

ARMED FORCES ACT 2006

EXPLANATORY NOTES

COMMENTARY

First Group of Parts – Discipline

Part 4 – Custody

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

Chapter 1 – Custody without charge

Section 98: Limitations on custody without charge

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

Section 99: Authorisation by commanding officer of custody without charge

214. This section sets out the circumstances in which a person may be held in custody without charge: as with the current provisions it provides for authorisation of custody without charge by the CO.
215. When a person is arrested for a service offence a report must be given to the CO as soon as practicable. That report must state the fact of the arrest and any reasons for keeping the person in custody without charging him with a service offence. Until the report is made, the arrested person may be kept in service custody without charge if the person who made the arrest has reasonable grounds for believing that to do so is necessary to secure or preserve evidence relating to the service offence for which the person was arrested, or to obtain this evidence by questioning him.
216. When a CO receives the required report he must decide whether he has reasonable grounds for believing that keeping the arrested person in custody without charge is

necessary to secure or preserve or obtain evidence relating to a service offence for which the person was arrested; and that the investigation into the alleged offence is being conducted diligently and expeditiously. If the CO is satisfied of these matters he must then decide whether to authorise the continued custody of the arrested person. If the CO does decide that keeping the arrested person in custody without charge is justified he may authorise continued detention for further 12 hour periods up to a maximum of 48 hours after the time of the arrest.

217. If a person who has been arrested for an offence (offence A) is kept in service custody without charge and is subsequently arrested for a further offence (offence B) the authorisation for custody in respect of offence A is terminated and the CO must go through the process again in relation to both offences A and B. Custody needs only to be justified in relation to one offence for an authorisation to be granted, but starting the process again avoids having multiple authorisations for custody in existence. Any authorisation for custody without charge is valid up to 48 hours from the time of the arrest for offence A.

Section 100: Review of custody by commanding officer

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

Section 101: Extension by judge advocate of custody without charge

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

Section 102: Further provision about applications under section 101

224. The CO may make an application to a judge advocate for continued custody without charge at any time before the expiry of the first 48 hours after the person's arrest, or, if it is not practicable to make the application within this time, as soon as practicable and no later than 96 hours after the arrest. However, if an application is made after the initial 48 hour period and it appears to the judge advocate that it would have been reasonable for the CO to make it before the expiry of that period, he must refuse the application.

225. If the CO does make an application for the continued custody of an arrested person after the expiry of the initial 48 hours, his review of, and authorisation for, continued custody under section 100 may be for a period beyond the initial 48 hours, but cannot be for longer than 6 hour blocks up to a maximum period of 96 hours after the arrest.
226. When a CO has applied to a judge advocate for the continued custody without charge of the arrested person and the judge advocate is not satisfied that there are reasonable grounds for believing that this is justified he must either refuse the application or adjourn the hearing of it until a later time, but not more than 48 hours after the person's arrest (the arrested person may be kept in custody during such an adjournment). If the judge advocate refuses an application for continued custody before the expiry of the initial 48 hour period he has discretion to direct that the arrested person either be charged with a service offence or be released without delay; but if he refuses an application after the initial 48 hour period he must direct that the person either be charged with a service offence or be released without delay.
227. All references to time periods are in relation to the first arrest if the arrested person is subsequently arrested for another offence and held in custody without charge.

Section 103: Custody without charge: other cases

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

Section 104: Custody without charge: supplementary

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

Chapter 2 – Custody etc after charge

Custody after charge

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

Section 105: Custody after charge

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

offence with which the accused is charged is murder, manslaughter, rape or attempted murder or rape, the judge advocate must state the reasons for his decision and ensure that they are properly recorded.

Section 106: Conditions A to D

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

Section 107: Release from custody after charge

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

Section 108: Review of custody after charge

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

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

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

Arrest after charge

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

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

Section 111: Arrest during proceedings at direction of court

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

Chapter 3 – Custody proceedings rules

Section 112: Custody proceedings rules

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