itself – because of the seriousness of the offence, for example.
617. In the above circumstances the service court may refer (“certify” is the term used in the Act) the offence to any civilian court which has power to commit for contempt, or, if the offence took place outside the UK, to the High Court. That civilian court may then inquire into the matter and deal with the offender under its own normal procedures. The Divisional Court of the Queen’s Bench Division, in the High Court, has a supervisory jurisdiction over inferior courts and in practice most serious forms of contempt will be referred to that court.
618. The power is similar to that provided for a number of other inferior courts and tribunals, for example the Data Protection Tribunal (section 6 of the Data Protection Act 1998).

***Section 311: Decisions of court under section 309: making and effect***

619. Subsection (1) provides that the rules relating to findings by the Court Martial and the SAC do not apply to this Chapter. Subsection (2) provides that the powers under sections 309 and 311 are to be exercised by the judge advocate alone.
620. Subsections (3) and (4) provide that the court may direct that a committal to service custody under section 309 shall take effect from the end of any period of service detention.
621. The section also provides that although committal to service custody is not service detention, certain of the rules relating to service detention can be applied in respect of such custody.

***Chapter 3 – Arrest and Detention by Civil Authorities***

**Arrest for service offences**

***Section 313: Arrest by civilian police under warrant of judge advocate***

622. This section permits judge advocates to issue warrants to the civilian police forces of the UK or any British overseas territory for the arrest of persons reasonably suspected of having committed service offences. There is an obligation on those making an arrest under such a warrant to transfer the arrested person into service custody as soon as practicable. Further rules as to the practice and procedure which are to apply when arrest warrants are issued under this section may be made by the Secretary of State by statutory instrument.

## **Arrest etc for desertion or absence without leave**

### ***Section 314: Arrest by civilian police of deserters and absentees without leave***

623. This section permits the civilian police in the UK or a British overseas territory to arrest a suspected absentee without a warrant. It also provides authority for an “authorised person” in the UK, the Isle of Man or a British overseas territory to issue an arrest warrant in certain circumstances. An authorised person is a person who is empowered in the civilian system to issue arrest warrants, e.g. a Crown Court judge or magistrate in England and Wales. A person who is arrested pursuant to these provisions must be brought before a court of summary jurisdiction.

### ***Section 315: Deserters and absentees without leave surrendering to civilian police***

624. This section provides that a person who surrenders himself as being a deserter or absent without leave to a police officer of a UK or British overseas territory police force must be taken to a police station. The person in charge of the police station (or a person authorised by him) must consider the case and if it appears to him that the person who has surrendered is subject to service law and illegally absent, he may arrange for him to be (a) delivered into service custody, (b) brought before a court, or (c) released with conditions as to his reporting at a future time and place (this last course is equivalent to being granted police bail in England and Wales).

### ***Section 316: Proceedings before civilian court where person suspected of illegal absence***

625. This section details the duties of a summary court in the UK, the Isle of Man or a British overseas territory when a person admits to being illegally absent or where the court is in possession of evidence that he is illegally absent.

626. If the suspect is not in custody for some other cause (e.g. if he was arrested for assault and it then transpired that he was an illegally absent serviceman he might be in custody for the assault), and the required evidence exists, the court must either (a) arrange for the suspect to be delivered into service custody, or (b) release him subject to conditions in respect of his reappearance at a later time and place ((b) is equivalent to being bailed by a magistrates’ court in England and Wales). If the court decides that he should be delivered into service custody it may hold a person in custody pending his transfer into service custody where it is likely that such transfer will be subject to delay.

627. Where the court does not have evidence that the person is illegally absent he must be released (unless he is in custody for some other cause). A person who has been released under this provision may nevertheless subsequently be arrested, either pursuant to a warrant for his arrest or under section 67 (powers of arrest where a person is reasonably suspected of committing or having committed a service offence).

### ***Section 317: Warrant for the arrest of persons released under section 315(4)(c) or 316(3)(a)(ii)***

628. When a suspect is released from custody subject to conditions under section 315(4)(c) or section 316(3)(a)(ii) and he fails to meet those conditions, a warrant may be issued for his arrest. Such warrants may be issued by a judge advocate, and if the release was authorised by a civilian court, by a person authorised to issue warrants by that court. A person arrested pursuant to these provisions must be transferred to service custody as soon as practicable. This section also provides that the Secretary of State may make rules by statutory instrument which set out the practice and procedure with respect to the issue of arrest warrants by judge advocates under this section.

## **Arrest of persons unlawfully at large**

### ***Section 318: Arrest by civilian police of persons unlawfully at large***

629. This section provides that a person who has been sentenced to service detention and is “unlawfully at large” (as defined by section 301) may be arrested by a member of the civilian police in the UK or a British overseas territory without a warrant and may be taken to wherever he is required to be detained. For example, a person sentenced to service detention and unlawfully at large in the UK could be arrested without a warrant and taken to the MCTC, which is where he would be required to serve his period of detention.

## **Supplementary**

### ***Section 319: Certificates in connection with transfer to service custody etc***

630. This section allows the Secretary of State to make a provision requiring a certificate in respect of a person who having been apprehended by the civil authorities is either delivered into service custody or released by them. The Secretary of State may make regulations by statutory instrument that set out matters such as the details the certificates should record. For example, a record of whether the person was wearing uniform may be useful evidence as to whether he was absent without leave or had actually deserted.

