



GUIDANCE ON SENTENCING IN THE COURT MARTIAL

Version 5

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1 INTRODUCTION

- 1.1 This guide is issued by the Judge Advocate General and contains judicial guidance on the approach to sentencing and appropriate sentencing tariffs while taking account of the Armed Forces discipline policy. It is intended to assist all concerned in the sentencing of offenders in the Court Martial and other Service courts. Sentencing is a complex and difficult exercise and whilst it must not be reduced to a rigid or mechanistic process, consistency of approach is essential to maintain public confidence. Those who sentence have a discretion to reflect the gravity of the offence, the effect on the victim, the circumstances of the offender, and the public and Service interest. This guide, therefore, is designed not to be prescriptive but to provide an aid to consistency in the Court Martial. This guide is also available to the Court Martial Appeal Court who will give it “due regard”¹ during their consideration of sentences on appeal.
- 1.2 The Armed Forces Act 2006 established the Court Martial as a standing, permanent court when it came into force in October 2009. The Court Martial may sit anywhere, within or outside the United Kingdom, and has the jurisdiction to try any Service offence including all criminal conduct and disciplinary offences. The presence of an independent civilian judge (known as the Judge Advocate for historical reasons) who conducts and presides over every trial guarantees its independence and impartiality. The Court Martial is not the Crown Court sitting in uniform, but its practices and procedures in contested trials resemble those in the Crown Court except where there are good operational reasons for differences. This is reinforced by the Armed Forces (Court Martial) Rules 2009 Rule 26 which specifies that where the court is faced with a matter which is not provided for then the judge shall ensure that proceedings are conducted in such a way as appears to him most closely to resemble the way in which comparable proceedings of the Crown Court would be conducted in comparable circumstances. The differences between the Service and civilian systems of justice exist only to reinforce and support the operational effectiveness of the Armed Forces, and are necessary because of the link between the maintenance of discipline and the administration of justice and the need to be able to hold trials anywhere in the world.
- 1.3 The lay members of the court (“the board”) fulfil the functions of a jury in contested trials but have additional functions, reflecting the service nature of the court. In particular the president of the board is more than a jury foreman in that he is responsible for maintaining the integrity of the deliberative process. At the sentencing stage the lay members move from the members’ box to the bench, to sit alongside the judge and assist him by bringing their collective Service experience and knowledge to bear in deciding the appropriate sentence. However, they are guided and directed by the judge who has the casting vote if the members cannot agree on the appropriate sentence.

¹ *R v Coleman* [2017] EWCA Crim 2346 per Macur LJ at paragraph 10

- 1.4 In addition to Service personnel there are many civilians either working overseas alongside the Armed Forces or accompanying as families of Service personnel abroad. They are not subject to Service law, but as civilians subject to Service discipline may be tried in the Court Martial (where the board members normally comprise or include civilians) if accused of committing a Service offence. If all of the members of the board are civilians, the judge sentences alone without their assistance. For lower level offences, civilian defendants overseas may also be tried summarily in the Service Civilian Court, which comprises a Judge Advocate sitting alone. The jurisdiction is equivalent to a Magistrates' Court sitting with a District Judge in the UK.
- 1.5 The vast majority of Service offences are dealt with at summary hearing by the Commanding Officer of the accused. This Sentencing Guide is primarily concerned with the Court Martial, but where trial in the Court Martial is at the election of the accused (rather than by direction for trial) the sentencing powers of the court are limited to those which could have been exercised by the Commanding Officer at a summary hearing. In such trials the Court Martial is entitled to take into account the Commanding Officers' guide to sentencing contained in the Manual of Service Law (Chapters 13 and 14), although it is not bound by that guide.
- 1.6 All persons convicted in the Court Martial have a right of appeal against conviction (following a contested trial) and sentence to the Court Martial Appeal Court (CMAC), with leave of the CMAC. In certain circumstances, the Attorney General may refer a sentence he or she considers unduly lenient to the CMAC for review and the Judge Advocate General may also refer a case to the CMAC where there is a point of law of exceptional importance. The CMAC is always provided with a copy of this guide when considering appeals against sentence.
- 1.7 This Guide reflects the law up to 31 December 2017. References to sections are to sections in the Armed Forces Act 2006, which came into force on 31 October 2009, unless another Act is stated.
- 1.8 Further help and guidance may be found in the following publications:
- i. Rant on the Court Martial and Service Law – 3rd Edition (OUP 2009)
 - ii. The Manual of Service Law (particularly Chapters 13 & 14 for sentencing at summary hearing) – (Ministry of Defence 2009)
 - iii. Sentencing Council Guidelines
 - iv. Banks on Sentence

His Honour Judge Jeff Blackett
Judge Advocate General of Her Majesty's Armed Forces

31 January 2018

2 GENERAL COMMENTS ABOUT SENTENCING IN THE COURT MARTIAL

2.1 The Jurisdiction of the Court Martial

2.1 The Court Martial has jurisdiction to try any Service offence [s 50(1)]. ‘Service offence’ is defined in the Armed Forces Act 2006 and includes both all acts punishable by the general law of England and Wales (‘criminal conduct offences’) and non-criminal offences (‘disciplinary offences’) unique to the Armed Forces [s 50(2)]. All persons subject to Service law and civilians subject to Service discipline may be tried for all criminal conduct offences. Persons subject to Service law may also be tried for all disciplinary offences, but civilians subject to Service discipline may be tried only for a restricted list of disciplinary offences.

2.2 Summary Hearings

2.2 Several Service offences listed in the Armed Forces Act 2006 s 53 are triable at a summary hearing by the accused’s Commanding Officer. When a charge is allocated for summary hearing, the accused in every case has an unrestricted right to elect for trial in the Court Martial [s 129]; where he does so, the Court Martial is restricted to the Commanding Officer’s powers of punishment [s 165]. For detention [s 133], forfeiture of seniority [s 134], reduction in rank [s 135], and fines [s 136], the Commanding Officer’s basic powers may have been extended if a Higher Authority has granted extended powers.

2.3 Sentencing Roles

2.3 Sentencing in the Court Martial is undertaken by the Judge Advocate sitting with the board of lay (meaning not legally qualified) Service members of the court; if the lay members are all civilians the Judge Advocate sentences alone. The judges are experienced in sentencing practice in the civilian courts, and have attended Judicial College training, and annual Circuit sentencing, seminars provided for Recorders and judges of the Crown Court and they also sit in the Crown Court when not required by the Service Justice System. In addition, they are experienced in the general sentencing practices and policies of the Armed Forces, and their needs and requirements. The board of lay Service members bring their Service background and knowledge of disciplinary issues to bear on the process, but as laymen with little or no training in sentencing practice (except for those of them who have been involved with summary hearings) they should always follow the directions of the Judge Advocate and stay within the sentencing parameters he sets.

2.4 Sentencing Process

2.4 Sentencing deliberations, over which the Judge Advocate presides, necessarily take place in closed court, or in a retirement room, and may not be disclosed. The judge and board members often achieve consensus, but if it is necessary for them to vote

on sentence only a simple majority is required with the judge having the casting vote. There is no public indication whether the decision was unanimous or by majority. The judge explains in open court the reasons for sentence and the president of the board then formally announces it [s 252]. In very exceptional circumstances (for example in cases of negligent performance of duty) the president of the board may also address the offender, but only having first sought and obtained the judge's permission.

2.5 Sentencing Powers

2.5 The maximum sentence which can be passed in the Court Martial is imprisonment for life, for the most serious Service offences. The range of sentences available to the Court Martial is wider than in the civilian courts: it has most of the powers of the Crown Court – with some exceptions such as power to disqualify from driving which is lacking – but in addition may impose several Service-only sanctions (such as dismissal from Her Majesty's Service, detention in a Service detention centre, Service Supervision and Punishment Orders, and (for civilians) Overseas Community Orders). Sentences of (Service) detention of eight days or more are served in the Military Corrective Training Centre (MCTC) at Colchester, where the regime is designed to rehabilitate Service personnel and either make them fit for further duty in the Services or prepare them for transition to a useful role in civilian society after dismissal or discharge.

2.6 Principles of Sentencing

2.6 The Court Martial, like any other criminal court, is reminded by the judge that any sentence passed is required to be in accordance with sentencing principles, and be proportionate by reference to its main purposes [s 237]:

- i. the punishment of offenders;
- ii. the maintenance of discipline;
- iii. the reduction of Service offences and other crime (including reduction by deterrence);
- iv. the reform and rehabilitation of offenders;
- v. the protection of the public; and
- vi. the making of reparation by offenders to persons affected by their offences.

For offenders aged under 18 the court must also have regard to their welfare.

2.7 Operational Effectiveness

2.7 Additionally, the Court Martial must take into account what is in the best interests of the Service, because the whole Services justice system is designed to underpin the operational effectiveness of the Armed Forces. This often makes the sentencing exercise different from that in the civilian courts. The close-knit structure of the Armed Forces means that sentences of the Court Martial are more widely disseminated than sentences in civilian courts, and thus deterrence is a

more important factor in Court Martial sentencing. The specialist judges who preside over trials in the Court Martial understand and apply this principle well, and this has been acknowledged by the Court of Appeal which has regularly referred to the Court Martial as a “specialist tribunal”. In *R v Lingard and Kirk*² Scott Baker LJ said:

“It is, in our judgment, extremely important that due deference should be given by the courts to decisions of the military authorities in sentence in cases of this kind (in this case theft and criminal damage in barracks). They, and they alone, are best placed to appreciate the significance of an offence such as this in relation to questions of morale and maintenance of appropriate behaviour in their units.”

2.8 Appeals to the Court Martial Appeal Court

2.8.1 The Court Martial Appeal Court (CMAC) has for a long time had jurisdiction to hear appeals against conviction, its more recent jurisdiction to hear appeals against sentence was conferred by the Armed Forces Act 1996 s 17, and the right of appeal now lies in the Armed Forces Act 2006 s 272 and Sch 8.

2.8.2 In the 1998 case of *R v Love*³ Simon Brown LJ described the jurisdiction to hear such cases as “new and unusual” and the combining of criminal with disciplinary sanctions more commonly associated with employment law as “unique”. The difficulty in combining these two disciplines was summed up by him as follows:

“The second point to note about this new appellate jurisdiction is that court martial sentences are concerned at one and the same time to achieve two things: first is to punish Service personnel for the criminality of their conduct; second, to deal with them also on a disciplinary basis. In that they are unique. Members of other professions and occupations who transgress the law of the land are dealt with quite separately, (a) by the civilian criminal courts followed (b) if appropriate by disciplinary proceedings before their own professional bodies. This would be so, for example, in the case of lawyers, doctors, nurses, architects and police officers.

“These considerations seem to us to be of some importance when it comes to determining what should be this court’s approach to these appeals. Hitherto this court has been concerned exclusively with an appellant’s criminality and whether his sentence is wrong in principle or manifestly excessive. By contrast statutory appeals from professional disciplinary bodies have gone traditionally to other courts generally either divisional court or the Privy Council, where a quite different approach is brought to bear upon them. ... In the present case of appeal it therefore seems to us that this court is exercising a somewhat hybrid jurisdiction and that, whilst we are free and clearly intended by Parliament to correct any injustice which we perceive in a court martial sentence, we must nevertheless be mindful that those imposing and confirming such sentence are, generally speaking better placed than we are when it comes to assessing the seriousness of offending

² *R v Lingard and Kirk* [2009] EWCA Crim 1745 at para 12

³ *R v Love* [1998] 1 Cr App R 458 at 461

in the context of Service life, and deciding upon what particular penalties are required to maintain the discipline and efficiency of the Armed Forces.”

- 2.8.3 The Service courts are generally better placed to determine the seriousness of cases and the appropriate sentence or particular penalties to maintain the discipline and efficiency of the Armed Forces. However, this does not mean that the Court Martial Appeal Court should “accept blindly” the decision of the Court Martial. In *R v Glenton*⁴, Judge LCJ said:

“In addressing these submissions ... we have reminded ourselves that the Court Martial is a specialist criminal court. That does not mean that we accept blindly the decision of the Court Martial, but we must attach due respect to a court which is designed to deal with service issues.”

2.9 Statutory Requirements

- 2.9 The Armed Forces Act 2006, in addition to requiring sentencers in the Court Martial to have regard to the purposes of sentencing listed in [paragraph 2.6](#) above, sets out considerations in deciding the seriousness of an offence including the treatment of previous convictions [s 238]. The Act requires the Court Martial to treat racial or religious aggravation of an offence, and hostility related to victims’ disability or sexual orientation, as aggravating factors in deciding the seriousness of the offence [ss 240-241]. The Act also provides for mandatory sentences in certain circumstances (such as third domestic burglary, firearms offences, etc) [ss 217-228]. Where an offender has pleaded guilty, the Act requires the Court Martial to take into account the stage in the proceedings when an offender first indicated his intention to plead guilty, and the circumstances in which the indication or the plea was given [s 239].

