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STATUTORY INSTRUMENTS

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**2009 No. 990**

**DEFENCE**

**The Criminal Justice and Public Order Act 1994  
(Application to the Armed Forces) Order 2009**

<i>Made</i>	- - - -	<i>14th April 2009</i>
<i>Laid before Parliament</i>		<i>20th April 2009</i>
<i>Coming into force</i>	- -	<i>31st October 2009</i>

The Secretary of State, in exercise of the powers conferred by section 39(1) of the Criminal Justice and Public Order Act 1994 (1), makes the following Order:

**Citation, commencement and interpretation**

1.—(1) This Order may be cited as the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009, and shall come into force on 31st October 2009.

(2) In this Order—

“the Act” means the Criminal Justice and Public Order Act 1994;

“the 1997 Order” means the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces ) Order 1997(2); and

“the 2006 Order” means the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2006 (3).

(3) For the purposes of this Order any reference to a person being charged with an offence in the provisions of the Act specified in column 1 of Schedule 1 has the same meaning as in Part 5 of the Armed Forces Act 2006(4).

**Application of the Act**

2.—(1) The provisions of the Act which are specified in column 1 of Schedule 1 shall apply to the proceedings to which this Order applies, subject to the modifications specified in column 2 of that Schedule.

(2) This Order applies to proceedings before the—

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(1) 1994 c. 33. Section 39 of the Act is amended by paragraph 130 of Schedule 16 to the Armed Forces Act 2006.  
(2) S.I. 1997/16, as amended by the 2006 Order.  
(3) S.I. 2006/2326  
(4) 2006 c. 52

- (a) Service Civilian Court;
- (b) Summary Appeal Court;
- (c) Court Martial; and
- (d) Court Martial Appeal Court.

(3) Schedule 2 sets out sections 34 to 38 of the Act as modified by the provisions of this Order, as they apply to the proceedings specified at paragraph (2).

### **Revocation**

3. The 1997 Order and the 2006 Order are revoked.

### **Transitional and transitory provisions**

4.—(1) In relation to any time before commencement references in the Act as applied by this Order to an accused's being charged with a service offence are to be read as references to an allegation of an offence being reported to the accused's commanding officer in the form of a charge under section 76(1) of the Army Act 1955<sup>(5)</sup>, section 76(1) of the Air Force Act 1955<sup>(6)</sup> or section 52B(1) of the Naval Discipline Act 1957<sup>(7)</sup>.

(2) In this article "commencement" means the date on which this Order comes into force.

5. Until paragraph 5 of Schedule 11 to the Constitutional Reform Act 2005<sup>(8)</sup> comes into force the modification to section 38(1) of the Act in column 2 of Schedule 1 that refers to the Court of Judicature of Northern Ireland is to be read as a reference to the Supreme Court of Northern Ireland.

14th April 2009

*Kevan Jones*  
Parliamentary Under Secretary of State  
Ministry of Defence

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(5) 1955 c. 18  
(6) 1955 c. 19  
(7) 1957 c. 53  
(8) 2005 c. 4

SCHEDULE 1

Article 2(1)

APPLICATION AND MODIFICATION OF THE ACT

<i>Column 1</i>	<i>Column 2</i>
<i>Provisions applied</i>	<i>Modifications</i>
<p>In section 34— subsubsection (1)</p>	<p>(i) for the words “an offence” substitute the words “a service offence”;                      (ii) in paragraph (a) for the word “constable” substitute the words “service policeman”;                      (iii) in paragraph (a) before the word “offence” wherever it occurs insert the word “service”;                      (iv) for paragraph (b) substitute the following—                          “(b) on being informed by a service policeman that the case would be referred either to the Director of Service Prosecutions or to the person’s commanding officer under section 116(2) or (3) of the Armed Forces Act 2006 (as the case may be), failed to mention any such fact”;                      (v) for the words “questioned, charged or informed” substitute “questioned or informed”;</p>
<p>subsubsection (2), except paragraphs (a) and (b)</p>	<p>in paragraph (d) omit the words “or jury”, and before the word “offence” insert “service”;</p>
<p>subsubsection (2A)</p>	<p>for the word “solicitor” substitute the words “legal representative”, and for the words “questioned, charged or informed” substitute “questioned or informed”;</p>
<p>subsections (3) and (5)</p>	
<p>subsubsection (6)</p>	<p>for the words in subsubsection (6) substitute the words “This section does not apply in relation to a failure to mention a fact if the failure occurred before the coming into force of the 1997 Order”;</p>
<p>In section 35— subsubsection (1)</p>	<p>after the word “trial” substitute “or appellate proceedings”;                      before the word “offence” insert “service”;</p>

