

# Chapter 6

## Investigation, charging & mode of trial

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## Chapter 6

### Investigation, charging and mode of trial

#### Introduction

1. The purpose of this chapter is to provide those responsible for administering discipline with guidance on the investigation of Service offences, the selection, drafting and bringing of a charge and deciding on the appropriate forum for trial.
2. The disciplinary system in the Armed Forces Act 2006 (the Act), creates a two tier procedure, the aim of which is to support the chain of command and retain the role of the Commanding Officer (CO) at the centre of Service discipline. There are two ways in which a Service offence can be dealt with in the first instance; either summarily or by a Service court (the Court Martial (CM) or Service Civilian Court (SCC)). How a charge is dealt with will depend upon the nature of the offence and also whether the accused is a Service person (i.e. a person subject to Service law<sup>1</sup>) or a relevant civilian (i.e. a civilian subject to Service discipline)<sup>2</sup>.
3. Disciplinary action<sup>3</sup> is action taken by the chain of command using statutory powers. It may be taken where criminal or non-criminal conduct offences are alleged and where it is considered to be in the Service interest to proceed with disciplinary action, for the purpose of maintaining Service discipline.
4. In the interest of brevity, the term CO will be used throughout this chapter to include the CO and subordinate commander, unless there is a reason to specify one or the other. In rare instances, there may be a need to make a bespoke appointment of a CO for a particular case, see [Chapter 2](#) (Meaning of a commanding officer). This will need to happen, for example, if the CO is a witness or there is not the necessary two rank separation between the CO and the accused. If a bespoke appointment is made then everyone connected to the case should be made aware of whom the relevant CO is.
5. **The use of the term Service person for this chapter only.** The term Service person is used in this chapter to cover a reference to both:
  - a. A member of the regular forces at all times or reserve forces<sup>4</sup> who falls into the categories described in the glossary and therefore is subject to Service Law; and
  - b. A member of the reserve forces who does not fall into the categories described in the glossary (for example the person is not training or on operations).
6. When considering a reference in this chapter to a Service person, it will be necessary to check the related provisions of the legislation as to whether that reference applies to a member of a regular and reserve force (see paragraph 5a above) or whether it applies to a member of the reserve forces, for example who is not training or on operations, see paragraph 5b above. If in doubt, staff legal advice should be sought. Also see [Chapter 3](#) (Jurisdiction and time limits).

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<sup>1</sup> Section 367, 368 & 369 of the Act.

<sup>2</sup> See [Chapter 3](#) (Jurisdiction and time limits).

<sup>3</sup> Major and minor administrative action may be considered instead of disciplinary action. Minor administrative action is dealt with under JSP 833. You should refer to single-Service guidance for major administrative action.

<sup>4</sup> Section 367 of the Act.

7. **Chapter structure.** This chapter is divided into 7 Parts as follows:
- a. **Part 1 – General principles.** Provides general guidance to all users of this chapter.
  - b. **Part 2 – Offences overview.** Provides an overview of the categories of Service offences to help the CO correctly identify the category of offence and decide on the appropriate method of investigation.
  - c. **Part 3 – Investigation.** Provides guidance on how an investigation should be conducted. This will depend upon whether the investigation is undertaken by the Service Police or a CO.
  - d. **Part 4 - Offences capable of being heard summarily.** Provides guidance in relation to offences that may be heard summarily, which are listed in Annexes [B](#) and [C](#).
  - e. **Part 5 - Offences triable by CM or SCC.** Provides guidance in relation to the procedure which should be followed when a charge is to be tried at CM. This might be because:
    - (1) The offence is not one which can be tried summarily (in other words, it is not an offence listed in Annexes [B](#) and [C](#));
    - (2) The accused is a relevant civilian and so cannot be tried by a CO;
    - (3) The accused elects trial by CM;
    - (4) The CO refers the charge to the DSP; or
    - (5) The accused is of or above the rank of commander, lieutenant-colonel or wing commander.
  - f. **Part 6 - Offences listed in Schedule 2 or committed in prescribed circumstances.** Provides guidance in relation to offences listed in Schedule 2 of the Act (see [Annex D](#)) or committed in prescribed circumstances<sup>5</sup> (see [Annex E](#)).
  - g. **Part 7 - Administrative and welfare responsibilities.** Provides general guidance on administrative and welfare responsibilities for victims and the accused.
8. **Statutory provisions.** The statutory provisions relating to investigation and charging can be found at sections 113 -128 of the Act, which are supplemented by the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. These can be found with the Act in [Volume 3](#) of the MSL.

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<sup>5</sup> Regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

## Part 1 - General principles

### Investigation

9. The purpose of an investigation is to establish the facts and gather all available evidence in order to determine whether and by whom an offence may have been committed. In all circumstances, a CO must investigate the incident appropriately<sup>6</sup> (see paragraph 30). An investigation should be conducted diligently and without undue delay.

10. Where an allegation is made or an incident comes to light, a CO, at the outset, is to consider whether they are under a legal obligation to ensure that the Service Police are made aware of the matter<sup>7</sup>. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that an offence listed in Schedule 2 to the Act ([Annex D](#) and paragraph 23d) has or may have been committed by a person under his command, or that prescribed circumstances exist (see Annex E and paragraph 23e), the CO must ensure that the Service Police are made aware as soon as reasonably practicable.

11. A CO has a duty to ensure that all offences are investigated appropriately. The CO will have to decide what investigation is appropriate. Whether there should be an investigation and (if so) whether it should be by the Service Police or by means of a CO's investigation depends on a number of factors, including (in addition to those mentioned in paragraph 10 above):

- a. The possible seriousness of the matter investigated.
- b. The possible complexity of the facts.
- c. Whether an offence, which may have been committed, may be heard summarily or tried by a Service court<sup>8</sup>.

The CO's responsibility can always be satisfied by ensuring that the Service Police are aware. This list is not exhaustive and paragraph 30 provides more detail.

12. On conclusion of an investigation by the Service Police, a report will be provided. If a charge or charges are recommended they will be contained in a Service Police report. The Service Police report will be sent to the CO and/or the Director of Service Prosecutions (DSP) depending on the offence(s) for which there is evidence to bring a charge. Any case in which there is enough evidence to charge an offence, and that offence is either listed in Schedule 2 to the Act or is one in relation to which prescribed circumstances exist, must be sent directly to the DSP. Other offences will be sent to the CO of the suspect or suspect(s). Service Police reports, other than those where there is enough evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances, should be sent to the CO.

13. On conclusion of a CO's investigation the officer conducting the investigation may suggest a charge. The CO will then decide whether he should bring a charge, involve the Service Police in the case, refer the case to the DSP, deal with the matter administratively or take no action.

### Representation

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<sup>6</sup> Section 115 of the Act.

<sup>7</sup> Section 113 and 114 of the Act.

<sup>8</sup> See paragraph 2.

14. The accused is entitled to the appointment of an accused's assisting officer (AAO) to advise and represent them at a summary hearing. The AAO fulfils an important role and can provide valuable assistance to the accused. They are to perform his duties entirely independently of the CO. The unit is to do everything reasonably possible to facilitate the AAO's functions. The accused may nominate an AAO see Annexes F and G to [Chapter 9](#) (summary hearing and activation of suspended sentences of Service detention). An individual may only be nominated as an AAO if:

- a. They are a Service person<sup>9</sup> and remains as such while carrying out this function.
- b. They are of at least the rank or rate of petty officer or military, marine or air force sergeant.
- c. He consents to the nomination.

## **Service victims' code of practice**

15. The CO, DSP and Service Police need to be aware of, and comply with, the policy requirements contained within the Code of Practice on Services to be provided by the Armed Forces to Victims of Crime (see DIN 200801-212) which is modelled on the equivalent Home Office code. The Services' code is tailored to meet the requirements of the armed forces (for further detail see paragraph 200).

## **Mode of trial**

16. Where a CO has received an investigation report and a charge is likely, the CO should consider the most appropriate forum for the case to be heard. This will either be a summary hearing or CM trial<sup>10</sup>. This forms part of the process of deciding the mode of trial.

17. A number of factors may be relevant in reaching such a decision, but broadly speaking, the CO will usually need to consider:

- a. The adequacy of his powers of punishment;
- b. The seriousness of the alleged offence; and
- c. The complexity of the case.
- d. If it is part of an incident where some other offences have been referred to the DSP

18. If he decides to hear the case summarily, the CO will go on to complete the charging procedure. Once a charge has been brought by the CO, he should bear in mind that he has the power to refer any charge to the DSP at any time before a finding has been recorded at summary hearing. For example, during the course of the hearing, the CO may decide that he has insufficient powers to deal with the charge, or unforeseen legal complexities may arise.

## **Charging**

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<sup>9</sup> Subject to Service law.

<sup>10</sup> For relevant civilians see Part 5 of this chapter.

19. A charge is brought when a charge sheet has been signed by the CO of the accused and a copy of the signed charge sheet handed to the accused. The charge should reflect the seriousness of the conduct alleged and be accurately stated in the charge sheet (see paragraphs 100 and 101).

### **Local acting ranks or rates (RN), local ranks (Army and RAF) and acting ranks or rates**

20. When an offender who holds a local acting or acting rate or rank is to be charged he must be treated as holding the substantive rate or rank as that acting rate or rank which he holds at the time of the summary hearing. Local ranks simply hold the next higher rank but are not paid at that rank. Therefore for disciplinary purposes they will be treated as holding their substantive rank<sup>11</sup>.

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<sup>11</sup> See RN BR 1066, Army QR (1975) paragraph 6.151 and RAF AP 3392 Volume 2.

## Part 2 - Offences overview

21. For the purposes of this chapter, offences are divided into several categories and depending on the category, the investigation and the subsequent actions to be taken may differ. The category of the possible offence affects who will investigate<sup>12</sup> it and also whether it can be dealt with summarily or whether it has to be tried by CM<sup>13</sup> or SCC<sup>14</sup>. Further explanatory notes on individual offences, including sample charges are to be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

22. It is important that a CO considers the possible offence and the category into which it falls at the outset, so that the appropriate investigation can be initiated. The CO must ensure that the Service Police are made aware as soon as reasonably practicable of a potential Schedule 2 offence and of the existence of prescribed circumstances. In other cases, the CO may choose to initiate an investigation into the matter or refer it to the Service Police. Where a CO's investigation has been initiated, if new evidence comes to light that indicates a more serious offence may be involved than first thought, the CO should reconsider whether to make the Service Police aware. When he does so, the Service Police have control of the case until the investigation is completed.

23. **Categories of offences.** The following categories will affect the decision on charge and the mode of trial:

a. **Offences that can be heard summarily<sup>15</sup>.** Offences that may always be heard summarily by the CO are listed at [Annex B](#). There are a small number of more serious offences which can be heard summarily by a CO, if he has permission from HA. These offences are listed at [Annex C](#) (see Part 4).

b. **Offences (other than those at sub-paragraphs d and e) that cannot be heard summarily.** Any offence can be tried by CM<sup>16</sup>. Offences that cannot be heard summarily must be tried at CM. There are criminal conduct offences which cannot be heard summarily but which do not fall within the list contained in Schedule 2 of the Act ([Annex D](#)) or offences committed in prescribed circumstances ([Annex E](#)), for example; burglary or section 20 wounding (see Part 5).

c. **Offences committed by relevant civilians.** Offences committed by a relevant civilian can only be tried by the SCC or, if an 'indictable-only' offence<sup>17</sup>, by CM. The procedure for dealing with a relevant civilian is the same as for a CM only offence (see (b) above and Part 5).

d. **Schedule 2 offences.** These offences are inherently serious disciplinary offences and are listed at [Annex D](#) and can only be tried by CM (see Part 6); for example, mutiny and desertion, and serious criminal offences, such as murder, manslaughter and certain sexual offences.

e. **Offences committed in prescribed circumstances.** The prescribed circumstances in which offences may be committed are detailed in [Annex E](#). Broadly

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<sup>12</sup> Schedule 2 offences and offences which fall within prescribed circumstances must be referred to the Service Police.

<sup>13</sup> The CM has jurisdiction to try any Service offence see section 50(1) of the Act.

<sup>14</sup> The SCC has jurisdiction to try any service offence committed outside the British Islands by a civilian unless it is an indictable only offence which can only be dealt with by CM. See section 51 of the Act and [Chapter 3](#) (Jurisdiction and time limits).

<sup>15</sup> Where it is alleged that the accused attempted to commit an offence listed in Annex B, the CO may hear the case summarily, provided it is not an attempt to commit a criminal conduct matter. Any attempt to commit an offence listed in Annex C may be dealt with summarily with permission.

<sup>16</sup> Section 50(1) of the Act.

<sup>17</sup> Within the special meaning under section 51(4) of the Act.

speaking this includes death in custody, bullying or abuse of position. The individual incidents may themselves only amount to an offence capable of ordinarily being heard summarily, but the circumstances in which it was committed mean that the case must be referred to the DSP for a decision on the charge and the mode of trial (see Part 6).

## Part 3 – Investigation

### Introduction

24. The starting point of any investigation is the point at which an allegation or incident comes to light. Preliminary enquiries will assist the CO in considering whether an offence may have been committed which may warrant disciplinary action, whether the Service Police should be informed or whether the matter would be more suitably dealt with by his own investigation. In less serious cases, the CO may decide that administrative action is appropriate or that the matter requires no action.

25. The CO is under a legal duty to ensure that the Service Police, as soon as is reasonably practicable, are aware of an offence or a suspected offence under Schedule 2 or of the existence<sup>18</sup> of prescribed circumstances<sup>19</sup>. In all other cases, the CO is under a duty to ensure that the matter is investigated appropriately<sup>20</sup>, whether by the Service Police, by a CO's investigation or by a referral to the civil authorities. The latter will depend upon the issue of jurisdiction see [Chapter 3](#) (Jurisdiction and time limits). In relation to relevant civilians it is recommended that the Service Police conduct the investigation.

26. If the CO has to or wishes to contact the Service Police, a person may be authorised to contact the Service Police on his behalf for this purpose, but responsibility for ensuring that the Service Police are made aware remains with the CO<sup>21</sup>. It is then a matter for the Service Police as to whether they investigate the allegation or circumstances and what form the investigation should take.

27. Once the Service Police, civilian police or MOD police are investigating any allegation or incident, the CO has no power to dispose<sup>22</sup> of the case. This will include those circumstances where the Service Police are investigating because the CO chose to refer the case to the Service Police or because they were under a duty to ensure that they were aware of it. In such cases, a CO cannot require the Service Police to stop or suspend the investigation and he cannot at this stage bring a charge or refer the case to the DSP.

### Jurisdiction

28. Within the United Kingdom jurisdiction in respect of offences committed by Service persons may lie with the Service authorities under the Act or with both the Service authorities and the civilian authorities under the ordinary law of the relevant part of the United Kingdom. In the second case, there are a number of established procedures that apply<sup>23</sup>. In cases where such issues arise, COs should liaise with the Service Police and seek staff legal advice.

29. **Concurrent jurisdiction.** In many cases there may be concurrent jurisdiction; this means that cases could be investigated or prosecuted by Service, UK civilian or foreign authorities. Decisions on who exercises jurisdiction will have to take into account the principles contained in relevant protocols, in Status of Forces Agreements (SOFA) or in memoranda of understanding (MOU). Decisions involving foreign authorities will require prior consultation with the appropriate Service authorities<sup>24</sup>. The Service Police will need to

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<sup>18</sup> Which does not all depend on whether it is likely that an offence has been committed

<sup>19</sup> Sections 113 and 114 of the Act.

<sup>20</sup> Section 115(4) of the Act.

<sup>21</sup> A CO is able to delegate any of his functions under Part 5 of the Act to a subordinate commander see regulation 16 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

<sup>22</sup> See paragraph 76 for the meaning of dispose.

<sup>23</sup> Copies of the extant protocols can be obtained from DDefSy-Def Policing at MOD.

<sup>24</sup> HA should be consulted and the Director of Service Prosecutions (DSP) for more serious cases.

consider jurisdiction before an allegation or offence can be investigated. In some cases they may (if the necessary requirements are met) exercise some of their powers, such as the power of arrest, before jurisdiction is confirmed. For information on arrest see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) and for detailed guidance on jurisdiction see [Chapter 3](#) (Jurisdiction and time limits).

## Deciding who should investigate

30. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that a Schedule 2 offence may have been committed by someone whose CO they are, or if he becomes aware of any of the prescribed circumstances referred to in [Annex E](#), he must ensure that the Service Police are made aware as soon as is reasonably practicable. Once the Service Police have been notified in these circumstances, the CO may take no further disciplinary action<sup>25</sup> in relation to the allegation or circumstances unless it is referred back to them by the Service Police or the DSP. In all other cases, the CO may conduct his own investigation, see paragraph 32 below, or ensure that the Service Police are made aware of the matter as soon as is reasonably practicable<sup>26</sup> so that they can investigate, see paragraph 40 below. In relation to those other cases, when reaching his decision as to what would be an appropriate investigation, the CO should take into account a number of factors including:

- a. The apparent seriousness of the matter investigated; for example, whether a criminal conduct offence may be appropriate see [Chapter 8](#) (Criminal conduct offences). If so, consideration should be given to referring the matter to the Service Police for investigation, as soon as reasonably practicable;
- b. The complexity of the alleged conduct; for example, whether it is a simple and straight-forward case, as is likely in cases of AWOL or conduct to the prejudice of good order and discipline. If so, the CO may wish to direct the investigation. If, however, identification is an issue, the investigation is likely to involve a search for evidence, or the investigation may require a multi-agency approach such as is necessary in cases involving children, the SP should investigate if at all possible;
- c. Whether it is likely that any offence which may be charged can be tried only by CM/SCC; for example, where the suspect is a relevant civilian, or it involves an allegation of burglary (section 9 of the Theft Act 1968) or an offence contrary to the Air Navigation Order (section 49 of the Act), which are triable at CM only. As the rules of evidence apply in any Service court, the Service Police should investigate the matter; and
- d. The complexity of investigating two or more incidents or the alleged conduct of two or more suspects, each person's conduct in relation to each incident is to be regarded as giving rise to a separate case<sup>27</sup>.

31. It may be necessary, in exceptional circumstances, to conduct initial investigations in those cases where normally the Service Police should carry out the investigation. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and investigate, for example, an SSBN on patrol. If this situation arises, the CO should be aware that he has departed from the normal procedure

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<sup>25</sup> He may however feel it appropriate to take some form of administrative action or posting if appropriate. If he does so he should be careful to ensure that he does not prejudice any disciplinary action in relation to that offence. In doubt advice should be sought.

<sup>26</sup> Section 115(4) of the Act.

<sup>27</sup> Section 117(2) of the Act.

and should bring the Service Police into the investigation as soon as is reasonably practicable.

## CO's investigation

32. A CO may direct anyone under his command to investigate a matter on his behalf, subject to the limits at [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention) on powers of investigation which apply in the absence of the Service Police. There will be occasions when it would be essential or at least preferable for the matter to be investigated by those who have specific training; however, there may be occasions when it may be sufficient to rely on other trained personnel, especially RN coxswains. Guidance on the conduct of a CO's investigation is contained at [Annex F](#). If the investigation reveals a potential Schedule 2 offence or the existence of prescribed circumstances then the CO must ensure that the Service Police are made aware. If the suspected offence is triable only at CM or SCC then subject to operational constraints, consideration should be given to referring the investigation to the Service Police. They should take over the investigation as soon as is reasonably practicable.

33. **Rights of the suspect.** These are outlined in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to a suspect's attention as soon as reasonably practicable at the commencement of the investigation, to ensure that they are aware of his rights.

34. **Dealing with evidence.** If evidence comes to light that suggests that an offence under Schedule 2 may be involved or that prescribed circumstances exist, the Service Police must be notified as soon as is reasonably practicable. Once the Service Police have been notified in these circumstances, the CO may take no further disciplinary action<sup>28</sup> in relation to the allegation unless it is referred back to them by the Service Police or the DSP (see paragraph 87). A CO may authorise any other person to notify the Service Police where an investigation is required<sup>29</sup>. If during the course of a CO's investigation the Service Police inform the CO that they are investigating the matter, the CO has no further power to investigate the matter or take any further action, unless and until the case is referred to them<sup>30</sup>.

35. **Advice during investigation.** Personnel conducting CO's investigations may consult the Service Police and may seek advice from the relevant staff legal adviser or HA staffs. RN coxswains should, however, seek advice from the relevant Naval Provost Marshal in the first instance.

36. **Findings of a CO's investigation.** The findings of the investigation are to be provided to the CO and should normally contain:

- a. All witness statements;
- b. All other records of evidence;
- c. A list of all exhibits and details as to where these exhibits are held and can be inspected;

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<sup>28</sup> He may however feel it appropriate to take some form of administrative action or posting if appropriate. If he does so he should be careful to ensure that he does not prejudice any disciplinary action in relation to that offence. If in doubt advice should be sought.

<sup>29</sup> Section 113 of the Act.

<sup>30</sup> Section 119 of the Act.

- d. All documentary exhibits;
- e. The suspect's disciplinary records; and
- f. A suggested charge<sup>31</sup>, if appropriate.

37. **Action by CO after CO's investigation.** Where the findings of an investigation indicate that an identified person in his command may have committed a Service offence, the CO will decide whether to charge, refer the case to the DSP, or to make the Service Police aware:

- a. If the CO proposes to bring a charge and it is capable of being dealt with summarily, and c. below does not apply the CO should follow the procedure at Part 4 (Offences capable of being heard summarily) of this chapter;
- b. If the CO considers that an appropriate charge may be one that is triable only at CM/SCC and c. below does not apply, the CO should follow the procedure at Part 5 (Offences triable by CM or SCC) of this chapter; or
- c. If the result of the investigation is that the CO has a duty in respect of a Schedule 2 offence or prescribed circumstances, the CO must inform the Service Police and then follow the procedure at Part 6 (Offences listed in Schedule 2 or committed in prescribed circumstance) of this chapter.

38. Where the result of the investigation is that there is insufficient evidence or no evidence to charge a Service offence and the CO does not propose to involve the Service Police, the CO should notify the former suspect of the outcome of the investigation. When doing so, the CO should, if appropriate, take care not to preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Having taken appropriate advice, the CO may wish to consider administrative action.

39. Whether disciplinary action is to be taken or not, the Victims Code should be complied with, as appropriate (see paragraph 200).

## **Investigation by Service Police**

40. When conducting an investigation the Service Police act independently of the chain of command. At the conclusion of the investigation, the Service Police report to the DSP or a CO. The Service Police may consult the DSP on any case and they should consult with the DSP when investigating possible Schedule 2 offences and offences committed in prescribed circumstances.

41. An investigation by the Service Police can be initiated:
- a. Having independently received a complaint or information;
  - b. On receiving information from a CO;
  - c. Having been notified by a CO of under his duties relating to a Schedule 2 offence or the existence of prescribed circumstances;
  - d. Having witnessed an offence being committed;

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<sup>31</sup> This is not binding on the CO. The CO makes the final decision on what summary charge, if any, should be brought.

e. On receipt of any report made by the civil police. Such reports should be forwarded to the Service Police, who will prepare a Service Police report.

42. **Conduct of the investigation.** Investigations by the Service Police must comply with the relevant provisions of the Act, subordinate legislation under the Act and other applicable legislation (such as the Police and Criminal Evidence Act 1984 (Application to the Armed Forces) Order 2009). In addition, the Service Police should also comply with the JSP 397 (Codes of Practice for the Service Police), governing, among other things, the manner in which investigations are conducted. The codes deal with the exercise by the Service Police of their powers to stop and search, to arrest and to search premises and with the treatment, questioning, and identification of suspects and the recording of interviews. Detailed guidance on arrest, stop and search is contained in [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention).

43. **Advice during investigation.** Whether the relevant advice should be sought from the DSP or the staff legal adviser depends on the subject matter of the advice. On matters which may be referred to the DSP by the Service Police, they should normally obtain legal advice from the DSP.

44. **Rights of accused.** The rights of a person arrested or charged with an offence are outlined in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to the attention of a person arrested or charged as soon as reasonably practicable. If a person is being held in custody<sup>32</sup>, or is to be interviewed under caution, free legal advice<sup>33</sup> may be available under the legal advice scheme or from Service lawyers (see JSP 838 Armed Forces Legal Aid Scheme).

45. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of questions put to them or of his replies, an appropriate adult should be present during questioning. This may be:

- a. A relative, guardian or other person responsible for his care or custody;
- b. Someone who has experience of dealing with mentally disordered or mentally incapable persons (such as an approved social worker as defined by the Mental Health Act 1983 or a specialist social worker), but is not a Service policeman or employed by the Service Police; or
- c. Failing either of the above, some other responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

46. **Suspect 16 years old or of a lower age.** Where a suspect is less than 17 years old or appears to be under the age of 17), they are to be treated as a juvenile for the purposes of investigation. An appropriate adult should be notified of the investigation and accompany the juvenile when being questioned or interviewed. Appropriate adult<sup>34</sup>, in the case of a juvenile means:

- a. A parent or guardian (or, if they are in care, the care authority or voluntary organisation);

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<sup>32</sup> See [Chapter 5](#) (Custody).

<sup>33</sup> The suspect is handed MOD form 811A entitled 'Notice to suspect', which sets out his right to legal advice and how it is obtained. Further guidance is also contained in JSP 838 (Armed Forces Legal Aid Scheme).

<sup>34</sup> The meaning is taken from the JSP 397 (Service Police Codes of Practice).

- b. A social worker; or
- c. Failing either of the above, another responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

47. A person, including a parent or guardian, is not an appropriate adult if they are suspected of involvement in the offence in question, if they are the victim or a witness, if they are involved in the investigation or if they are a person to whom the suspect has admitted the offence prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.

48. **Multiple suspects/incidents.** When investigating two or more incidents or the alleged conduct of two or more suspects, each person's conduct in relation to each incident is to be regarded as giving rise to a separate case<sup>35</sup>. Where there are two related cases against an accused where one requires referral to the DSP and the other is referred to the CO, the CO should refer the lesser case to the DSP as well.

49. **Evidence given at a Service Inquiry.** For guidance on evidence given, see [Chapter 11](#) (Summary hearing – dealing with evidence).

50. **Criminal Procedure and Investigations Act 1996 and disclosure.** Provision equivalent (subject to modifications) to Parts 1 and 2 of the Criminal Procedure and Investigations Act 1996 (CPIA) is applied to the armed forces<sup>36</sup>. Part 1 applies after charge to all cases dealt with by the CM, the SCC or the SAC, and Part 2 applies to all Service Police investigations. The CPIA (Codes of Practice) (Armed Forces) place a duty on the Service Police to record and retain relevant material recovered during the course of an investigation. The evidence gathered during the investigation is to be held by the Service Police. Further guidance on CPIA 96 is contained in JSP 890 (Service Codes of Practice for Disclosure).