2.10 Sentences Available

- 2.10 The sentences available to the Court Martial are [s 164]:
- i. Imprisonment (including custody for young offenders)
 - ii. Dismissal with disgrace from Her Majesty’s Service
 - iii. Dismissal from Her Majesty’s Service
 - iv. Detention for a term not exceeding two years (normally served in the Military Corrective Training Centre)
 - v. Forfeiture of a specified term of seniority or all seniority
 - vi. Reduction in rank or disrating
 - vii. A fine
 - viii. A service community order
 - ix. A severe reprimand or reprimand
 - x. A service supervision and punishment order

⁴ *R v Glenton* [2010] EWCA Crim 930 at 19

- xi. Such minor punishments as authorised by regulations made by the Defence Council. The current minor punishments are:
 - a. stoppage of leave
 - b. restrictions of privileges
 - c. admonition
- xii. A service compensation order.

2.11 Other Orders

2.11 In addition the Court Martial may impose any of the following Orders:

- i. Hospital Order [s 169(2)]
- ii. Service Supervision Order [s 170]
- iii. Overseas Community Order [s 182] – civilians only
- iv. Conditional Discharge [s 185] – civilians only
- v. Suspended Sentence Order [s 200]
- vi. Sexual Harm Prevention Order [s232A and Sexual Offences Act 2003 s 137(2)]

Court orders other than sentences:

- vii. Service Restraining Order [s 229]
- viii. Financial Penalty Enforcement Order [s 322]

2.12 Severity

2.12 Under the pre-Armed Forces Act 2006 law sentences were listed in order of severity. This is no longer the case and where there is an issue of whether one sentence is more severe than another the judge must take account of the effect of each particular sentence on the individual to be sentenced. For example, dismissal may be more severe than a short sentence of imprisonment for a senior person about to qualify for pension, but less severe than detention for a very junior person who wished to leave the Service in any event.

2.13 Separate Sentences

2.13 The Court Martial is required to pass a separate sentence in respect of each offence [s 255], except where the trial was at the election of the defendant, in which case one global sentence for all offences is passed [s 131(5) & s 165⁵]. Where the court considers that the totality of the offending should be marked by a disciplinary sanction (such as dismissal, reduction in rank etc) the relevant sentence may either be attached to each charge or to the most serious charge with “No Separate Penalty” recorded against the others.

2.14 Pre-Sentence Reports and Medical Reports

⁵ S 165 was amended by Armed Forces Act 2011 s14 which added a new Schedule 3A into the Act

2.14.1 The court must obtain and consider a pre-sentence report [s 256(1)] before passing:

- i. a sentence of imprisonment
- ii. a sentence of detention
- iii. a sentence of dismissal or dismissal with disgrace
- iv. a community sentence
- v. a sentence in respect of a dangerous offender; or
- vi. a sentence in respect of violent or sexual offences.

2.14.2 However, if it is of the opinion that it is unnecessary [s 256(2)] the court may decide not to obtain and consider a PSR. For cases of Absence Without Leave (AWOL), where a period of detention is normally awarded, the court is likely to dispense with a PSR if there are no special circumstances, provided the defendant has legal representation and has had the opportunity to request a PSR.

2.14.3 The court must obtain and consider a medical report before passing a custodial sentence on an offender who is or appears to be mentally disordered [s 258].

2.15 Sentencing Council Guidelines

2.15 The Act requires the court to “have regard to” any guidelines issued by the Sentencing Council [SC] that are relevant to the offender’s case [s 259(1)]. The Coroners and Justice Act 2009 s 125(1), which requires a court to “follow” any relevant sentencing guidelines, does not apply to the Court Martial. The Armed Forces Act 2006 permits the court to depart from those guidelines if in its opinion the departure is justified by any features of Service life or of the Service disciplinary system that are relevant to the case [s 259(2)]. The SC Guidelines do not take into account the different range of sentencing options available to the Court Martial. This Sentencing Guide supplements the SC guidelines in relation to criminal conduct offences and provides examples of such features and differences. When explaining the court’s reasons for sentence, the judge should explain whether there is any departure from the SC guidelines and state what features of Service life or of the Service disciplinary system justifies any departure. There are no SC guidelines in relation to Service disciplinary offences; this guide, and the Manual of Service Law Chapter 14 for summary hearings, provides the only available guidance.

2.16 Giving Reasons

2.16 The Court Martial is obliged when passing sentence to state in open court in ordinary language and in general terms its reasons for deciding on the sentence passed, and to explain the effects of the sentence to the offender in ordinary language [s 252(1)].

2.17 Recording Convictions

2.17 Convictions in the Court Martial for certain non-criminal conduct offences listed as ‘recordable service offences’⁶ are recorded on the Police National Computer, in addition to convictions for all criminal conduct offences; and the same offences are recorded on the PNC if convicted at a summary hearing.

2.18 Service Policy Considerations

2.18.1 The Court Martial is an independent court but it is also an essential part of the process which maintains discipline within the Armed Forces. It is legitimate for the Court to take account of (but not to be strictly bound by) declared Service policy considerations when deciding appropriate sentences. Service policy considerations, upon which the Services have been consulted, are given in this guide where appropriate.

2.18.2 In certain circumstances a person who has been sentenced in the Court Martial but not dismissed may nevertheless subsequently be considered for discharge by his Commanding Officer. Queen’s Regulations for the Army paragraph 9.404 states that a person should normally have their service terminated in the following circumstances:

- i. If they have been convicted during their service by a court (civil court, court martial or summary hearing) of any of the following offences (to include attempts and aiding and abetting): Homicide, serious sexual offences, firearms and explosive offences, serious offences of dishonesty, road traffic offences involving death, arson and other instances of serious criminal damage, public order offences (riot, violent disorder), cultivation, importation possession and supply of drugs.
- ii. If they receive a sentence of imprisonment or any other sentence such that the person is no longer freely available for employment.

2.18.3 Queen’s Regulations for the Army provides an exception to this policy in the following terms: “If a Commanding Officer is of the opinion, despite a conviction listed in [i above] that exceptional circumstances do exist and that termination of service is not merited, AGAI 67 action is still to be taken and a lesser sanction considered.

2.18.4 When sentencing in cases listed in (i) above, if the Court decides not to dismiss, it should be aware that further administrative action will be taken and the Judge Advocate may make appropriate comments about exceptional circumstances in his sentencing remarks which should subsequently be drawn to the offender’s Commanding Officer.

2.19 Offender’s Rank, Special Qualifications and Unit

⁶ In the Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009 [SI 2009/1922]

2.19 The Court Martial when sentencing will always take account of the rank of an offender, and normally the higher the rank the greater the degree of culpability. Reduction in rank (available for Warrant Officers and below) normally has significant financial effects and the court must take into consideration the amount of pay lost and the length of time it may take for the offender to recover his rank. Anyone holding rank up to Warrant Officer, when awarded a custodial sentence, may also as a separate part of the sentence be reduced by a specified number of ranks or to the ranks. If the court does not also pass a sentence of reduction to the lowest possible rank when sentencing a Warrant Officer or NCO to custody, the offender is automatically treated as a seaman, private or airman while in custody serving the sentence but regains the former rank (or the rank to which the court did reduce him) on release [s294]⁷. This does not apply if the offender is also dismissed the Service in which case his rank is automatically forfeit. Certain categories or branches within the Services rely on special professional or technical qualifications which are aligned to ranks and for some trades the persons qualified to practise them cannot be reduced below a specified rank. When this arises the court should always ascertain the effect of any proposed sentence on the offender's special qualification, and take that into account.

2.20 Starting Points

2.20 This guide contains suggested starting points for the Court Martial when sentencing many common offences, and lists aggravating and mitigating factors. Unless otherwise specified the starting points assume the sentencing of a first-time offender on conviction after a plea of not guilty. They take account of SC guidelines, including features of Service life justifying a departure from them, and of legal authorities on sentencing principles. This guide does not fetter the discretion of the Court Martial to apply whatever punishment it decides is just, appropriate and lawful. Where the punishment awarded departs significantly from the starting point, the judge must explain in the reasons for sentence the aggravating and/or mitigating factors which have caused the departure. For all criminal conduct offences where this guide does not suggest a starting point, the Court Martial should be guided by the SC guidelines and apply relevant aggravating or mitigating factors, and any additional factors which are relevant to Service personnel. For disciplinary offences where no starting point has been given, the court must rely on its own experience of Service discipline and the judge should explain in the reasons for sentence how the court decided the appropriate starting point.

2.21 Reduction for a Guilty Plea

2.21.1 The Court Martial follows the statutory provisions relating to reduction in sentence for a guilty plea [s 239], and approaches reductions in accordance with the SC guidelines. For sentences based on numerical values, such as lengths of custody or amounts of fines, the level of reduction is a proportion of the total sentence which

⁷ The Armed Forces Act 2011 s14 repealed s293 which had caused some confusion about regaining former rank.

would otherwise be imposed, with the proportion being on a sliding scale depending upon the stage in the proceedings at which the guilty plea was entered or indicated. The first reasonable opportunity attracts the maximum 1/3 reduction; after the trial date is set, a 1/4 reduction; and at the door of the court/after the trial has begun a 1/10 reduction.

- 2.21.2 Defendants are normally reminded of the reductions for a plea of guilty at the Initial Hearing (IH) if their counsel has not already done so. Reduction may be withheld in certain circumstances⁸, but the normal sliding scale applies even where the offender has been “caught red-handed”. As sentences of Service detention include a large element of retraining the success of which depends upon minimum periods at MCTC, the mathematical approach to reduction is not appropriate for short sentences of detention where the reduction would be only a few days⁹. For non-numerical sentences such as dismissal this approach has no applicability but it is possible to reduce a sentence (for example fewer steps in reduction of rank) to reflect a guilty plea.

2.22 Goodyear Indications

- 2.22 In appropriate cases the judge may give a *Goodyear* indication at an Initial Hearing, or at a subsequent hearing, if requested by the defence. This sets a ceiling on the sentence, in the event that the defendant pleads guilty, and is given on the record. If a *Goodyear* indication was given and a guilty plea was entered on that basis, the sentencing court is bound by that indication (even if there is a different judge) and a court may not pass a sentence which is more severe than the indication given by the judge. The judge will advise the Board at the beginning of the sentencing process if an indication has been given.

2.23 Concurrent and Consecutive Sentences

- 2.23 When sentencing an offender for a number of offences, the Court Martial must always consider whether custodial sentences are to be served concurrently or consecutively. Where the sentences are consecutive the Court Martial should review the aggregate and consider whether the whole sentence is just (the totality principle). If the aggregate is too high, the Court Martial should adjust the series of sentences in one of two ways; it may make one sentence of full proportionate length and then make all others concurrent (provided none is out of proportion to the offence to which it refers). Or it may make such adjustments to the lengths of individual sentences as to ensure that the total sentence is proportionate. In all circumstances the judge must explain precisely how the overall sentence has been determined. In the case of *R v Ingram*¹⁰, Leveson LJ said:

⁸ See Sentencing Council Definitive Guideline on Reduction in Sentence for a Guilty Plea

⁹ See also 4.7.2 below in relation to calculating credit for time spent in post-charge custody

¹⁰ *R v Ingram* [2010] EWCA Crim 1645 at 19

“In order to succeed in an appeal against sentence it is not, in our judgment, sufficient to cherry pick the single offence to which the sentence has been attached even though the Act requires a sentence for each offence. Rather it is necessary to look at the overall picture and determine whether the sentence for the offending was, in the round, wrong in principle or manifestly excessive.”

2.24 Activation of suspended sentences [s 191]

2.24 The Court Martial¹¹ has power to activate a sentence of (Service) detention suspended by the Court Martial or at a summary hearing, where a new offence was committed during the operational period of the suspension. Any activation is always in addition to the sentence for the new offence, and if appropriate may be served consecutively. The court may activate the full original term of detention or any lesser term it considers appropriate. The new offence does not necessarily have to have been dealt with in the Court Martial; the offender may have been dealt with elsewhere and be brought before the Court Martial solely for activation of the suspended sentence to be considered (known as ‘Activation Proceedings’). If the offender has repeated the same or a similar offence without extenuating circumstances, activation of the whole sentence would be normal. If the new offence is wholly unrelated to the original offence, or of a minor nature, the court should consider activation only in part, or not activating at all. The overall maximum of two years’ Service detention may not be exceeded by the combination of the activated and new sentences. Where a defendant has elected for trial in the Court Martial, the aggregate of two sentences may not exceed 28 days detention (or 90 if the commanding officer had extended powers)¹².

