

ARMED FORCES ACT 2006

EXPLANATORY NOTES

COMMENTARY

First Group of Parts – Discipline

Part 5 – Investigation, Charging and Mode of Trial

Chapter 1 – Investigation

243. This Chapter imposes duties on COs with respect to the investigation of allegations of service offences, of circumstances which indicate that a service offence may have been committed and of other circumstances that may be prescribed.
244. It also imposes on members of the service police duties to refer certain cases to the Director of Service Prosecutions (the “DSP”) and certain other cases to a CO. Under Chapter 2 the DSP and the CO each have powers, for example as to the bringing of charges, in respect of cases referred to him under Chapter 1.
245. Some provisions of Part 5 refer to a CO. But the provisions are still capable of applying to civilians subject to service discipline, as a CO may be appointed in respect of such civilians under section 360. The provisions of Part 5 accordingly apply in relation to civilians, except as summarised in the Notes below.

Duties of commanding officers

Section 113: CO to ensure service police aware of possibility serious offence committed

246. Under this section, if a CO becomes aware of certain allegations or circumstances, he must ensure that the service police are aware of them. He may find that they are already aware, or he may need to inform them. He must do so as soon as is reasonably practicable. The duty applies to allegations or circumstances which would suggest to a reasonable person that someone (whether or not identified) within the CO’s command may have committed any service offence listed in Schedule 2. The service offences listed in that schedule are all inherently serious, in that it is difficult to envisage a trivial example of any of them.
247. The section gives the Secretary of State power by order to amend Schedule 2. Under section 373, an order under this section must be approved in draft by both Houses of Parliament.

Section 114: CO to ensure service police aware of certain circumstances

248. This section requires certain officers to ensure as soon as reasonably practicable that the service police are aware of certain circumstances. The Secretary of State may prescribe the circumstances, and the officers on whom the duty falls, in regulations. The circumstances which may be prescribed are not limited to where there is an indication that an offence has been committed.

Section 115: Duty of CO with respect to investigation of service offences

249. This section deals with situations (other than those in which a duty arises under section 113 or 114) in which a CO becomes aware of allegations or circumstances which would suggest to a reasonable person that someone within his command may have committed a service offence. In such cases the CO may ensure that, as soon as reasonably practicable, that the service police know of the matter. Alternatively he may ensure that the matter is appropriately investigated. An investigation other than by the service police will in many cases be appropriate, because service offences (defined in section 50) include all offences which may be committed by service personnel under the Act, including the less serious disciplinary offences.

Duty of service policeman following investigation

Section 116: Referral of case following investigation by service or civilian police

250. This section deals with the duties of the service police in relation to a case which they have investigated or which has been referred to them after an investigation by a UK police force (defined in section 375 as including civilian forces in the UK and the Isle of Man) or by an overseas police force (defined in section 375 to include foreign service and civilian forces).
251. Under subsection (2), where a service policeman considers that there is sufficient evidence to charge the person with a Schedule 2 offence (explained in the Note on section 113), he must refer the case to the DSP. The same duty arises where a service policeman considers there is sufficient evidence to charge any other service offence and he is aware of any circumstances prescribed in regulations (these might, for example, be aggravating circumstances).
252. Where the service policeman considers that there is sufficient evidence to charge the person with a service offence, but the circumstances do not require a reference to the DSP, he must refer the case to the person's CO (subsection (3)).
253. Subsection (4) deals with cases where the matter has been referred to the service police either under section 113 (possibility of a Schedule 2 offence) or section 114 (existence of prescribed circumstances) and the service police propose not to refer the case to the DSP under subsection (2). This might be because they propose to refer the case to the CO or because they do not consider that any charge of a service offence should be brought. In those circumstances the service police must consult the DSP as soon as reasonably practicable and in any case before referring the case instead to the CO.

Section 117: Section 116: position where investigation is of multiple offences or offenders

254. This section applies where a case to which section 116 applies (one investigated by the service police or referred to them by another force) involves more than one incident or more than one suspect (or both).
255. The requirements of section 116 are to apply to each incident and each suspect as if they were separate cases. However the section also empowers the Secretary of State to provide by regulations for circumstances in which, where one case is referred to the DSP, linked cases must also be treated as referred to the DSP.

Section 118: Duty of service policeman to notify CO of referral to DSP

256. This section applies if under section 116(2) a service policeman refers a case about a person to the DSP. The service policeman must as soon as practicable notify the person's CO of the referral. He must also provide the CO with any documents prescribed in regulation. The notification to the CO must state the service offence of which the service policeman considers there is sufficient evidence to charge the person and (if

that offence is not one listed in Schedule 2) the circumstances prescribed in regulations which bring the cases within section 116(2). The policy intention is broadly to ensure that the CO is aware that a case about someone in his command has been referred to the DSP and that the CO is aware what the case is about, so that the CO can provide any relevant information about the person or the case to the DSP.

Chapter 2 – Charging and Mode of Trial

257. **Chapter 2** deals with the powers of COs and of the DSP to decide what charges, if any, are to be brought. It also provides for the powers of COs in relation to cases allocated to them for summary hearing and of the DSP in relation to cases allocated for trial by the Court Martial or the SCC.

Powers of charging etc

Section 119: Circumstances in which CO has power to charge

258. This section specifies the circumstances in which a CO has “initial powers” (specified in section 120) in relation to a case. He has these powers if he becomes aware of anything indicating that someone in his command may have committed a service offence, unless broadly speaking the service police should be involved (under section 113 or 114), are already involved or (in the CO’s view) are likely to be involved by another police force.
259. The CO also has initial powers where a case is referred to him either by a service policeman under section 116 or by the DSP under section 121.