51. **Sufficient evidence to charge an offence.** On completion of an investigation, the Service Police must consider whether there is sufficient evidence to charge a person with an offence. The evidential test to be applied by the Service Police is as follows:

‘There is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted<sup>37</sup>.’

52. If there is sufficient evidence to charge an offence but it is not listed in Schedule 2 and the Service Police are not aware of prescribed circumstances in relation to the offence, the Service Police must refer the case to the CO and must<sup>38</sup> state the service offence(s) they consider there is sufficient evidence to charge. (Where the matter investigated had given rise to a duty on the CO in relation to Schedule 2 offences or prescribed circumstances, the Service Police must consult the DSP before referring the case to the CO<sup>39</sup>.)

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<sup>35</sup> Section 117(2) of the Act.

<sup>36</sup> The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009 and the Criminal Procedure and Investigations Act 1996 (Code of Practice)(Armed Forces) Order 2009.

<sup>37</sup> Section 116(5) of the Act.

<sup>38</sup> See regulation 7(2)(a) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>39</sup> In other words the Service Police investigation has not found evidence of either a Schedule 2 offence or an offence committed in prescribed circumstances.

53. If there is sufficient evidence to charge an offence listed in Schedule 2 or, an offence committed in prescribed circumstances, the Service Police must refer the results of the investigation to the DSP, recommend a charge and inform the CO.

54. The following is a summary<sup>40</sup> of the prescribed circumstances which require the Service Police to refer a case to the DSP:

a. the evidence of a Service offence is that a Service person has been the victim of:

(1) A course of conduct by a Service person, involving on at least two occasions an assault; or

(2) A Service offence corresponding to an offence under section 4 of the Protection from Harassment Act 1997<sup>41</sup>.

b. The evidence of a Service offence is that a Service person has been the victim of an assault causing serious injury<sup>42</sup>, inflicted by a Service person of superior rank or rate while the assailant was otherwise carrying out his duties.

c. The evidence of a Service offence is that a person:

(1) Inflicted (or participated in inflicting) serious injury on a relevant person<sup>43</sup> in a relevant place<sup>44</sup>;

(2) Was under a duty to safeguard a relevant person in a relevant place and failed to prevent an assault inflicting serious injury on that person; or

(3) Failed to prevent the death being caused of any person whom they were under a duty to safeguard while that person was in a relevant place.

d. The evidence of a Service offence is evidence that the death of a person was caused (directly or indirectly), or contributed to, by the misconduct of a Service person or a relevant civilian and the misconduct occurred while the deceased was in a relevant place<sup>45</sup> in Service custody.

In the above circumstances, the Service Police must refer<sup>46</sup> the case to the DSP.

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<sup>40</sup> These prescribed circumstances are set out in full in regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>41</sup> A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions (s.4 Protection from Harassment Act 1997). Legal advice should be sought whenever it is believed that this offence might apply.

<sup>42</sup> 'Serious injury' is defined in regulation 2(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. Serious injury means 'a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of a bodily function'.

<sup>43</sup> See regulation 6(1) Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009: 'relevant person' means – (a) a person who is not a member of the regular or reserve forces; or (b) a person who is a member of the regular or reserve forces and (i) is under 18 yrs old (ii) has enlisted in the regular or reserve forces and has not completed Phase 1 and Phase 2 Training, (iii) is an officer or officer cadet and has not completed Phase 1 Training, or (iv) is in service custody within the meaning of the Act.

<sup>44</sup> See regulation 6(2) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009: 'relevant place' means – (a) any premises or other place which at the time of the death or serious injury was in use for the purposes of Her Majesty's forces, and (b) any vehicle, aircraft or vessel which at the time of the death or serious injury was in use for the purposes of Her Majesty's forces.

<sup>45</sup> A 'relevant place' means any premises or other place which at the time of the suspected misconduct was permanently or temporarily occupied by Her Majesty's forces, or any vehicle, aircraft or vessel used for the purposes of Her Majesty's forces. See regulation 6(3) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>46</sup> Section 116(2)(b) of the Act.

55. **Referral of a case by Service Police.** When referring a matter either to the CO or the DSP, the Service Police must provide a written statement<sup>47</sup> or an oral statement, specifying the Service offence which the Service Police consider there is sufficient evidence to charge and why the Service Police consider that there is sufficient evidence to charge an offence. While the regulations are permissive as to making oral statements when referring the matter, reports should be in writing except in the most exceptional circumstances.

56. **Case papers.** If there is sufficient evidence to charge a person the Service Police must compile the case papers<sup>48</sup>, which consist of:

- a. All reports prepared by the Service Police (which will usually contain a written recommended charge for the CO to consider);
- b. All witness statements;
- c. All other records of evidence, including a summary or transcript of all tape-recorded interviews;
- d. A list of all exhibits and a statement of where any that are not documentary exhibits are held;
- e. All documentary exhibits;
- f. All formal disciplinary records of the suspect; or
- g. In the case of relevant civilians if no formal disciplinary record of the suspect is maintained and held by any of Her Majesty's forces, a list of his convictions (if any) for a Service offence or an offence under any of the Service Discipline Acts and of his convictions (if any) by a civilian court;
- h. All documents to be provided to a person involved in the prosecution of Service offences<sup>49</sup>; and
- i. All equivalent papers prepared by a UK police force or an overseas police force and provided by that force to a Service Police force.

57. The case papers are to be provided to the CO or the DSP, as appropriate. If the case papers<sup>50</sup> cannot be provided to the CO or the DSP (as appropriate) at the time of referral, the Service Police must provide them as soon as reasonably practicable after referring the case. If the referral is direct to the DSP, the CO must<sup>51</sup> be notified of the referral and provided with a copy of the Service Police report<sup>52</sup>.

58. Once the case has been referred to the CO or the DSP as applicable, if the recommended charge is:

- a. Capable of being dealt with summarily, the procedure at Part 4 is to be followed;

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<sup>47</sup> Regulation 7 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>48</sup> Regulation 2(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>49</sup> In accordance with a code of practice made under section 78(2)(b) of the Criminal Procedure and Investigations Act 1996.

<sup>50</sup> Regulation 7 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>51</sup> Section 118 (2) of the Act

<sup>52</sup> Regulation 8(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

- b. Triable only at CM/SCC, the procedure at Part 5 is to be followed; or
- c. For an offence under Schedule 2 or an offence committed in prescribed circumstances, the procedure at Part 6 is to be followed.

59. **Situations in which the Service Police should not refer a case to the DSP following an investigation.** It is important to note that the Service Police cannot refer all of the matters they have investigated to the DSP. Where the Service Police consider there is sufficient evidence to charge a person with a Service offence but it is not a Schedule 2 offence or an offence which has been committed in prescribed circumstances they must refer the case to the CO of the person whom it is believed has committed a Service offence.

60. If the Service Police have carried out an investigation and:

- a. The allegation or circumstances which were the subject of the investigation gave rise to a duty to ensure that the Service Police were aware (because of a possible Schedule 2 offence or prescribed circumstances); and
- b. The Service Police propose not to refer the case to the DSP,

the Service Police must consult the DSP as soon as reasonably practicable and before referring the case to a person's CO<sup>53</sup>. This is to ensure that the DSP is satisfied that there is insufficient evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances. In deciding whether there is sufficient evidence to charge a Schedule 2 offence or an offence committed in prescribed circumstances, the Service Police should give weight to the DSP's view. In some cases the DSP will need to consider a report from the Service Police and any evidence which has been gathered before giving its view. In such cases the Service Police should provide a report and any other documents and information requested by the DSP.

61. **Insufficient evidence to charge any Service offence.** If there is insufficient evidence to charge any Service offence, the Service Police should provide the CO with a written summary of the investigation and the reason why they consider that there is insufficient evidence to charge. When notifying the former suspect of the outcome of the investigation, the CO should take care not to preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Having taken appropriate advice the CO may wish to consider administrative action. The Victim's Code should be complied with, if appropriate (see paragraph 200).

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<sup>53</sup> See Section 116(4) of the Act.

## Part 4 - Offences capable of being heard summarily

### Jurisdiction to hear charges

62. Before taking any action to bring a charge the CO must first be satisfied he has jurisdiction to bring a charge in accordance with [Chapter 2](#) (Meaning of a commanding officer) and [Chapter 3](#) (Jurisdiction and time limits)

63. The offences that may be dealt with summarily by a CO are set out in [Annex B](#)<sup>54</sup>. Offences that may be heard summarily only with permission of HA or by a CO if they are of or above the rank of rear admiral, major-general or air vice-marshal<sup>55</sup> are listed at [Annex C](#). Further details and specimen charges for these offences are contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

64. A flow chart of the procedure to be followed is at [Annex A](#).

### Legal advice

65. Where a CO is considering whether to hear a criminal conduct offence<sup>56</sup> summarily, he should be aware that staff legal advice will be necessary in all but the simplest and most straightforward cases. Offences, the complexity of which necessitate that staff legal advice should be sought before proceeding summarily, are:

- a. All those offences listed at [Annex C](#);
- b. Low flying (section 34 of the Act);
- c. Annoyance by flying (section 35 of the Act); and
- d. Possession of a controlled drug (contrary to section 5(2) of the Misuse of Drugs Act 1971).

### Delegation of a CO's powers

66. A CO, see [Chapter 2](#) (Meaning of commanding officer), may delegate to a subordinate commander not below the rank of naval lieutenant, military or marine captain or flight lieutenant<sup>57</sup> any or all of his functions<sup>58</sup> listed below, subject to such conditions as he considers appropriate<sup>59</sup>:

- a. The referral of a case<sup>60</sup> to the DSP;
- b. Bringing a charge (including bringing a charge as a result of a direction from the DSP);
- c. Amending or substituting a charge, or bringing an additional charge;
- d. The referral of a charge<sup>61</sup> to the DSP; and

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

<sup>55</sup> Section 54 and Schedule 1 Part 2 of the Act.

<sup>56</sup> Section 42 of the Act.

<sup>57</sup> This applies to acting and substantive rank only.

<sup>58</sup> See Part 5 of the Act and regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>59</sup> See regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>60</sup> Cases are referred where an allegation has been made but no suspect has been charged.

<sup>61</sup> Charges are referred where a suspect has been charged.

- e. Discontinuing proceedings on a charge.

67. **Notifying the Service Police.** Although the functions of the CO that can be delegated include ensuring that the Service Police are aware of a matter where an offence under Schedule 2 may have been committed or where there are prescribed circumstances, as a matter of policy, it is a function that should not be delegated. This does not mean that the CO cannot instruct someone else to notify on his behalf, however, the obligation to ensure the Service Police are aware remains with the CO. When the notification is given by someone other than the CO, the authority under which this has taken place is to be recorded, for example as the duty officer.

68. **Delegations to more than one person.** The CO can delegate to more than one subordinate commander at the same time the functions of:

- a. Referral of a case to the DSP; and
- b. Bringing a charge (including bringing a charge as a result of a direction from the DSP) in respect of the same case.

However, once a subordinate commander exercises either of these delegated functions, in relation to a particular case<sup>62</sup>, no other subordinate commander can exercise either of these functions in relation to that particular case.

69. **Delegations after a charge has been brought.** After a charge has been brought any or all of the following functions can only be delegated to one subordinate commander at a time:

- a. Amending or substituting the charge, or bringing an additional charge;
- b. The referral of the charge to the DSP; and
- c. Discontinuing proceedings on the charge.

For example, where in relation to a charge a CO has delegated any of these functions to a subordinate commander (A), the CO cannot exercise those functions themselves unless he revokes the delegation. Similarly, if a CO wants a different subordinate commander (B) to exercise any of the above functions in relation to a particular charge, he should revoke the delegation to subordinate commander (A) and delegate the function(s) to subordinate commander (B).

70. **Delegation to hear a charge.** Delegations to hear a charge<sup>63</sup> are dealt with in [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). However, when a subordinate commander is given powers to hear a charge, he must also be given the powers to:

- a. Amend or substitute the charge, or bring an additional charge;
- b. Refer the charge to the DSP; and
- c. Discontinuing proceedings on the charge.

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<sup>62</sup> Section 120 of the Act sets out the initial powers referred to in paragraph 68 a. and b.

<sup>63</sup> Part 6 of the Act.

71. **Limitation to CO's delegation.** Because a subordinate commander does not have power to exercise the relevant function, the CO cannot<sup>64</sup> delegate to a subordinate commander the authority to:

- a. Apply for extended powers of punishment including those in relation to activation orders, see the preliminary procedures section of [Chapter 9](#) (Summary hearing and activation of suspended sentences of service detention);
- b. Apply for permission from HA to hear a charge relating to an offence outlined in [Annex C](#)<sup>65</sup>;
- c. Hear a charge relating to an offence that requires HA permission (see paragraph 71b above); or
- d. Hear a charge relating to an offence alleged to have been committed during the operational period of a suspended sentence of detention.

72. In addition the following limitations on delegation apply:

- a. A subordinate commander of or above the rank of lieutenant commander, major and squadron leader can only hear a charge brought against a person of or below the rank or rate of chief petty officer, marine colour sergeant, military staff sergeant, or flight sergeant; and
- b. A subordinate commander of the rank of naval lieutenant, military or marine captain or flight lieutenant can only hear a charge brought against a person of or below the rank or rate of leading rate, military or marine corporal or air force corporal<sup>66</sup>.

73. **Conditions for CO's delegation.** When delegating any relevant disciplinary functions to subordinate commanders, a CO may make conditions on such delegations. For example, the CO may limit the type of charge that the subordinate commander can bring by excluding any offences of criminal conduct, or charges that relate to particular offences. Wherever possible, notice of officers who have disciplinary functions delegated to them, and any limitations on those delegations, should be promulgated in the ship, unit or establishment.

74. **Revocation of delegation.** The delegation will endure until it ends in accordance with its terms or when the CO expressly revokes it. A CO should revoke a delegation orally or in writing.

## **Procedure for offences capable of being heard summarily**

75. The procedure for offences capable of being heard summarily is outlined in the 6 steps below.

### **Step 1 – Deciding whether CO has initial powers to dispose of a case**

76. Where a Service policeman has referred a case to the CO (following investigation by Service or civilian police), where a CO's investigation has been completed or where a case

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<sup>64</sup> As set out at rule 3 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>65</sup> Section 54 of the Act.

<sup>66</sup> Rule 3(4) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

has been referred to them by the DSP<sup>67</sup>, the CO will need to satisfy themselves that he has initial powers<sup>68</sup>. If the CO does have initial powers he may dispose of the case in one of the following ways:

- a. Bringing a charge which can be heard summarily;
- b. Referring a case to the DSP;
- c. Taking no disciplinary action (the CO may decide that administrative action should be taken instead); or
- d. Referring a case to civilian authorities.

77. If a CO decides to take action to hear the case summarily or refer the case to the DSP the procedure to be followed is set out at Step 2 below. For factors relevant to the CO bringing a charge and to referring a case to the DSP, the CO should consider especially paragraphs 82 and 83.

78. If the CO decides not to bring a charge or refer the case to the DSP, he may wish to consider administrative action (see paragraphs 215 - 221). However, where the Service Police have investigated and found there is sufficient evidence to charge, the CO should not take this course of action without first obtaining appropriate advice, which may include staff legal advice. For factors relevant to the CO bringing a charge and to referring a case to the DSP, the CO should consider especially paragraphs 82 to 83.

79. If the CO considers that it would be appropriate to refer the matter to the civilian authorities he should first obtain advice from the staff legal adviser/HA. In the case of a relevant civilian where a decision is made not to take action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

## **Step 2 – Deciding mode of trial before charge**

80. A CO with initial powers with respect to a case may only bring a charge which is capable of being heard summarily, which means:

- a. It is an offence listed in [Annex B](#), or [Annex C](#) where permission has been given, unless permission is not required because the CO is a 2\* CO<sup>69</sup>.
- b. The accused is a Service person of or below the rank or rate of warrant officer, or the accused is an officer of or below the rank of commander, lieutenant colonel or wing commander (see paragraph 4 above regarding two rank rule).

81. All cases must be considered for suitability for summary hearing or for trial by CM before any charge is brought. This is part of the process referred to as deciding the mode of trial.

82. A CO should consider the seriousness and the complexity of the case and whether, if he brings a charge and hears it, his powers of punishment are likely to be adequate, see [Chapter 13](#) (Summary hearing sentencing and punishments). For example, if a weapon is

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<sup>67</sup> Section 121(4) of the Act.

<sup>68</sup> The initial powers referred to are those of bringing a charge or referring a case to the DSP (section 120 of the Act).

<sup>69</sup> A 2\* CO is of, or above, the rank of rear admiral, major-general or air vice-marshal.

used in an assault, the CO may decide that this is an aggravating feature, for which his powers of punishment are likely to be insufficient. In serious or complex cases, it is most likely to be appropriate for the CO to refer the case to the DSP. A complex case may be one in which, for example, there are legal or evidential issues, more than one accused or where witnesses may have to give evidence in foreign languages. If in doubt staff legal advice should be sought.

83. Additional factors which the CO should consider and may be relevant in particular cases are:

- a. Whether vulnerable victims or vulnerable witnesses are involved, who would be better examined and cross examined by professional advocates;
- b. Whether his powers of compensation are sufficient see [Chapter 13](#) (Summary hearing sentencing and punishments);
- c. Whether a civilian witness<sup>70</sup> is involved;
- d. The effect of delay if the case is referred to the DSP and dealt with by the CM;
- e. Whether the offence is alleged to have been committed during the operational period of a suspended sentence imposed by a CM. A CO cannot activate a suspended sentence imposed by a CM. It may be preferable that the CM considers the activation<sup>71</sup> of the suspended sentence, and for this purpose that the CM should also deal with the new offence, indicating that the charge ought to be referred for CM. Staff legal advice should be sought in these circumstances;
- f. Whether the offence is alleged to have been committed during the operational period of a suspended sentence imposed by a CO or Summary Appeal Court (SAC). If so, when hearing the new offence and activating the suspended sentence the CO<sup>72</sup> is limited in his powers of punishment. For example, if the suspended sentence is for 60 days detention, provided the CO has obtained permission to use extended powers of punishment in relation to the new offence he may award up to a maximum punishment of 30<sup>73</sup> days detention for the new offence, (the total period of detention would be 90 days including the 60 days of the suspended sentence). If the CO is not satisfied that his powers of punishment are sufficient, then he may decide to refer the case to the DSP.
- g. Whether the victim is not a member of the UK armed forces.
- h. Whether the victim was being held in any form of service custody

This list is not exhaustive. If in doubt seek staff legal advice. As to factors g and h above, any form of violence or abuse against the victim should be recognised as having important disciplinary implications. In such cases the CO should refer the matter to the DSP, unless the CO is completely satisfied (with legal advice) that he should bring the charge himself.

## Referral of case to the DSP before charge

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<sup>70</sup> Civilian witnesses cannot be compelled to attend a summary hearing to give evidence.

<sup>71</sup> The CO may proceed to hear the charge and subsequently notify the CAO of the finding so that the CM can consider whether to activate the suspended sentence. See [Chapter 13](#) (Summary hearing sentencing and punishments).

<sup>72</sup> A subordinate commander may not activate a suspended sentence of detention, this may only be done by the CO. For detailed guidance see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention).

<sup>73</sup> Only if permission to use extended powers of punishment has been granted by HA.

84. When referring a case to the DSP following a CO's investigation, the CO should send all relevant material (see paragraph 36 above) and his reasons as to why they are referring the case. The Service person who is the subject of the referral should be notified of such a referral.

85. When a case investigated by the Service Police is referred to the DSP by the CO:

a. If the Service Police provided the CO with a written statement the CO must provide a copy of it to the DSP;

b. If the Service Police made an oral statement to the CO, the CO should ensure that as soon as practicable the Service Police provide the DSP with a written statement or make an oral statement to the DSP, specifying the Service offence with which the Service Police considers there is sufficient evidence to charge and why he considers there is sufficient evidence;

c. When the CO refers the case to the DSP or as soon as reasonably practicable afterwards, he must provide the DSP with a copy of the case papers (see paragraph 56 above)<sup>74</sup>;

d. The CO should provide a brief statement of his reasons for the referral; and

e. The CO should notify the Service person who is the subject of the referral.

86. Once the case has been referred, the CO has no powers in relation to the case unless the case is referred back to the CO by the DSP.

87. **Referral of a case by the DSP back to the CO.** Where the DSP refers the case back to the CO, the DSP cannot direct the CO to bring a charge but may advise the CO of a suitable summary charge.

88. Where a case is referred to a CO, he will have initial powers in relation to the case<sup>75</sup>. As a result, the CO should reassess the evidence in the case and decide on the appropriate way to dispose of the case (see step 1). If the CO considers that there is sufficient evidence (see paragraph 93 below) to charge a Service offence which is capable of summary disposal, he may bring a charge. When the DSP refers a case back to the CO, the DSP may (although they are not required to) advise the CO of a suitable (summary) charge that may be brought. Where this occurs the CO is not compelled to follow the DSP's advice. However, a CO should take this advice into account when deciding on the appropriate method of disposal or appropriate charge. When selecting a charge in these circumstances a CO may wish to obtain staff legal advice.

89. If after reviewing the case, the CO does not consider that a charge should be brought, the person who was investigated should be advised that disciplinary action will not be taken. Care should be taken when notifying the former suspect that the notification does not preclude the possibility of disciplinary action being taken in the future, if new evidence comes to light. Further, it should not preclude any administrative action that may be taken against the former suspect.

90. Having taken staff legal advice, the CO may wish to consider whether administrative action should be taken.

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<sup>74</sup> See regulation 9 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>75</sup> Section 119(5) of the Act.

### Step 3 - Decision whether to charge

91. Having decided that the case can be heard summarily, the CO should go on to consider whether:

- a. To charge;
- b. Not to charge but to take administrative action; or
- c. Not to charge and not to take any administrative action.

92. If the CO decides to charge he should also consider the appropriate level at which the charge should be heard taking into account:

- a. The type of charge;
- b. The seriousness of the offence;
- c. Powers of punishment of subordinate commanders (for example a subordinate commander cannot award a Service compensation order<sup>76</sup> for personal injury therefore charges relating to offences of violence should be given careful consideration);
- d. Delegations;
- e. The accused's disciplinary record and in particular whether they are under a suspended sentence of Service detention<sup>77</sup>;
- f. The factors stated in paragraphs 82 and 83; and
- g. Any other factors he considers relevant.

93. **The evidential test.** Generally a CO should not charge a person with a service offence if it is plain that either there is no basic evidence against the suspect or the evidence is clearly outweighed by evidence in the suspect's favour.

94. **The Service interest test.** Where there is evidence to support the bringing of a charge, a CO should also consider whether there are any factors that would make disciplinary action inappropriate. He should, however, be careful to ensure that any exercise of his discretion not to take disciplinary action is consistent with justice and with the fair and efficient maintenance of discipline and operational effectiveness.

95. A CO should also note that there are Service policies that provide for administrative action being used as an alternative to discipline (see paragraphs 215 - 221 as to where administrative action may be appropriate). If the offence appears complex or serious or if the CO is in doubt, he should seek staff legal advice.

### Charging

96. Having decided to charge, the CO should bring an appropriate charge.

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<sup>76</sup> See Armed forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) rules 2009 and [Chapter 13](#) (Summary hearing sentencing and punishments).

<sup>77</sup> Subordinate commanders cannot hear a charge relating to an offence alleged to have been committed during the operational period of a suspended sentence of detention.

97. **Selecting a charge.** A charge should be selected which is appropriate taking into account the circumstances, particularly the seriousness of the offence.

98. When an investigation<sup>78</sup> has taken place and a charge is recommended/suggested, if the CO decides to deal with the matter summarily, it is for them to decide the most appropriate charge.

99. Where a CO wishes to charge an offence, the charge(s) should be prepared using the specimen charges contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences). Where no such specimen charges are provided, staff legal advice should be sought on the correct wording and any other advice on the law relating to the offences.

100. **Contents of a charge.** The charge is to be set out in a charge sheet (see [Annex H](#)) and must contain<sup>79</sup>:

- a. Full name of the accused;
- b. Service number, rank or rate;
- c. The name of the ship, establishment or unit of which they are a member<sup>80</sup>;
- d. A statement in ordinary language of the offence charged, identifying the precise statutory provision creating the offence<sup>81</sup>. When a person is charged with a criminal conduct offence, the charge must specify the offence under the law of England and Wales as well as that it is an offence contrary to section 42 of the Act<sup>82</sup>. A charge of assault occasioning actual bodily harm will therefore include in the statement that the offence is one under section 42 of the Act and under section 47 of the Offences Against the Person Act 1861 (see [Chapter 8](#) (Criminal Conduct Offences)); and
- e. Such particulars of the conduct constituting the commission of the offence as are necessary to make clear what is alleged against the accused.

101. Care must be taken to ensure that each charge does in fact disclose enough information to establish an offence under the Act and for offences charged under section 42 of the Act the corresponding offence under the law of England and Wales is specified. Each separate charge must allege only a single offence. For example, if a Service person misses a number of duties, each duty missed must be subject to a separate charge. It is important not to overload a charge sheet. Additionally where there are serious offences it may not be appropriate to charge additional minor offences. If in doubt, seek staff legal advice.

102. **Multiple accused.** Where there is more than one accused each individual should be charged on a separate charge sheet. More than one charge can be set out on each individual's charge sheet<sup>83</sup>. The cases of multiple accused can be heard at the same summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentences

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<sup>78</sup> Service Police or CO's investigation.

<sup>79</sup> Full details as to what should be contained in a charge can be found in the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>80</sup> This includes his parent unit and attached unit.

<sup>81</sup> Unless it is an offence contrary to common law, see [Chapter 8](#) (Criminal conduct offences).

<sup>82</sup> See para 5(a) in the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>83</sup> See paragraph 48 for guidance on multiple suspects/incidents. Also see the Schedule to the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 for contents of a charge and Annex H on the format of a charge sheet.

of Service detention). If one of the accused elects CM trial then the CO must decide whether or not to refer the charges or charges against the non-electing offender to the DSP.

103. **Charging of accomplices and accessories.** This is a complex area of the law and in such cases staff legal advice should be sought. A person who aids, abets, counsels or procures<sup>84</sup> the commission by another of any Service offence may be convicted of that offence. For example, A searches and removes a watch from a soldier detained in the course of an operation. If A does not have a reasonable excuse for his actions, he may have committed an offence of looting contrary to section 4 of the Act. If B agrees to keep a look out for A whilst they are committing the act, B may be charged under section 4 of the Act.

104. The same applies when a Service person or relevant civilian aids, abets, counsels or procures the commission of a criminal offence by another person; Section 42<sup>85</sup> applies to those who aid, abet, counsel or procure the commission of a criminal offence in the same way as to the principal offender. Whilst it is proper to charge an accessory as if he were a principal offender, it may sometimes be more appropriate to charge them as an accessory (e.g. when it is clear at the outset that he did not actually commit the offence themselves). The words aid, abet counsel and procure may all be used together to charge a person who is alleged to have participated in the offence in some way, but not as the principal offender.