2.25 Variation Proceedings (slip rule) [s 163(3)(h)]

2.25 After the Court Martial has passed a sentence, power exists¹³ for the court to vary the sentence during the 56 days after sentence. Variation proceedings may take place of the judge’s own motion, or on the application of the prosecution or defence. The court comprises the same judge as at the sentencing proceedings and all the same lay members, or as many of them as can practicably attend in person or by live video link. The purpose of the variation proceedings is to correct legal errors in sentencing (such as a longer period of custody than the maximum for that offence, or a sentence which is not available for a person of that rank). It is not intended to be used so that discretion can be exercised differently, or because opinions have changed. A defendant wishing to seek a variation should write to the Judge Advocate General giving reasons for his application. The JAG will forward the application to the judge who sat in the sentencing proceedings for a decision as to whether to list the case for variation proceedings. There is no appeal against a judge’s decision not to proceed, but the sentence whether varied or not is still subject to appeal to the Court Martial Appeal Court.

¹¹ Armed Forces (Court Martial) Rules 2009 rr130 to 138

¹² Schedule 3A paragraph 12 (inserted by the Armed Forces Act 2011 s14(2))

¹³ Armed Forces (Court Martial) Rules 2009 rr 118 to 124

3 SENTENCES AVAILABLE TO THE COURT MARTIAL¹⁴

3.1 Imprisonment and Youth Custody

- 3.1.1 Most of the sentencing options introduced by the Criminal Justice Act 2003 (as amended), are available to the Service justice system, and maximum terms apply equally. Sentences of imprisonment are not normally imposed by the Court Martial for a criminal conduct offence unless the same offence would attract a sentence of imprisonment in the civilian courts. However, and exceptionally, if the conduct is more serious within a Service context imprisonment might be appropriate. The same principles apply when determining the length of the sentence of imprisonment; this should follow the general civilian guidance unless there is some special Service justification for departure. The Court Martial has the same regard as civilian courts to judgments of the Court of Appeal which give guidance as to sentencing, and to guidelines of the Sentencing Council to the extent that they are applicable.
- 3.1.2 Any sentence of imprisonment imposed upon a warrant officer or non-commissioned officer when passed with dismissal or dismissal with disgrace [s 295(4)], involves automatic reduction in rank or disrating to the lowest level that could be awarded in the Court Martial, and can also have the effect of preventing immediate payment of a pension; this means that some differences in practice are inevitable. Although reduction in rank is automatic in these circumstances, the offender should be so informed in sentencing remarks.
- 3.1.3 Where the criminal conduct offence is so serious that it would inevitably warrant a sentence of imprisonment in a civilian court, considerations related to the disciplinary issues of the Services become less significant and the accepted practice of the civilian courts is always followed unless there are exceptional Service-related circumstances that justify a departure. ([See also para 5.2 below](#)).
- 3.1.4 In the Crown Court, the only form of custodial sentence available is imprisonment (except for young offenders). Where the appropriate penalty lies on the margin between imprisonment and a Community Order, the sentencing judge might take the view that a Community Order would not be sufficient to mark the gravity of the offence, and pass a sentence of imprisonment on the grounds that the offence is so serious that the offender ought to be deprived of his liberty. Alternatively, the judge might make a suspended sentence order whereby the term of imprisonment is suspended but one or more community requirements are added. In the Court Martial (Service) detention is an additional option (for Warrant Officers and below), and dismissal is yet a further option. Detention involves loss of liberty, but does not carry the stigma of imprisonment. This alternative is often appropriate, and it is not wrong for a court to consider the availability of prison spaces as a factor in

¹⁴ See also list of punishments available, at Annex B below

its deliberation on the options. The different release regimes ([paras 3.4.7 to 3.4.9 below](#)) can also be a relevant consideration. However, detention is not normally appropriate for offenders convicted of the more serious criminal offences.

- 3.1.5 The provisions of the Criminal Justice Act 2003 (as amended by the Criminal Justice and Immigration Act 2008 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012¹⁵) relating to dangerous offenders apply equally in the Court Martial, which may sentence an offender to imprisonment or detention for life and new extended sentences of imprisonment or detention (in this context, ‘detention’ means of a young offender, not Service detention). The assessment of dangerousness relating to a court’s decision whether there is a significant risk of the offender causing serious harm by committing further specified offences is applied by the Armed Forces Act 2006 s 223(2).
- 3.1.6 The Court Martial is informed whether an offender has been held in custody prior to trial. If so, this period counts towards the time the offender will serve¹⁶. A sentence of imprisonment generally runs from the date it is passed but where the offender is already serving a previous custodial sentence, the court may order that the new custodial sentence shall run consecutively from the expiry of the earlier sentence [s 188(3)(b)].
- 3.1.7 The Court Martial may impose a suspended sentence order with or without community requirements in the same way as a civilian court [s 200]. On one interpretation the legislation appears to make it possible for the Court Martial to impose community requirements with a suspended sentence of imprisonment but without dismissal. Such a sentence would frustrate the Services policy that community orders are incompatible with continued service and should not be used.
- 3.1.8 Custodial sentences, other than Service detention, for young offenders aged between 18 and 21 years need particular care. There are no provisions in the Armed Forces Act 2006 for custody in a Young Offender Institution, because it was expected that the provisions in the Criminal Justice Act 2003 reducing the minimum age for imprisonment from 21 to 18 years would be in force by the time the Armed Forces Act 2006 was brought into force. As at 31 December 2017 those 2003 Act provisions have not been brought into force. However, transitory provisions were made under the Armed Forces Act 2006 s 380¹⁷ which enable Service courts to sentence an offender aged over 18 but under 21 years to detention in a Young Offender Institution, until the relevant provisions in the 2003 Act (reducing the minimum age for imprisonment from 21 to 18 years) come into force.

¹⁵ LASPO s123 abolished sentences of IPP and DPP and extended sentences and introduced “new extended sentences”. See AFA06 ss 218A, 219A and 221A.

¹⁶ [See 3.4.16 below](#)

¹⁷ Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 Sch 2 para 4

3.1.9 Civilian custodial sentences are also available to Service courts for offenders under 18¹⁸. Where a defendant aged under 18 is convicted in the Court Martial of an offence punishable with imprisonment for 14 years or more (including life or where the maximum sentence is not fixed by law), the court may impose a sentence of YOI detention (not Service detention) for any period up to the maximum [s 209]. In all cases where a defendant aged under 18 is convicted in the Court Martial or the Service Civilian Court of an offence punishable with imprisonment, the court may impose a detention and training order in the same terms as would be available in the civilian courts. A child aged between 12 and 15 may be sentenced to a detention and training order only if the court is of the opinion that he is a persistent offender; and a child under 12 may be given such a sentence only if the court is of the opinion that he is a persistent offender and only a custodial sentence would be adequate to protect the public from further offending by him [s 211].

3.2 Dismissal and Dismissal with Disgrace from Her Majesty's Service

3.2.1 Dismissal is a sentence imposed by a court; discharge is an administrative action resulting in the ending of employment. Although the effects may appear similar, there are significant differences. Dismissal either with or without disgrace can have far-reaching consequences on an ex-Service person in civilian life. The primary consideration for the Court Martial is whether the offence is serious enough that the offender should be dismissed as a sentence [s 265(1)]. In *R v Downing*¹⁹ Judge LCJ said:

“The question whether the criminal activities of a member of the military require dismissal from the Service is pre-eminently, although not exclusively, a decision for the Court Martial. For this purpose, for the assessment of the impact of the applicant's convictions on his ability to continue to serve in the relevant force, the Court Martial must be regarded as an expert tribunal, entitled to the same level of respect to which any such tribunal is entitled when an appeal court is considering its decision.”

3.2.2 It is, therefore, well established that dismissal should not be imposed as a matter of mere expediency. It would be wrong in principle to dismiss purely because the offender is, for some extraneous reason, not fitted for Service life, or states that he does not wish to remain in the Service. In those circumstances administrative discharge may be appropriate, and that is not a matter within the power of the court. Dismissal can be awarded with or without either imprisonment or detention, and in combination with any other punishment. Dismissal and dismissal with disgrace remains on an offender's record for 12 months from the date of sentence before becoming spent²⁰; (6 months for offenders sentenced when under 18 years old).

¹⁸ Armed Forces Act 2006 Part 8 Chapter 5

¹⁹ *R v Downing* [2010] EWCA Crim 739 at 13

²⁰ LASPO 2012 s 139

- 3.2.3 Where dismissal is an option, particularly in cases where the Services' policy in relation to the particular type of offending is that it is incompatible with further Service (for example some forms of drug abuse), but the court decides not to dismiss, it should give its reasons fully. The court should state that the decision not to dismiss is made on the basis of all the information before it. It is important for the court's reasons for non-dismissal to be clear to the Services when considering whether to discharge the offender subsequently. It would arguably be executive interference in the judicial process (and therefore unfair) for the Services to discharge the offender solely for the same matter for which the court decided not to dismiss, not least because the court may have imposed a heavier sentence of detention, designed to re-train and rehabilitate, to offset the non-dismissal. There might however be separate additional reasons for discharge which were not considered by the court and which must remain a matter for the Services; the court cannot prevent or restrain the Services from discharging. See paras [2.18.1 to 2.18.4](#) above and also paras [3.4.13 to 3.4.15](#) below.
- 3.2.4 An offender who is dismissed from the Service must also be reduced to the ranks [s 295(4)] (except in the case of a commissioned officer, whose commission is forfeit) and has no right to a resettlement course or terminal leave. There is inevitably a financial effect on the offender of losing his job, and added effects, which may be more significant, if he has not yet qualified for a pension in immediate payment ([see para 3.3 below](#)). Although reduction in rank is automatic, the court should always state in sentencing remarks that reduction is part of the sentence.
- 3.2.5 The Court Martial does not as a matter of course hear whether an offender's Commanding Officer wishes to retain him (as used to be the case). The offender may introduce evidence from his superior officers in mitigation or as a character reference, and the prosecutor can address the Court Martial on Service policy regarding the relevant offence. In that way, operational effectiveness can be taken into account as a relevant consideration. The future employability of the offender is a relevant consideration. In *R v. Bywater*²¹ the CMAC said:
- “...there is a sound basis for concluding that, given the particular features of military service referred to elsewhere in the Guidance, “employability” may be a relevant consideration when a Court Martial is considering the question of dismissal, even if not the only or primary factor.”
- 3.2.6 The Board should be reminded that an officer called by defence to give the character of the accused may not necessarily be expressing the views of the Commanding Officer.
- 3.2.7 Dismissal with disgrace is an exceptional form of punishment for use when the nature and circumstances of the offence make a sentence of dismissal inadequate to reflect the displeasure with which the court regards the defendant's conduct. It

²¹ *R v. Bywater* [2010] EWCA Crim 483 at 20

marks the fact that the defendant's conduct has disgraced the Service in the sense that it has been dishonoured, shamed, discredited or brought the Service into disrepute. The offence itself need not necessarily be disgraceful. It is used sparingly to avoid diluting its effect, and when the offending conduct is such that the court wishes to draw attention to its gravity. When considering whether dismissal with disgrace is appropriate the court takes into account:

- i. The nature of the offence;
- ii. Its surrounding circumstances;
- iii. The rank of the offender and the degree of responsibility that should therefore be expected of him; and
- iv. Whether the sentence is necessary in the interests of the Service.

3.2.8 The Court Martial should always consider dismissal with disgrace where an offender is sentenced for a serious offence committed on operations where the offence is likely to tarnish the reputation of other members of the British Armed Forces involved in that operation. In the case of *R v Blackman*, where a Royal Marine Sergeant was filmed executing an injured enemy combatant and then telling those under his command not to report it, the court of first instance correctly concluded that dismissal with disgrace was appropriate. (The point was not fully argued before the CMAC, which, as a matter of clemency substituted dismissal for dismissal with disgrace.)

3.3 Effect of Dismissal on Immediate Pension

Financial implications

3.3.1 The Armed Forces have three pension schemes for the Regular Forces. It is important that the court knows which scheme applies to a defendant where dismissal is being considered. Those who are susceptible to the greatest financial loss are those with higher ranks or those who have been in the Services for a long time. Whilst it is necessary to consider the financial implications of sentences passed on such Service personnel, seniority and maturity in an offender are aggravating factors and it would be wrong to sentence a high-ranking offender to a significantly lower sentence than a junior or low-ranking one for the same offence solely in order to preserve his financial advantages.

3.3.2 Entitlement to a pension or Early Departure Payment (EDP), without having to wait until scheme pension age, is a valuable benefit. Early departure as a result of dismissal from the Armed Forces before the member reaches their entitlement point will cause the member to lose this benefit and instead leave with a deferred pension and, if they have served long enough, potentially a resettlement grant. Members who leave after passing their entitlement point will receive an immediate pension or EDP, based on service up to the last day of reckonable or qualifying service in the Armed Forces.