### ***Section 320: Power to use reasonable force***

631. When an arrest is effected by a police officer he may use such force as is reasonable to apprehend the suspect.

## ***Chapter 4 – Powers of the Criminal Cases Review Commission***

### ***Section 321: Powers of the Criminal Cases Review Commission***

632. This section gives effect to Schedule 11, which confers powers on the Criminal Cases Review Commission in relation to convictions by service courts.

## ***Chapter 5 – Supplementary***

## **Financial penalty enforcement orders**

### ***Section 322: Financial penalty enforcement orders***

633. This section permits the Secretary of State by way of secondary legislation to make provision to enable the Defence Council or authorised persons to make orders for the enforcement of financial penalties by prescribed courts in England and Wales, Scotland and Northern Ireland or the Isle of Man.
634. The regulations may in particular provide for the type of cases in which orders may be made; the form content and effect of such orders; and the functions of the Defence Council in relation to such orders and their power to delegate such functions (subsection (2)).
635. Where the regulations make provision with respect to the effect of such orders, the regulations may provide that an outstanding sum is to be treated as if it had been a fine imposed by a specified court and for prescribed enforcement procedures to be or cease to be available on prescribed events (subsection (3)).
636. A “financial penalty” is defined as a fine or compensation order imposed by virtue of this Act (including such penalties ordered to be paid by a service parent or guardian under section 268), and a sum adjudged to be paid under section 236(3).



## **Power to make provision in consequence of criminal justice enactments**

### ***Section 323: Power to make provision in consequence of criminal justice enactments***

637. The broad purpose of this section is to enable statutory changes in the criminal justice system of England and Wales to be adapted and applied by subordinate legislation to the Services' system of justice. The powers in this section are based on those in section 31 of the Armed Forces Act 2001.
638. Under this section the Secretary of State may by order make in relation to service policemen, service courts, persons subject to service law, civilians subject to service discipline and service law proceedings provision equivalent (subject to modifications) to:
- any enactment (called in the section a "criminal justice enactment") passed after 1<sup>st</sup> January 2001 which amends the law of England and Wales relating to any "criminal justice matter",
  - any other enactment about a criminal justice matter which is itself amended by a criminal justice enactment, and
  - any subordinate legislation made under either of the above types of enactment.
639. The Secretary of State is, for example, able to make for the armed forces provision equivalent to new criminal justice legislation and other legislation about criminal justice which has been altered by such new legislation.
640. A "criminal justice matter" is itself defined in section 324 (2). It covers such matters as police powers of investigation and detention, powers of arrest, custody, bail, evidence, procedure and court powers (including sentence). The Secretary of State may by order extend it to other criminal justice matters, but in such a case the order must be approved in draft by both Houses of Parliament.
641. The power to make equivalent provision is wide enough to allow the Secretary of State to amend existing legislation, but again in such a case the order must be approved in draft by both Houses of Parliament.

### ***Section 324: Section 323: definitions***

642. This section contains a number of definitions for the purposes of section 323, including (as mentioned in the note on section 323) definitions of "criminal justice enactment" and "criminal justice matter".

## **Other supplementary provisions**

### ***Section 325: Evidential burden as respects excuses***

643. It is a general principle of English criminal law that it is for the prosecution to prove beyond all reasonable doubt that an accused person is guilty of an offence. However an accused is sometimes subject to a burden in relation to the evidence, for example if he raises insanity as a defence. Statutes may expressly or impliedly impose such a burden on the accused. This section imposes such a burden on an accused if he raises a defence of lawful excuse or reasonable excuse. "Lawful excuse" is a defence, for example, to an offence of assisting an enemy under section 1 of the Act, and "reasonable excuse" is a defence, for example, to the offence of misconduct on operations (under section 2).
644. Under the criminal law of England and Wales there two main kinds of burden that could apply. One is a burden to prove something (which, in the case of an accused, would be on a balance of probabilities). The other burden is lower. It is not strictly one of proof, but only of bringing sufficient evidence to satisfy the judge (the judge advocate

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in the Court Martial) that there is an issue which should be left to those responsible for deciding the facts (such a jury or, in the case of the Court Martial, the panel of Service members). Section 323 provides that this lower burden applies to an accused in relation to a defence of lawful excuse or reasonable excuse.

***Section 326: Exclusion of enactments requiring consent of Attorney General or DPP***

645. This section makes it clear that proceedings under the Act for a service offence do not require the consent of the Attorney General or the Director of Public Prosecutions, even if proceedings for a corresponding civilian offence would require such consent. This does not affect section 61(2), which requires the consent of the Attorney General to the bringing of a charge once a time limit under any of sections 55 to 58 has expired.

***Section 327: Local probation boards***

646. **Section 327** inserts a provision into the Criminal Justice and Court Services Act 2000 (“the 2000 Act”) in substitution for a similar provision inserted into that Act by Schedule 16. The reason for this, and the effect of the inserted provision, is as follows.
647. **Paragraph 178** of Schedule 16 inserts a new section – section 5A – into the 2000 Act. This provision empowers the Secretary of State to make arrangements for local probation boards to provide the full range of their professional services in respect of persons who appear before service courts. Examples of these services would include the preparation of pre-sentence reports, and the supervision of offenders subject to an overseas community order.
648. It is intended that paragraph 178 of Schedule 16 should come into force as soon as is practicable. As a consequence, the section it inserts into the 2000 Act is necessarily an interim measure, containing references to the SDAs (which are to be repealed by the Act) and to courts constituted under those Acts.
649. **Section 327** is intended to come into force on the Act’s main commencement date, and sets out a new section 5A that is consistent with the rest of the Act, and is substituted for that inserted by Schedule 16. The amendment to the 2000 Act set out in this section is to the same effect as that inserted by Schedule 16.