105. By contrast, if a Service person encourages or assists another person to commit any offence, they are guilty not of the main offence, but of the separate offence of encouraging or assisting. If the encouraging or assisting is to commit criminal conduct which would be an offence under the law of England and Wales, the encouraging or assisting will be an offence under section 42 of the Act. If the encouraging or assisting is to commit an offence under the Act (other than a criminal conduct offence)<sup>86</sup>, the relevant offence will be under section 40 of the Act. For example, if A encourages or assists B to make a false record (contrary to section 18 of the Act), B should be charged with an offence under section 40, as A did not themselves make the false record.

106. Specimen charges for involvement as a secondary party under section 41 of the Act are set out in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and specimen charges for aiding, abetting, counselling or procuring are set out in [Chapter 8](#) (Criminal conduct offences).

107. **Charging procedure.** Once the charge sheet has been raised, the CO should proceed to charge the suspect. The procedure set out below must be followed:

- a. The CO (or a subordinate commander) must sign<sup>87</sup> the charge sheet (ie. the person who it is intended is to hear the charge); and
- b. A copy of the signed charge sheet must be served by hand<sup>88</sup> on the accused. Service of a charge can be carried out by the CO, or by anyone authorised<sup>89</sup> by the CO. The charge sheet should also be signed and dated when service is carried out.

108. The charge is brought once a copy of the charge has been served on (handed to) the accused. The original charge sheet must be retained on file<sup>90</sup>. Accurate recording of the

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<sup>84</sup> In accordance with section 41 of the Act.

<sup>85</sup> Section 42 of the Act.

<sup>86</sup> Section 40 of the Act.

<sup>87</sup> Regulation 11(1)(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>88</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>89</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>90</sup> This is necessary in the event that the charge, and therefore the original charge sheet, is subsequently needed to be sent to the DSP.

timing of a charge is particularly important in custody cases or where other time limits might apply.

109. Once a charge is brought, the charge is allocated for summary hearing<sup>91</sup>. A summary hearing<sup>92</sup> cannot take place before at least 24 hours have elapsed from the time all the case papers<sup>93</sup> were served. The time of service should be recorded.

### **Amending, substituting or bringing an additional charge**

110. A CO may amend, substitute or bring an additional<sup>94</sup> charge at any time before the summary hearing or during the course of the summary hearing prior to the finding being recorded, provided the amended, substituted or additional charge is capable<sup>95</sup> of being heard summarily. The hearing will need to be adjourned in order for the preliminary procedures to be carried out in relation to that charge see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). If the CO decides to refer a charge to the DSP, that charge and any other charge brought in respect of the same case are to be regarded as allocated for CM trial. A CO may not amend, substitute or bring an additional charge, where the case has been allocated for CM trial. A CO should refer all related charges to the DSP.

111. **Amending a charge before summary hearing.** If the CO amends<sup>96</sup> a charge before the summary hearing, the following process must be followed:

- a. The CO should sign the charge sheet as amended;
- b. The amended charge sheet should then be personally served by hand on the accused together with a notification of amendment, by the officer who signed the amended charge sheet or by a person authorised by them;
- c. A written record should be kept of the time and date of service of the amended charge; and
- d. The accused must be given a minimum of a further 24 hours from the time of service before the summary hearing can commence.

112. **Amending a charge during a summary hearing.** Where a charge is amended after the start of a summary hearing, the hearing will need to be adjourned in order for the preliminary procedures paragraph 107 above to be carried out in relation to that charge. The CO shall immediately serve a copy of the amended charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given a further 24 hours and the option to elect CM trial on the amended charge.

113. **Correcting a charge sheet.** The CO may, at any time, correct a minor typographical error in the charge sheet that has no bearing on the case, such as a mistake in the accused's Service number. However, if the CO corrects an error of substance or fact, e.g. the date of the offence, that correction would amount to an amendment and guidance at paragraph 111 above should be followed. The CO is to adjourn to take legal advice on this issue if they are in any doubt as to the status of the correction.

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<sup>91</sup> Section 120(4) of the Act.

<sup>92</sup> See [Chapter 9](#) (Summary Hearing and Activation of Suspended Sentences of Service detention).

<sup>93</sup> See paragraphs 56 for a list of case papers.

<sup>94</sup> Section 123 (2) of the Act.

<sup>95</sup> Section 123 (4) of the Act.

<sup>96</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

114. **Substituting a charge before summary hearing.** A charge is substituted<sup>97</sup> when an existing charge is replaced with another charge that alleges a different Service offence. For example, a charge of assault might be substituted for a charge of assault occasioning actual bodily harm. Where a charge is substituted before the hearing the following process must be followed:

- a. The CO should sign the charge sheet containing the substituted charge;
- b. The original charge should be discontinued, see paragraph 118 below;
- c. The new charge sheet (containing the substituted charge) should then be served by hand on the accused together with a notice to that effect. Service of these papers may be carried out by the officer who signed the charge sheet or a person authorised by them;
- d. As is the case with bringing a charge, a written record should be kept of the time and date of service. For this purpose the person serving the charge should sign and date the charge sheet accordingly; and
- e. The accused must be given a minimum of a further 24 hours from the time of service before the summary hearing can commence.

115. **Substituting a charge during a summary hearing.** If the CO substitutes a charge after the summary hearing has commenced<sup>98</sup>, the CO must immediately serve a copy of the substituted charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given 24 hours and he must also be given the option to elect for CM trial on the substituted charge.

116. **Bringing an additional charge before summary hearing.** This occurs where an additional charge<sup>99</sup> is added to a charge or charges that have already been brought against the accused. Where an additional charge is brought before the hearing, the following process must be followed:

- a. The CO should sign the new charge sheet that will contain the original charge and the additional charge that is to be brought. It is important to ensure that it is clear what charges have been brought against the accused and what charges are being heard by a CO at a summary hearing, especially when additional charges are brought or a charge is discontinued. All of the charges brought against an accused should therefore be set out on one charge sheet; and
- b. The new charge sheet should then be served by hand on the accused. Service of these papers may be carried out by the officer who signed the charge sheet or a person authorised by them.

117. **Bringing an additional charge during a summary hearing.** If the CO brings an additional charge after the summary hearing has commenced<sup>100</sup>, the CO must immediately serve a copy of the additional charge and a written notice to that effect on the accused. The procedure for hearing the charge starts again. The accused must be given 24 hours and he must also be given the option to elect for CM trial on the additional charge.

## Discontinuing a charge

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<sup>97</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>98</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>99</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>100</sup> See regulation 13 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

118. A CO has a power to discontinue<sup>101</sup> a charge which has been allocated<sup>102</sup> for summary hearing at any time up to the start of summary hearing and during the course of the summary hearing itself. A charge may be discontinued where:

- a. It is no longer appropriate to take disciplinary action against the accused;
- b. A more appropriate charge has been substituted;
- c. The case is to be handed over to the civilian authorities;
- d. A fresh charge is to be brought in order to rectify an error in the conduct of the hearing; or
- e. A witness cannot be located but it is possible that he will be in future.

The accused is to be notified that a charge is being discontinued using the form of notice at [Annex I](#).

### **Dismissal of a charge**

119. The CO may dismiss<sup>103</sup> the charge at any stage of the hearing, unless he determines that the charge has been proved. He may not determine that the charge has been proved unless, on the basis of all the evidence heard, they are sure that the accused committed the offence charged. For the CO to be sure, he must believe that the charge is proved beyond reasonable doubt; this is the criminal standard of proof, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

### **Action to be taken when a charge is brought**

120. As soon as practicable after the charge has been brought, the CO or a person authorised by them must<sup>104</sup>:

- a. Prepare a summary of the evidence (the case summary) relevant to the charge, see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention);
- b. Inform the accused in writing<sup>105</sup> of his right to:
  - (1) Elect CM trial<sup>106</sup>;
  - (2) Be represented by an AAO<sup>107</sup>;
  - (3) Question witnesses whose evidence is requested by the CO<sup>108</sup>;
  - (4) Give evidence<sup>109</sup>;

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<sup>101</sup> The effect of doing so is that the matter remains unresolved. The CO should only use this power with staff legal advice.

<sup>102</sup> Section 120(4) of the Act.

<sup>103</sup> Section 131(2), of the Act.

<sup>104</sup> Rule 8 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>105</sup> All of the information in this paragraph will be contained within the booklet 'Your rights if you are accused of an offence under the Service justice system' (Annex G), therefore providing the accused with a copy of this booklet will discharge the CO's duty under this paragraph.

<sup>106</sup> Section 129, of the Act.

<sup>107</sup> Rule 10 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>108</sup> Rule 15 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>109</sup> Rule 16 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

- (5) Provide evidence of witnesses<sup>110</sup>; and
  - (6) Appeal to the Summary Appeal Court (SAC)<sup>111</sup>;
- c. If appropriate, provide the accused with information about the activation of suspended sentences of detention<sup>112</sup>, see [Chapter 9](#) (summary hearing and activation of suspended sentences of Service detention) and Part 4 below;
- d. Provide the accused with<sup>113</sup>:
- (1) A copy of the charge sheet;
  - (2) A copy of the Case Summary<sup>114</sup>;
  - (3) A copy of the written evidence relevant to the charge;
  - (4) Details of exhibits that form part of the evidence relevant to the charge and where and when they may be inspected;
  - (5) A copy of unused material gathered as part of the investigation of the charge;
  - (6) Written details of any unused exhibits gathered as part of the investigation and where and when unused exhibits may be inspected; and
  - (7) A copy of any disciplinary record of the accused; and
- e. Fix a time for the hearing and notify the accused.

121. In addition, the CO or a person authorised by them should inform the accused that he may consider seeking legal advice and that this may be a matter that he discusses with his AAO, if he has nominated one (see paragraphs 206 - 208 on availability of legal advice within the Services).

122. If the CO is satisfied that the accused already has a copy of a document listed in paragraph 120 above, he need not provide a further copy<sup>115</sup>, for example, where the charge has been amended but the evidence in support of that charge remains the same.

123. Where the CO does not require permission from HA to hear the charge or does not consider that he might require extended powers of punishment, he should proceed to hear the charge, see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention). If an application to HA is required, proceed to step 5 below.

## Step 4 - Applications to HA

124. If the charge brought is one of those listed in [Annex C](#), the CO must seek permission from HA to hear the charge summarily (see paragraph 126 below). If the CO considers he

<sup>110</sup> Rule 17 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>111</sup> Section 141, of the Act.

<sup>112</sup> Section 193 of the Act.

<sup>113</sup> Rule 8(1)(c) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>114</sup> Rule 8(1)(c)(ii) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>115</sup> Rule 8(2) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

requires extended powers of punishment, he must make an application to HA (see paragraph 129 below). The application for permission to hear a charge may be made in conjunction with an application for extended powers of punishment. Neither of these functions can be delegated to a subordinate commander, see paragraph 71.

125. In either circumstance the CO should consult staff legal/HA advice before bringing a charge. This consultation does not negate the requirement to submit an application to hear a charge, but may assist in preventing nugatory staff work.

126. **Application to hear certain charges summarily.** A CO below the rank of rear admiral, major-general or air vice-marshal who considers that any of the serious criminal conduct offences<sup>116</sup> listed below should be heard summarily<sup>117</sup>, must apply to HA for permission to do so. A template of a letter of application for this purpose is at [Annex A of Chapter 9](#) (Summary Hearing and activation of suspended sentences of Service detention):

- a. Assault occasioning actual bodily harm (Section 47 of the Offences against the Person Act 1861);
- b. Possession in a public place of an offensive weapon (Section 1 of the Prevention of Crime Act 1953);
- c. Abstracting of electricity (Section 13 of the Theft Act 1968);
- d. Possession in public place of point or blade (Section 139 of the Criminal Justice Act 1968);
- e. Dishonestly obtaining electronic communications services, e.g. using MOD telephones for private calls (Section 125 of the Communications Act 2003);
- f. Possession or supply of apparatus for obtaining electronic communications services (Section 125 of the Communications Act 2003);
- g. Fraud (Section 1 of the Fraud Act 2006);
- h. Dishonestly obtaining services (Section 11 of the Fraud Act 2006); or
- i. Attempting to commit one of the indictable<sup>118</sup> offences above<sup>119</sup>.

127. The application to HA must be made as soon as is reasonably practicable after the charge is brought<sup>120</sup> and must contain<sup>121</sup>:

- a. The CO's reasons for considering that the charge should be heard summarily;
- b. A copy of the charge sheet;
- c. A copy of the written evidence relevant to the charge;
- d. A copy of any unused written evidence gathered as part of the investigation of the charge;

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<sup>116</sup> Section 54(2) of the Act.

<sup>117</sup> This cannot be delegated.

<sup>118</sup> See glossary of terms.

<sup>119</sup> Section 43 of the Act.

<sup>120</sup> In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

<sup>121</sup> Rule 5(3) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

- e. A copy of any disciplinary record of the accused; and
- f. Any other material that may, in the opinion of the CO, be relevant to the application.

The obligation to disclose unused material does not include any requirement to disclose sensitive material. The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009 does not apply to a charge allocated for summary hearing (it only applies to charges allocated for trial by the Court Martial or the Service Civilian Court or the Summary Appeal Court). In this context, “unused material” means simply the relevant material obtained during the investigation which is not sensitive.

128. Whether or not the application to hear the charge is granted the CO must provide<sup>122</sup> the accused with a copy of the notification from HA and proceed to Step 5.

129. **Application for extended powers in relation to punishment.** If the CO is below the rank of rear admiral, major-general or air vice-marshal and considers that a charge against a person should be dealt with summarily and that his powers of punishment might be insufficient to deal with the accused if the charge were proved, he must apply to HA for extended powers<sup>123</sup>. A template letter of application for this purpose is at [Annex B of Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention). In order to make the decision to apply for extended powers, the CO should consider a number of factors including:

- a. The nature of the charge;
- b. The CO’s basic powers of punishment (i.e. without extended powers);
- c. The sentencing guidelines for such an offence see [Chapter 13](#) (Summary hearing sentencing and punishments);
- d. The accused’s disciplinary record; and
- e. All the evidence presented in the case papers.

130. The application must be made as soon as is reasonably practicable after the charge is brought<sup>124</sup> (which may be after the CO has complied with the preliminary procedures) and must contain<sup>125</sup>:

- a. The CO’s reasons for considering his powers of punishment might be insufficient should the charge be found proved unless he has extended powers;
- b. A copy of the charge sheet;
- c. A copy of the written evidence relevant to the charge;
- d. A copy of any unused written evidence gathered as part of the investigation of the charge;
- e. A copy of any disciplinary record of the accused;

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<sup>122</sup> Rule 5(4) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>123</sup> Section 133(1) of the Act for the extended powers that are available.

<sup>124</sup> In order to avoid having to change the charge the CO is advised to informally consult with HA before the charge is brought.

<sup>125</sup> Rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

- f. Specific details of all provisions for the purpose of which the CO considers he needs extended powers<sup>126</sup>. This should include details of the punishment for which they are asking for extended powers (e.g. loss of seniority for officers or more than 28 days detention for other ranks) (see [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention)); and
- g. Any other material that may, in the opinion of the CO, be relevant to the application.

Where the CO's application to HA for extended powers has been granted, the CO must provide the accused with a copy of the notification from HA, see paragraph 132 below<sup>127</sup>.

131. In the exceptional event that the CO considers it necessary to apply for extended powers after he has complied with the preliminary procedures, but before he proceeds to hear the charge summarily (ie. before he has offered the accused the right to elect CM trial), the CO must notify the accused if the application has been granted and provide the offender with a copy of the notification from HA to this effect. Further, if an application is made after a time is fixed for the hearing, a new time must be fixed. If the application is granted, the new time must be fixed at not less than 24 hours after a copy of the notification is given to the accused. This situation should arise only rarely, for example, when new information (that could not have been known beforehand) emerges that makes such an application for extended powers necessary. Whether the application for extended powers is granted or not, the CO should proceed to Step 5.

## Step 5 – Action by CO following HA decision

132. **CO application to hear a charge and/or extended powers granted.** When permission has been granted, and if the CO decides to proceed to hear the charge, then he should ensure that the actions detailed at paragraph 120 above have been carried out. In addition the accused is to be provided with:

- a. A copy of any permission from HA to deal with the matter summarily<sup>128</sup>; and
- b. A copy of any authority to use extended powers<sup>129</sup>.

Exceptionally the CO may decide that the charge should no longer be proceeded with (if, for example, further evidence/information came to light).

133. The CO or a person authorised by them should inform the accused that he may consider seeking legal advice and that this may be a matter that he discusses with his AAO. If the CO is satisfied that the accused already has a copy of a document mentioned in paragraph 120d, he need not provide a further copy<sup>130</sup> e.g. where the charge has been amended but the evidence in support of that charge remains the same. Once these actions have been carried out the CO should proceed to summary hearing, see [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention).

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<sup>126</sup> Rule 6(2)(a) of the Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) Rules 2009.

<sup>127</sup> Rule 6(3) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>128</sup> See rule 5 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>129</sup> See rule 6 of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

<sup>130</sup> Rule 8(2) of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

134. **CO's application to hear the charge denied.** If a charge has been brought and the HA decides against the CO's application for permission to hear the charge, the charge must either be referred to the DSP (see paragraph 137) or (exceptionally) discontinued if the CO considers that the charge should no longer be proceeded with (if, for example, further evidence/information comes to light). Following discontinuance it is open to the CO to review the case and where necessary bring a fresh charge against the accused.

135. **CO's application for extended powers denied.** If a charge has been brought and the HA decides against the CO's application for extended powers, the CO should review the decision to hear a charge in the light of the HA's decision. The CO can either:

- a. Hear the charge without extended powers; or
- b. Refer the charge to the DSP (see paragraph 137).

136. In addition, the CO may, between bringing the charge and the hearing itself, review his decisions in the light of changes in other relevant circumstances, for example:

- a. The accused has committed further offences whilst waiting to be dealt with;
- b. New information comes to light which suggests that the offence with which the accused is charged needs to be changed to a more serious offence, which cannot or ought not to be dealt with summarily;
- c. New information comes to light, which indicates that the powers of punishment available to the CO are likely to be inadequate (for example, because the circumstances are more aggravating than they were originally viewed to be); or
- d. The CO may need to review previous decisions if, during the hearing<sup>131</sup> and before a finding has been reached, there has been a failure to comply with any part of the summary hearing procedure. This may involve adjourning the procedure and considering whether it is possible or necessary to start the procedure again.

137. **Referring a charge to the DSP.** When referring a charge to the DSP following the HA decision on an application to hear/for extended powers, the CO should send all relevant material (see paragraph 175) to the DSP. The Service person who is the subject of the referral should be notified of such a referral. Once the charge has been referred, the CO has no powers in relation to the charge. Charges referred to the CO by the DSP are dealt with in paragraphs 174 to 176.

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<sup>131</sup> See [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) for action to be taken during a summary hearing.

## Part 5 - Offences triable by CM or SCC

### Introduction

138. This Part deals with offences that can be tried at CM or SCC. A Service person committing any Service offence that is not listed at Annexes [B](#) and [C](#) can only be tried by CM. Part 6 (below) deals with charges in respect of a Schedule 2 offence or an offence in relation to prescribed circumstances. Additionally Part 5 deals with cases referred to the DSP and charges referred to the DSP where the accused elects for CM trial or the CO chooses to refer a charge to the DSP.

139. Relevant civilians can only be tried by SCC or CM. However, the jurisdiction of the SCC to deal with Service offences is limited, see [Chapter 3](#) (Jurisdiction and time limits). For example, a SCC cannot deal with indictable-only<sup>132</sup> offences. A CO<sup>133</sup> will be appointed for disciplinary purposes in respect of all relevant civilians, for example, to bring a charge on the direction of the DSP. For further guidance refer to [Chapter 2](#) (Meaning of commanding officer).

140. The procedure to be followed for an offence which may be tried by CM or before the SCC is set out below. A flow chart of the procedure to be followed is at [Annex A](#).

141. The procedure for referring a case to the DSP is at paragraphs 142 - 173. The procedure for referring a charge to the DSP is at paragraphs 174 - 176.

### Procedure for referring a case to the DSP

142. **Preliminary considerations.** Before a CO takes any action to refer a case to the DSP he should consider the matters at Part 4 steps 1 and 2 (whether he has initial powers to dispose of the case and deciding the mode of trial.) The CO should also ensure he has jurisdiction to bring a charge in accordance with [Chapter 2](#) (Meaning of commanding officer). The CO's attention is drawn particularly to the importance of considering the factors mentioned and guidance given in paragraphs 82 and 83.

143. **Time limits.** Time limits may apply in certain situations (for example former members of the regular or reserve forces or civilians formerly subject to Service discipline). Detailed guidance can be found in [Chapter 3](#) (Jurisdiction and time limits) and COs should seek staff legal advice.

144. **Criminal Procedure and Investigations Act 1996 and disclosure.** All charges allocated for CM or SCC trial are governed by the Criminal Procedure and Investigations Act (CPIA) 1996 (Application to the Armed Forces) Order 2009, which make provision equivalent (with modifications) to provisions of Part 1 of the CPIA. They include provision which places a duty: on the DSP to disclose certain documents and material to the accused; on the Service Police to record the details of the officer in charge of the investigation (OCI) and the disclosure officer (DO); and requiring the accused to provide a defence statement to the CAO and the prosecutor. The Service Police are required, under the CPIA code of practice for the armed forces to record and retain material which may be relevant to an investigation<sup>134</sup>.

145. The DSP may disclose by sending material to an accused's CO. Where he does so, the CO will be required by the DSP to serve the accused with any material or written

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<sup>132</sup> These offences may only be tried by CM and have a special meaning under section 53 of the Act.

<sup>133</sup> See [Chapter 2](#) (Meaning of a CO) and regulation 6 of the Armed Forces (Meaning of "Commanding Officer") Regulations 2009.

<sup>134</sup> The Code of Practice set out in the Schedule to the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009.

statements or documents, as soon as practicable. Once the information has been served, the CO must notify the DSP in writing of the date on which the accused received it. Further guidance on CPIA is contained in JSP 890 (Armed Forces Code of Practice for Disclosure).

146. Where the findings of an investigation indicate that an offence triable only at CM/SCC should be charged (and the requirements relating to possible Schedule 2 offences or to offences committed in prescribed circumstances do not apply) the procedures below should be followed.

### **Step 1 – Decision to refer to the DSP**

147. A CO should take legal advice before deciding not to refer a case to the DSP.

148. If after taking legal advice the CO considers that an offence capable of being dealt with summarily may be brought, he should follow the procedure at Part 4, paying particular attention to the factors mentioned and guidance given in paragraphs 82 and 83.

149. If the CO decides not to take disciplinary action he may wish to consider administrative action (see paragraphs 215 - 221); however, where the Service Police have investigated and found there is sufficient evidence to charge, the CO should not take this course of action without obtaining staff legal advice.

150. In the case of a relevant civilian where a decision is made not to take disciplinary action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

### **Step 2 - Referring a case<sup>135</sup> to the DSP**

151. In some instances where a CO has undertaken an investigation he may decide to refer the case to the DSP. In this unlikely event, when referring a case to the DSP following a CO's investigation, the CO should send all relevant material (see paragraph 36 above) and his reasons as to why they are referring the case. The Service person who is the subject of the referral should be notified of such a referral.

152. When a case investigated by the Service Police is referred to the DSP:

- a. If the Service Police provided the CO with a written statement the CO must provide a copy of it to the DSP;
- b. If the Service Police made an oral statement to the CO, the CO should ensure that as soon as practicable the Service Police provide the DSP with a written statement or make an oral statement to the DSP, specifying the Service offence with which the Service Police considers there is sufficient evidence to charge and why he considers there is sufficient evidence;
- c. When the CO refers the case to the DSP or as soon as reasonably practicable afterwards, he must provide the DSP with a copy of the case papers (see paragraph 56 above)<sup>136</sup>; and
- d. The CO should provide a brief statement of his reasons for the referral.

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<sup>135</sup> This is where a suspect has not yet been charged.

<sup>136</sup> See regulation 9 of the Armed Forces (Part 5 to the Armed Forces Act 2006) Regulations 2009.

153. The Service person or relevant civilian against whom an allegation has been made should be notified of such a referral as soon as reasonably practicable. The CO should comply with the Victim's Code<sup>137</sup> where that applies, see paragraph 200 below.

154. Once the case has been referred, the CO has no powers in relation to it. (Cases referred to a CO by the DSP in respect of Service personnel are dealt with at paragraphs 87 - 90 above). In the case of a relevant civilian where a case has been referred, the CO may consider whether to inform that person's employer (if applicable). In these circumstances, staff legal advice should be sought.

### Step 3 - DSP powers in respect of cases referred to the DSP

155. The DSP may take one of the following courses of action in relation to a case referred to the DSP:

- a. **Direction to bring a charge.** The DSP may direct that the CO bring a specified charge(s) for CM trial or SCC trial (if the DSP has allocated the charge for trial by SCC) (see [Annex K](#));
- b. **Service personnel only.** The DSP may refer the case to the accused's CO without giving a direction as to which charge or charges should be brought<sup>138</sup> (see [Annex L](#)). It is then for the CO to decide whether any charges capable of being dealt with summarily should be brought against the accused. In these circumstances, as no charge has been brought as yet, the CO will regain his initial powers<sup>139</sup> in relation to the case and follow the procedure set out in Part 4 (step 3), offences capable of being heard summarily;
- c. **Relevant civilians only.** The DSP may allocate the charge for SCC trial once the DSP has made a direction to the CO to bring a charge against a relevant civilian (see [Annex K](#)). If a civilian is jointly charged with a Service person both will be tried by the CM. Relevant civilians cannot be dealt with summarily;
- d. **Direction barring further proceedings.** The DSP may issue a direction barring<sup>140</sup> either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offence (see Annexes [M](#) and [N](#) for specimen directions). The DSP may make such a direction<sup>141</sup> in respect of any Service offence as to which he could make a direction under paragraph 155a above. A direction barring<sup>142</sup> further proceedings is a direction that the person specified is to be treated as acquitted of the offence specified<sup>143</sup>. This means that the CO may not take any further disciplinary action in the case. The CO must notify<sup>144</sup> the accused as soon as reasonably practicable of the direction barring further proceedings. The CO may, however, consider whether administrative action is appropriate; or
- e. **Take no action.** This may arise if the DSP considers that the case would be better dealt with by the civilian authorities.

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<sup>137</sup> See paragraph 201 on the Victim's Code.

<sup>138</sup> Section 121(4) of the Act.

<sup>139</sup> Initial powers are defined in section 120 of the Act.

<sup>140</sup> Sections 121(5) and 127 of the Act and note regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

<sup>141</sup> Sections 121(5) and 127 of the Act.

<sup>142</sup> Section 63 relates to service proceedings; section 64 relates to civilian proceedings for a criminal conduct offence under section 42 of the Act.

<sup>143</sup> For the purposes of sections 63 and 64 of the Act.