- 3.3.3 Those who are nearing a qualification point for an immediate pension or EDP would be the most affected by the financial effects of dismissal, which can amount to the loss of a significant sum accrued over many years. The loss of opportunity to have the remaining years of an engagement count towards a pension calculation has an additional effect. As dismissal is not automatic (as used to be the case when a person was sentenced to imprisonment, for example) the decision to dismiss will always be made having considered all of the consequences of the sentence.

The Armed Forces Pension Scheme 75 (AFPS75)

- 3.3.4 Pension benefits start to build up at age 18 for other ranks/ratings and age 21 for officers, or date of entry if later.
- i. An immediate pension is payable to other ranks/ratings after completion of 22 years' service (i.e. at age 40, or later for those joining the Service after the age of 18), and to officers after completion of 16 years' service (i.e. at age 37, or 38 for RAF officers, or later for those joining the Service after the age of 21).
 - ii. Those who leave the service after qualifying for immediate pension also receive a tax-free lump sum worth three times the annual pension.
 - iii. Those who continue to serve after reaching the immediate pension point continue to accrue additional benefits, the maximum number of years' service counting towards pension being 34 years for officers and 37 years for other ranks (i.e. to age 55).
 - iv. If a person leaves the Service before reaching the immediate pension point then he/she receives no immediate payment but instead qualifies for a deferred pension (and a tax-free lump sum of three times the pension when pension begins) based on number of years' service and final rank. A deferred pension is paid when the member is age 60 and/or age 65 for service after 6 April 2006.
- 3.3.5 If an individual has qualified for a Resettlement Grant (i.e. over 12 years' reckonable service Other Ranks or 9 years reckonable service Officers) this will be paid if no other pensionable benefits are paid (Immediate Pension, invaliding pension or redundancy payment).

The Armed Forces Pension Scheme 05 (AFPS05)

- 3.3.6 This came into force on 6 April 2005 for all those joining the Armed Forces after that date, and for those serving before that date who opted to transfer from AFPS75 to AFPS05.
- i. All personnel have to serve for 18 years and reach the age of 40 to qualify for Early Departure Payments (comprising a tax-free lump sum of three times pension, and income worth at least half deferred pension). The EDP is not a pension. It is paid until the member is eligible for a pension at age 65.

- ii. There is no immediate pension or payment unless the member leaves service at age 55, qualifies for an EDP or is awarded an ill health pension. Otherwise a deferred pension is payable at age 65 (together with a tax-free lump sum).
- iii. If an individual has qualified for a Resettlement Grant (i.e. over 12 years' relevant service) this will be paid if no other pensionable benefits are paid (Immediate Pension, EDP, ill health pension or redundancy payment).

The Armed Forces Pension Scheme (AFPS 15)

3.3.7 AFPS 15 was introduced on 1 April 2015. It is the pension scheme for Regular and Reserve Service personnel who first join the Armed Forces from 1 April 2015, and those Service personnel who were already in Service before that date and did not qualify for Transitional Protection in their legacy pension scheme.

3.3.8 AFPS 15 is a defined benefit, Career Average Revalued Earnings (CARE) scheme. All members of the Armed Forces have transferred to AFPS 15 except those who within 10 years of their current scheme pension age on 1 April 2012, who have remained in their legacy pension scheme.

- i. All personnel have to serve for 20 years and reach the age of 40 to qualify for Early Departure Payments (comprising a tax-free lump sum of three times pension, and income worth at least half the deferred pension). The EDP is not a pension. It is paid until the member is eligible for a pension at State pension age.
- ii. AFPS 15's normal retirement age is 60 (retirement in service) and the deferred pension age is State Pension Age.
- iii. Every year, the MOD adds an amount equal to 1/47th of annual pensionable earnings for that year, to the individual 'pension pot'. The member's 'pension pot' accumulates from first day of paid service and is carried forward into each year where indexation applies, based on the Average Weekly Earnings index. This process is repeated every year until the member leaves the Armed Forces.

3.3.9 If an individual has qualified for a Resettlement Grant (i.e. over 12 years' relevant service) this will be paid if no other pensionable benefits are paid (Immediate Pension, EDP, ill health pension or redundancy payment). Members who on 1 April 2015, were transferred from their legacy scheme to AFPS 15 have accrued rights protection. This means that the benefits, up to and including 31 March 2015, will be guaranteed and they are entitled to receive that proportion of the benefits at the same time as originally expected (in accordance with the relevant legacy scheme rules). Providing there is no break in service of more than 5 years, the legacy pension will also be linked to the member's final pensionable salary at the date of leaving the Armed Forces - not the salary/rank at the time of transfer into AFPS 15.

Forfeiture of pension

- 3.3.10 As a general rule, pension entitlements once earned may not be forfeited and the court has no power to sanction forfeiture. However, all Pension Schemes do provide for exceptional circumstances where the Secretary of State may order forfeiture. Such an order may be made where, for example, the Service person is convicted of treason, Official Secrets Acts offences where the sentence is at least 10 years' imprisonment, and other offences which the Secretary of State considers to have been injurious to the defence, security or other interests of the State (e.g. assisting the enemy, mutiny, desertion in war and grave breaches of the Geneva Conventions). Similarly, surviving spouses' benefits may be abated where they wilfully aided and abetted the commission of the offence. The schemes allow forfeiture if the member has a monetary obligation to the Crown which arises out of criminal, negligent or fraudulent act or omission and arises out of or in connection with service in the Armed Forces. Recovery is possible once the pension begins payment.

Information

- 3.3.11 Before sentencing, the Court Martial is informed which scheme applies to the offender, and it is provided with a Statement of Serviceman's Monthly Pay and Compulsory Deductions including individual financial predictions with options.

Principle

- 3.3.12 Any court in sentencing must take account of the effect of the sentence passed, and particularly the financial effect. In *R v Cooney* 21 the CMAC reinforced this principle and, on the facts of one of the cases (*Allam*), stated (page 183e of the judgment) that dismissal and the ensuing loss of an immediate pension was too severe for a single charge of causing death by dangerous driving, particularly because there was no aggravating feature arising from the Service context.
- 3.3.13 Sometimes, however, the issue of loss of pension and gratuity has been exaggerated and misinterpreted by advocates seeking to use this point to argue against dismissal. In civilian life, a professional person convicted of serious offences would inevitably lose his employment. He would retain contributions conferring entitlement to a pension which he would be due to receive when reaching scheme pension age, and he would most likely suffer financial loss by not being able to earn as much money in any subsequent employment. In the Service context, the dismissed individual retains a deferred pension which fully reflects the years already served, but he may lose the opportunity to qualify for a Resettlement Grant lump sum, or an immediate pension (AFPS75) or Early Departure Payment (AFPS05 or AFPS 15). In effect that future loss is no different from future loss of earnings in the civilian context. It is, therefore, a flawed argument to suggest that someone who has committed an offence meriting dismissal should be retained in the Service solely on the basis that he otherwise would lose the opportunity to qualify for an immediate pension by serving for a further period. Nevertheless, any potential loss should be one of the factors, which is relevant when considering dismissal.

- 3.3.14 The CMAC has accepted this proposition in a number of cases²². In *R v Birch*²³ Hughes LJ said:

“Courts Martial are extremely familiar with the financial consequences of what they do. Any calculation of loss of income in any event proceeds upon the wholly hypothetical basis that the defendant is not going to be employed anywhere else and as a fit young man he almost certainly would be employed elsewhere. We agree with the general proposition that in this case, as in some others, the impact of the loss of income is readily susceptible to over-statement. We also bear in mind that a person in a civilian occupation who behaved as this defendant did would at least be at serious risk of losing a civilian job.”

3.4 Service Detention

- 3.4.1 Service Detention in all but short sentences of less than fourteen days should normally be served at the Military Corrective Training Centre (MCTC) Colchester. Service detention is available only for Warrant Officers and below, and an offender sentenced to detention in the Court Martial may also be reduced in rank or rate – there is no automaticity as there used to be before the Armed Forces Act 2006 came into force. If he is not reduced or disrated by the court to the lowest rank or rate he can be, he is treated as an able seaman, private or airman for the duration of the sentence of detention. On completion of the sentence he regains his original rank (or any lower rank specified by the court). See also [para 3.6.4](#) below.
- 3.4.2 The maximum sentence of Service detention which can be imposed by a Court Martial is two years. The remission rules for Service detention are different from those that apply to sentences of imprisonment. Automatic remission of one-third of the sentence is given to all offenders sentenced to over 36 days detention, and sentences of between 25 and 35 days detention attract remission on a sliding scale to ensure the detainee actually serves for 24 days detention. There is no remission for detainees sentenced to 24 days detention or less. Additional remission can be earned on sentences of over 90 days detention at the discretion of the Commandant MCTC, up to a maximum remission of one-sixth of the portion in excess of 90 days. Where consecutive sentences are being served, it is the total period in aggregate that counts for purposes of earning additional remission. A sentence of detention ends when the offender is released from the Service Custody premises; there is no period of license, no probation requirement nor any recall provisions.
- 3.4.3 Service personnel are not paid any salary whilst serving a sentence of detention in Service Custody premises; they are provided with a small allowance to meet their immediate needs. An allowance may also be paid to help meet the needs of their dependant family. The time in detention does not count towards qualification for Service pension entitlement.

²² For example *R v Peters* [2005] AER (D) 68 (Nov)

²³ *R v Birch* [2011] EWCA Crim 46

- 3.4.4 Offenders who are not sentenced also to dismissal serve sentences in A Company MCTC where the regime is not dissimilar to basic military training. The aim is to return re-trained Service personnel to their Service to continue their career. The MCTC can achieve their objectives of re-training, rehabilitation and addressing offending behaviour only if the length of the term of detention is sufficient to enable a full programme of training to be completed, and in this respect detention has some similarities with certain community orders in civilian life.
- 3.4.5 Offenders who are sentenced also to dismissal (or who are to be discharged) serve sentences in D Company MCTC where the regime has less military training and contains a significant element of pre-release training aimed at rehabilitation and resettlement, thereby assisting the Service person to make a successful transition to civilian life.
- 3.4.6 The regime at MCTC is not primarily intended for those who have been convicted of serious criminal offences. However, even for a fairly serious offence an offender (including a sex offender) might be ordered to serve a period of detention where the court considers there is a better chance of rehabilitation for him in the Service environment than in a civilian penal institution. Such a course is not usual but it is available to the Court Martial as a real alternative to imprisonment. Whilst convicted sex offenders are subject to licensing conditions MCTC does not treat sex offenders. Therefore, in the case of a serious offender (including a sex offender), the likelihood of re-offending and the impact and harm that this would have should be considered both before and during sentencing. The PSR should help the sentencing court in this consideration. Those concerned with sentencing sex offenders should understand that the MOD cannot licence, order community requirements nor recall serious offenders once they have been released from Service detention.

The Difference Between Imprisonment and Service Detention

- 3.4.7 The CMAC has equated Service detention with imprisonment in terms of loss of liberty²⁴ although in *R v. Holmes*²⁵ and *R v. Birch*²⁶ the CMAC acknowledged that imprisonment and detention are different notwithstanding the loss of liberty.
- 3.4.8 It is wrong to consider a sentence of Service detention to be a more severe punishment than a sentence of imprisonment of the same length on the grounds that remission in a sentence of detention is one-third (unless the detainee earns extra remission) whereas for a determinate sentence of imprisonment of the same length it is one-half. Detention does not carry the stigma that having served a sentence of imprisonment does, and when released from detention an offender is not subject to licence as a released prisoner is. Detainees at MCTC routinely sleep in barrack rooms, and can earn a half-day's leave per week at a certain stage of their sentence. Service personnel are used to certain restrictions on their liberty

²⁴ *R v. Ball, R v. Rugg* (1998) Times, 17 February

²⁵ *R v. Holmes* [2004] EWCA Crim 3180 at 12

²⁶ *R v. Birch* [2011] EWCA Crim 46 at 11

and the regime in A Company MCTC is no more demanding than most basic military training regimes. The crucial issue is that a sentence must be of sufficient length to enable retraining and rehabilitation to be completed, whilst also allowing the regime at the MCTC to address any prevalent offending behaviour. This has worked well in the past and rates of recidivism among those who have served sentences of Service detention at MCTC are very low, with many former detainees going on to have highly successful careers including subsequent promotion.

- 3.4.9 Thus when calculating the appropriate length of a sentence of Service detention, it would not be appropriate for the court to reduce sentences artificially to reflect the length of time an offender in a civilian prison would actually serve before being released on licence.

