

## **ARMED FORCES ACT 2011**

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### **EXPLANATORY NOTES**

#### **COMMENTARY ON THE SCHEDULES**

##### *Schedule 1 – Court Martial sentencing powers*

124. Section 165 of AFA 2006 limits the Court Martial’s powers of punishment in the case of an offender who elected under section 129 of that Act to be tried by that court rather than being dealt with by his or her commanding officer (referred to in the note on this Schedule as “CO”). The objective is to ensure that summary hearing of a charge by a CO does not infringe the accused’s Convention right under the Human Rights Act 1998 to a fair trial by an independent tribunal. The accused has a right to be tried by a compliant court, and there is no incentive to refrain from exercising that right because by doing so the accused does not risk incurring a more severe punishment.
125. However, section 165 itself deals only with relatively straightforward cases: the more complex situations are the subject of Court Martial rules made under section 163. Part 20 of the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041) supplements section 165 in a number of ways. For example, it requires the court to pass a single sentence, like a CO, where the accused is convicted of two or more offences which, but for the election, the CO would have heard together.
126. [Section 14](#) replaces both section 165 of AFA 2006 and Part 20 of the Court Martial Rules with a new Schedule 3A to AFA 2006 (set out in Schedule 1 to the Act), so that the relevant provisions will be all in one place. The overall effect is unchanged, with two exceptions (as to which, see paragraphs 129, as to paragraph 3 of new Schedule 3A, and 162, as to paragraph 9 of Schedule 3, below).
127. The substantive provisions of the new Schedule 3A apply where the Court Martial convicts a person of a “relevant offence” (or, in the case of paragraph 13 only, where the court acquits a person of, or makes certain other findings in relation to, an offence which would be a relevant offence if the person were convicted of it). [Paragraph 1](#) defines a relevant offence as one that falls within any of cases A to D.
128. Under [paragraph 2](#), an accused is convicted of a case A offence if he or she elects Court Martial trial of a charge and is convicted on that charge.
129. Under [paragraph 3](#), an accused is convicted of a case B offence if he or she elects Court Martial trial of one charge, the Director of Service Prosecutions substitutes another, and the accused is convicted on the substituted charge. But this is so only if the substitution is one which, under the new section 130A inserted by paragraph 9 of Schedule 3 to the Act (see paragraph 162 below), does not require the accused’s consent. Under the current rules an offence is relevant if the charge in respect of it was brought in addition to the charge on which the accused elected (which would always require the accused’s consent) or substituted for that charge (which might or might not require the accused’s consent, depending on the charge substituted). The new rule is based on the assumption that an accused will not be deterred from electing by the risk of the Director’s taking a step which cannot be taken without the accused’s consent.

130. *Paragraph 4* provides for the case where an accused elects on one charge, and the CO then refers a second charge (which would otherwise have been heard separately from the first) to the Director without offering the opportunity to elect on the second charge. For example, the accused elects Court Martial trial on a charge of common assault. There is also an outstanding charge of fighting. The CO decides not to offer the accused the right to elect Court Martial trial in respect of the fighting charge, but instead refers it to the Director together with the assault charge. The accused is convicted on the fighting charge, but not on the assault charge. The conviction on the fighting charge is a conviction of a relevant offence (a case C offence). If this were not so, the accused might be deterred from electing on the assault charge by the possibility that this might prompt the CO to refer the fighting charge, and that the Court Martial might then award a more severe punishment on the fighting charge than the CO could have awarded.
131. Case D is to case C as case B is to case A. Under *paragraph 5*, an offence is a case D offence if the charge of the offence is substituted (without the accused's consent) for a charge of an offence which, if the accused were convicted of it, would be a case C offence. In the example at paragraph 130 above, if the Director substituted for the fighting charge a charge of conduct prejudicial to discipline, and the accused were convicted of that offence, it would be a case D offence.
132. *Paragraph 6* restricts the Court Martial's sentencing powers in respect of a single case A or B offence. The court may not award any punishment which the CO could not have awarded if the charge on which the accused elected had been heard summarily. *Paragraph 16* makes it clear that for this purpose it is irrelevant that the CO may have been promoted since the time of the election - even if, had the accused not elected, the higher rank would have meant that the CO had extended powers of punishment - and that, had the accused not elected, the CO might have *applied* for such powers. In other words it is to be assumed that the CO would not have had extended powers, unless such powers had already been granted when the accused elected (or the CO had them automatically, by virtue of holding at least 2-star rank).
133. Similarly, *paragraph 7* prohibits the court from punishing a case C or D offence more severely than the CO could have punished the offence alleged in the charge that was referred to the Director without the accused's being offered the opportunity to elect on it. In the examples at paragraphs 130 and 131 above, this would be the fighting charge.
134. *Paragraphs 8 to 10* provide for the case where the Court Martial convicts an accused of two or more relevant offences which, had the accused not elected (or, in relation to offences within case C or D or both, had the CO not referred the charge without offering the right to elect), would have been heard summarily together. Paragraphs 6 and 7 do not apply in this case. Because the CO would have awarded a single punishment (or combination of punishments) in respect of both or all the offences proved, paragraph 9 requires the Court Martial similarly to pass a single sentence for both or all of the relevant offences. This is an exception to section 255 of AFA 2006, which would otherwise the court to pass a separate sentence for each offence. Under paragraph 9(3) and (4), the punishments awarded by the single sentence must be punishments which the CO could have awarded had the accused not elected (or, in relation to offences within case C or D or both, had the CO not referred the charge without offering the right to elect).
135. *Paragraph 10* modifies several sections of AFA 2006 which differentiate between the principles applicable to the passing of individual sentences by the Court Martial and those applicable to the award of "global" punishments by a CO, so that, where paragraph 9 requires the Court Martial to pass a global sentence, it is the principles relevant to global punishments awarded by a CO that apply. *Paragraph 15* similarly modifies certain sections of the Court Martial Appeals Act 1968 so that, where the Court Martial Appeal Court substitutes a different sentence for that passed by the Court Martial, the substituted sentence is also a global sentence.

*These notes refer to the Armed Forces Act 2011 (c.18)  
which received Royal Assent on 3 November 2011*

136. *Paragraphs 11, 13 and 14* disapply some provisions of AFA 2006 which would otherwise apply in relation to an offender convicted of a relevant offence (or, in the case of paragraph 13, where the court makes certain other findings instead of convicting the accused of a relevant offence), which are potentially disadvantageous to such a person, and which would not apply if the charge had been heard summarily.
137. *Paragraph 12* makes provision in relation to the Court Martial's power to activate a suspended sentence of service detention passed by a CO or the Summary Appeal Court. Section 194(1) prohibits a CO from activating such a sentence for more than 28 days, unless the CO has extended powers. Where the Court Martial activates such a sentence by virtue of having convicted the offender of a relevant offence, paragraph 12(2) accordingly prohibits the activation of the sentence for more than 28 days unless the CO would have had extended powers for the purpose of section 194. Paragraph 12(3) similarly prevents the Court Martial from making the activated sentence consecutive to another sentence in such a way that the aggregate of the terms is longer than that which would have been permitted by section 194(2) if the CO had heard the charge.
138. *Paragraph 17* ensures that, where the Director replaces one charge with another and then substitutes a third charge for the second, for the purposes of references in the Schedule to substituted charges the third charge is treated as having been substituted for the first; and so on.