<sup>144</sup> Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

156. If it is decided to prosecute, that decision will be kept under review. If subsequently there is reason to change that decision, for example, through the receipt of fresh evidence which means that the case no longer meets the evidential test, those proceedings will be discontinued (see Annexes [O](#) and [P](#)).

## Step 4 - Charging

157. **Action by CO on a DSP charge.** If the DSP has directed a CO to bring a charge, the DSP will provide the CO with a charge sheet specifying the charges (see Annexes [K](#) and [Q](#)). The CO must bring the charge(s) specified in the charge sheet as directed<sup>145</sup>. In these circumstances, the case is not referred back to the CO and a CO does not therefore have initial powers<sup>146</sup>. The DSP remains responsible for those cases in which he has directed a CO to bring a charge.

158. **Charging procedure.** The charging procedure is as follows:

- a. The CO<sup>147</sup> of the accused must sign<sup>148</sup> the charge sheet; and
- b. A copy of the signed charge sheet ([Annex Q](#)) and a copy of the DSP's direction to bring the charge ([Annex K](#)) must be served by hand<sup>149</sup> on the accused. Service of a charge sheet can be carried out by the CO, or by anyone authorised<sup>150</sup> by the CO.

159. When the accused is served with the charge sheet, the name of the person serving it should be recorded in addition to the date and time of service. A copy of the charge sheet should be retained on file. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits may apply.

160. Once a copy of the charge has been served on the accused the charging procedure is complete<sup>151</sup>. The original charge sheet (signed by the CO) must be returned to the DSP as soon as reasonably practicable<sup>152</sup>.

161. **Appointment of a defendant's assisting officer.** As soon as reasonably practicable after a charge is brought, a defendant's assisting officer (DAO) may be appointed to assist the defendant with the preparations for and during the trial. A defendant may ask for any suitable person to assist them subject to certain restrictions. Further details in relation to a DAO are set out in [Chapter 29](#) (Court Martial proceedings). A brief for the DAO is also contained in [Chapter 29](#) (Court Martial proceedings).

162. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of the charging procedure, an appropriate adult should be present. This may be:

- a. A relative, guardian or other person responsible for his care or custody;

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<sup>145</sup> Section 122(1) of the Act.

<sup>146</sup> Section 119(5) of the Act.

<sup>147</sup> Guidance on delegation of the COs powers under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 is dealt with in paragraphs 66 to 74.

<sup>148</sup> Regulation 11(1) (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>149</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>150</sup> Regulation 11(1)(c) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>151</sup> For the circumstances when the accused can be interviewed about an offence after he has been charged see the Code of Practice for the Treatment and Questioning of Persons by the Service Police (Code C).

<sup>152</sup> Regulation 12(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

- b. Someone who has experience of dealing with mentally disordered or mentally incapable persons (such as an approved social worker as defined by the Mental Health Act 1983 or a specialist social worker), but is not a Service policeman or employed by the Service Police; or
- c. Failing either of the above, some other responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

163. **Suspects 17 years old or of a lower age.** Where a suspect is less than 17 years old (or appears to be under 17), they are to be treated as a juvenile for the purposes of charging. An appropriate adult should be notified of the intention to charge and accompany the juvenile when being handed the charge sheet and the booklet entitled 'Your rights if you are accused of an offence under the Service justice system (T-SL-accused) see [Annex G](#). Appropriate adult<sup>153</sup>, in the case of a juvenile, means:

- a. His parent or guardian (or, if they are in care, the care authority or voluntary organisation);
- b. A social worker; or
- c. Failing either of the above, another responsible adult aged 18 years or over, who is not a Service policeman or employed by the Service Police and is not involved and not likely to be involved in the investigation.

164. A person, including a parent or guardian, should not be an appropriate adult if they are suspected of involvement in the offence in question, the victim, a witness, or is involved in the investigation or has received admissions prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence.

165. **Charging and custody.** The issue of custody after charge is dealt with in detail in [Chapter 5](#) (Custody). The CO does not have the power to bring a charge that can only be tried by the CM or to charge a relevant civilian; only the DSP<sup>154</sup> has the power to direct the CO to bring such a charge.

### **DSP powers after charge<sup>155</sup>**

166. **Charges allocated for CM trial.** Once the CO has brought a charge in accordance with a direction from the DSP, that charge is allocated for CM trial unless the DSP has allocated it for SCC trial. The DSP may, prior to arraignment at trial:

- a. Amend the charge;
- b. Substitute for the charge another charge against the accused;
- c. Bring an additional charge against the accused;
- d. Discontinue the charge. In these circumstances the CO must as soon as reasonably practicable, give written notification of the discontinuance to the accused, see [Annex O](#);

<sup>153</sup> The meaning is taken from the JSP 397 (Service Police Codes of Practice Part 2 paragraph 1.4(c)).

<sup>154</sup> A duty prosecutor will be available to direct a charge in such circumstances. See [Chapter 5](#) (Custody) for further information and guidance on how and when to consult the Duty Prosecutor.

<sup>155</sup> Section 125 of the Act.

- e. Refer the charge to the accused's CO<sup>156</sup> (if the accused is a Service person), but only if the charge is capable of being heard summarily (see [Annex L](#));
- f. Allocate<sup>157</sup> the charge for trial by the SCC, but only if the charge is one that the SCC has jurisdiction to try; or
- g. Make a direction barring further proceedings in respect of the offence charged or any offence that could be charged under paragraph 166c above<sup>158</sup> (see [Annex N](#)). If a direction is made, the accused's CO must be notified as soon as reasonably practicable and the CO must write to the accused without delay notifying them of the direction.

167. In order to carry out the actions at paragraphs 166a, b or c above<sup>159</sup>, the DSP must prepare and sign the charge sheet and ensure that a copy of the signed charge sheet is served by hand on the accused<sup>160</sup>. The DSP must also provide a copy of the charge sheet to the CAO.

168. If the amended substituted or additional charge is brought less than 24 hours before the hearing, the DSP must provide a copy of the charge sheet to the judge advocate.

169. CM rules<sup>161</sup> may restrict the exercise of powers under paragraphs 166a - g above after arraignment by the CM or after referral of the charge to the CM<sup>162</sup> or where the accused has elected CM trial. See [Chapter 29](#) (Court Martial proceedings).

170. **Charges allocated for SCC trial.** The DSP may prior to SCC trial<sup>163</sup> :

- a. Amend the charge;
- b. Substitute for the charge another charge against the accused;
- c. Bring an additional charge against the accused;
- d. Discontinue proceedings on the charge (see [Annex P](#)). In these circumstances the CO must, as soon as reasonably practicable, give written notification of the discontinuance to the accused;
- e. Allocate the charge for trial by the CM; or
- f. Make a direction barring further proceedings (see [Annex N](#)) in respect of the offence charged or any offence that could be charged under paragraph 170c above (If a direction is made the accused's CO must be notified as soon as reasonably practicable and the CO must write to the accused without delay notifying them of the direction)<sup>164</sup>.

<sup>156</sup> Section 125 of the Act: these powers are available after arraignment subject to restrictions in Court Martial rules.

<sup>157</sup> Section 125(2)(f) of the Act.

<sup>158</sup> Section 121(5) of the Act.

<sup>159</sup> See the requirements of regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>160</sup> This is not required to be done by a CO. Amended, substituted or additional charges will be served by a Service Prosecutor or by someone authorised by him.

<sup>161</sup> See the Armed Forces (Court Martial Rules) 2009 Rule 60.

<sup>162</sup> See section 279(4) or 280(3) (referral by the SCC) of the Act.

<sup>163</sup> Section 126 of the Act.

<sup>164</sup> Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

171. In order to carry out the actions at paragraphs 170a, b or c above<sup>165</sup>, the DSP must prepare and sign the charge sheet and ensure that a copy of the signed charge sheet is served by hand on the accused<sup>166</sup>. The DSP must also provide a copy of the charge sheet to the CAO.

172. If the amended, substituted or additional charge is brought less than 24 hours before the hearing, the DSP must provide a copy of the charge sheet to the judge advocate.

173. SCC rules<sup>167</sup> may restrict the exercise of powers under paragraphs 170a - f above after a decision by the SCC<sup>168</sup> as to whether it should try the charge see [Chapter 32](#) (Service Civilian Court).

## Procedure for referring a charge to the DSP

174. A CO will refer a charge to the DSP in two situations:

- a. Where the accused has elected CM trial the CO must refer the charge to the DSP; and
- b. Where the CO has decided that it would be more appropriate that the matter be dealt with by CM trial; see Part 4 and [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

175. When referring a charge to the DSP, the CO should forward:

- a. The original charge sheet;
- b. The case summary<sup>169</sup>;
- c. All papers relating to that charge prepared by the Service Police or during a CO's investigation including: all reports prepared by the Service Police; all witness statements; all other written records of evidence including a summary or transcript of all tape recorded interviews; a list of all exhibits and a statement of where any which are not documentary exhibits are held; all documentary exhibits; all disciplinary records of the suspect; if no formal disciplinary record of the suspect is maintained and held a list of his convictions for a Service offence or an offence under any of the SDAs and all equivalent papers prepared by a UK police force or an overseas police force and provided by that force to the Service Police; all documents to be provided, in accordance with the CPIA 1996 (Application to the Armed Forces) Order 2009, to a person involved in the prosecution of Service offences (the case papers<sup>170</sup>);
- d. Any notification from HA that permission to hear the charge has been granted;
- e. Any notification from HA that extended powers have been granted; and
- f. A covering letter explaining why they are referring the charge to the DSP including whether the accused elected CM trial.

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<sup>165</sup> See the requirements of regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>166</sup> Regulation 14 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>167</sup> Armed Forces (Service Civilian Court) Rules 2009.

<sup>168</sup> See section 279 of the Act.

<sup>169</sup> Rule 8(1)(c)(ii) Armed Forces (Summary Hearing and Activation of Suspended Sentence of Service Detention) 2009.

<sup>170</sup> Regulation 2(1)(a) and (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

176. When the CO refers any charge to the DSP that charge is regarded as allocated for CM trial, including where the accused elects CM trial<sup>171</sup>. The DSP will then consider whether the matter should proceed to CM trial or whether he should exercise any of his powers to amend, substitute, bring additional charges or discontinue the charge or to refer a charge back to the CO. Some of these powers would require the accused's consent where he has elected CM trial. The DSP will provide directions as to any action the CO may take in relation to these matters.

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<sup>171</sup> Section 129(2)(b) of the Act.

## Part 6 - Offences listed in Schedule 2 or committed in prescribed circumstances

### Introduction

177. Schedule 2 offences and circumstances of a prescribed description are listed in Annexes [D](#) and [E](#) respectively. Further details and specimen charges are contained in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

178. Once a case has been referred to the DSP following a Service Police investigation (see paragraph 55 above), the procedure to be followed is set out below. See Appendix 2 to Annex A.

### Preliminary considerations

179. When, or as soon as reasonably practicable after, making the referral, the Service Police must provide the DSP with a copy of the case papers<sup>172</sup> and must provide the CO with a copy of all reports relating to the case<sup>173</sup>. This is necessary to ensure that the CO is made aware of matters relating to personnel under his command. This will also allow the CO to bring to the attention of the DSP<sup>174</sup> any other information that he considers relevant to the case, for example, matters relating to the operational context within which the offence is alleged to have been committed.

180. If a CO considers that there is information relevant<sup>175</sup> to the case which ought to be drawn to the attention of the DSP, he must bring it to the attention of the DSP as soon as reasonably practicable. COs should confine themselves to providing factual information relevant to any potential charge and should not express any opinion on whether anyone under command should be charged with a Service offence. A CO should bear in mind that any information he provides to the DSP will be, in most cases, disclosed to an accused as unused material in the event that the DSP decides to direct the bringing of a charge.

181. **Delegation of a CO's powers.** A CO, see [Chapter 2](#) (Meaning of a commanding officer), may delegate to a subordinate commander not below the rank of naval lieutenant, military or marine captain or flight lieutenant any or all of his functions<sup>176</sup>, subject to such conditions as he considers appropriate<sup>177</sup>. For the purpose of this Part, his functions are:

- a. The requirement to notify the Service Police of an offence under Schedule 2 or an offence committed in prescribed circumstances; and
- b. The bringing of one or more charges specified in a direction from the DSP.

182. **Time limits.** Time limits may apply in certain situations (for example former members of the regular or reserve forces or civilians formerly subject to Service discipline). Detailed guidance can be found in [Chapter 3](#) (Jurisdiction and time limits) and COs should seek staff legal advice.

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<sup>172</sup> Regulation 7(1) (b) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009 see paragraph 56 above.

<sup>173</sup> Regulation 8(1) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

<sup>174</sup> "Relevant information" is information that the CO believes the DSP should be aware of including any health problems, whether property has been recovered, or a civilian has returned to the UK and the time limits for dealing with the matter have changed.

<sup>175</sup> Regulation 8(2) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

<sup>176</sup> See Part 5 of the Act and regulation 16 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>177</sup> See regulation 16 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009.

183. **Criminal Procedure and Investigations Act 1996 and disclosure.** All charges allocated for CM trial are governed by the Criminal Procedure and Investigations Act (CPIA) 1996 (Application to the Armed Forces) Order 2009 which make provision equivalent (with modifications) to provisions of Part 1 of the CPIA. They include provision which places a duty: on the DSP to disclose certain documents and material to the accused; on the Service Police to record the details of the officer in charge of the investigation (OCI) and the disclosure officer (DO); and requiring the accused to provide a defence statement to the CAO and the prosecutor. The CPIA code of practice for the Armed Forces includes a requirement on the Service Police to record and retain material which may be relevant to an investigation<sup>178</sup>.

184. The DSP may disclose by sending material to an accused's CO. Where he does so, the CO will be required by the DSP to serve the accused with any material or written statements or documents, as soon as practicable. Once the information has been served, the CO must notify the DSP in writing of the date on which the accused received it. Further guidance on CPIA is contained in JSP 890 (Armed Forces Code of Practice for Disclosure).

### DSP powers

185. Once a case has been referred by the Service Police to the DSP, the DSP will decide whether or not to allocate the case for CM/SCC trial, whichever is appropriate. In making that decision the DSP will apply the principles laid out in the Code for Service Prosecutors<sup>179</sup>.

186. The DSP may take one of the following courses of action:

a. **Direction to bring a charge.** The DSP may direct that the CO bring a specified charge(s) for CM trial or SCC trial (if the DSP has allocated the charge for trial by SCC) (see [Annex K](#));

b. **Service personnel only.** The DSP may refer the case to the accused's CO without giving a direction as to which charge or charges should be brought<sup>180</sup> (see [Annex L](#)). It is then for the CO to decide whether any charges capable of being dealt with summarily should be brought against the accused. In these circumstances, as no charge has been brought as yet, the CO will regain his initial powers<sup>181</sup> in relation to the case and follow the procedure set out in Part 4 (step 3), offences capable of being heard summarily;

c. **Relevant civilians only.** The DSP may allocate the charge for SCC trial once the DSP has made a direction to the CO to bring a charge against a relevant civilian (see [Annex K](#)). If a civilian is jointly charged with a Service person both will be tried by the CM. Relevant civilians cannot be dealt with summarily;

d. **Direction barring further proceedings.** The DSP may issue a direction barring<sup>182</sup> either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offence (see Annexes [M](#) and [N](#) for specimen directions). The DSP may make such a direction<sup>183</sup> in respect of any Service offence as to which he could make a direction under paragraph 186a above.

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<sup>178</sup> In accordance with the Code of Practice set out in the Schedule to the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2008.

<sup>179</sup> This can be found in Volume 3 of the MSL

<sup>180</sup> Section 121(4) of the Act.

<sup>181</sup> Initial powers are defined in section 120 of the Act.

<sup>182</sup> Sections 121(5) and 127 of the Act and note regulation 15(5) of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

<sup>183</sup> Sections 121(5) and 127 of the Act.

A direction barring<sup>184</sup> further proceedings is a direction that the person specified is to be treated as acquitted of the offence specified<sup>185</sup>. This means that the CO may not take any further disciplinary action in the case. The CO must notify<sup>186</sup> the accused as soon as reasonably practicable of the direction barring further proceedings. The CO may, however, consider whether administrative action is appropriate; or

e. **Take no action.** The DSP may decide to take no action under his statutory powers in relation to a Service person or a relevant civilian. This is most likely to occur where the DSP decides to refer the case to the civilian authorities in the UK or abroad. In such circumstances the DSP will notify the CO of his decision (eg to refer the case to the specified civilian authorities).

187. If it is decided to prosecute, that decision will be kept under review. If there is reason subsequently to change that decision, for example, through the receipt of fresh evidence which means that the case no longer meets the evidential test, those proceedings will be discontinued, see Annexes [Q](#) and [P](#).

## Charging

188. **Action by CO on a DSP charge.** If the DSP has directed a CO to bring a charge, the DSP will provide the CO with a charge sheet specifying the charges. The CO must bring the charge(s) in the charge sheet as directed<sup>187</sup>. In these circumstances, the case is not referred back to the CO and a CO does not therefore have initial powers<sup>188</sup>. The DSP remains responsible for those cases in which he has directed a CO to bring a charge.

189. **Charging procedure.** The charging procedure<sup>189</sup> is as follows:

- a. The CO<sup>190</sup> of the accused must sign the charge sheet; and
- b. A copy of the signed charge sheet ([Annex Q](#)) and a copy of the DSP's direction to bring the charge ([Annex K](#)) must be served by hand on the accused. Service of a charge sheet can be carried out by the CO, or by anyone authorised by the CO.

190. When the accused is served with the charge sheet, the name of the person serving it should be recorded in addition to the date and time of service. A copy of the charge sheet should be retained on file. Accurate recording of the timing of a charge is particularly important in custody cases or where other time limits may apply.

191. Once a copy of the charge has been served on the accused, the charging procedure will be complete<sup>191</sup>. The original charge sheet (signed by the CO) must be returned to the DSP as soon as reasonably practicable<sup>192</sup>.

192. **Appointment of a defendant's assisting officer.** As soon as reasonably practicable after a charge is brought, a defendant's assisting officer (DAO) may be appointed to assist the defendant with the preparations for and during the trial. A defendant may ask

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<sup>184</sup> Section 63 relates to service proceedings; section 64 relates to civilian proceedings for a criminal conduct offence under section 42 of the Act.

<sup>185</sup> For the purposes of sections 63 and 64 of the Act.

<sup>186</sup> Regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>187</sup> Section 122(1) of the Act.

<sup>188</sup> Section 119(5) of the Act.

<sup>189</sup> Regulation 11(1) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>190</sup> Guidance on delegation of the COs powers under Part 5 of the Act are dealt with in paragraphs 66 – 74.

<sup>191</sup> For the circumstances when the accused can be interviewed about an offence after he has been charged see the Code of Practice for the Treatment and Questioning of Persons by the Service Police (Code C).

<sup>192</sup> Regulation 12(b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

for any suitable person to assist them subject to certain restrictions. Further details in relation to a DAO are set out in [Chapter 29](#) (Court Martial proceedings). A brief for the DAO is also contained in [Chapter 29](#) (Court Martial proceedings). A copy of the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#), should be provided (if it has not already been done).

193. **Mentally disordered/incapable suspects.** Where a suspect is mentally disordered or is mentally incapable of understanding the significance of the charging procedure, then an appropriate adult should be present. An appropriate adult is defined at 162 above.

194. **Suspects 17 years old or of a lower age.** Where a suspect is 17 years old or of a lower age, they are to be treated as a juvenile for the purposes of charging. An appropriate adult should be notified of the intention to charge and should accompany the juvenile when being handed the charge sheet and the copy of the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). Appropriate adult<sup>193</sup>, in the case of a juvenile is given the same meaning as in paragraphs 163 and 164 above.

195. **Charging and custody.** The issue of custody after charge is dealt with in detail at [Chapter 5](#) (Custody). The CO does not have the power to bring a charge in relation to a Schedule 2 offence or offence committed in prescribed circumstances, only the DSP<sup>194</sup> has the power to direct the CO to bring a specified charge.

196. In those cases where an application for custody after charge is likely to be made, the CO should be aware that he has no power to charge a Schedule 2 offence or an offence committed in prescribed circumstances, unless directed by the DSP.

197. In these circumstances, the DSP should be asked without delay to consider directing an appropriate charge. The DSP will consider the available evidence and apply the realistic prospect of conviction test<sup>195</sup>. If the DSP directs the CO to bring a charge, the normal charging procedure should then be followed<sup>196</sup>. If the matter arises outside normal working hours, the Duty Prosecutor must be contacted<sup>197</sup>.

198. The CO should obtain staff legal advice in respect of the application for custody.

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<sup>193</sup>The meaning is taken from the Service Police Codes of Practice.

<sup>194</sup> A duty prosecutor will be available to direct a charge in such circumstances. See [Chapter 5](#) (Custody) for further information and guidance on how and when to consult the duty prosecutor.

<sup>195</sup> Code for Service Prosecutors found on the SPA website.

<sup>196</sup> Where custody after charge is applied for out of normal duty hours the duty/orderly officer must be a subordinate commander with delegated authority to refer a case to the DSP.

<sup>197</sup> Duty Prosecutor contact telephone number 07554 114229.

## Part 7 - Administrative and welfare responsibilities

### Introduction

199. In disciplinary matters, it is essential in the interests of fairness and justice that matters are dealt with diligently and without undue delay. Delay can be particularly stressful to both victims and the accused and such pressure can cause difficulty in their personal lives as well as an inability to focus on routine work, decision making, key career courses and decisions. Delay can also impact on an investigation and fairness of the proceedings because over time, witnesses' recollections of an event may be affected or evidence may be lost. Once an investigation has been completed, the resulting report should be acted upon as soon as reasonably practicable. Discipline case files should be carefully maintained, with accurate record keeping and file management.

### Code of practice on services to be provided by the armed forces to victims of crime

200. The code of practice set out in JSP 389 lists specific duties for the CO, DSP, MCS, CAO and Service Police in respect of a victim of a Service offence. This is a tri-Service policy on the treatment of victims, which should be brought to the attention of any victim of crime within the Service, including relevant civilians. The requirements contained within the code are mandatory and govern the minimum level of service to be provided to:

- a. Victims of relevant criminal conduct which occurred in the United Kingdom; and
- b. Victims of relevant criminal conduct which occurred outside the United Kingdom when those victims were Service personnel or relevant civilians.

201. A person entitled to receive support under the code is a person who has made a complaint to the ship/unit/establishment or Service Police in relation to an allegation of violence, interference with property (including theft and criminal damage), an offence of a sexual nature, ill treatment, conduct of a cruel kind and any other matter the CO decides requires support. The DIN must be consulted as the authoritative document.

### Publications

202. Information on the disciplinary system is to be found in a number of publications, which should be brought to the attention of the suspect/accused at the appropriate stage of proceedings. These are:

- a. Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#)<sup>198</sup>;
- b. Brief for accused's assisting officer<sup>199</sup>;
- c. Defendant's assisting officer guide<sup>200</sup>; and
- d. JSP 838 (Armed Forces Legal Aid Scheme) and see Form JPA T002.

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<sup>198</sup> This publication provides information to a Service personnel or relevant civilians on their rights whilst being investigated, charged heard summarily or by Service court.

<sup>199</sup> See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) which contains instructions to the AAO.

<sup>200</sup> See [Chapter 29](#) (Court Martial proceedings) which contains the DAO instructions.

203. There is a well established system under which Service personnel who are under investigation or charged with an offence are supported. This may include:

- a. Comprehensive information and guidance on the disciplinary system<sup>201</sup>;
- b. Access to legal advice and assistance, see paragraphs 206 - 208 below and JSP 838 (Armed Forces Legal Aid Scheme);
- c. Continuing employment and sensitive career management while the case progresses<sup>202</sup>;
- d. The appointment of assisting officers from the individual's ship/unit/establishment<sup>203</sup>;
- e. The normal range of welfare support (welfare officers, padre, medical, family support); and
- f. Protection from media attention where appropriate<sup>204</sup>.

## Direct welfare support

204. In all cases, welfare support should be provided. An accused and their family have access to the full range of welfare support, including pastoral and medical care that is tailored to meet the needs of the individual.

205. It is important that welfare support is open to all on an equal basis. The Services have issued specific guidance covering support to accused personnel<sup>205</sup>. COs and line management have ready access to welfare expertise and subject matter experts to call upon if required, especially if the accused has just landed from a ship or been transferred from his unit for disciplinary reasons.

## Legal aid

206. **Interview.** A suspect who is being interviewed by the Service Police is entitled to free legal advice during the interview in accordance with JSP 397 (Service Police Codes of Practice). This may be provided under the duty solicitor legal aid scheme or from a Service lawyer if overseas.

207. **The Criminal Legal Aid Scheme.** The primary function of the Armed Forces Criminal Legal Aid Authority is to provide legal aid case management and funding for defendants or appellants who:

- a. Appeal against findings and/or awards following summary dealings, including applications for extension of the appeal period by the Summary Appeal Court, for leave to appeal out of time (Service personnel only);

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<sup>201</sup> Your rights if you are accused of an offence under the Service justice system (Annex G).

<sup>202</sup> Removal from post or suspension considered under QRs or single-Service administrative instructions, RN: PLAGO 0803 and FLAGO Chapter 16, Army; AGAI 67 and QRs Chapter 6, RAF: QRs 1027 and AP 3392 Vol 5 Leaflet 127.

<sup>203</sup> See [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention) for a full brief to the Accused Assisting Officer.

<sup>204</sup> See Tri-Service Guidance on contact with the media (DIN 2007 03-006).

<sup>205</sup> RN: PLAGO article 0101; Army: AGAI 81 paragraph 081.035 and RAF: AP3392 Vol 4.

- b. Have a case referred to the DSP, for a decision on prosecution; this includes schedule 2 offences which are referred directly to the DSP by the Service Police as well as matters referred to the DSP by the Commanding Officer;
- c. Are to be tried in the Court Martial (CM) or the Service Civilian Court (SCC);
- d. Wish to apply for leave to appeal to the Court Martial Appeal Court (CMAC);
- e. Wish to appeal in the CM, against the finding and/or sentence after trial in the SCC (relevant civilians only); or
- f. Are to be tried by a criminal court outside the UK

For more detail reference should be made to JSP 838 (Armed Forces Legal Aid Scheme). See also [Annex R](#) for a quick reference flow chart on applying for legal aid..

208. **Summary hearing.** Legal advice to the accused is ordinarily at the accused's expense, but there are many potential sources of free legal advice from firms of solicitors who offer a free initial consultation. Advice may be available from a Service lawyer. The AAO may be in a position to advise the accused whether they are able to get free legal advice contacting a staff lawyer if he themselves requires guidance in this respect. A legal adviser is not allowed to be present during the summary hearing. Legal aid is not available for summary hearings by the CO; however, an individual is entitled to obtain legal advice prior to a summary hearing at his own expense, or from a Service lawyer if available.