Suspending Sentences of Service Detention

- 3.4.10 The Court Martial may suspend a sentence of Service detention for between 3 and 24 months [s 190(2) as amended by AFA16 s6]. If there is a conviction for a further offence committed during the operational period of that suspended sentence, the Court Martial may order that the suspended sentence take effect for the full original term or for a lesser term [s 191(3)]. Its decision depends on the seriousness of the further offence, and its connection to the offence which led to the imposition of the original suspended sentence. The term may be served immediately, or consecutively to another term of Service detention.

- 3.4.11 Examples of factors to take into account when considering whether to suspend a sentence of Service detention are whether:

- i. the offender can retrieve his good name without actually undergoing a committed sentence. This is often the case where there has been significant delay between the offence and trial during which period the offender has performed his duties very well and effectively rehabilitated himself;
- ii. the offender has shown genuine remorse and voluntarily made reparation for any damage caused by the offending;
- iii. the offender is young and inexperienced and it is clear that the offence is an isolated occurrence;
- iv. the offence does not involve serious violence, or violence towards a superior officer;
- v. the offender is required for important operational duties.

Custodial Sentences – how time is expressed

- 3.4.12 Periods of imprisonment or Service detention below 6 months are expressed in days, a month being 30 days. Periods of imprisonment or Service detention above 6 months are expressed in years (if appropriate), months and days, a month being a calendar month.

Discharge Following Service Detention

- 3.4.13 Where dismissal is an option but the court has decided after careful consideration not to dismiss, and has given its reasons fully on the basis of all the information before it, the Services sometimes nevertheless consider administrative discharge.
- 3.4.14 There might be separate additional reasons for discharge in a particular case which were not considered by the court and which must remain a matter for the Services. On the other hand, the court may have imposed a heavier sentence of detention, fine or loss of rank to offset its decision not to dismiss, following the ‘totality’ principle.
- 3.4.15 The court has no power to forbid or prevent the discharge of any offender, but in fairness the Services ought not to discharge subsequent to a decision of the court not to dismiss unless there exist other relevant factors which were not before the court. (See also paras [2.18.1 to 2.18.4](#) and [3.2.4](#) above).

Calculating Credit for Time Spent in Pre-trial Custody

- 3.4.16 The calculation for credit for time spent in pre-trial custody (or on remand) is carried out administratively at the MCTC or at the civilian prison, where the offender is informed of his expected release date. Where an offender has been held in Service custody after charge pending trial, the time thus served is allowed against the time to be served under the sentence passed. The offender’s pay may be forfeited²⁷ for any time in detention allowed against the sentence but that is an administrative decision not part of the sentence. Judges in the civilian courts are no longer required to direct that time spent on remand should count towards sentence²⁸. However, as a matter of good practice in the Court Martial when dealing with sentences of Service detention the judge states the time to be taken into account when calculating the release date. The judge announces the full length of the sentence of Service detention without deductions, and explains that the offender will be released after he has served 2/3 of the sentence of detention less the time already served in custody, subject to the restrictions of credit in [paragraph 3.4.2](#) above or any further credit he may receive for good behaviour in sentences of over 90 days.
- 3.4.17 In the case of imprisonment the judge need only state that the offender will serve 50% of the sentence but it is good practice for the judge to place on record the number of days spent in pre-trial custody in MCTC so that the prison authorities can take this into account when calculating the release date.

3.5 Forfeiture of Seniority

- 3.5.1 This punishment applies only to commissioned officers. An officer’s seniority date is the day upon which he was promoted to the rank held, including for pay purposes an acting rank – this is the Incremental Base Date (IBD). From that date he builds

²⁷ The Armed Forces (Forfeitures and Deductions) Regulations 2009 (SI 2009/1109) reg 3(1)(b)

²⁸ LASPO 2012 s108 which repealed CJA 2003 s 240

up seniority. Annual increments of pay (Incremental Levels (IL)) are applied on each anniversary of the IBD up to a specified maximum level. Promotion to the next rank will normally depend partly on achieving a minimum amount of seniority in the current substantive rank. Forfeiture of seniority for an officer can, in some respects be equivalent to reduction in rank or disrating for other ranks. Although it does not carry the same visible stigma, the impacts on pay, pension and promotion prospects can be significant.

- 3.5.2 The court may order that an officer forfeits either all seniority in the present rank or some specified lesser amount of seniority (given in years and months). The effect of the punishment is that the officer's IBD is set back by the period of the forfeiture. For example: a Captain is sentenced in the Court Martial on 1 November 2009. His seniority IBD for promotion to Captain was 1 January 2003 and he is sentenced to forfeit 3 years' seniority. His new adjusted IBD is 1 January 2006 from which date eligibility for further promotion is assessed. In this example the officer's pay will reduce from the current IL (IL6) to IL3. Loss of seniority or time forfeited may involve loss of reckonable service for retired pay, pension entitlement or gratuity purposes. Consequently, before making an order for forfeiture of seniority the Court Martial should be informed of and take into consideration all the effects in terms of pay and promotion prospects.

3.6 Reduction in Rank or Disrating

- 3.6.1 This sentence is available only for Warrant Officers and below. It involves loss of status and income, and it may also involve a reduction in pension entitlement as a Service pension is based on the highest rank held for two years in the last five years of service. Because of the loss of income, it is rarely appropriate to impose a further financial penalty (except a service compensation order). If the offender is also dismissed or is about to leave the Service in any event, the loss of rank would have no financial effect so a further financial penalty would be an option.
- 3.6.2 It would be wrong to consider this punishment in purely financial terms. A reduction in rank is mainly a reduction in responsibility and status which remains a visible indication of conviction, and may include changes in messing and accommodation arrangements. The important question is whether the offender by committing this offence has demonstrated that he is unfit to hold his present rank. Whether he is reduced to the ranks or allowed to retain some intermediate rank will depend on how seriously the court views his conduct, and on the mitigating factors.
- 3.6.3 If a Warrant Officer or non-commissioned officer is dismissed he must also be reduced to the ranks, the rationale being that if his misconduct was so severe as to merit dismissal he must necessarily be unfit to hold any position of authority.
- 3.6.4 If a Warrant Officer or non-commissioned officer is sentenced to detention the court may also reduce him in rank by one or more ranks. It is Army policy that SNCO or WO rank is normally inconsistent with being awarded detention, the court

should normally consider reduction to the ranks for a SNCO or WO and only allow retention of rank in exceptional circumstances. If the court feels that retention of rank is warranted then it should be made clear in the sentencing remarks which will be taken into account by the Services when they consider whether subsequent administrative action is necessary. Thus the court should state what the offender's rank will be on release from detention, and why. If the court decides not to reduce in rank when sentencing a WO/NCO to detention, he will nevertheless be treated as an AB/private/airmen while serving a sentence of detention [s 294(1)] even if the Court Martial did not reduce him to that rank. When he is released he regains his original rank (or the rank to which the court reduced him).

- 3.6.5 The three Services differ in the time taken for someone who has been disgraced or reduced in rank to be promoted back to his original rank. The court should consider the specific regulations in relation to regaining rank in the offender's Service before sentencing him. The court needs to be aware of the likelihood of the offender regaining some or any rank and the probable timescale.

3.7 A Fine

- 3.7.1 The court may award a fine up to the maximum prescribed by statute for the offence. There is no limit on the level of fine to be awarded for a Service disciplinary offence, except where the defendant elected trial and the court is therefore limited to the powers of a commanding officer. In those circumstances the maximum fine for a Service offence is a sum equivalent to 28 days' pay [s 136]. Pay for these purposes means basic pay, not including allowances. A fine is expressed as an amount of money, rather than numbers of days' pay.
- 3.7.2 If an offender is retained in the Service, a fine will normally be recovered through the offender's pay account and the court should specify the time by which the fine should be recovered. The court may order the fine to be paid by instalments; in that event, given that Service pay is monthly at the end of each month, the court should specify the dates of the instalments correspondingly. Generally if a fine cannot reasonably be recovered within 12 months it may be at too high a level. If the offender has been dismissed or discharged from the Service, a fine can be enforced through the use of a Financial Penalty Enforcement Order (FPEO) [s 322]. FPEOs are also used where the person against whom the financial penalty was awarded is neither subject to Service law nor subject to Service discipline [s 309(3)]²⁹.
- 3.7.3 Like a civilian court, the Court Martial has regard to the means of the offender when assessing the level of a fine and is provided with details of the offender's gross pay³⁰. The court may allow time for the fine to be paid, or direct that it be paid in instalments [s 251], but there are administrative instructions capping deductions from pay which are designed to ensure that every Service person has sufficient money left each month for living expenses.

²⁹ See Manual of Service Law Chapter 16

³⁰ Armed Forces (Court Martial) Rules 2009 r114(2)(g)

- 3.7.4 The Court Martial can impose a term of imprisonment in default of payment of a fine in the same way as in the civilian courts. If a defendant is serving a sentence of imprisonment (or detention in a YOI) the judge may order the sentence in default to run consecutively³¹. Periods in custody for default are contained in the Powers of Criminal Court (Sentencing) Act 2000 s139(4).

Combination of Financial Penalties with Other Sentences

- 3.7.5 Normally a financial penalty should not be imposed where other elements of the sentence (such as dismissal, detention or reduction in rank) carry significant financial consequences and reduce the offender's means. In exceptional cases a financial penalty can be added to these punishments, for example if the offender is leaving the Service immediately after trial and the reduction in rank would have no practical effect. However a service compensation order can be awarded with other sentences carrying financial consequences, but the court should have in mind the offender's ability to pay. See [para 3.12](#) below.

3.8 Service Community Order (only in combination with dismissal)

- 3.8.1 This is an order providing Service courts with almost the full range of community punishment options available to civilian courts when the offender is sentenced to dismissal or dismissal with disgrace, and provided he is over 18 and will reside in the United Kingdom. [s 178 and s 164] The court may sentence an offender to any Community Order listed in the Criminal Justice Act 2003 s 177³².
- 3.8.2 The court may attach community requirements to a suspended sentence of imprisonment [s 200], but would not normally do so unless the offender was also sentenced to dismissal ([see 3.1.7 above](#)). A Pre-Sentence Report is usually available to the court which advises as to the usefulness of any proposed order, and an order is in the same terms as in the civilian courts.
- 3.8.3 As SCOs may be awarded only in combination with dismissal, their supervision is undertaken by the probation service in the area where the offender is to reside after he has left the Service. Before a court imposes an SCO it must be satisfied that arrangements are in place for the supervision to be carried out. It is, therefore, helpful for the judge to give an early indication to the PSR writer that dismissal and an SCO is a possible sentence, so that the writer can undertake the necessary checks before making any recommendation.
- 3.8.4 Breaches of Service Community Orders are dealt with by the civilian courts in the United Kingdom.

3.9 Severe Reprimand and Reprimand

³¹ See s 269A (inserted by AFA11 s16) and [3.12.4](#) below in relation to setting a period of imprisonment in default

³² But see s178(5) relating to certain minor technical differences

3.9.1 These punishments are available only where the offender is an officer, Warrant Officer or non-commissioned officer. They have no direct financial consequences but are a mark of disapproval. They are frequently coupled with a financial penalty.

3.9.2 Effects: At the time of writing (31 December 2017) the Services had introduced a policy that reprimands are not recorded on an individual's service or promotion record because the sentence is spent immediately after having been passed. Work is currently being undertaken to rectify this anomaly by attaching a period during which the reprimand will be active, and therefore taken into account by promotion boards. Further guidance will be issued when this is resolved.

3.10 Service Supervision and Punishment Order (SSPO) [s 173]

3.10.1 This is an order which provides an alternative to (Service) detention, placing restrictions on an offender whilst leaving him available to his unit for normal duties. Its implementation is supervised by the Commanding Officer of the unit.

3.10.2 A SSPO may be awarded only to an able rate, marine, private or airman. The order must specify its length as 30, 60 or 90 days [s 173(2)]. In each of these periods there is an initial period of 14, 18 and 21 days respectively in which the offender may be required to undertake extra work or drill up to a maximum of 5½ hours per day. After the initial period has expired, the remainder of the order is the secondary period. Throughout the duration of the order the offender forfeits one-sixth of his gross pay [s 173(1)(b)], and for the initial period he may not take leave [s 173(3)(b)] without his Commanding Officer's permission (leave entitlement is deferred but not lost).

3.10.3 The SSPO also contains a number of discretionary elements, one or more of which may be imposed in addition to the mandatory element of the punishment³³. The Court may set the requirements of the Order itself or authorise the Commanding Officer to set the requirements on their behalf.

- i. extra duties up to 1 hour per day during the secondary period;
- ii. not to leave a relevant place without the permission of his Commanding Officer;
- iii. subject to such conditions as may be specified in the SSPO, not to enter specified places in a relevant place without the permission of his Commanding Officer.