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<i>Column 1</i>	<i>Column 2</i>
<i>Provisions applied</i>	<i>Modifications</i>
subsection (2)	omit the words “(in the case of proceedings on indictment, in the presence of the jury)”; omit the words “or jury”;
subsection (3)	omit the words “or jury”; before the word “offence” insert “service”;
subsections (4),(5)	
In section 36—	
subsection (1)	for the word “constable” wherever it occurs substitute the words “service policeman”;  in paragraph (b) for the words “an offence” substitute “a service offence”;  after paragraph (d) before the word “offence” insert “service”;
subsection (2), except paragraphs (a) and (b)	in paragraph (d) omit the words “or jury” and before the word “offence” insert “service”;
subsection (3)	
subsection (4)	for the word “constable” substitute the words “service policeman”;
subsection (4A)	for the word “solicitor” substitute the words “legal representative”;
subsection (6)	
subsection (7)	for the words in subsection (7) substitute the words “This section does not apply in relation to a failure or refusal which occurred before the coming into force of the 1997 Order”;

<i>Column 1</i>	<i>Column 2</i>
<i>Provisions applied</i>	<i>Modifications</i>
In section 37— subsection (1)	for the word “constable” wherever it occurs substitute the words “service policeman”;  for the words “the offence” wherever they occur substitute the words “the service offence”;
subsection (2), except paragraphs (a) and (b)	in paragraph (d) omit the words “or jury” and before the word “offence” insert “service”;
subsection (3)	for the word “constable” substitute the words “service policeman”;
subsection (3A)	for the word “solicitor” substitute the words “legal representative”;
subsection (5)	
subsection (6)	for the words in subsection (6) substitute the words “This section does not apply in relation to a failure or refusal which occurred before the coming into force of the 1997 Order”;
In section 38— subsection (1)	(i) omit the definition of “legal representative”; and (ii) insert the following definitions in the appropriate places— “appellate proceedings” means any of— (a) the Summary Appeal Court hearing an appeal from a summary hearing; (b) the Court Martial hearing an appeal from the Service Civilian Court; or (c) the Court Martial Appeal Court hearing an appeal from the Court Martial;

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<i>Column 1</i>	<i>Column 2</i>
<i>Provisions applied</i>	<i>Modifications</i>
	<p>“legal representative ” means            (a) a person who has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990<sup>(9)</sup>; (b) an advocate or solicitor in Scotland; (c) a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland; or (d) a person having in any of the Channels Islands, the Isle of Man, a Commonwealth country or a British overseas territory rights and duties similar to those of a barrister or solicitor in England and subject to punishment or disability for a breach of professional rules;            “service policeman” has the same meaning as in section 375(1) of the Armed Forces Act 2006;            “the 1997 Order” means the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997 (S.I. 1997/16).</p>
subsection (2)	for the words “an offence” there shall be substituted “a service offence” and after the word “other” there shall be inserted “service”;
subsection (2A)	after the words “a police station;” omit the word “or” and after paragraph (b) insert the words “(c) any building or part of the building, any structure, or any room (whether on land or on a ship) which is used by a service policeman for the performance of his duties”;
subsection (3)	the omission of the words “have the proceedings against him transferred to the Crown Court for

(9) 1990 c. 41. Subsection (6) of section 71 of the Courts and Legal Services Act 1990 was substituted by the Access to Justice Act 1999 (c. 22), section 32, Schedule 6, paragraphs 4 and 9. Subsections (7) and (8) of section 71 of the 1990 Act were repealed by section 106, Schedule 15, Part 2, of the 1999 Act. Prospective amendments to section 71 of the 1990 Act are made to subsections (1) and (3) by the Constitutional Reform Act 2005 (c. 4), section 59(5). Schedule 11, part 2, paragraph 4(1), (3). Prospective amendments are made to subsections (4) and (6) and a new subsection (6A) is inserted into section 71 of the 1990 Act by the Legal Services Act 2007 (c. 29), section 208(1), Schedule 21, paragraphs 83 and 94(a), (b) and (c).

<i>Column 1</i>	<i>Column 2</i>
<i>Provisions applied</i>	<i>Modifications</i>
subsections (5) and (6)	trial,” and for the words “an offence” there shall be substituted “a service offence”;

SCHEDULE 2

Article 2(3)

“Inferences from accused’s silence

**34. Effect of accused’s failure to mention facts when questioned or charged**

(1) Where, in any proceedings against a person for a service offence, evidence is given that the accused—

- (a) at any time before he was charged with the service offence, on being questioned under caution by a service policeman trying to discover whether or by whom the service offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
- (b) on being informed by a service policeman that the case would be referred either to the Director of Service Prosecutions or to the person’s commanding officer under section 116(2) or (3) of the Armed Forces Act 2006 (as the case may be), failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies—

- (a) ..
- (b) ..
- (c) the court, in determining whether there is a case to answer; and
- (d) the court, in determining whether the accused is guilty of the service offence charged,

may draw such inferences from the failure as appear proper.

(2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a legal representative prior to being questioned or informed as mentioned in subsection (1) above.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) ..

(5) This section does not—

- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

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- (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.
- (6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the coming into force of the 1997 Order.
- (7) ..

**35. Effect of accused’s silence at trial**

- (1) At the trial or appellate proceedings of any person...for a service offence, subsections (2) and (3) below apply unless—
  - (a) the accused’s guilt is not in issue; or
  - (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court in determining whether the accused is guilty of the service offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

- (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
  - (b) the court in the exercise of its general discretion excuses him from answering it.
- (6) ..
  - (7) ..