## Legal advice to the CO and the Service Police

209. **During investigation.** The DSP and staff legal advisers can provide legal advice to the Service Police during the course of an investigation. Once an investigation report has been submitted by the Service Police to the CO, the CO should obtain legal advice from a staff legal adviser; this will include any application for Service custody, whether before charge or after charge.

210. RN coxswains should seek advice during the course of an investigation from the relevant Naval Provost Marshal in the first instance. In the other Services, personnel conducting CO's investigations should seek advice from a staff legal adviser or HA.

211. **Following investigation.** The CO should seek legal advice from a staff legal adviser in relation to charging, referral to the DSP, custody matters, extended powers, and applications to hear any of the offences listed in [Annex C](#). This list is not exhaustive.

212. General guidance on disciplinary action may be also sought from HA.

## Employment during an investigation and/or while awaiting trial

213. A CO may suspend a suspect/accused from duty during the investigation of an alleged offence or any matter, if he considers that such action is necessary in the interests of the Service or individual. Full guidance on suspension<sup>206</sup> and removal from post<sup>207</sup> is contained in single-Service instructions. Staff legal advice should be taken.

<sup>206</sup> Suspension from duty pending investigation is dealt with under single-Service policy. RN: PLAGO 0803; Army: QRs paragraph 6.015; and RAF: AP 3392 Volume 5 leaflets 127 to 130.

<sup>207</sup> See single-Service guidance on removal from post RN: PLAGO 0803; Army: AGAI 67; and RAF AP 3392 Volume 5 leaflet 127 to 130.

214. The potential impact on the accused of an investigation and charge should be addressed during the disciplinary process. Consideration should be given to whether a specialised medical assessment is required (particularly psychiatric) for those employed in a safety critical area or who have access to firearms.

## **Administrative action**

215. There may be times when administrative action should be considered instead of, or in addition to, formal disciplinary action. The distinction between disciplinary action and administrative action is important. As a general rule, disciplinary action should be used where there is evidence that an offence has been committed, where the application of Service law is appropriate and where an individual should, if convicted, be punished. Minor administrative action is intended to correct professional and personal shortcomings. It should not be used as a substitute for disciplinary action in clearly criminal matters (unless it is following a criminal conviction). When minor administrative action is taken, the sanction should fit the professional failing, and be clearly designed to correct it, not to punish the individual. Major administrative action, which includes discharge from the Service, may be taken in conjunction with or following disciplinary action.

216. Guidance on major administrative action is set out in the single-Service publications<sup>208</sup>. JSP 833 (Minor Administrative Action) addresses minor administrative action. In addition, legal advice may be sought from a staff legal adviser.

217. Where harassment or bullying is alleged, reference should be made to JSP 831 (Redress of individual grievance: Service complaints) and if necessary, JSP 763 (The MOD Harassment Complaints Procedure), when considering how to proceed.

218. A CO should be aware that an allegation of harassment or bullying may amount to a prescribed circumstance<sup>209</sup>. It may not be immediately apparent whether a disciplinary offence has been committed and whilst proceeding with his preliminary enquiries a CO<sup>210</sup> should be aware of the possibility.

219. If at any point during his enquiries, it appears that prescribed circumstances do or may exist, the CO is under a duty to immediately inform the Service Police. If the matter is reported to the Service Police, the CO may not take any further action to investigate the allegation under JSP 831 or JSP 763, until the Service Police either refer the matter back to them or inform them that there is insufficient evidence to charge an offence. If the CO is unsure whether prescribed circumstances exist he should seek staff legal advice.

220. Although relevant civilians are not subject to the Services' provisions on administrative action, civilians are allowed certain privileges such as bringing a vehicle onto camp or are entitled under a licence to occupy a married quarter. Accordingly such privileges or licences may be revoked if the misconduct warrants it. For example, where a civilian is found to have contravened standing orders by driving without insurance, the CO may wish to consider revoking the civilian's vehicle pass to enter the unit/establishment. Staff legal advice should be sought in these cases.

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<sup>208</sup> Single-Service guidance on major administrative action can be found in PLAGO for the RN, AGAI 67 for the Army and QRs paragraph 1028 for the RAF.

<sup>209</sup> Under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (see Annex E).

<sup>210</sup> The CO does not have discretion to investigate circumstances of a prescribed description (see section 114 of the Act), even if the complainant does not wish to make a formal complaint to the Service Police. In such cases the matter must be referred to the Service Police. If the case has been investigated and referred back to the CO, then administrative action may be taken, if appropriate. This will also apply to any allegation made in the form of a redress of grievance, in which prescribed circumstances arise.

221. In the case of a relevant civilian where a decision is made not to take disciplinary action, a CO may consider whether to refer the matter to that person's employer (if applicable). In these circumstances staff legal advice should be sought.

**Administrative considerations**

222. When despatching case papers, the normal postal system can incur protracted delays. Case papers should be unclassified unless they contain classified information, but must have the appropriate privacy marking<sup>211</sup>. They are to be passed by the fastest possible means and optimum use should be made of e-mail, fax and couriers. Service duty vehicles and existing contracted courier services are to be used and all packages clearly marked with a label containing the following text:

<b>PRIORITY - DISCIPLINE CASE PAPERS</b>	
This package contains papers relating to a discipline case. Service policy requires that on the day of receipt an authorised person opens it and takes the necessary action.	
Note: this label is to be retained with the case papers for future audit purposes.	
Date of Despatch:	Date of Receipt:
From:	Name (BLOCKS):
To:	Rank:
Signature:	

**Reporting of deaths to Service Police (where no Service offence is suspected)**

223. Where a death occurs overseas of a Service person or a relevant civilian, the Service Police should be notified, even when no Service offence is suspected. The Service Police have certain obligations when an unexpected death occurs, even though no offence is suspected.

<sup>211</sup> See JSP 440 (The Defence Manual of Security).

## Part 8 – Transitional guidance

224. This Part outlines the main transitional provisions related to Part 5 of the Act contained in the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. The basic aim of the transitional arrangements for Part 5 is to allow continuity under the new provisions in respect of events occurring wholly or partly before commencement (ie before 31 October 2009).

### Application of AFA06 to SDA offences

225. Paragraphs 227 to 233 set out how, for the purposes of transitional arrangements, AFA 06 will apply to SDA offences. This annex specifically identifies those SDA offences which may be dealt with at a summary hearing and those SDA offences which will count as 'Schedule 2' offences for the purposes of AFA 06.

226. Offences committed before commencement must be charged as offences under AA55, AFA55 or NDA57 as the case may be, *not* as the corresponding offence under AFA06. This annex explains:

- a. Which offences under AA55, AFA55 and NDA57 may be dealt with at a summary hearing under AFA06; and
- b. Which offences under AA55, AFA55 and NDA57 count as Schedule 2 offences for the purposes of Part 5 of AFA06.

This annex is 'transitional' only in a technical sense. It will continue to be relevant whenever offences committed before commencement come to light after commencement.

### Offences which may be dealt with at a summary hearing<sup>212</sup>

227. In addition to the offences listed at Annexes [B](#) and [C](#), a number of offences under AA55, AFA55 and NDA57 may be dealt with at a summary hearing under AFA06.

228. **AA/AFA55 offences.** Offences under the following sections of AA/AFA55 may be dealt with at a summary hearing under AFA06:

- a. Section 29 (offences by or in relation to sentries, persons on watch etc);
- b. Section 29A (failure to attend for duty, neglect of duty etc);
- c. Section 30(c) (taking vehicle, equipment or stores abandoned by the enemy);
- d. Section 33 (insubordinate behaviour);
- e. Section 34 (disobedience to lawful commands);
- f. Section 34A (failure to provide a sample for drug testing);
- g. Section 34B (failure to provide sample after serious incident);
- h. Section 35 (obstruction of provost officer);

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<sup>212</sup> See article 15 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

- i. Section 36 (disobedience to standing orders);
- j. Section 38 (absence without leave);
- k. Section 39 (failure to report or apprehend deserters or absentees);
- l. Section 42(1)(a) (falsely pretending to be suffering from sickness or disability);
- m. Section 43 (drunkenness);
- n. Section 43A (fighting, threatening words etc);
- o. Section 44 (damage to, or loss of, public or Service property etc);
- p. Section 44A(1)(c), (d) or (e) (damage to, and loss of, HM aircraft or aircraft material);
- q. Section 44B(2) (conduct likely to impair efficiency or effectiveness of public or Service equipment etc);
- r. Section 45 (misapplication and waste of public or Service property);
- s. Section 46 (offences relating to issues and decorations);
- t. Section 50 (inaccurate certification);
- u. Section 51 (low flying);
- v. Section 52 (annoyance by flying);
- w. Section 54(2) (releasing prisoner or allowing escape);
- x. Section 55 (resisting arrest);
- y. Section 56 (escape);
- z. Section 60 (unauthorized disclosure of information);
- aa. Section 61 (false statements on enlistment);
- ab. Section 62 (false documents);
- ac. Section 65 (ill-treatment);
- ad. Section 66 (disgraceful conduct of a cruel, indecent or unnatural kind);
- ae. Section 68 (attempt, where the offence attempted is one of those above);
- af. Section 69 (conduct to prejudice of military or air-force discipline);
- ag. Section 75J (failure to attend hearing after release from custody).

This includes an offence under one of the above sections which was committed because AA/AFA55 section 68A (aiding and abetting, and inciting) applied.

229. An offence under AA/AFA55 section 70 (criminal conduct) may be dealt with at a summary hearing if the corresponding civil offence is one of those listed at Schedule 1 to AFA06. However if the corresponding civil offence is listed at Part 2 of Schedule 1 to AFA06 it may not be heard summarily without the permission of higher authority, unless the CO hearing the charge is a 2\* or above.

230. **NDA offences.** Offences under the following sections of NDA57 may be dealt with at a summary hearing under AFA06:

- a. Section 5(c) (taking vehicle, equipment or stores abandoned by the enemy);
- b. Section 6 (offences by or in relation to sentries, persons on watch etc);
- c. Section 7 (failure to attend for duty, neglect of duty etc);
- d. Section 11 (insubordinate behaviour);
- e. Section 12 (disobedience to lawful commands);
- f. Section 12A (failure to provide a sample for drug testing);
- g. Section 12B (failure to provide sample after serious incident);
- h. Section 13 (fighting, threatening words etc);
- i. Section 14 (obstruction of provost officer);
- j. Section 14A (disobedience to standing orders);
- k. Section 17 (absence without leave);
- l. Section 18 (failure to report or apprehend deserters or absentees);
- m. Section 21 (low flying);
- n. Section 22 (annoyance by flying);
- o. Section 25 (inaccurate certification);
- p. Section 27 (malingering), but only if the offence is one of falsely pretending to be suffering from sickness or disability, or failing to do anything whereby any sickness or disability is prolonged or aggravated;
- q. Section 28 (drunkenness);
- r. Section 29 (damage to, or loss of, public or Service property etc);
- s. Section 29A(1)(c), (d) or (e) (damage to, and loss of, HM aircraft or aircraft material);
- t. Section 29B(2) (conduct likely to impair efficiency or effectiveness of public or Service equipment etc);
- u. Section 30 (misapplication and waste of public or Service property);

- v. Section 31 (offences relating to issues and decorations);
- w. Section 33A(2) (releasing prisoner or allowing escape);
- x. Section 33B (resisting arrest);
- y. Section 33C (escape);
- z. Section 34 (unauthorised disclosure of information);
- aa. Section 34A (false statements on entry);
- ab. Section 35 (false documents);
- ac. Section 36A (ill-treatment);
- ad. Section 37 (disgraceful conduct of a cruel, indecent or unnatural kind);
- ae. Section 39 (conduct to prejudice of naval discipline);
- af. Section 40 (attempt, where the offence attempted is one of those above);
- ag. Section 47K (failure to attend hearing after release from custody).

This includes an offence under one of the above sections which was committed because NDA57 section 41 (aiding and abetting, and inciting) applied.

231. An offence under NDA57 section 42 (criminal conduct) may be dealt with at a summary hearing if the corresponding civil offence is one of those listed at Schedule 1 to AFA06. However if the corresponding civil offence is listed at Part 2 of Schedule 1 to AFA06 it may not be heard summarily without the permission of higher authority, unless the CO hearing the charge is a 2\* or above.

232. **AWOL under RFA96.** An offence of AWOL under RFA96 section 96 or 97 may be dealt with at a summary hearing under AFA06 even if committed before commencement<sup>213</sup>.

233. **Charges capable of being heard summarily.** Appendix 4 to [Annex A](#) explains the conditions that must be met before a charge is 'capable of being heard summarily' under AFA06. In the case of an SDA offence, section 52(4) of AFA06 is *also* met if the accused:

- a. Was subject to military or air-force law or to NDA57 from the time of the offence to commencement, and
- b. Has been subject to Service law since commencement.

## Schedule 2 offences<sup>214</sup>

234. In addition to the offences listed at [Annex D](#), the following SDA offences count as 'Schedule 2 offences' for the purposes of Part 5 of AFA06:

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<sup>213</sup> Where a period of AWOL began before commencement and continued until after commencement, legal advice should be sought.

<sup>214</sup> See article 42 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

- a. An offence under AA/AFA55 section 24 or NDA57 section 2 (misconduct in action);
- b. An offence under AA/AFA55 section 25(1)(a), (b), (c), (d) or (f) or NDA57 section 3(1)(a), (b), (c), (d) or (f) (assisting the enemy);
- c. An offence under AA/AFA55 section 26(1) or NDA57 section 4(1) (obstructing operations);
- d. An offence under AA/AFA55 section 30 or NDA57 section 5 (looting);
- e. An offence under AA/AFA55 section 31 or NDA57 section 9 (mutiny);
- f. An offence under AA/AFA55 section 32 or NDA57 section 10 (failure to suppress mutiny);
- g. An offence under AA/AFA55 section 37 or NDA57 section 16 (desertion) where the accused intends to avoid active service<sup>215</sup>;
- h. An offence under AA/AFA55 section 44A(1)(f) or NDA57 section 29A(1)(f) (causing sequestration etc of aircraft) where the offender acts wilfully or with wilful neglect;
- i. An offence under AA/AFA55 section 48A or NDA57 section 19 (loss or hazarding of ship);
- j. An offence under AA/AFA55 section 49 or NDA57 section 20 (dangerous flying etc) where the offender acts wilfully or with wilful neglect;
- k. An offence under AA/AFA55 section 68 or NDA57 section 40 of attempting to commit any of the offences above;
- l. An offence under AA/AFA55 section 70 or NDA57 section 42 (criminal conduct) where the corresponding civil offence is:
  - (1) An offence listed in paragraph 12 of Schedule 2 to AFA06;
  - (2) An offence under the Sexual Offences Act 1956, sections 1 to 7, 9 to 11, 16, 17, 19 to 24, 26 to 29 or 32;
  - (3) An offence under the Mental Health Act 1959, section 128;
  - (4) An offence under the Indecency with Children Act 1960, section 1;
  - (5) An offence under the Sexual Offences Act 1967, section 4 or 5;
  - (6) Attempt, conspiracy or incitement to commit any of the offences above;
  - (7) An offence under Part 2 of the Serious Crime Act 2007 of assisting or encouraging the commission of an offence within (1) above.

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<sup>215</sup> For the meaning of 'active service' in this context, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) section 8(3).

## **Offences discovered post-commencement and cases in progress at commencement**

235. Paragraphs set 236 to 262 out how, for the purposes of transitional arrangements, SDA offences which are discovered post-commencement or matters which are ongoing at commencement are to be dealt with.

### **Situation 1 - SDA offences discovered post-commencement**

236. This situation will occur where an offence is committed pre-commencement but does not come to light until after commencement. Offences which are committed before 31 Oct 09 must be charged under one of the SDAs. Where, post-commencement, it appears that an offence might have been committed pre-commencement, it will generally be handled in the same way as a Service offence. For this reason the AFA 06 arrangements and therefore the [Chapter 6](#) guidance will apply. The transitional guidance in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences) should be read to confirm the arrangements for SDA offences post-commencement.

237. **Situation 2 - Where a CO is aware that a SDA offence has been committed but a suspect has not been charged pre-commencement.** The circumstances in which a CO will have 'initial powers' in relation to a case (such as the power to bring a charge) because of events which occurred before commencement<sup>216</sup> are explained at paragraphs 241 to 244 below

238. **Situation 3 - Where an accused has been charged with an SDA offence but the charge has not been disposed of pre-commencement.** The circumstances in which a CO has powers under AFA06 in relation to a charge brought under the SDAs before commencement are explained in paragraphs 245 to 262 below.

239. Situations 2 and 3 outlined above are matters which will be ongoing at commencement and the transitional arrangements that apply are complicated. COs should take not take action without staff legal advice.

240. This guidance should be read in conjunction with the flow diagrams at [Annex S](#) starting at the 'Transitional guidance - Overview' flow diagram.

### **Situation 2 - Where a CO is aware that a SDA offence has been committed but a suspect has not been charged pre-commencement**

241. If no charge was brought before commencement<sup>217</sup>, the CO may have initial powers under AFA06 section 119(2), (4) or (5). If so, he can bring a charge or refer the case to the DSP, under section 120.

242. The CO has initial powers under section 119(2) if:

- a. At commencement, they are aware<sup>218</sup> of an allegation or circumstances indicating that a person under his command has or may have committed an SDA offence;

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<sup>216</sup> The question whether a CO has 'initial powers' will normally arise only where no charge was reported to him before commencement and no charge has yet been brought under AFA06. However, it is also possible that a CO might need 'initial powers' in respect of a case where a charge was reported to him before commencement, e.g. because the proceedings were stayed but the CO now wishes to bring another charge.

<sup>217</sup> The CO may also have initial powers if a charge was brought before commencement but no charge is 'current at commencement', see footnote 1 above.

- b. The case has not been investigated by Service Police;
- c. If the case has been investigated by civilian police, it is not likely to be referred to the Service Police; and
- d. The CO is not required by AFA06 section 113 or 114 to ensure that the Service Police are aware of the matter<sup>219</sup>.

243. The CO has initial powers under section 119(4) if, before commencement, the Service Police made a deemed referral for the purposes of section 116(3)<sup>220</sup>, see paragraph 259 below.

244. The CO has initial powers under section 119(5) if, before commencement, the PA referred *part* of a case back to them, and no charge relating to that part of the case is 'allocated for Court Martial trial' or 'allocated for summary hearing'<sup>221</sup>. If the PA referred the *whole* case back, the summary charge will be 'allocated for summary hearing', so the CO does not need initial powers: he already has the section 123 powers in relation to the existing charge. If the PA only referred *part* of the case back, however, it may be that the summary charge relates to the part which the PA retained. In these circumstances there may be no summary charge which relates to the part of the case that was referred back; but in that case the CO has initial powers.

### **Situation 3 - Where an accused has been charged with an SDA offence but the charge has not been disposed of pre-commencement**

245. **Possible outcomes.** Where a charge was reported to the accused's CO before commencement and has not been disposed of before commencement, it *may* be possible for the CO to hear it, or exercise the section 123 powers in relation to it, under AFA06. The main possibilities are as follows:

- a. The charge is 'allocated for Court Martial trial'. That is, the DSP has the section 125 powers in relation to the charge, and the CO has no powers.
- b. The charge is 'allocated for summary hearing', and the CO may hear it. Note that 'allocated for summary hearing' is a technical term. It means only that the CO has the section 123 powers in relation to the charge. It does *not* necessarily mean that the charge will in fact be heard summarily, or even that it *can* be heard summarily. Hence the third possibility:
- c. The charge is 'allocated for summary hearing', *but the CO may not hear it* (or may not *yet* hear it); or
- d. No further steps may be taken on the charge<sup>222</sup>.

246. **Charges preferred by the PA.** In paragraph 245, 'the charge' means the charge reported to the CO under AA/AFA55 section 76 or NDA57 section 52B, or any charge that

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<sup>218</sup> See article 43(4) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, which modifies the words 'becomes aware' in section 119(2).

<sup>219</sup> AFA06 sections 113 and 114 apply not only where a CO 'becomes' aware (after commencement) of a possible Schedule 2 offence or of prescribed circumstances, but also where they were already aware of the matter *before* commencement, Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 43(1) to (3). For SDA offences which count as Schedule 2 offences, see paragraph 234.

<sup>220</sup> Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 50.

<sup>221</sup> Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, article 51.

<sup>222</sup> But it may be possible to bring another charge, see footnote 1 above.

the CO may have substituted for that charge before commencement. Where a charge has been reported to the CO and the case has been referred to the PA, the PA may have preferred a new charge (possibly identical to the one originally reported) with a view to court-martial trial. In these circumstances the SPA should be consulted as to whether the charge preferred by the PA is 'allocated for Court Martial trial'. If it is, the CO will have no powers in relation to *that* charge unless and until the DSP refers it back; and the CO will also have no powers in relation to *the charge originally reported to them*.

## Determining possible outcomes

247. In the rest of this Part:

- a. It is assumed either that no charge has been preferred by the PA, or that any charge preferred by the PA is not 'current at commencement' (e.g. because the PA has discontinued proceedings on it); and
- b. 'The summary charge' is short for 'the charge reported to the CO under AA/AFA55 section 76 or NDA57 section 52B, or any charge that the CO may have substituted for that charge before commencement'. The expression 'summary charge' should *not* be read as implying that the charge can or should be heard summarily.

Note that the summary charge will in certain circumstances be 'allocated for Court Martial trial', even though it is by definition a charge which under the SDAs could not be tried by court-martial (because a court-martial could only try charges preferred by the PA).

## Question 1 - Is the summary charge 'current at commencement'?

248. The summary charge will be 'current at commencement' if the conditions set out at article 46(4) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 are met. Those conditions are summarised in the flow diagram at [Appendix 1 to Annex S](#) entitled 'Summary charge current?' and in paragraphs 249 and 250 below.

249. **Was a finding recorded before commencement?**

a. **Yes.** If so, the summary charge cannot be current: it has been superseded by the finding. If the summary charge was found proved and punishment was not awarded before commencement, punishment must be awarded (under the SDAs, *not* AFA06) if this has not yet been done, see the transitional guidance in [Chapter 13](#) (Summary hearing sentencing and punishments).

b. **No.** If no finding was recorded on the summary charge before commencement:

(1) Was the charge dismissed without a hearing, under AA 1955 section 76(5)(a) or NDA 1957 section 52B(5)(a)?

(2) Were further proceedings on the charge stayed under AA/AFA55 section 76(4) or NDA57 section 52B(4)?

(3) Did higher authority refer the charge back to the CO under AA/AFA55 section 76A(2) or NDA57 section 52C(2) with a direction to dismiss it or to stay further proceedings on it?

If the answer to any of these questions<sup>223</sup> is *yes*, the summary charge is not 'current at commencement'<sup>224</sup>. If the answer to all of these questions is *no*, then ...

**250. Was the case referred to the PA before commencement?**

a. **No.** If not, the summary charge is 'current at commencement'. Go to paragraph 251 below.

b. **Yes.** If so, the status of the summary charge depends on the action (if any) that the PA took before commencement.

(1) If the PA preferred a charge, the summary charge is *not* 'current at commencement' *unless* the PA also referred the case back to the CO or the ASA under AA/AFA55 section 83B(2) or 83BB(2A) or NDA57 section 52I(2) or 52II(2A)<sup>225</sup>. If the PA did not refer the case back, the charge preferred by the PA will normally be 'allocated for Court Martial trial', and the summary charge falls away.

(2) If the PA did not prefer a charge, the summary charge *is* 'current at commencement'<sup>226</sup> *unless* the PA informed the CO before commencement that the PA had decided to take no action, i.e. that he had decided *neither* to prefer a charge *nor* to refer the case (or a part of the case to which the charge relates) back to the CO.

**Question 2 - Is the summary charge 'allocated for summary hearing'?**

251. A summary charge which is 'current at commencement' is not necessarily 'allocated for summary hearing' immediately after commencement<sup>227</sup>. It may be 'allocated for Court Martial trial' instead, so that it is the DSP rather than the CO who has powers in relation to it (even though it was not the PA who preferred it). The allocation of the charge will depend on the factors in paragraphs 252 to 254.

**252. Did the accused elect court-martial trial of the charge?**

a. **Yes.** If so (and he did not withdraw the election with leave before commencement)<sup>228</sup>, the summary charge is 'allocated for Court Martial trial' immediately after commencement. The CO need not formally refer it, but should pass the details to the SPA if they are not already aware of the matter.

b. **Declined.** If the accused *declined* the opportunity to elect court-martial trial before commencement (or did elect but withdrew the election with leave before commencement), special rules apply, see paragraph 262 below.

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<sup>223</sup> There is one further case in which a summary charge is not 'current at commencement', viz. where the time limit for court-martial trial has already expired. The time limit applicable for this purpose is defined in article 48 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009. This situation is very unlikely to arise.

<sup>224</sup> Article 46(4)(e) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 also provides that a charge is not 'current at commencement' if another charge has been substituted for it, because the new charge takes the place of the original one. In these circumstances the questions in the flowchart and the text must be considered in relation to the *new* charge.

<sup>225</sup> If the PA preferred a charge and referred *part* of the case back, the summary charge is not 'current at commencement' unless it relates to the part that was referred back.

<sup>226</sup> But 'allocated for Court Martial trial', see paragraph 253 below.

<sup>227</sup> Even if it is 'allocated for summary hearing' immediately after commencement, it will become 'allocated for Court Martial trial' if the CO refers it to the DSP. Conversely, if the charge is initially 'allocated for Court Martial trial' it will become 'allocated for summary hearing' if the DSP refers it back to the CO.

<sup>228</sup> If the case was referred to the PA following the election, a withdrawal of the election with leave does not prevent the charge from being 'allocated for Court Martial trial' unless the PA referred the case back.

c. **Not given the opportunity.** If the accused was *not given the opportunity to elect court-martial trial* before commencement, the summary charge is 'allocated for summary hearing' immediately after commencement unless it is an 'excluded' charge (as defined by article 47 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009), in which case it is initially 'allocated for Court Martial trial'. The factors which determine whether a charge is 'excluded' are summarised in the flow diagram at [Appendix 2 to Annex S](#) entitled 'Excluded charge?' and paragraphs 253 and 254 below.

253. **Was the case referred to the PA before commencement?**

a. **Yes and case was not referred back.** If so, and the case (including any part of the case to which the charge relates) *was not referred back* before commencement, the summary charge is 'allocated for Court Martial trial' immediately after commencement. The CO need not refer it.

b. **Yes but case was referred back.** If the case was referred to the PA, but the case (or any part of the case to which the charge relates) *was referred back* before commencement, the summary charge is 'allocated for summary hearing' immediately after commencement. As to whether it can be *heard* summarily, see paragraphs 256 to 261 below.

c. **No.** If the case was not referred to the PA before commencement, then ...