3.11 Minor Punishments

3.11.1 Minor punishments³⁴ are usually awarded by a Commanding Officer at summary hearing, but may be awarded by the Court Martial for minor offences, and where

³³ The Armed Forces (Service Supervision and Punishment Orders) Regulations 2009 (SI 2009/1214) reg 3.

³⁴ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 (SI 2009/1215) reg 3(3).

a defendant has elected trial. They are: i) Stoppage of Leave, ii) Restriction of Privileges, and iii) Admonition. Where the Court Martial awards stoppage of leave, the Commanding Officer decides the dates on which each of the specified number of days is to fall. Where the Court Martial awards restriction of privileges, the Commanding Officer specifies when and how the restrictions are to apply. The court explains the role of the CO to the offender.

- 3.11.2 Stoppage of leave is available up to a maximum of 14 days and only if the offender is below the rank of warrant officer. This does not remove an offender's entitlement to part of his annual leave entirely, but has the effect of preventing him from leaving his ship, establishment or station during the period of the stoppage. If the punishment commences when the offender was expecting to proceed on annual leave it has the effect of deferring that leave. The commencement of this punishment may be delayed for up to 28 days for compassionate or operational reasons.
- 3.11.3 Restriction of Privileges is available for up to a maximum of 14 days and only if the offender is an able rate, marine, private soldier, Senior Aircraftsman or military officer cadet. This requires the offender to undertake extra duties including work, training or any other Service duty up to a maximum of 5½ hours per day. These extra duties must take place during the period from two hours before the start of the offender's working day to six hours after completion of his working day. He may also be required to muster or parade at a particular place on the ship, establishment or station as one of his extra duties up to a maximum of six times a day.

Admonition

- 3.11.4 When an offence is proved but of itself or because of the mitigating circumstances it is very minor, the offender may be admonished. It is equivalent to an absolute discharge in the civilian system although it may be awarded in combination with a Service Compensation Order.

3.12 Service Compensation Order (SCO)

- 3.12.1 This is an order requiring the offender to pay compensation for any personal injury, loss or damage to a victim as a result of his substantive offence or another offence which he has asked to be taken into consideration [s 175]. The Court Martial must consider making a SCO in any case where it has power to do so³⁵. The Court Martial may award any sum it considers appropriate after hearing representations from the offender and the prosecutor [s 175(2)]. The awarding of an SCO in favour of a victim does not prevent the victim from pursuing a claim for damages, but may mean he or she is spared from needing to do so. An SCO cannot be made in respect of bereavement, funeral expenses or other loss suffered by dependants of a person as a consequence of their death [s 175(4)].

³⁵ S175(7A) inserted by LASPO 2012 s63

- 3.12.2 Where the court considers it appropriate both to award a fine and to make an SCO, but the offender would have insufficient means to pay both, the court should give preference to the SCO in the interests of the victim. The court may still impose a (smaller) fine as well if appropriate.
- 3.12.3 If the offender has been dismissed or discharged from the Service, or the offender is a civilian, the recovery of compensation may prove more difficult. In the interests of justice, the Court may order the Military Court staff to take address and bank details (or cheque if appropriate) from the offender to ensure that compensation is paid as detailed in the SCO before they leave the Court premises. If this fails, then the SCO can be enforced through the use of a Financial Penalty Enforcement Order (FPEO) [s 322]. FPEOs are also used where the person against whom the financial penalty was awarded is neither subject to Service law nor subject to Service discipline [s 309(3)].
- 3.12.4 Periods in custody for default are contained in the Powers of Criminal Court (Sentencing) Act 2000 s139(4). The Court Martial may specify a longer period than the maximum term to which the person is liable to be committed to prison for default if an enforcement order is made³⁶.

³⁶ S269B (inserted by AFA11 s16)

4 THE SENTENCES AVAILABLE TO THE COURT MARTIAL WHEN SENTENCING CIVILIANS³⁷

4.1 Jurisdiction Regarding Civilians Subject to Service Discipline

4.4.1 Certain civilians who accompany the Armed Forces outside the United Kingdom are subject to Service jurisdiction (the Court Martial and Service Civilian Court)³⁸ in respect of criminal offences and a limited number of disciplinary offences. The persons to whom this part of the law extends are those civilians listed in the Armed Forces Act 2006 Schedule 15 Part 1 and The Armed Forces (Civilians Subject to Service Discipline) Order 2009³⁹ (see Chapter 6).

4.4.2 Normally lay members of courts are not involved in sentencing civilians as the judge sentences alone. However, in a joint trial of a serviceman and a civilian, where the board is a mixture of Service and civilian lay members, all the lay members assist the judge in sentencing.

Sentences Available

4.4.3 The sentences available to the Court Martial and Service Civilian Court when sentencing civilians subject to Service discipline⁴⁰ are:

- i. Imprisonment
- ii. Fine
- iii. Service Community Order
- iv. Overseas Community Order
- v. Service Compensation Order
- vi. Order for a conditional discharge
- vii. Order for an absolute discharge

4.2 Jurisdiction Regarding Civilians who are Ex-Servicemen

4.2.1 An Ex-Serviceman may be tried in the Court Martial and sentenced for offences committed while he was serving, provided:

- i. he is charged within six months of leaving the Service [s 55];
- ii. he is not subject to service law;
- iii. he is not a member of a volunteer reserve force;
- iv. he is not subject to a reserve additional duties commitment [s 56]; and
- v. he is not a civilian offender.

³⁷ Different provisions apply when the Court Martial is sentencing a civilian who is an ex-serviceman: See AFA 06 Sch 3

³⁸ The Service Civilian Court (SCC) is created by AFA06 s 277

³⁹ SI 2009/836

⁴⁰ For definition see AFA06 Sch 15 Part 1

4.2.2 An ex-Serviceman can be tried even having been charged outside this six month time limit but only with the consent of the Attorney General [s 61(2)]. The power is wide but it is unlikely to be exercised unless the offences alleged are serious.

4.2.3 The Court Martial has the power to impose all of the sentences available for a Serviceman of the relevant rank with the exception of forfeiture of seniority, a service supervision and punishment order, and any minor punishments. It may award an absolute discharge⁴¹ but not a conditional discharge. It may impose dismissal or dismissal with disgrace, meaning that the previous discharge, retirement or resignation is converted into a dismissal from the Service, but only upon an officer or a member of the reserve forces [Sch 3 para 3(1) – Table rows 2 & 3].

4.3 Sentencing All Civilians including Ex-Servicemen:

4.3.1 *Imprisonment*

4.3.1 This includes detention in a Young Offender Institution for offenders aged over 18 and under 21, and detention for offenders under 18 (this is not Service detention). The maximum limit for the Service Civilian Court is imprisonment for 12 months in respect of any one offence. Where consecutive sentences are passed, their aggregate must not exceed 65 weeks.

4.3.2 *A fine*

4.3.2 The civilian offender must pay the fine to the unit with which he is connected. Where the offender is under 18 and he has a Service parent or guardian the court may order (and where the offender is under 16 must order) that the fine be paid by that Service parent or guardian unless it is unreasonable to do so. The Service parent or guardian must be given the opportunity to be heard by the court before the order is made [s 268]. See 3.12.3 above in relation to default.

4.3.3. *A Service Community Order*

4.3.3 The Service Civilian Court or the Court Martial sentencing a civilian may make a Community Order in the same terms as would be made by the magistrates' court or the Crown Court sitting in England and Wales applying the provisions of the Criminal Justice Act 2003 s 177(1). However, it may impose an SCO only if the offender is over 18 years of age when convicted and it appears to the court that he will reside in the United Kingdom while the SCO is in force [s 164(5)].

4.3.4 *An Overseas Community Order*

⁴¹ Armed Forces Act 2006 Sch 3 Part 2

4.3.4 The Service Civilian Court or the Court Martial sentencing a civilian may make an Overseas Community Order as an alternative to the Service Community Order in cases where it appears to the court that the offender will reside outside the United Kingdom while the order is in force [s 182]. It is an appropriate sentence for punishing civilians (such as families of Service personnel) accompanying British Forces in Germany. The court may impose one or more of the requirements mentioned in the Criminal Justice Act 2003 s 177(1)⁴². When a court makes an OCO it must provide a copy of the order to the offender's Commanding Officer, to his parent or guardian (if he is under 14 years of age) and to Service Children's Education if the order contains an education requirement.

4.3.5 The responsible officer charged with the duty of monitoring community order requirements overseas is an officer of the local Probation Service who supports the overseas community. Breaches are dealt with in the same way as community orders in the UK under the Criminal Justice Act 2003⁴³. The Service Civilian Court (or the Court Martial if the order was made by that court) may issue a summons or warrant for the offender's arrest, so that he may be brought back to the court for the order to be reviewed.

4.3.6 A Conditional or Absolute Discharge

4.3.6 A conditional discharge is an order discharging the offender subject to the condition that he commits no Service offence during the period specified in the order (the maximum being 3 years). An absolute discharge imposes no conditions on the defendant, and in any future proceedings for a subsequent offence it is not regarded as resulting from a conviction. [s 185].

4.3.7 A Service Compensation Order

4.3.7 Where the offender is under 18 the court has the same power in relation to making orders against his Service parent or guardian as it has for fines.

⁴² But see the restrictions in s183(1) and s182 amended by LASPO 2012 s78

⁴³ Armed Forces Act 2006 Sch 5 Part 2

5 CRIMINAL CONDUCT OFFENCES

General Comments

5.1 *Definition*

5.1 The Court Martial has jurisdiction to try all criminal offences under the law of England and Wales by virtue of the Armed Forces Act 2006 s 42. Within the Service jurisdiction these offences are known as “criminal conduct offences”. Persons who are either subject to Service law or civilians subject to Service discipline may be tried in the Court Martial for criminal conduct offences. A limited number of criminal conduct offences (listed in Schedule 1 of the Act) may be heard summarily by the Commanding Officer but only if the defendant is a person subject to Service law.

5.2 *Guidelines issued by the Sentencing Council (SC)*

5.2 The Court Martial (and all other courts in the Service Justice System) must “have regard”⁴⁴ to any relevant sentencing guidelines issued by the Sentencing Council (formerly the Sentencing Guidelines Council) when sentencing an offender for a criminal conduct offence [s 259]. The court may depart from those guidelines if, in its opinion, the departure is justified by any features of Service life or of the Service disciplinary system that are relevant to the case. The guidance below for each offence includes a framework which may provide the court with a justification for departing from the SC guidelines, but where there are no Service-specific aggravating features or mitigating factors the court should be guided by the guidelines.

5.3 *Approach to sentencing criminal conduct*⁴⁵

5.3.1 The court should first refer to any relevant SC guideline and follow the steps to categorise the offending and determine a starting point. It should then apply any aggravating and mitigating factors in the SC guideline.

5.3.2 Where this exercise leads to consideration of a community penalty, and the defendant is not to be dismissed, the court should consider a sentence of detention of the appropriate length in place of a community penalty, referring to additional guidance in this book.

5.3.3 Having ascertained an appropriate sentence (before any reduction for a guilty plea) the court should then refer to any additional guidance in this book to determine whether there are any additional features of Service life or the Service disciplinary

⁴⁴ Note: *not* “follow” – see [para 2.15 above](#)

⁴⁵ See *R v L* [2017] EWCA Crim 709 at paragraph 19 where the Vice President of the Court of Appeal (Criminal Division) provided guidance on the approach to sentencing

system which may justify a departure from that sentence. The availability of additional sentencing options unique to the Service Justice System, such as dismissal, reduction in rank etc, is also a factor.

- 5.3.4 The pressures of Service life including active operations and the unique circumstances of service in the armed forces may constitute aggravation or mitigation depending on the circumstances. A higher sentence is justified where the offence is potentially corrosive of Service discipline, for example theft from fellow Service personnel or assaults upon superiors; likewise where the consequences of criminal conduct are magnified catastrophically in a dangerous Service environment, for example drug abuse or excessive consumption of alcohol. On the other hand, a more lenient sentence may be justified for example where the guideline sentence would lead to a loss of status or pension rights disproportionate to the culpability, or where the operational context is relevant.
- 5.3.5 If, in the court's opinion, the departure is so justified, then the sentence should be adjusted accordingly. This should be clearly set out in the sentencing remarks.
- 5.3.6 Apply any discount for a guilty plea and then refer back to the Sentencing Council guideline to deal with dangerousness, totality and any ancillary orders.

5.4 *List of Offences*

- 5.4 It is not practicable to give an exhaustive list of every possible criminal offence in this Guide; this chapter deals with those criminal conduct offences most commonly tried in the Court Martial. It includes offences committed against members of the local civilian population in foreign countries, and particular types of offence which are prevalent in the Armed Forces and may require strong deterrent sentences.

