

ARMED FORCES ACT 2006

EXPLANATORY NOTES

COMMENTARY

First Group of Parts – Discipline

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.