254. **Was the summary charge referred to higher authority before commencement?**

a. **Yes.** If so, and the summary charge was not referred back to the CO (or to the ASA) before commencement, the summary charge is automatically 'allocated for Court Martial trial' immediately after commencement<sup>229</sup>. The CO need not formally refer it, but should pass the details to the SPA.

b. **No.** If the summary charge was not referred to higher authority, or was referred back to the CO (or to the ASA), it is 'allocated for summary hearing' immediately after commencement if it is '*capable of being heard summarily*'. See the flow diagram at [Appendix 3 to Annex S](#) entitled 'Charge capable of being heard summarily?'. If any of the requirements shown in that flow diagram are *not* met, the summary charge is 'allocated for Court Martial trial' immediately after commencement<sup>230</sup>. The CO need not formally refer it, but should pass the details to the SPA.

## Consequences of summary charge being 'allocated for summary hearing'

255. If the summary charge is 'allocated for summary hearing', the CO has the powers conferred by AFA06 section 123. That is, he may:

- a. Amend the charge,
- b. Substitute another charge which is 'capable of being heard summarily',
- c. Bring an additional charge which is 'capable of being heard summarily',

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<sup>229</sup> This is so even if the charge was referred to higher authority with a view to its being heard by the ASA.

<sup>230</sup> Unless the accused was given the opportunity to elect court-martial trial before commencement, see paragraph 262 below.

- d. Discontinue proceedings on the charge, or
- e. Refer the charge to the DSP.

If the CO has made a delegation under the Armed Forces (Part 5 of the AFA06) Regulations 2009, it is the subordinate commander who has the section 123 powers.

256. However, the summary charge cannot necessarily be *heard* by the CO (or the subordinate commander) even if it is 'allocated for summary hearing'. There are two main reasons for this:

- a. **Summary charges not 'capable of being heard summarily'**. First, a charge may not be heard summarily if it is *not 'capable of being heard summarily'*<sup>231</sup> (see [Appendix 3 to Annex S](#)). For the circumstances in which a charge is 'capable of being heard summarily', see paragraph 254b above. A charge which is not 'capable of being heard summarily' may be 'allocated for summary hearing' if the case was referred back by the PA before commencement (see paragraph 253). In these circumstances the CO may either substitute a charge which *is* 'capable of being heard summarily', and hear that charge<sup>232</sup>, or discontinue the proceedings.
- b. **Further restrictions on the power to hear a charge.** Second, article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 imposes restrictions on the power to *hear* a charge, even if it is 'allocated for summary hearing' *and* 'capable of being heard summarily'. These restrictions are summarised in the flow diagram at [Appendix 4 to Annex S](#) entitled 'Allocated for summary hearing' and paragraphs 257 to 261 below.

257. Article 49 applies if:

- a. The Service Police have investigated the case; or
- b. A civilian police force has investigated the case and may refer it to the Service Police; or
- c. The CO is aware of:
  - (1) An allegation or circumstances suggesting that a Schedule 2 offence<sup>233</sup> may have been committed by a person under his command, or
  - (2) Circumstances prescribed by the Armed Forces (Part 5 of the AFA06) Regulations 2009 for the purposes of AFA06 section 114.

258. If the summary charge is 'allocated for summary hearing' and 'capable of being heard summarily', and article 49 does not apply, the charge may be heard summarily.

259. If article 49 applies, the position *immediately after commencement* is that the summary charge may not be heard summarily unless:

- a. The case, or a part of the case to which the charge relates, was referred back by the PA before commencement; or

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<sup>231</sup> Unless the accused was given the opportunity to elect court-martial trial before commencement, see paragraph 262 below.

<sup>232</sup> Article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009, discussed below, will not apply because the case has been referred back.

<sup>233</sup> For SDA offences which count as Schedule 2 offences, see paragraph 234.

b. The Service Police made a 'deemed referral' for the purposes of AFA06 section 116(3) before commencement, which was not countermanded before commencement. A deemed referral is a report to a person's CO, before commencement, that:

(1) There is sufficient evidence to charge<sup>234</sup> the person with an offence, but *not* sufficient evidence to charge them with a Schedule 2 offence<sup>235</sup>; and

(2) The Service Police are not aware of any circumstances prescribed by the Armed Forces (Part 5 of the AFA06) Regulations 2009 for the purposes of AFA06 section 116(2)(b). See the flow diagram at [Appendix 3 to Annex A](#) for the procedure for a CO to determine whether circumstances of a prescribed description exist when he has become aware of an allegation or circumstances.

260. If either of those exceptions applies, the summary charge may be heard summarily despite article 49.

261. If neither of those exceptions applies, the summary charge may not yet be heard summarily. It may be heard summarily if, *after* commencement, the Service Police refer the case to the accused's CO under AFA06 section 116(3). If section 116(2) applies, however, it will never be possible to hear the charge summarily, because the Service Police will not be able to refer the case under section 116(3). In these circumstances the CO should refer the charge to the DSP.

## **Opportunity to elect court-martial trial declined before commencement**

262. If the accused was given the opportunity to elect court-martial trial before commencement but declined to elect (or did elect but withdrew the election with leave before commencement), and the summary charge is current at commencement, special rules apply, see the flow diagram at [Appendix 5 to Annex S](#) entitled 'Right to elect offered'.

a. If, after giving the accused the opportunity to elect, the CO referred the summary charge to higher authority, and higher authority did not refer it back, the summary charge is 'allocated for Court Martial trial'.

b. If the CO did not refer the summary charge to higher authority (or he did, but higher authority referred it back), the summary charge is 'allocated for summary hearing'. If the charge was brought under NDA57, and was within the CO's jurisdiction under that Act, it does not matter that the charge is not 'capable of being heard summarily' under AFA06. Permission to hear the charge is not required.

c. Even if the summary charge is 'allocated for summary hearing', however, article 49 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 may prevent it from being *heard* summarily, see paragraphs 256b to 261 above. If article 49 applies, the charge may not be heard summarily unless:

(1) One of the exceptions in paragraph 259 applies, or

(2) The Service Police refer the case to the CO under AFA06 section 116(3) after commencement.

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<sup>234</sup> ie a prima facie case, not necessarily a 'realistic prospect of conviction', section 116(5).

<sup>235</sup> For SDA offences which count as Schedule 2 offences, see paragraph 234.

d. If article 49 does not apply, or one of the exceptions in paragraph 259 applies, or the Service Police refer the case to the CO under AFA06 section 116(3), the summary charge may be heard summarily. If a hearing of the charge began before commencement, evidence heard before commencement need not be reheard; but the remainder of the hearing must be conducted as a fresh hearing under AFA06 and in accordance with the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009. See the transitional guidance in [Chapter 9](#) (Summary hearing and activation of suspended sentences of Service detention).

This annex contains the following flowcharts to assist in the process of investigation, charging and mode of trial. They should be read in conjunction with the relevant paragraphs of this chapter.

Appendix 1- Investigation procedure	1-6-A1-1
Appendix 2 – Charging and mode of trial	1-6-A2-1
Appendix 3 – Existence of prescribed circumstances	1-6-A3-1
Appendix 4 – Procedure to determine if a charge is capable of being heard summarily	1-6-A4-1
Appendix 5 – Procedure to be followed when amending, substituting or bringing an additional charge	1-6-A5-1
Appendix 6 – Procedure to determine whether higher authority permissions required	1-6-A6-1

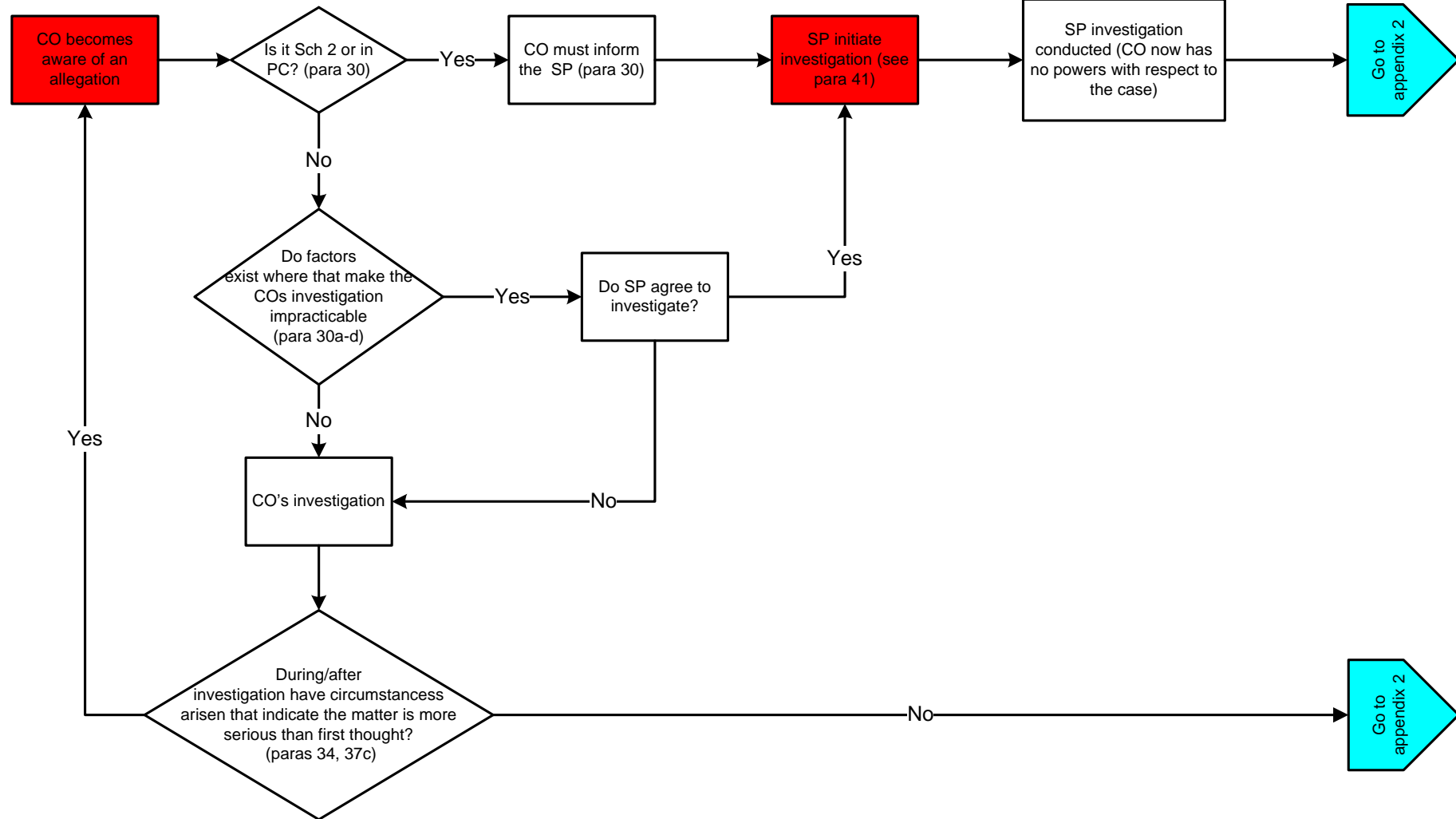
PC = Prescribed Circumstances  
SP = Service Police  
Sch 2 = Schedule 2 AFA06 (Annex C)

 Start point

To determine whether circumstances of a prescribed description (PC) exist go to appendix 3

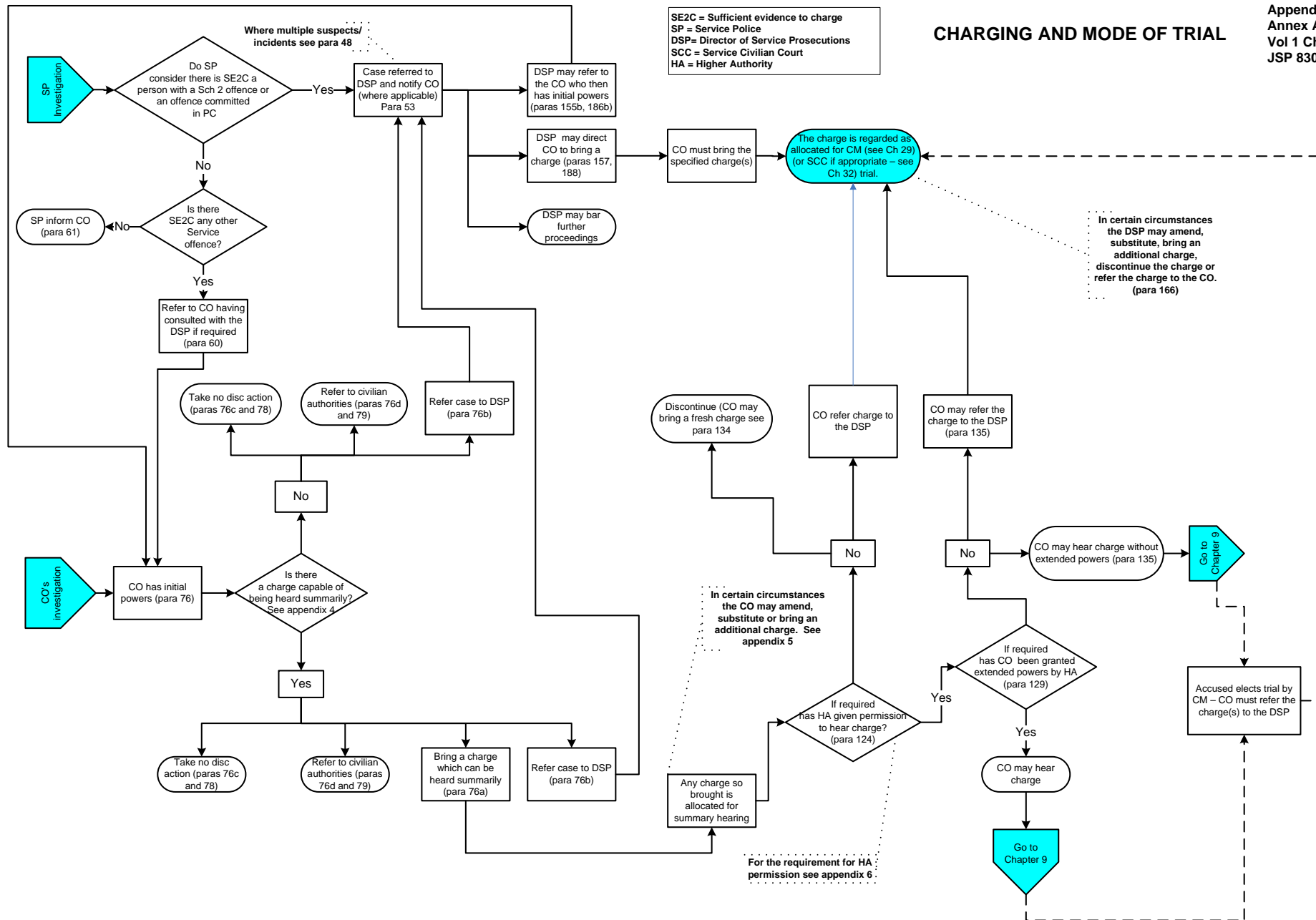
# INVESTIGATION PROCEDURE

Appendix 1 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



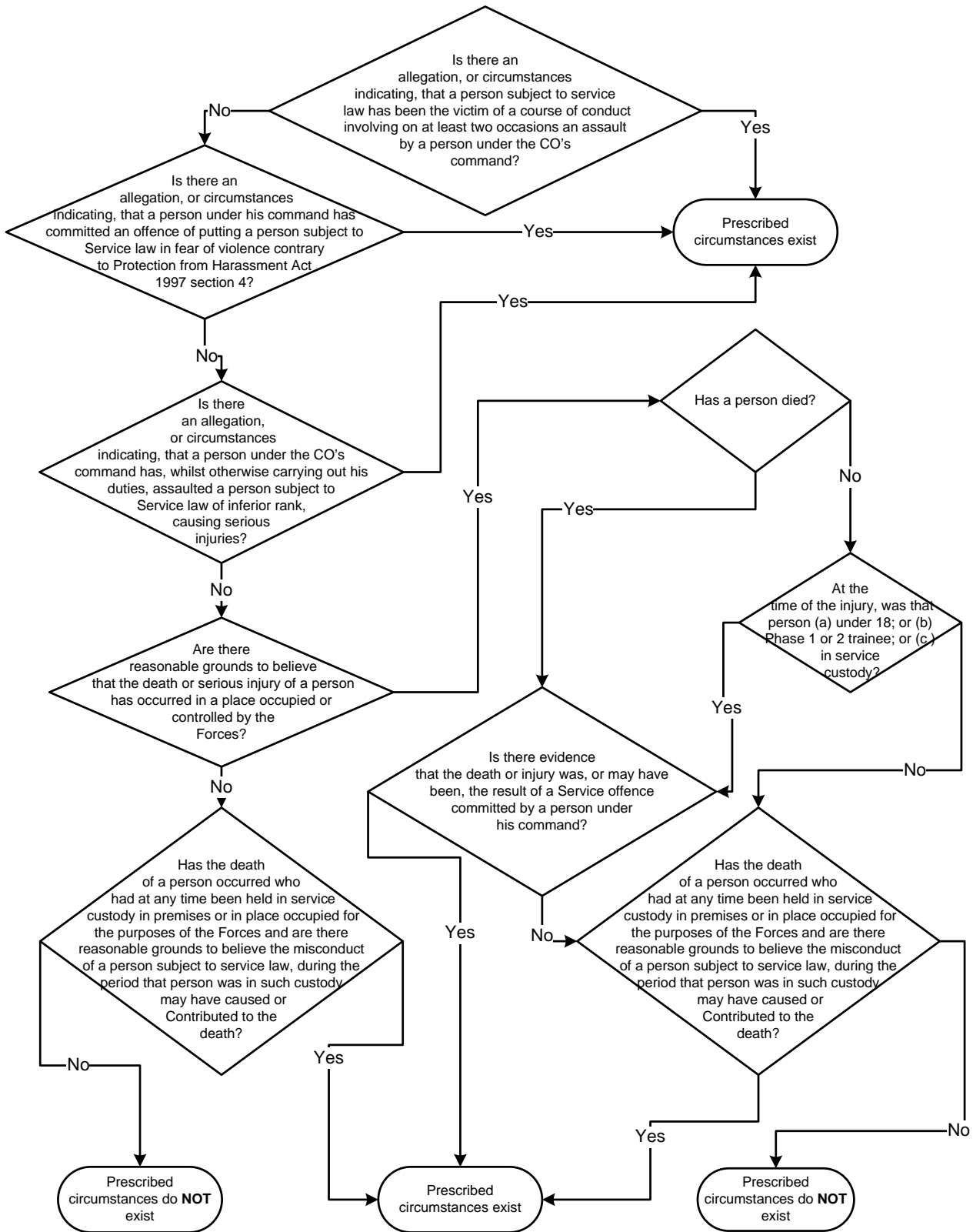
### CHARGING AND MODE OF TRIAL

SE2C = Sufficient evidence to charge  
SP = Service Police  
DSP= Director of Service Prosecutions  
SCC = Service Civilian Court  
HA = Higher Authority



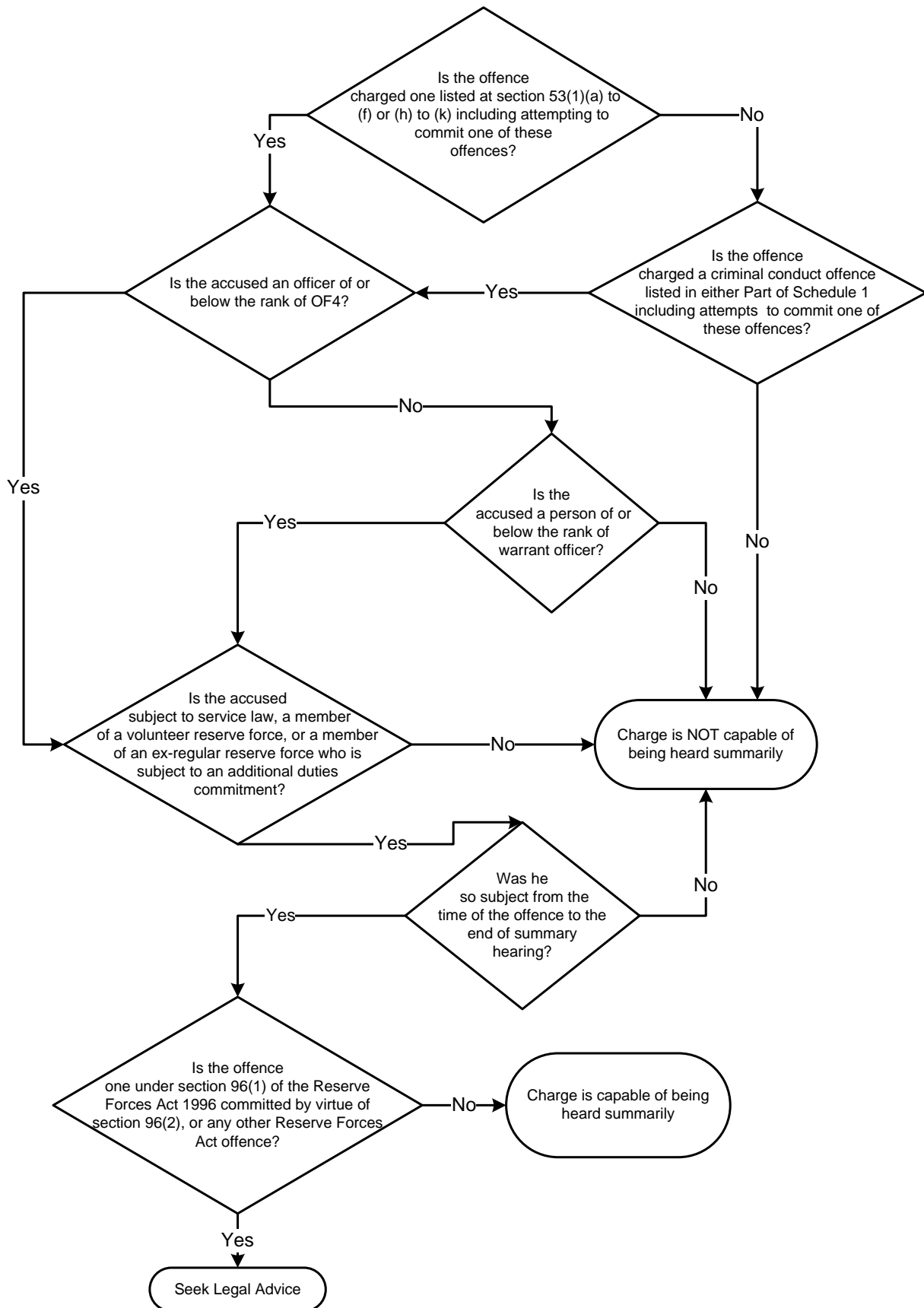
**PROCEDURE FOR CO TO DETERMINE WHETHER  
CIRCUMSTANCES OF A PRESCRIBED DESCRIPTION EXIST  
WHEN HE HAS BECOME AWARE OF ALLEGATION OR  
CIRCUMSTANCES**

Appendix 3 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



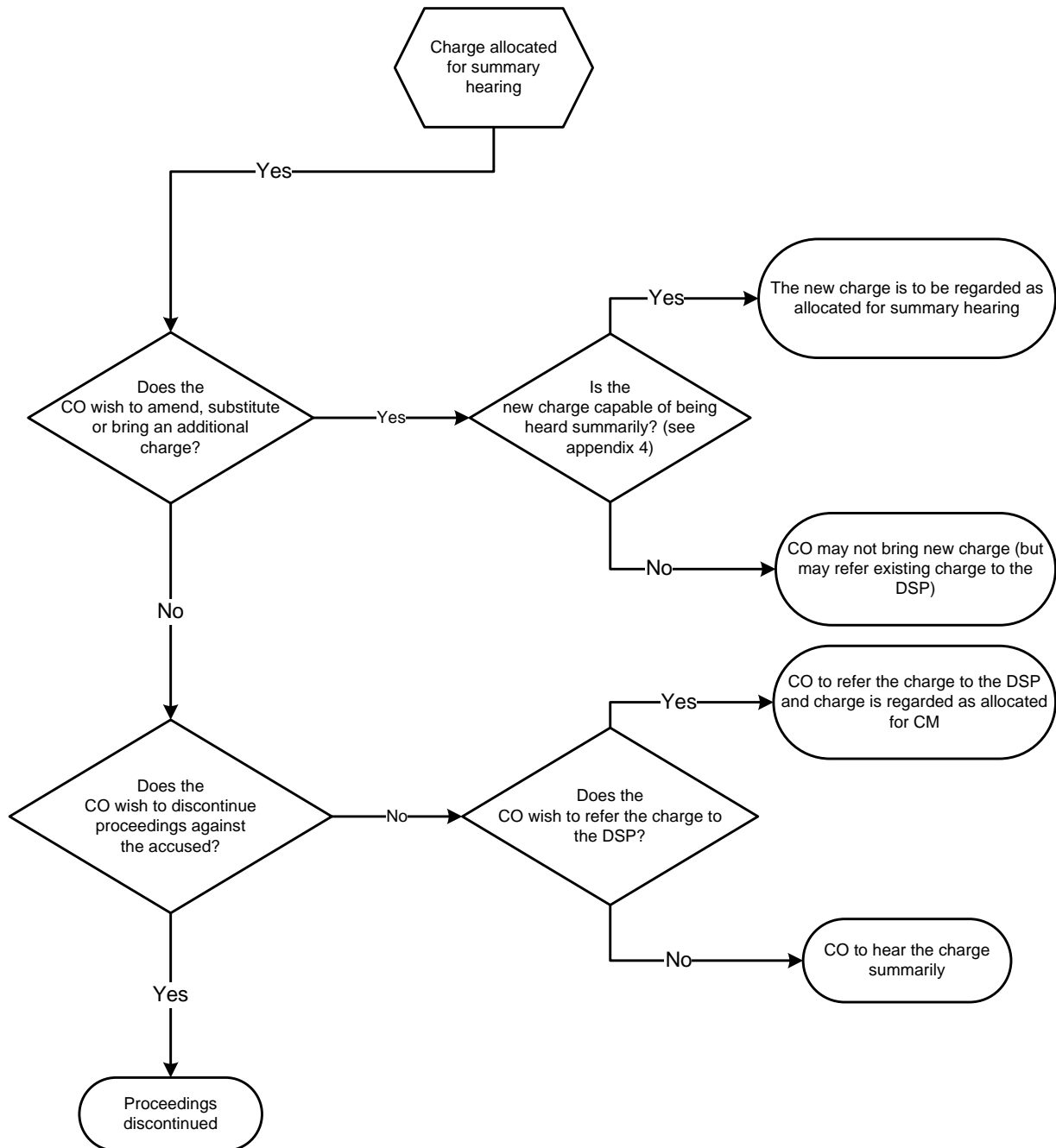
# PROCEDURE TO DETERMINE WHETHER A CHARGE IS CAPABLE OF BEING HEARD SUMMARILY

Appendix 4 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



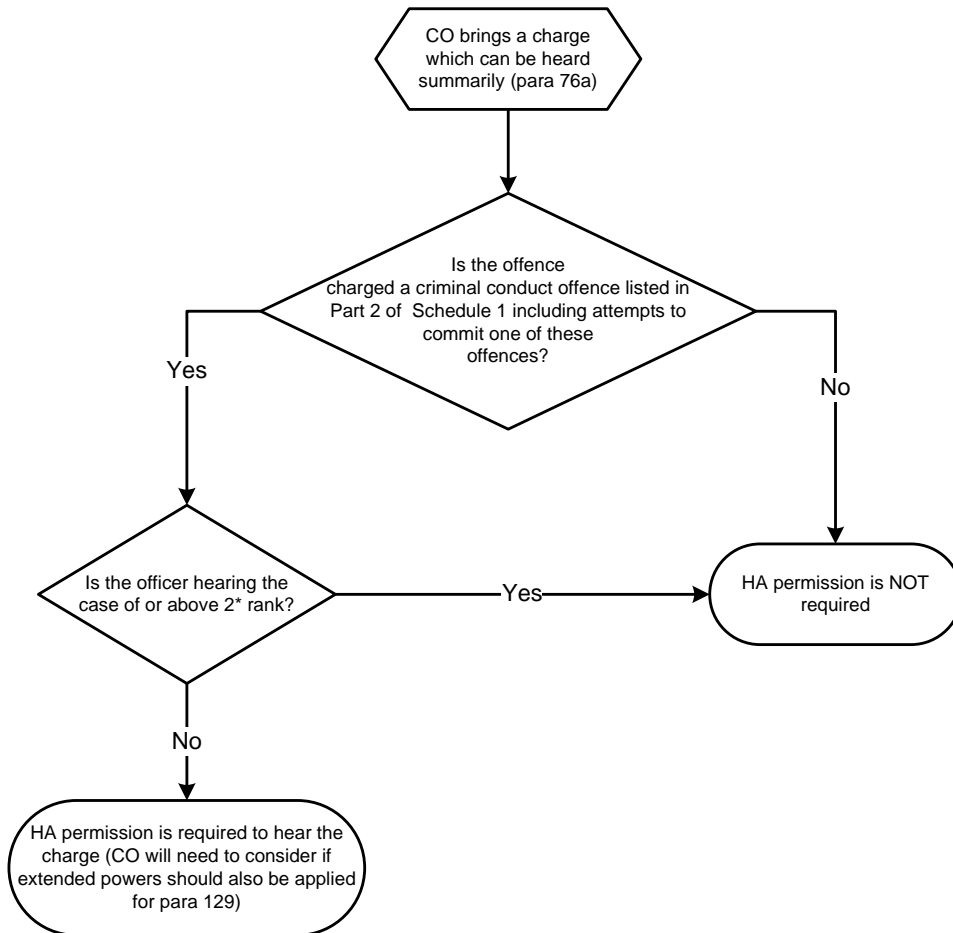
# PROCEDURE TO BE FOLLOWED WHEN AMENDING SUBSTITUTING OR BRINGING AN ADDITIONAL CHARGE