**36. Effect of accused’s failure or refusal to account for objects, substances or marks**

- (1) Where—
  - (a) a person is arrested by a service policeman, and there is—
    - (i) on his person; or
    - (ii) in or on his clothing or footwear; or
    - (iii) otherwise in his possession; or
    - (iv) in any place in which he is at the time of his arrest, any object, substance or mark, or there is any mark on any such object; and
  - (b) that or another service policeman investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the



person arrested in the commission of a service offence specified by the service policeman;  
and

- (c) the service policeman informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and
- (d) the person fails or refuses to do so,

then if, in any proceedings against the person for the service offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

- (a) ..
- (b) ..
- (c) the court, in determining whether there is a case to answer; and
- (d) the court, in determining whether the accused is guilty of the service offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a mark or substance thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the service policeman when making the request mentioned in subsection (1) (c) above what the effect of this section would be if he failed or refused to comply with the request.

(4A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a legal representative prior to the request being made.

(5) ..

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(7) This section does not apply in relation to a failure or refusal which occurred before the coming into force of the 1997 Order.

(8) ..

### **37. Effect of accused's failure or refusal to account for presence at a particular place**

(1) Where—

- (a) a person arrested by a service policeman was found by him at a place at or about the time the service offence for which he was arrested is alleged to have been committed; and
- (b) that or another service policeman investigating the service offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the service offence; and
- (c) the service policeman informs the person that he so believes, and requests him to account for that presence; and
- (d) the person fails or refuses to do so,

then if, in any proceedings against the person for the service offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

- (a) ..
- (b) ..

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(c) the court, in determining whether there is a case to answer; and  
(d) the court, in determining whether the accused is guilty of the service offence charged,  
may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the service policeman when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(3A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) do not apply if he had not been allowed an opportunity to consult a legal representative prior to the request being made.

(4) ..

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure or refusal which occurred before the coming into force of the 1997 Order.

(7) ..

### **38. Interpretation and savings for sections 34, 35, 36 and 37**

(1) In sections 34, 35, 36 and 37 of this Act—

“appellate proceedings” means any of—

- (a) the Summary Appeal Court hearing an appeal from a summary hearing;
- (b) the Court Martial hearing an appeal from the Service Civilian Court; or
- (c) the Court Martial Appeal Court hearing an appeal from the Court Martial;

“legal representative” means—

- (a) a person who has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990;
- (b) an advocate or solicitor in Scotland;
- (c) a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland; or
- (d) a person having in any of the Channel Islands, the Isle of Man, a Commonwealth country or British overseas territory rights and duties similar to those of a barrister or solicitor in England and subject to punishment or disability for a breach of professional rules;

“place” includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever;

“service policeman” has the same meaning as in section 375(1) of the Armed Forces Act 2006;

“the 1997 Order” means the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997 ([S.I. 1997/16](#)).

(2) In sections 34(2), 35(3), 36(2) and 37(2), references to a service offence charged include references to any other service offence of which the accused could lawfully be convicted on that charge.

(2A) In each of sections 34(2A), 36(4A) and 37(3A) “authorised place of detention” means—

- (a) a police station;
- (b) any other place prescribed for the purposes of that provision by order made by the Secretary of State; or

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(c) any building or part of the building, any structure, or any room (whether on land or on a ship) which is used by a service policeman for the performance of his duties);  
and the power to make an order under this subsection shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) A person shall not have a case to answer or be convicted of a service offence solely on an inference drawn from such failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) ..

(5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise)."

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

The Criminal Justice and Public Order Act 1994 at sections 34 to 37 (with interpretative provisions at section 38), introduced measures which allow a court to draw such inferences as appear proper from the failure or refusal of an accused person to provide information in defined circumstances. The Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997 ("the 1997 Order") and the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2006 ("the 2006 Order"), applied those provisions, with modifications, to proceedings set out in the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 ("the Service Discipline Acts"). The Service Discipline Acts have been repealed and replaced with the Armed Forces Act 2006. This Order revokes the 1997 Order and the 2006 Order and applies, with modifications, sections 34 to 38 of the 1994 Act to the proceedings specified in article 2(2), to reflect changes in terminology and procedure under the 2006 Act.

The relevant provisions of the 1994 Act have the following effect:

Section 34 applies when an accused fails to mention facts when questioned under caution or when he is charged.

Section 35 makes provision for the effect of an accused's silence at trial.

Section 36 applies when an accused is arrested and fails or refuses to account for objects, substances or marks (either on his person or clothing or footwear, or in the place where he is arrested, or otherwise in his possession).

Section 37 applies when an accused is arrested and fails or refuses to account for his presence at a particular place.

Section 38 is an interpretation and savings provision which relates to sections 34 to 37.

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Schedule 2 to this Order, which is for ease of reference and information purposes only, reflects sections 34 to 38 of the 1994 Act as modified by Schedule 1, as they apply to the proceedings specified in article 2(2).