Section 120: Power of CO to charge etc

260. This section provides that the initial powers of a CO in respect of a case are to bring charges (but only charges which can be heard summarily under the Act) or to refer the case to the DSP. The charges capable of being heard summarily are defined in section 52. Two effects of that definition are that a CO has no power under this section to charge an officer above the rank of lieutenant-colonel (or equivalent rank in the Royal Navy or RAF), and no such power to charge a civilian subject to service discipline.
261. One effect of sections 119 and 120 taken together is that a CO cannot use initial powers to bring charges where the service police are, or should be, aware of the case, unless the case has been referred to the CO either by the service police or the DSP.
262. The section also empowers the Secretary of State to provide by regulations for circumstances in which, where a CO refers one case to the DSP, linked cases must also be treated as referred to the DSP.
263. Where a CO brings charges under this section, they are referred to in the Act as “allocated for summary hearing”.

Section 121: Power of DSP to direct bringing of charge etc

264. This section gives powers to the DSP where he has had a case referred to him by a service policeman (under section 116) or by a CO (under section 120). The powers are:
- to direct a CO to bring specified charges
 - where he gives such a direction, to allocate the case for trial by the SCC if that court has jurisdiction
 - where he decides it would not be appropriate to give such a direction, to refer the case to the CO (in which event, under section 119 the CO has initial powers in relation to the case)
 - to give a direction (under section 127) barring further proceedings for an offence to which the case relates.

Section 122: Charges brought at direction of DSP

265. This section provides that a CO must bring any charge which he is directed to bring by the DSP under section 121. Unless the DSP allocates the charge to the SCC, the charge is to be regarded as allocated for trial by the Court Martial.

Powers of commanding officer or DSP after charge etc

Section 123: Powers of CO after charge

266. Where under his initial powers under section 120 a CO charges a person with an offence triable summarily, this section gives the CO certain powers in relation to the charge.
267. The powers are to amend the charge, substitute another charge, bring an additional charge, discontinue proceedings or refer the charge to the DSP. But the charges must still be ones capable of summary hearing, and any additional charge must relate to the same case. The powers may be exercised before or after the start of a summary hearing. The amended, substituted or additional charge is then regarded as “allocated for summary hearing”.

Section 124: CO to hear charge allocated for summary hearing

268. This section requires an accused’s CO to hear charges which are allocated for summary hearing. This duty ceases to apply to a charge, if the CO substitutes another charge, discontinues proceedings or refers the case to the DSP, or if the accused elects to be tried by the Court Martial. The duty also ceases to apply if either the charge ceases to meet the requirements of section 52 (requirements for charges to be capable of being heard summarily) or the permission of a senior officer (under section 54) is needed for summary hearing and that permission is not obtained.

Section 125: Powers of DSP in respect of charge allocated for Court Martial trial

269. This section gives the DSP certain powers where a case is allocated for Court Martial trial (under section 122). Some of the powers are broadly similar to those of a CO in respect of a charge allocated for summary hearing. These are powers to amend the charge, substitute another charge, bring an additional charge or discontinue proceedings. Any additional charge must relate to the same case. Any amended, substituted or additional charge is regarded as “allocated for Court Martial trial”, and so remains subject to the DSP’s powers under this section.
270. The DSP also has powers under this section:
- to refer the charge back to the accused’s CO (if the charge can be heard summarily in accordance with section 52),
 - to allocate to the SCC a charge which that court can deal with, and
 - to give a direction (under section 127) barring further proceedings for an offence to which the case relates.
271. The section also gives a power for the making of Court Martial rules (by the Secretary of State under section 163) to restrict the exercise by the DSP of his powers under this section once an accused has been asked by the Court Martial how he pleads or where a charge is referred to the Court Martial by the SCC. Additionally the Court Martial Rules can make provision to restrict the court’s powers when it is dealing with a charge where the accused elected to be tried by the Court Martial. This power will ensure that the Court Martial is restricted in its sentencing powers to those that would be available to a CO if he had dealt with a charge summarily.

Section 126: Powers of DSP in respect of charge allocated for SCC trial

272. This section gives certain powers to the DSP where a case has been allocated for trial by the SCC. The powers are equivalent to some of those of the DSP under section 125 in relation to charges allocated for Court Martial trial. Accordingly the DSP has powers to amend the charge, substitute another charge, bring an additional charge or discontinue proceedings. Any additional charge must relate to the same case. Any amended, substituted or additional charge is regarded as “allocated for Service Civilian Court trial”, and so remains subject to the DSP’s powers under this section.
273. The DSP also has powers under this section:
- to allocate the charge for trial by the Court Martial (e.g. if, on reflection, it is thought to be too serious for SCC trial) and
 - to give a direction (under section 127) barring further proceedings for an offence to which the case relates.
274. The section also gives a power for the making of SCC rules (by the Secretary of State under section 288) to restrict the exercise by the DSP of his powers under this section once the SCC has decided (under section 279) whether it should try the charge.

Chapter 3 – Supplementary

Section 127: Directions by DSP barring further proceedings

275. Certain provisions of the Act (sections 121, 125 and 126) empower the DSP to make a direction under this section. This section provides that the directions that may be made are that a person is to be treated as being acquitted of an offence for the purposes of barring either further service proceedings or both service and civilian proceedings.

Section 128: Regulations for purposes of Part 5

276. This section empowers the Secretary of State to make regulations for the purposes of any provision of Part 5 of the Act, for example for the delegation by COs of any of their functions under Part 5.