Appendix 5 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



PROCEDURE TO DETERMINE WHETHER HA  
PERMISSION REQUIRED

Appendix 6 to  
Annex A to  
Vol 1 Ch 6  
JSP 830 MSL



## OFFENCES CAPABLE OF BEING HEARD SUMMARILY WITHOUT PERMISSION OF HIGHER AUTHORITY (SECTION 53 OF THE ACT)

### Non-criminal conduct (disciplinary) offences

1. The following non-criminal conduct offences are capable of being heard summarily without permission. Further detail can be found in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences):

- a. Looting any vehicle, equipment or stores abandoned by an enemy (section 4(3)).
- b. Absence without leave (section 9).
- c. Failure to cause apprehension of deserters or absentees (section 10).
- d. Disobedience to lawful commands (section 11).
- e. Misconduct towards a superior officer (section 12).
- f. Contravention of standing orders (section 13).
- g. Using force against a sentry etc (section 14).
- h. Failure to attend for or perform a duty (section 15).
- i. Malingering (section 16(1) (a), or an offence under section 16(1) (c) committed by omission).
- j. Disclosure of information to the enemy (section 17).
- k. Making a false record (section 18).
- l. Conduct to the prejudice of good order and military discipline (section 19).
- m. Unfitness or misconduct through alcohol or drugs (section 20).
- n. Fighting and threatening behaviour (section 21).
- o. Ill treatment of subordinates (section 22).
- p. Disgraceful conduct of a cruel or indecent kind (section 23).
- q. Damage to or loss of public or Service property (section 24).
- r. Misapplying or wasting public or Service property (section 25).
- s. Obstructing or failing to assist a Service policeman (section 26).
- t. Resistance to arrest etc (section 28).

- u. Offences in relation to Service custody (section 29).
  - v. Allowing escape, or unlawful release, of prisoners etc (section 30(1) of negligently doing an act that results in a person's escape, or an offence under section 30(2)).
  - w. Low flying (section 34).
  - x. Annoyance by flying (section 35).
  - y. Inaccurate certification (section 36).
  - z. Failure to attend a hearing after release from custody after charge (section 107).
  - aa. Failure to provide a sample for a drugs test (section 305).
  - ab. Failure to provide a sample for analysis after serious incident (section 306).
  - ac. Enlistment offences (section 328).
  - ad. Service Inquiry offences<sup>236</sup> (section 343).
  - ae. Absence without leave (section 96 or 97 of the Reserve Forces Act 1996).
2. An attempt (section 39) to commit any offence listed in paragraph 1 above.

### **Criminal conduct offences**

3. The following criminal conduct (section 42) offences, as set out at Part 1 of Schedule 1, are capable of being heard summarily without permission. Further detail can be found in [Chapter 8](#) (Criminal conduct offences):
- a. Theft (section 1 of the Theft Act 1968).
  - b. Taking vehicle etc without consent (section 12 of the Theft Act 1968).
  - c. Possession of controlled drug (section 5(2) of the Misuse of Drugs Act 1971).
  - d. Criminal damage (section 1(1) of the Criminal Damage Act 1971).
  - e. Making off without payment (section 3 of the Theft Act 1978) where the payment required or expected did not exceed £100.
  - f. Interference with vehicles (section 9 of the Criminal Attempts Act 1981).
  - g. Assault and battery (section 39 of the Criminal Justice Act 1988).
  - h. Careless driving etc (section 3 of the Road Traffic Act 1988).
  - i. Driving a vehicle where driver has consumed excessive amount of alcohol etc (section 5 of the Road Traffic Act 1988).

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<sup>236</sup> See Service Inquiry Regulations 2008 for full details of the offences.

- j. Tampering with vehicles etc (section 25 of the Road Traffic Act 1988) where the vehicle was on a road.
  - k. Dangerous cycling (section 28 of the Road Traffic Act 1988).
  - l. Careless cycling etc (section 29 of the Road Traffic Act 1988).
4. An attempt to commit an (indictable) offence (section 43) listed in paragraph 3 above.

**OFFENCES CAPABLE OF BEING HEARD SUMMARILY BY A 2\*  
COMMANDING OFFICER OR WITH PERMISSION OF HIGHER  
AUTHORITY (SECTION 54 OF THE ACT)**

1. The following offences are capable of being heard summarily by a 2\* CO or with permission of HA, further detail can be found in [Chapter 7](#) (Non-criminal conduct (disciplinary offences)) and [Chapter 8](#) (Criminal conduct offences):

- a. Assault occasioning actual bodily harm (section 47 of the Offences against the Person Act 1861).
- b. Possession in public place of offensive weapon (section 1 of the Prevention of Crime Act 1953).
- c. Abstracting of electricity (section 13 of the Theft Act 1968).
- d. Possession in public place of point or blade (section 139 of the Criminal Justice Act 1988).
- e. Dishonestly obtaining electronic communications services (section 125 of the Communications Act 2003).
- f. Possession or supply of apparatus etc for dishonestly obtaining electronic communication services (section 126 of the Communications Act 2003).
- g. Fraud (section 1 of the Fraud Act 2006).
- h. Dishonestly obtaining services (section 11 of the Fraud Act 2006).
- i. Attempting to commit one of the offences listed above.

## SCHEDULE 2 OFFENCES

1. The following offences<sup>237</sup> are **not** capable of being heard summarily, further detail can be found in [Chapter 7](#) Non-criminal conduct (disciplinary) offences and [Chapter 8](#) (Criminal conduct offences):

- (1) An offence under section 1 (assisting an enemy).
- (2) An offence under section 2(1) (misconduct on operations).
- (3) An offence under section 3 (obstructing operations) which relates to an action or operation against an enemy.
- (4) An offence under section 4(1) or (2) (looting).
- (5) An offence under section 6 (mutiny).
- (6) An offence under section 7 (failure to suppress mutiny).
- (7) An offence under section 8 (desertion) where the accused intended to avoid a period of active service (within the meaning of that section).
- (8) An offence under section 31(1) (hazarding of ship).
- (9) An offence under section 33(1) (dangerous flying etc).
- (10) An offence under section 39 of attempting to commit an offence within any of paragraphs (1) to (9).
- (11) An offence under section 40 of encouraging or assisting another person to commit an offence within any of paragraphs (1) to (9).
- (12) An offence under section 42 (criminal conduct) as respects which the corresponding offence under the law of England and Wales is–
  - (a) Murder;
  - (b) Manslaughter;
  - (c) Kidnapping;
  - (d) High treason;
  - (e) Piracy;
  - (f) Cheating the public revenue;
  - (g) An offence under section 2 of the Treason Act 1842 (c. 51)

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<sup>237</sup> Special provisions governing these offences is dealt with in Part 6 of this chapter.

(attempt to injure or alarm the Sovereign);

(h) An offence under section 3 of the Treason Felony Act 1848 (c. 12) (compassing the deposition of the Sovereign etc);

(i) An offence under section 4, 18, 22, 23, 28 or 29 of the Offences against the Person Act 1861 (c. 100) (soliciting murder, wounding with intent, using chloroform etc to commit indictable offence, administering poison, causing injury by explosives, using explosives etc with intent);

(j) An offence under section 20 of that Act of inflicting grievous bodily harm;

(k) An offence under section 2 or 3 of the Explosive Substances Act 1883 (c. 3) (causing explosion likely to endanger life or property etc);

(l) An offence under section 1 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (corruption in office);

(m) An offence under section 1 of the Prevention of Corruption Act 1906 (c. 34) (corrupt transactions with agents), other than an offence falling within that section by virtue only of the third paragraph of subsection (1) of that section;

(n) An offence under section 1 or 2 of the Perjury Act 1911 (c. 6) (perjury or false statements on oath);

(o) An offence under section 1 or 7 of the Official Secrets Act 1911 (c. 28) (spying or harbouring spies); (p) an offence under section 1 of the Infant Life (Preservation) Act 1929 (c. 34) (child destruction);

(q) An offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to children);

(r) An offence under section 1 of the Infanticide Act 1938 (c. 36) (infanticide);

(s) An offence under section 33 or 33A of the Sexual Offences Act 1956 (c. 69) (keeping a brothel etc);

(t) An offence under section 1 of the Geneva Conventions Act 1957 (c. 52) (grave breaches of conventions);

(u) An offence under section 2 of the Suicide Act 1961 (c. 60) (assisting suicide etc);

(v) An offence under section 5, 16, 16A, 17, 18 or 20 of the Firearms Act 1968 (c. 27) (unlawful possession or use of firearm etc);

(w) An offence under section 8, 10 or 21 of the Theft Act 1968 (c. 60) (robbery, aggravated burglary, blackmail);

(x) An offence under section 12A of that Act (aggravated vehicle taking) involving an accident which caused the death of any person;

- (y) An offence under section 4, 5(3) or 8 of the Misuse of Drugs Act 1971 (c. 38) (production and supply of controlled drugs, possession of such drugs with intent to supply, permitting production of such drugs);
- (z) An offence under section 1(2) of the Criminal Damage Act 1971 (c. 48) (destroying or damaging property with intent to endanger life);
- (aa) An offence under section 1 of the Biological Weapons Act 1974 (c. 6) (developing biological agents etc);
- (ab) An offence under section 51 of the Criminal Law Act 1977 (c. 45) (bomb hoaxes);
- (ac) An offence under section 1 of the Protection of Children Act 1978 (c. 37) (indecent photographs of children);
- (ad) An offence under section 170 of the Customs and Excise Management Act 1979 (c. 2) (fraudulent evasion of duty etc);
- (ae) An offence under section 1 of the Taking of Hostages Act 1982 (c. 28) (hostage-taking);
- (af) An offence under any of sections 1 to 4 of the Aviation Security Act 1982 (c. 36) (hijacking, destroying, damaging or endangering safety of aircraft etc);
- (ag) An offence under section 1 or 2 of the Child Abduction Act 1984 (c. 37) (abduction of child);
- (ah) An offence under any of sections 1 and 18 to 23 of the Public Order Act 1986 (c. 64) (riot, stirring up racial or religious hatred, possession of inflammatory material);
- (ai) An offence under section 134 or 160 of the Criminal Justice Act 1988 (c. 33) (torture, possession of indecent photograph of child);
- (aj) An offence under section 1, 3A or 22A of the Road Traffic Act 1988 (c. 52) (causing death by dangerous driving, causing death by careless driving when under the influence of drink or drugs, causing danger to road-users);
- (ak) An offence under any of sections 1 to 6 or 8(6) of the Official Secrets Act 1989 (c. 6) (disclosure of information relating to security, intelligence, defence, international relations etc);
- (al) An offence under any of sections 1 or 9 to 13 of the Aviation and Maritime Security Act 1990 (c. 31) (endangering safety at aerodromes, offences against the safety of ships and fixed platforms);
- (am) An offence under section 72 of the Value Added Tax Act 1994 (c. 23) (evasion of VAT);
- (an) An offence under Part II of the Channel Tunnel (Security) Order 1994 (S.I. 1994/570) (offences relating to Channel Tunnel trains and the tunnel system);

- (ao) An offence under section 2 of the Chemical Weapons Act 1996 (c. 6) (use etc of chemical weapons);
  - (ap) An offence under section 11, 12, 15, 16, 17, 18, 38B, 39, 54, 56, 57 or 58 of the Terrorism Act 2000 (c.11);
  - (aq) An offence under section 51 or 52 of the International Criminal Court Act 2001 (c. 17) (genocide, crimes against humanity, war crimes etc);
  - (ar) An offence under section 47, 79, 80, 113 or 114 of the Anti-terrorism, Crime and Security Act 2001 (c. 24);
  - (as) An offence under section 1 of the Dealing in Cultural Objects (Offences) Act 2003 (c. 27) (dealing in tainted cultural objects);
  - (at) Any offence under Part 1 of the Sexual Offences Act 2003 (c. 42) except one under section 3, 66, 67 or 71;
  - (au) An offence under any of sections 1, 2, 5, 6 or 8 to 11 of the Terrorism Act 2006;
  - (av) an offence under section 62(1) of the Coroners and Justice Act 2009 (possession of prohibited images of children);
  - (aw) An offence under 1, 2 or 6 of the Bribery Act 1020.
- (13) An offence under section 42 as respects which the corresponding offence under the law of England and Wales is–
- (a) An offence under section 1 of the Criminal Attempts Act 1981 (c. 47) of attempting to commit an offence within a sub-paragraph of paragraph 12;
  - (b) An offence under section 1 of the Criminal Law Act 1977 (c. 45) of conspiracy to commit such an offence;
  - (c) An offence under Part 2 of the Serious Crime Act 2007 of encouraging or assisting the commission of such an offence<sup>238</sup>.

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<sup>238</sup> The effect of paragraph 13 is that any (a) attempt to commit, or (b) conspiracy to commit, or (c) offence of encouraging or assisting the commission of, any of the offences listed in paragraph 12 is a Schedule 2 offence. For example, a conspiracy to cheat the public revenue is Schedule 2, whereas a conspiracy to commit fraud is not.

## PRESCRIBED CIRCUMSTANCES IN RELATION TO THE NEED TO ENSURE THAT CERTAIN CIRCUMSTANCES ARE REFERRED BY THE CO TO THE SERVICE POLICE

1. Prescribed circumstances under the Act relate to two distinct, but connected aims. The first aim is to ensure that certain circumstances are investigated by the Service Police. The second is to ensure that certain situations where there is evidence of a Service offence are referred to the DSP for a decision whether to charge and if so, as to what the charges are to be.
2. The Act requires such steps where there is evidence of a Schedule 2 offence. Prescribed circumstances provide for additional circumstances in which the Service Police must be made aware or in which a decision on charging must be taken by the DSP.
3. Regulations under the Act prescribe:
  - a. In relation to a commanding officer<sup>239</sup>, circumstances in which he must, as soon as reasonably practicable, ensure that the Service Police are aware of the circumstances; and
  - b. In relation to the Service Police circumstances in which, if they consider there is sufficient evidence to charge a Service offence, the case must be referred to the DSP for a decision on what charge, if any, is to be brought.
4. Becoming aware of prescribed circumstances will not always place a duty on a CO to ensure that the Service Police are aware. This will depend on whether the CO is a prescribed officer in relation to the particular prescribed circumstance. For example, if a number of COs become aware of such circumstances, including perhaps the CO of the victim and one or more suspects, Regulations under the Act define who, in different circumstances, would be required to ensure that the Service Police are made aware. Broadly speaking, the CO of any suspect will be under a duty to ensure that the Service Police are made aware. The other COs may wish to liaise to ensure the Service Police are made aware. They do not have to contact the Service Police individually.
5. The following are prescribed circumstances in relation to the relevant CO<sup>240</sup>:

**(a) an allegation has been made which would indicate to a reasonable person, or there are other circumstances which would indicate to a reasonable person, that a person subject to service law has or may have been the victim of—**

- (i) a course of conduct by a person subject to service law, involving on at least two occasions an assault in which that individual participated as a principal offender or as a secondary party; or**
- (ii) an offence under section 42 as respects which the corresponding offence under the law of England and Wales is the offence under section 4 of the Protection from Harassment Act 1997, committed by a person subject to service law;**

<sup>239</sup> The CO or a subordinate commander to whom the CO has delegated this function may authorise someone to inform the Service Police on his behalf but the ultimate responsibility for informing the Service Police remains with the CO.

<sup>240</sup> The Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, regulation 3.

a. *Person subject to service law* – includes every member of the regular forces at all times and every member of the reserve forces (a) in permanent service on call-out (b) in home defence service on call-out (c) in full-time service (d) undertaking any training or duty, or (e) serving on the permanent staff of a reserve force. Persons subject to service law are defined in ss 367, 368 & 369 of the Armed Forces Act 2006.

b. *Course of conduct* - is a legal concept on which there is considerable case law. In some cases a course of conduct is obvious, as where there is evidence that one person has undertaken a campaign of misconduct against another. But there may be a course of conduct where the connection between incidents is less obvious. For example the mere fact of two assaults cannot of itself establish a course of conduct, the sort of factors which may be sufficient to establish a course of conduct would be if there was also evidence that the assailant intended to or had threatened that he would carry out further assaults or the two assaults came after a sustained campaign of threats and intimidation in the past. In all but the most obvious cases where the CO suspects that there may be a course of conduct he should take Staff legal advice.

c. *Assault* - See [Chapter 8](#) (Criminal conduct offences).

d. *Principal offender* – means the person who actually assaults the victim.

e. *Secondary party* – means the person(s) who aids, abets, counsels or procures the commission of the offence see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) and [Chapter 8](#) (Criminal conduct offences).

f. *On at least two occasions* – means on distinct occasions which are clearly separated. The principal offender may assault the victim more than once on a single occasion but his conduct would not fall within this regulation unless he assaulted the victim on at least one other occasion.

g. *Section 4 of the Protection from Harassment Act 1997* – a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against them is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions. This offence consists of putting a person in fear of *violence on more than one occasion*. Legal advice should be sought whenever it is believed that this offence might apply.

**(b) an allegation has been made which would indicate to a reasonable person, or there are other circumstances which would indicate to a reasonable person, that a person subject to service law has or may have been the victim of an assault causing serious injury, inflicted by a person of superior rank or rate while the assailant was otherwise carrying out his duties;**

h. *Serious injury* – means a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ.

i. *Superior rank or rate* – means a person of higher rank than the victim regardless of which Service the victim and the assailant are members. Determining relative rank between Services is a matter for Queen's Regulations (section 377(3) of the Act). If a person holds acting rank then that acting rank will be relevant when determining whether they are of a higher rank than the victim. Local acting rank will be relevant when determining whether they are of a higher rank than the victim.

j. *Otherwise carrying out his duties* – the assailant must be carrying out his duties at the time of the alleged assault. Assaulting service personnel and causing them serious injury cannot be part of the assailant’s duties, hence the reference to ‘otherwise carrying out his duties’.

**(c) there are what appear to the prescribed officer to be reasonable grounds to believe that the death of any person, or serious injury to a relevant person, has occurred in a relevant place, unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a Service offence committed by a person of whom he is the commanding officer;**

k. *Prescribed officer* – covers in this particular case the commanding officer of any person (see regulation 4 of the Armed Forces (Part 5 Armed Forces Act 2006) Regulations 2008), but a duty to ensure that the Service Police are informed does not fall on them if they are satisfied that there is no reasonable indication that someone in his command may have caused the death or serious injury.

l. *Relevant place* – means any premises or other place which at the time of the death or serious injury was permanently or temporarily occupied or controlled for the purposes of Her Majesty’s forces, and any vehicle, ship or aircraft which at the time of the death or serious injury was in use for the purposes of Her Majesty’s forces.

m. *Death of any person* – this is not confined to service personnel and relevant civilians. It would include detainees, a visitor or a prisoner of war for example.

n. *Relevant person* – means;

(1) A person who is *not* a member of the regular or reserve forces or

(2) A person who is a member of the regular or reserve forces and:

(a) Is under 18 years old;

(b) Has enlisted in the regular or reserve forces but has not completed Phase 1 and Phase 2 Training;

(c) Is an officer or officer cadet and has not completed Phase 1 Training; or

(4) Is in service custody.

o. *Unless the prescribed officer is satisfied that there is no allegation which would indicate to a reasonable person, or circumstances which would indicate to a reasonable person, that the death or injury was, or may have been, the result of a service offence committed by a person of whom they are the commanding officer;* - The effect is that there will not be a prescribed circumstance if it is clear, for example, that the dead person was killed by incoming enemy fire or has died from natural causes in a hospital occupied or controlled by HM forces.

**(d) the death of a person has occurred and—**

**(i) it appears to the prescribed officer that the person had at any time been held in a relevant place in service custody within the meaning of the Act;**

- and**
- (ii) **there are reasonable grounds to believe that the misconduct, during the period that person was in such custody, of a person subject to service law or a civilian subject to service discipline may have caused (directly or indirectly), or may have contributed to, the death.**

p. *Prescribed officer* – means the commanding officer of a person subject to service law or a civilian subject to service discipline whose misconduct may have caused (directly or indirectly), or may have contributed to, the death

q. *The person had at any time been held in a relevant place in service custody* - the deceased need not have died in service custody; this regulation will apply to a person who dies after being released from service custody if para. d (ii) above applies.

r. *Relevant place* – means any premises or other place which at the time of the suspected misconduct was permanently or temporarily occupied for the purposes of HM forces, and any vehicle, ship or aircraft which at the time of the suspected misconduct was in use for the purposes of HM forces

s. *Service custody within the meaning of the Act* – in the Armed Forces Act 2006 there are numerous references to service custody which includes custody without charge, custody after charge and detention in service custody following the passing of a custodial sentence. The reference to service custody in this regulation means all references to service custody in the 2006 Act.

t. *Misconduct* – means any conduct which falls below what would normally be expected of the person (whether a Service person or a civilian). Such conduct will, in the case of a person subject to service law, usually amount to at least a disciplinary service offence, but it is not limited to where there was a service offence. The general aim of the provision is that, where there is a failure of standards which may have caused or contributed to a death in service custody, this should be investigated, to see whether a service offence has been committed.

u. *During the period that person was in such custody* – this regulation only applies if the suspected misconduct took place when the deceased was in service custody.

v. *May have caused (directly or indirectly), or may have contributed to, the death* - This is a wide test. There must be reasonable grounds to believe that misconduct – which might, for example, be a direct assault, a failure to help a person who had been injured, or a failure to guard a person from harm where there was a responsibility to do so, - may have been a factor in the person's death. The general aim should be borne in mind: that deaths in service custody should be investigated by the Service Police if there is reasonable ground to believe that misconduct was a contributory factor.

6. The prescribed circumstances in relation to references by the Service Police to the DSP are set out in regulation 5 of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009. There are differences between those prescribed circumstances and those relating to a CO's duty to ensure that the Service Police are aware of a matter. The main reason for these differences is that those under regulation 5 only apply where the Service Police consider that there is sufficient evidence to charge a person with a Service offence. Those which govern a CO's duty relate in part to circumstances which need to be investigated even if there is no immediate evidence of an offence. The prescribed circumstances under regulation 5 are summarised in paragraph 54 of Chapter 6.

## CO'S INVESTIGATION - GUIDANCE

### General

1 The aim of this guidance is to provide basic advice to personnel other than the Service Police on gathering evidence whilst conducting a CO's investigation<sup>241</sup>. It is not for the person conducting the investigation to prove whether a person has committed an offence; rather, they are to gather all the evidence in order that a CO can make a properly informed decision on how to proceed with the matter. This guidance should be read in conjunction with [Chapter 11](#) (Summary hearing dealing with evidence). Staff legal advice may be obtained at any point during a CO's investigation, as well as advice from HA discipline staffs and the Service Police<sup>242</sup>.

2. A CO's investigation is appropriate for simple disciplinary offences or where, owing to operational constraints, the Service Police are not available. Although the legal rules of evidence do not apply to gathering evidence during unit investigations or to the use of evidence in summary hearing, an accused has the right to elect for CM trial or appeal to the SAC, where only admissible evidence may be used. If new information subsequently comes to light or after the investigation has begun the matter appears to be more complex than initially envisaged, it may need to be handed over to the Service Police.

3. It may, in exceptional circumstances, be necessary to conduct initial investigations in those cases where normally the Service Police should carry out the investigation. An exceptional circumstance may be that, for operational reasons, no Service Police are available to attend the scene and investigate, for example, an SSBN on patrol. If this situation arises, the CO should be aware that he has departed from the normal procedure and should bring the Service Police into the investigation as soon as is reasonably practicable.

4. As a civilian can only be dealt with by the SCC or the CM, normally the Service Police should conduct any investigation.

5. **Advice during investigation.** Personnel conducting CO's investigations may consult with the Service Police and may seek advice from the relevant staff legal adviser or HA staffs. RN coxswains, however, should seek advice from the relevant Naval Provost Marshal, in the first instance.

### Admission

6. An admission or confession includes any statement, written or oral, which is wholly or partly adverse to the person who made it. If a suspect is questioned (other than under caution by the Service Police) he should not be put under any pressure to make an admission.