5.5 *Serious Offences*

- 5.5 Differences in the level of sentence between civilian and Service courts are minimal for the more serious criminal conduct offences. Homicide, rape or armed robbery are sentenced as in a Crown Court; only exceptionally would the sentence vary, for example when the offence is committed during operations⁴⁶ and there are significant mitigating factors which would enable the court to impose a much lower sentence than would be the case in the civilian environment. Thus for example, the entry point for a soldier being sentenced for rape would be the same as in the Crown Court since the general sentencing tariff is sufficient to subsume the Service interests. However, if the offender was of a superior rank to the victim, the additional elements of breach of trust and abuse of authority might be an aggravating factor which could lead to a more severe sentence. Similarly where Service personnel are convicted of possession or supply of illegal drugs, sentences are likely to be more severe than in the civilian courts because of the risk that drug abusers could be an extra danger to Service colleagues in hazardous conditions,

⁴⁶ R v Blackman [2014] EWCA Crim 1029 and [2017] EWCA Crim 325

and because drug abuse is corrosive to unit effectiveness. If issues of superior rank, breach of trust or abuse of authority arose, they would be an extra aggravating factor.

Certain Common Criminal Conduct Offences

5.6 Drug Offences

5.6.1 For drug offences other than possession (fraudulent evasion, supply, production, permitting premises to be used etc) – refer to the Sentencing Council Guidelines and refer to the additional aggravating and mitigating factors relevant to Service life below. In addition to any criminal sanction, the defendant must be dismissed and reduced in rank (if appropriate) unless it is not in the service interests so to do.

5.7 Possession of Dangerous Drugs

Service policy considerations

5.7.1 The Armed Forces' policy on drug abuse is published in Joint Service Publication 835. It states that the misuse of drugs is incompatible with the demands of Service life and poses a significant threat to operational effectiveness. The implications of drug misuse are particularly damaging and the illegal possession and use of controlled drugs is an offence under both Service and civil law. Drugs impair judgement and reliability, reduce fitness, damage health, degrade performance, and harm team cohesion and Service ethos - as well as being harmful personally, to family relationships and to society generally. It is Service Personnel Board policy that there is no place in the Armed Forces for those who misuse drugs. Only in exceptional circumstances will any member of the Armed Forces be retained following drug misuse.

5.7.2 Personnel in the Armed Forces who carry lethal weapons, operate and maintain dangerous equipment, or bear responsibility for the safety of others must display higher standards of behaviour than civilians. They must expect to be punished more severely for breaching those high standards. For the Royal Navy and the Royal Air Force, single Service direction is that dismissal on conviction or administrative discharge is inevitable where the drug involved is Class A. The Army does not rule out retention for Class A drugs provided other criteria are met.

5.7.3 Aggravating factors:

- i. quantity other than very small
- ii. use within the Service environment or on duty
- iii. previous conviction for drugs offences
- iv. corruption of others
- v. abuse of position of authority (in supply cases)
- vi. Class A drugs

5.7.4 Mitigating factors:

- i. very small quantity
- ii. youthful first time experimentation
- iii. social setting away from the Service environment
- iv. youth of offender
- v. admission of involvement at early stage
- vi. genuine remorse
- vii. co-operation with investigators
- viii. special personal or domestic circumstances

Starting points:

5.7.5 Starting points in the Sentencing Council Guideline for the lower categories of offences are not applicable in the Service context and a fine would never be appropriate.

Possession – Dismissal + Custody for 90 days within a range of Dismissal to Dismissal and 180 days custody.

5.7.6 Exceptionally an offender may be retained in the Service if the Court Martial finds the following factors in his favour:

- i. the offender was young and inexperienced
- ii. it was a first offence involving singular use on one occasion
- iii. the chances of reform are good
- iv. the offender expresses remorse
- v. the offender has significant potential
- vi. it is in the interest of the Service to retain the offender

5.8 *Theft and Other Offences of Dishonesty*

Service policy considerations

5.8.1 Dishonesty is not consistent with service in the Armed Forces because it is corrosive to unit cohesiveness and morale.

Theft from employer/breach of trust

5.8.2 These are serious aggravating factors. Where the theft amounts to a breach of trust, the well-established principles established in the civilian courts are applied and the starting point is the same as for cases of theft from an employer, except that minor theft from the employer is often treated more severely within the Service context. The rank of the offender, the degree of trust reposed, the value involved, the effects of the lost items on operational effectiveness, and the period of time over which the offences have been committed are the determining factors.

The more senior the rank held by the offender the more serious the aggravation and it is usual to dismiss a commissioned officer on conviction of a first offence.

Barrack Room or Messdeck Theft

5.8.3 Theft from colleagues who live in a close community undermines the mutual respect and comradeship that are the basis of Service life, and may ultimately affect operational effectiveness. It is a serious aggravating feature even where the value of the items stolen is low.

Joint Personnel Administration (JPA) Fraud

5.8.4 Under the JPA system Service personnel are able to claim expenses on line with minimal supervision. This makes it easier for Service personnel who choose to act dishonestly to submit false claims for expenses (such as travel and subsistence). It is made abundantly clear to Service claimants that the accuracy of all claims is a personal responsibility and is subject to audit, and that false claims (of whatever sum) are almost certain to result in disciplinary action or prosecution.

5.8.5 The Army policy (which broadly accords with the other two Services) deals with potentially fraudulent JPA Claims in the following manner⁴⁷:

- i. Claims made in error. A simple recovery by the expenses auditor is all that is required. The claimant is placed on the Authorisation Required List (ARL) for 6 months.
- ii. Claims made in ignorance or without due diligence. Overpayment is recovered, administrative action is considered and the claimant is placed on the ARL.
- iii. Intentional Misrepresentation. Recovery is made immediately and the claimant is placed on the ARL. A disciplinary investigation will be initiated depending on the amount of money claimed, whether the claimant is in a position of trust, the frequency of any claims, the type of claim and whether other people in the same unit have made similar fraudulent claims (in which case there may be an investigation into a conspiracy).

5.8.6 Mitigation based on such supposed factors as peer pressure, small sums, or the assertion that such offending is tolerated carries little weight. Likewise, it is no mitigation to assert that false claims were made only on an opportunistic basis as all personnel have access to JPA throughout their careers and the opportunity to abuse the system is always present. Fraud by JPA administrators is especially serious. The policy of the Services is that the amount of any overclaim discovered is recovered immediately from the claimant, without awaiting the outcome of any prosecution.

⁴⁷ HQ Land Forces policy letter PS2(A)01.01.10 dated 8 November 2010

5.8.7 Sentencing in these types of cases has been the subject of a number of CMAC judgments. In the 2009 case of *R v. Earle*⁴⁸ which related to 16 instances of JPA fraud totalling £693, a sergeant had been sentenced (a) to dismissal, (b) to be reduced to the ranks, (c) to 60 days Service detention, and (d) to repay the amount defrauded. The CMAC substituted a sentence of reduction to the rank of corporal and to repay the amount defrauded, but without dismissal or detention. Thomas LJ said:

“...we ought to approach this matter on the principle that there is no objectively justifiable basis upon which we can distinguish dishonesty in expense claims in the army or navy or air force, from dishonesty in expense claims in other institutions.

...

We are, without doubt, sure that the judge advocate was wrong in principle in imposing his sentence of custody. It was not the correct sentence.”

5.8.8 In 2010 in *R v. Downing*⁴⁹ which related to 47 instances of JPA fraud totalling £7,959, refusing to disturb a sentence of dismissal Judge LCJ said:

“However the applicant’s dishonesty was substantial: it was a two year fraud on his Service. It was not a tiny “expenses fiddle”; that would underplay its extent. It was long-term dishonesty in the course of his employment in the Royal Navy. It was brought to an end fortuitously, not voluntarily on his part. In the context of an application for leave to appeal against an order for dismissal, we must bear in mind that the Court Martial is dealing with an individual who has committed crime, with all the exigencies of military life. The impact of a crime committed by a civilian has a different impact to a similar or an identical piece of criminal activity by a Service man or woman in the course of their work. It may impact on operational efficiency as a whole and there may be a diminution in the ability of the applicant to perform his military responsibilities as part of a team.”

5.8.9 In 2010 in *R v. Brown*⁵⁰ which related to six charges of fraud totalling £8,590 by a System Sergeant, refusing to disturb a sentence of six months’ imprisonment (not suspended) Griffith Williams J said:

“In our judgment there can be no criticism of an immediate custodial sentence in this case. The appellant's offending was of a nature and degree which called for an immediate sentence, as the Guideline makes clear. On the facts of this case we are in no doubt that the Panel properly directed itself and reached the inevitable conclusion that there had to be an immediate prison sentence.”

5.8.10 In 2010 in *R v Ingram*⁵¹ [2010] EWCA Crim 1645 at 20, Leveson LJ said:

⁴⁸ *R v. Earle* 2009 04059 D5

⁴⁹ *R v. Downing* [2010] EWCA Crim 739 at 12

⁵⁰ *R v. Brown* [2010] EWCA Crim 2912 at 12

⁵¹ *R v Ingram* [2010] EWCA Crim 1645 at 20

“...offending which involved the deliberate provision of false information, and forgery in circumstances redolent with dishonesty ... inevitably called into question the propriety of that officer remaining within the service. The Court Martial were perfectly entitled to conclude that it was appropriate to dismiss the appellant.”

5.8.11 In the Earle case the focus was on the custodial element of the sentence. The Court Martial had treated the dismissal as an inevitable consequence of the detention rather than a sentence requiring to be justified in itself. The CMAC concluded that custody was not justified for a £693 fraud, since that level of offending was far below the custodial level (meaning prison) in the (then) SGC guidelines. The quashing of the dismissal followed almost automatically, without regard to the fact that in the civilian world an employer would have dismissed an employee following a fraud upon the employer even for a sum as small as £693. The later Downing case by contrast focused exclusively on the dismissal element of the sentence, since the 12 months’ detention was not under appeal. The CMAC upheld dismissal for £7,959 of fraud for good Service reasons and recognised the Court Martial as an “expert tribunal” whose decisions were entitled to be respected. The Brown case focused exclusively on the imprisonment element of the sentence, since the dismissal was not under appeal. The CMAC upheld a total sentence of six months’ imprisonment, and the decision not to suspend. It cited this Guidance (in its earlier version) with approval.

5.8.12 In summary, the Court Martial should always consider dismissal for offences of dishonesty in the same way as any other employer. It should not impose a sentence of imprisonment if the level of culpability falls too far below the level which would justify prison in the civilian system. However a sentence of detention might be appropriate in these circumstances to reflect the breach of the higher standards of honesty and integrity required within the Armed Forces.

5.8.13 Aggravating factors:

- i. type of theft (breach of trust, theft from employer, barrack room/messdeck theft)
- ii. undermining of morale and discipline
- iii. the more senior the rank of the accused the more serious is the case particularly dishonesty by an officer
- iv. systematic theft (e.g. repeated JPA fraud)
- v. effect on the victim
- vi. effect on the Service or the unit
- vii. high value of money or goods taken

5.8.14 Mitigating factors:

- i. value of item stolen is low
- ii. the overall level of dishonesty is not great
- iii. single instance, opportunistic, unpremeditated theft
- iv. co-operation with investigators

- v. special personal or domestic circumstances
- vi. expression of remorse and willingness to repay (if not already recovered)
- vii. no subsequent deceit
- viii. good professional and disciplinary history
- ix. the offender has significant potential or is of value to the Service

Starting point:

5.8.15 The starting point in all cases of dishonesty is Dismissal.

(An offender may be retained in the Service where many of the mitigating factors are present and retention is in the interests of the Service)

- + Service Compensation Order for the amount stolen (if not already recovered)
- + Custody as below

Barrack room theft - Dismissal + 6 months custody (within a range of 3 - 9 months detention)

JPA fraud: The sentence depends on the number of fraudulent transactions and/or the total value.

- i. Three or less separate frauds and/or total amount less than £500 – 6 months detention
- ii. Four or more separate frauds – Dismissal +
 - a. £500 - £2000 6 months detention or Service Community Order
 - b. £2000 - £10,000 12 months detention
 - c. Over £10,000 Apply SC guidelines

5.9 Offences of Violence (e.g. Assault, Battery, ABH, GBH, Wounding)

Service policy considerations

5.9.1 Personnel in the Armed Forces are trained to exercise controlled and lawful violence towards the enemy. Unlawful violence displays a lack of discipline and can corrode unit cohesiveness and operational effectiveness, particularly when directed at Service colleagues. Deterrent sentences are often necessary particularly where violence is associated with excess alcohol⁵². The starting points for more serious offences of violence are those provided in the SC guidelines. Where the violence is directed at superiors, or is an abuse of rank or authority against junior personnel, the aggravation may justify heavier sentences than the SC guidelines, but factors resulting from operational considerations may amount to mitigation justifying a lower sentence than in the guidelines. In 2010 this guideline was cited with approval by Hughes LJ in *R v. Birch*⁵³.