7. Where an accused has admitted certain matters in relation to an offence, the CO should satisfy themselves that any admission not made in an interview under caution was not

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<sup>241</sup> See paragraphs 32 of this chapter for additional guidance on investigating allegations of harassment or bullying (prescribed circumstances).

<sup>242</sup> RN coxswains will obtain advice from relevant NPM staff, who if necessary will raise the issue with the DSP (see paragraph 5 of this Annex).

made under pressure. Where an admission or a confession is made, the CO should exercise care in using that evidence.

## Witness evidence

8. In all cases, no matter how minor, it will be necessary to collect witness evidence by way of written statement. There is no required format for a witness statement; however, it should include the following information:

- a. Service number (if applicable), rank/rate/title and name of the witness;
- b. The facts (including the date/time/location of the incident);
- c. Signature of the witness; and
- d. Date of witness statement.

9. If a witness is unavailable to provide a statement to the person conducting the investigation, if for example, he has been deployed, the person conducting the investigation may request the witness write or type out the statement, sign it and send it by post (an email will not be sufficient as it can not be signed). These statements will be disclosed to the accused before summary hearing.

10. When written statements are taken from witnesses, the best practice is for the witness to compose his own statement using his own words. The person conducting the investigation is, however, through experience and knowledge of the case, more likely to be aware of the particular areas of relevance, about which he may ask the witness. Care should be taken not to provide the witness with information relating to the matter known only to the person conducting the investigation or other witnesses, which may influence his evidence. The importance of detailed witness statements, written when the incident is still fresh in the mind of the witness, cannot be overstated, particularly if the investigation results in a CM trial or summary appeal some months after the alleged offence.

11. If the victim is vulnerable, for example, a Service person under 18 years of age, it is preferable if the Service Police conduct the interview with that person and record a statement.

12. Civilian witnesses cannot be compelled to attend a summary hearing and if civilian witnesses are central to the case, the Service Police should normally conduct the investigation, as it is more likely that the matter will be dealt with by CM trial.

## Identification

13. Where there is a requirement to conduct formal identification procedures, for example identification parades, the matter should be referred to the Service Police to investigate. If in doubt, seek staff legal advice or guidance from the Service Police.

## Medical evidence

14. **Violent offences.** In any case involving the use of violence against another person, the evidence of the medical officer<sup>243</sup> is often important. It may be appropriate in such cases that both the victim and the suspect are examined by a medical officer. Where bruising or

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<sup>243</sup> In the RN a Medical Assistant can also perform this function.

other injuries may emerge over a period of time, a follow-up medical examination should be considered.

15. When unfitness or misconduct through drink or drugs is under investigation, a medical examination may be obtained to determine whether there is any other reason why the suspect may be in that condition. In cases of unfitness or misconduct through alcohol or drugs, the decision of the following rests with the officer hearing the charge: fitness of a Service person to perform his duty or any duty he might reasonably be expected to perform; acting in a disorderly manner or a manner likely to bring discredit on the Service. However, in all cases of unfitness through alcohol or drugs, medical evidence can be of significant value at a subsequent summary hearing.

## **Search and seizure**

16. Searches will normally be conducted by the Service Police. If in the course of an investigation the person conducting the investigation believes that it is necessary to perform a search and secure evidence, see [Chapter 4](#) (Arrest and search, stop and search, entry, search and seizure, and retention).

## **Rights of the suspect**

17. The rights of a suspect are set out in the booklet 'Your rights if you are accused of an offence under the Service justice system' (T-SL-accused) see [Annex G](#). This should be brought to a suspect's attention as soon as reasonably practicable at the commencement of the investigation, to ensure that he is aware of his rights.

18. On completion of a CO's investigation, the findings of the investigation are to be provided to the CO and should normally contain:

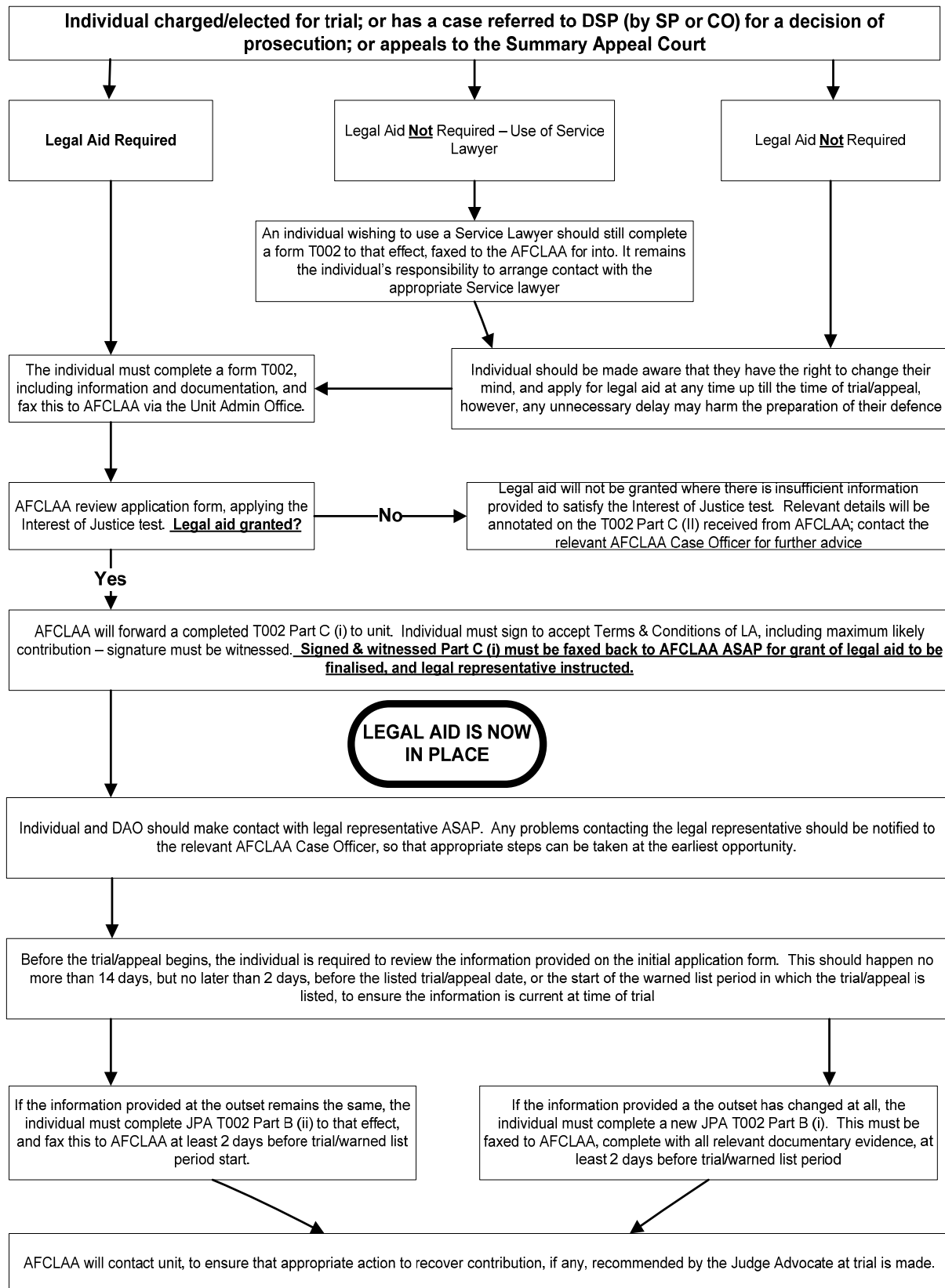
- a. All witness statements;
- b. All other records of evidence;
- c. A list of all exhibits and details as to where these exhibits are held and can be inspected;
- d. All documentary exhibits;
- e. The suspects disciplinary records; and
- f. A suggested charge<sup>1</sup>, if appropriate.

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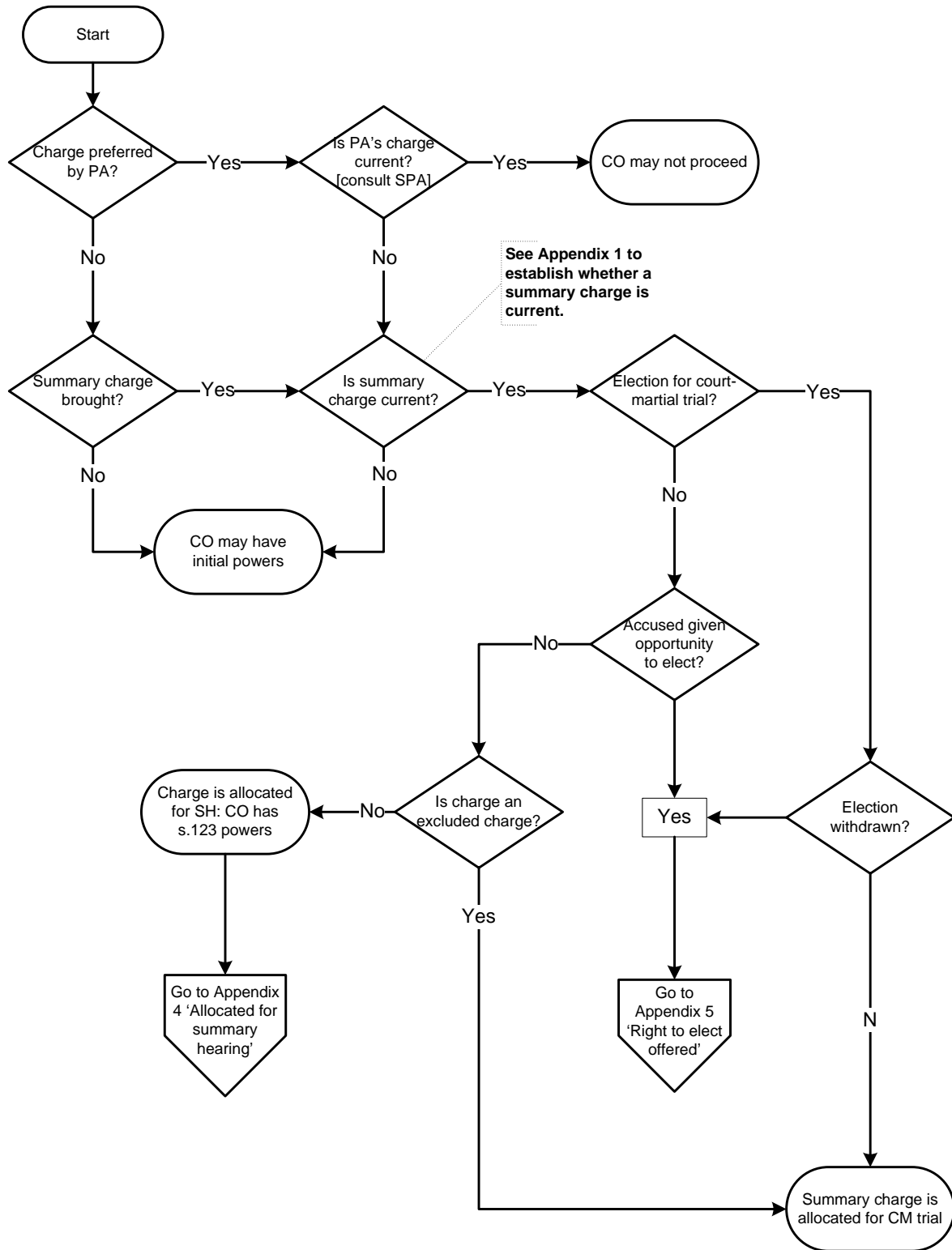
<sup>244</sup>This is not binding on the CO. The CO makes the final decision on what charge should be brought.

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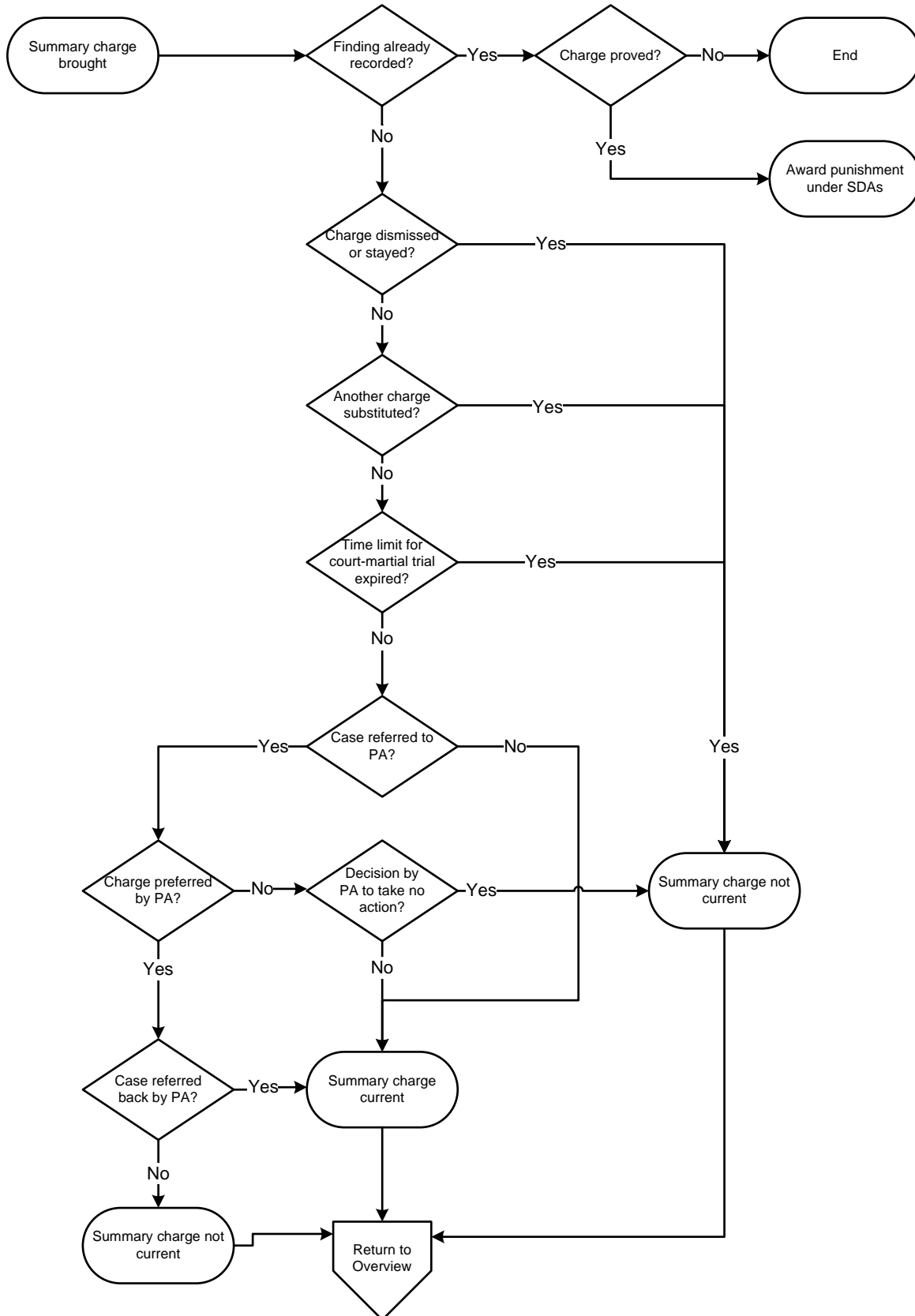
## FLOW CHART – LEGAL AID PROCESS



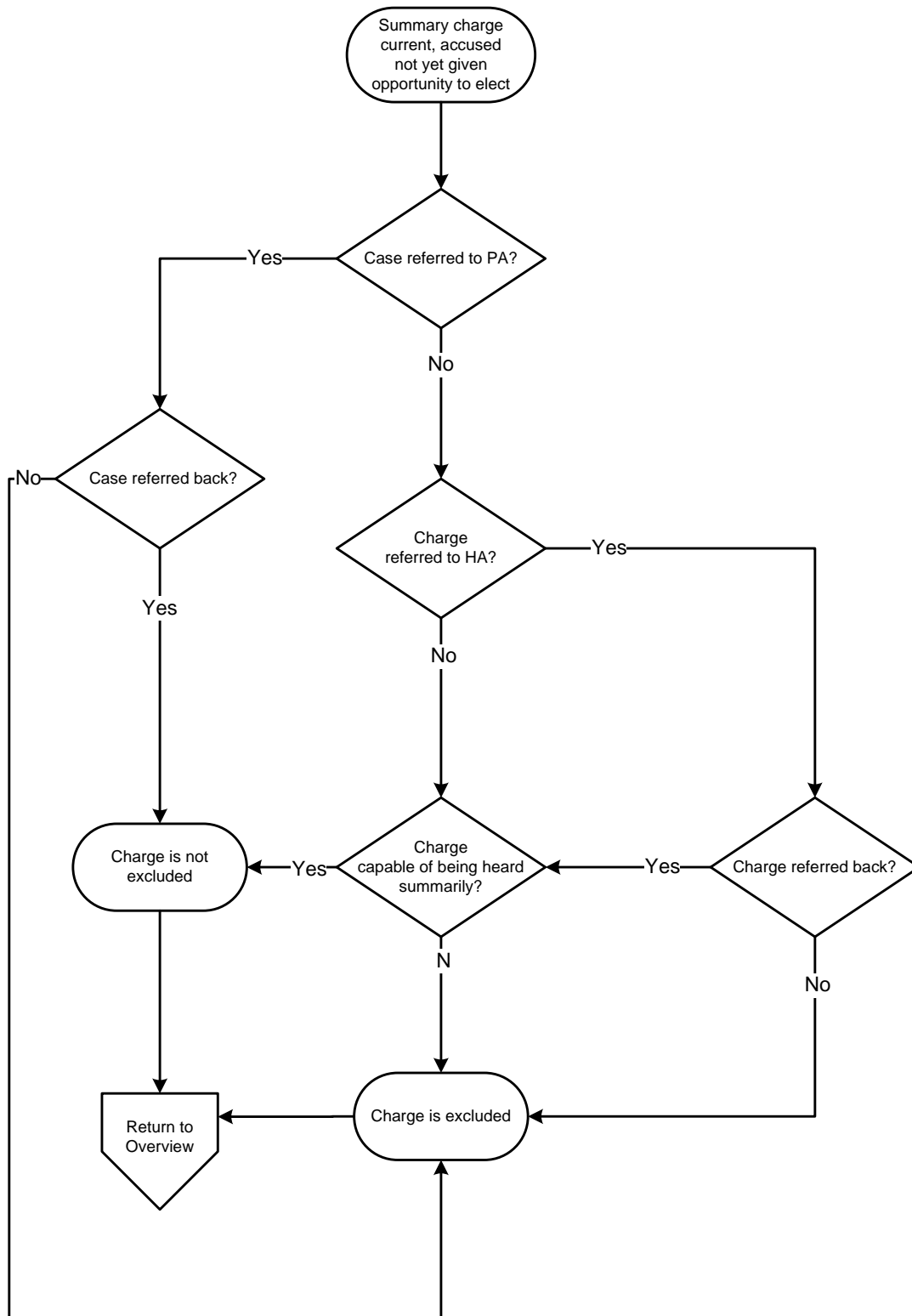
**TRANSITIONAL GUIDANCE - OVERVIEW**



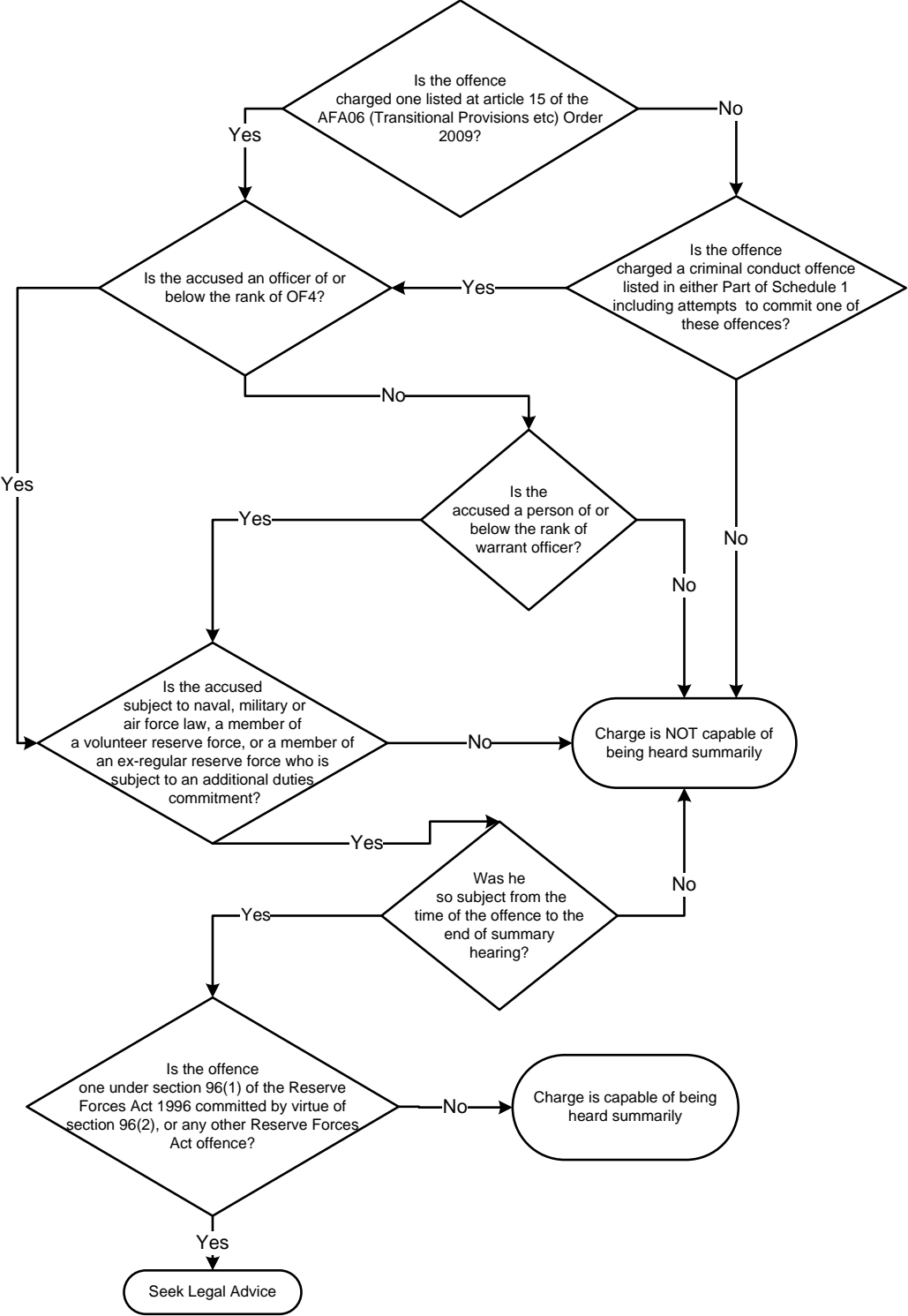
**SUMMARY CHARGE CURRENT?**



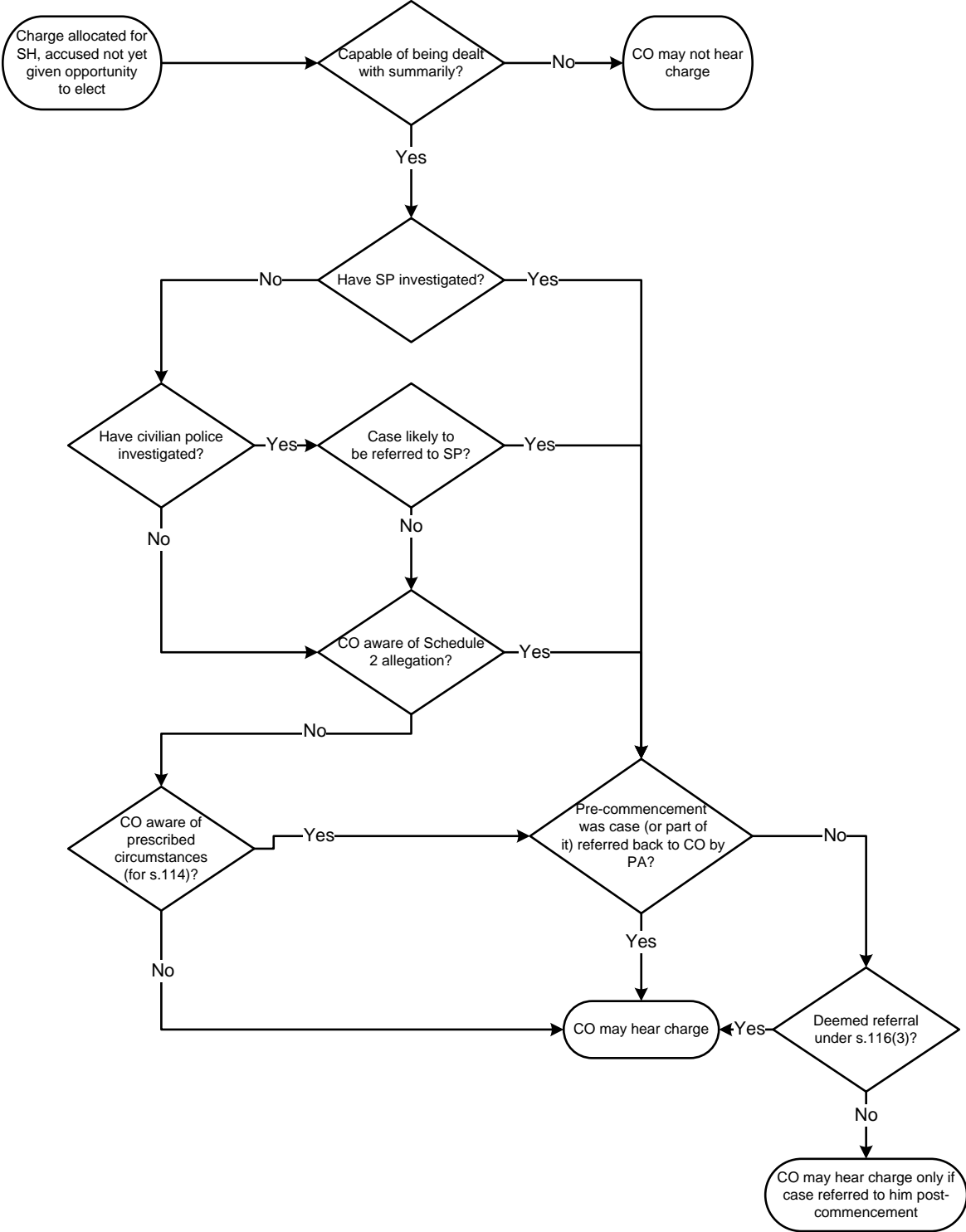
### EXCLUDED CHARGE?



**CHARGE CAPABLE OF BEING HEARD SUMMARILY?**



ALLOCATED FOR SUMMARY HEARING



**RIGHT TO ELECT OFFERED**