5.9.2 Aggravating factors:

⁵² Cited in *R v Collins & Chapman* [2010] EWCA Crim 460 at 19

⁵³ *R v. Birch* [2010] EWCA Crim 46 at 9

- i. harassment including bullying – where assaults take the form of bullying, particularly by superiors who take advantage of their rank or are against those who are particularly vulnerable such as recruits. The Armed Forces policy is to eradicate any traces of a bullying culture and even where an assault is relatively minor, sentences may be increased to provide an element of deterrence
- ii. group action – this is an aggravating factor in civilian cases but it is additionally so in the Service context as it contains an implicit element of bullying which can have a deleterious effect on morale and unit effectiveness
- iii. insubordination – where the victim of the assault is of superior rank to the offender, or a member of the Service police or provost, or in the RN someone exercising authority on behalf of the OOD/OOW. Any unlawful violent attack on a superior is extremely serious within the Service context because it undermines discipline and demonstrates contempt for the chain of command thereby reducing operational effectiveness.
- iv. vulnerability of the victim – an attack on fellow Service personnel in their private living space, particularly when the victim is resting or asleep in bed, undermines the mutual trust and cohesiveness which is the very fabric of military success.
- v. drunkenness – violence fuelled by excessive alcohol is prevalent among young Service personnel and sentences which contain an element of deterrence are normal
- vi. violence against citizens of host countries – where unlawful violence is used overseas against citizens of an occupied or host country, or in a public place in the host country, it is particularly harmful to the reputation of the United Kingdom and her Armed Forces especially in that theatre. It can undermine the mutual trust between Service personnel and the local population, inspire retaliation putting the welfare or lives of other Service personnel at risk, and hamper future operations

5.9.3 Mitigating factors:

- i. Stress and Post-Traumatic Stress Disorder – Service personnel may commit offences as a reaction to stress caused in an operational deployment either during that deployment or after return to a peaceful environment. Service courts understand the pressures on individuals during stressful, risky or arduous operations and the effect of exhaustion on Service personnel
- ii. Impulsive action or provocation – where the operational context of the offending justifies it (for example where a soldier overreacts in a hostile crowd control situation), the Court Martial may allow greater weight to be given to the mitigation than would be appropriate where the offence was committed in a civilian environment

Starting point for ABH

5.9.4 Assault occasioning actual bodily harm is prevalent in the Armed Forces. Dismissal and reduction in rank should always be considered where the injuries caused to

the complainant are serious or permanent, or where it would be incompatible for the defendant to continue to serve in a particular role (for example the Service Police). In all cases custody must be considered.

5.9.5 Starting points within the Sentencing Council Guideline may be adjusted as follows:

Category 1 18 months custody within a range of 1 – 3 years
 Category 2 9 months custody within a range of 6 – 18 months
 Category 3 120 days custody within a range of 90 – 180 days

5.10 Sexual Offences

Serious sexual offences

5.10.1 Only judges who are ticketed to deal with serious sexual offences (having completed the relevant Judicial College training seminars) are specified to sit in such cases. The starting points for all serious sexual offences are those within the SC guidelines, but there may be additional aggravating factors associated with the Services which should be taken into account. Dismissal (with or without disgrace) is almost inevitable apart from in the most exceptional cases. Additional aggravating factors comprise:

- i. a difference in rank and/or age between the offender and the victim, or the abuse of a position of authority (especially where grooming is involved)
- ii. damage to the reputation of the armed forces
- iii. the impact on future employability of the offender within the service

Indecent images of children

5.10.2 The incidence of child pornography cases has risen significantly in the Service jurisdiction over the past few years. This sort of offending and the management of sexual offenders of this kind (involving e.g. restrictions on working with young persons) is often incompatible with their continued service in the Armed Forces. Trust is undermined and in a close knit community an offender of this kind may be ostracised by his peers; that can lead to a breakdown of unit cohesion and operational effectiveness. In addition to the sentences in the SC guidelines, which depend partly on the quantity and level of seriousness of the images, offenders should therefore be dismissed (with or without disgrace) unless there are exceptional reasons for retention in the Service. When considering the appropriate sentence, the judge should decide whether or not he and the board members should view the images. This is a matter for the judge's discretion, but if he decides that a view would be helpful then all members of the board should view the same material.

Sexual assaults

- 5.10.3 Minor sexual assaults are more serious in a Service context than in civilian life because they can cause resentment and undermine unit cohesion. Where the offender is superior to the victim the rank differential is an aggravating feature. Normally a short period of custody is appropriate, even for very minor offences, and reduction in rank is almost inevitable.

Ancillary orders and requirements

- 5.10.4 The notification requirements for persons convicted of sexual offences are contained in the Sexual Offences Act 2003 Part 2 and are applied to those convicted and sentenced in the Court Martial in the same way as in the civilian courts. Where a person is sentenced to detention, the notification requirements are governed by the Sexual Offences Act 2003 Sch 3 paragraph 93A: a reference in Sch 3 to being made the subject of a community sentence of at least 12 months is to be read, in relation to an offence under the Armed Forces Act 2006 s 42, as a reference to being made the subject of a service community order or overseas community order under the Act of at least 12 months, or being sentenced to a term of service detention of at least 112 days. Placement on what used to be known as “the sex offenders register” is an automatic administrative consequence of a sentence, and is not part of the sentence as such. The offence may also be one which would make the offender subject to barring from working with children or others and the sentencing judge should remind the offender that he will be told of the restrictions under the Safeguarding Vulnerable Groups Act 2006 by the Disclosure and Barring Service. The court may also impose a Sexual Harm Prevention Order (SHPO)⁵⁴ in the appropriate terms. See also the JAG’s Practice In The Court Martial: Collected Memoranda section 7. Courts should note that there are no facilities at MCTC Colchester for providing Sexual Offence Treatment Programmes (SOTPs), so an SOTP should not be combined with Service detention.

5.11 Motoring Offences and Disqualification from Driving⁵⁵

Service policy considerations

- 5.11.1 Military establishments occupy large areas and can contain infrastructure the size of a town. Motoring offences within military establishments, if committed on roads that are as a matter of law public roads, are dealt with in the same way as motoring offences on public roads in England and Wales but are subject to a different sentencing regime because the Court Martial has no power to impose penalty points on driving licences or disqualify from driving. Driving offences are often charged as breaches of standing orders.

Overseas cases

- 5.11.2 If a motoring offence is committed overseas, the offender’s Commanding Officer has the power to withdraw the military permit which a Service person requires to

⁵⁴ Sexual Offences Act 2003 s103A and s137

⁵⁵ Charged either under the Road Traffic Acts or as contravention of standing orders [s 13]

drive in that country. In Germany, Standing Orders prohibit the driving of any motor vehicle unless a BFG driving permit, gained after a written test, has been obtained. Withdrawal of the permit effectively disqualifies the holder from driving in that country, but has no effect on his licence to drive anywhere else including in the UK. The withdrawal of the permit is an administrative action, not a legal or judicial punishment. In Germany a scheme has been agreed whereby the judge makes a recommendation to the Service authorities to withdraw a permit and the length of any such withdrawal. By the time an offender is ready to be sentenced, he may already have suffered withdrawal of the driving permit for a period and the judge takes this into account. If the offender is shortly to leave the country, the withdrawal of the driving permit would have little effect.

Serious and alcohol related motoring offences

- 5.11.3 The sentences for dangerous driving, causing death, alcohol over twice the limit, and similar very serious matters should be based on those in the SC guidelines. Where a custodial sentence is indicated, that may be taken as either imprisonment or detention. Offenders sentenced for road traffic offences should be reminded of their obligation to inform their insurance company of that conviction and that failure to do so may render their insurance policy invalid.

Starting point⁵⁶

- 5.11.4 Speeding (not dangerously), careless driving and other minor offences – Fine of 5 days' pay + recommendation for withdrawal of military driving permit.
- 5.11.5 Drink driving –
- i. where the level of alcohol is under twice the limit – fine of 28 days' pay
 - ii. Where the level of alcohol is over twice the limit – 90 days detention
- 5.11.6 Causing death by dangerous or careless driving – imprisonment in accordance with SC guidelines + Dismissal

5.12 Illegal possession of firearms and ammunition

Service policy considerations

- 5.12.1 The Services are the nation's professional users of firearms and aspire to be exemplary in this matter. As such they are subject to the same laws as any other citizen outside their use on duty. It may be that soldiers can come to possess arms or ammunition negligently in a way that private citizens may not and that may be taken into account but the same rules should generally apply. A claim to be ignorant of the lethal effect of firearms would not be persuasive. There is a concern amongst the Police that the Army is a source of illicit weapons. The rules for the

⁵⁶ See also *Wilkinson's Road Traffic Offences* for guidance on levels of fines

safeguarding of Service weapons including the de-commissioning of Trophy Weapons are clear⁵⁷.

Starting Points

- 5.12.2 Refer to Current Sentencing Practice and SC Guidelines. Presumption of Dismissal unless there are truly exceptional circumstances.

Exceptional Circumstances

- 5.12.3 The Firearms Act 1968 s51A provides for a minimum sentence of 5 years imprisonment where an individual is convicted of certain offences under s5 of that Act. However lower sentences are appropriate in exceptional circumstances⁵⁸. If a court decides that there are exceptional circumstances they should be clearly specified in sentencing remarks – a simple statement that there are exceptional circumstances would be insufficient.

⁵⁷ JSP 440 Part 7.

⁵⁸ For example, in *R v Nightingale* [2013] the trial judge listed the following exceptional circumstances which were accepted by the Court of Appeal in dismissing Nightingale's appeal against a suspended sentence of 2 years detention:

1. He was an exceptional soldier who had served with distinction in the SAS including on operations;
2. He had done more than his duty by improving the medical care of those who receive traumatic injury by developing the Nightingale dressing;
3. He suffered a brain injury in 2009 and the court accepted that he had some mental impairment which may have affected the way he failed to decommission the pistol or return the ammunition;
4. He dealt with weapons routinely both at home and abroad and was required to be expert with them. The court accepted that weapons were a normal part of his life and he would not have held them in the sort of awe which civilians would.
5. He had no criminal intention – his offending was because of poor administrative practices and possibly forgetfulness.

6 DISCIPLINARY OFFENCES

6.1 General Comments

6.1 The Armed Forces Act 2006 sections 1-41 create a number of Service disciplinary offences. A list is supplied in tabular form at Annex A below. Each section specifies the maximum punishment. The disciplinary offences listed below are examples that have been considered in the Court Martial in recent years. Where the court has to deal with other offences, policy guidance can be obtained from the Manual of Service Law, and the general principles of sentencing exemplified in this guide should be adopted.

6.2 Service Differences

6.2 Many Service offences are dealt with summarily by Commanding Officers. Guidance in the Manual of Service Law, Chapters 13 and 14 on summary punishment is helpful and should be consulted in appropriate cases (and always where the defendant elected trial in the Court Martial). There are a few remaining differences in sentencing policy between the three Services where a particular type of offending is considered to be more serious in one Service than another. Where appropriate those differences are highlighted in the text of this guide.

6.3 Serious Disciplinary Offences

6.3 Parliament has decided that certain disciplinary offences that do not constitute criminal behaviour in civilian life are nevertheless to be punished as such in a Service context and therefore attract a significant custodial sentence of either imprisonment or Service detention. A custodial sentence is by default detention at the MCTC in Colchester, but exceptionally imprisonment is appropriate particularly where there is a public interest in deterring conduct below the minimum standard of behaviour expected of all members of the Armed Forces. In general, offences which undermine discipline or the integrity of the chain of command attract more severe punishment, as does any offence where an offender has let down his colleagues or encouraged similar offending in others thereby affecting morale or unit cohesion.

6.4 Relevance of Rank

6.4.1 Starting points specified in the following paragraphs assume the offender is a rating or other rank. Where the offender is an officer sentences are likely to be higher, to reflect the fact that the highest standards of behaviour are expected of those holding the Queen's commission. Where the starting point specifies reduction in rank, the equivalent for an officer is forfeiture of seniority

Statutory Aggravating factors

- 6.4.2 As with criminal conduct offences, disciplinary offences which were religiously or racially aggravated, or which are motivated by or demonstrate hostility to the victim based on their sexual orientation or disability, are to be treated more seriously. Cases of this type can significantly undermine morale, discipline and retention.

Certain Common Disciplinary Offences

6.5 Misconduct on Operations [s 2]

(Maximum sentence: imprisonment for life)

Service policy considerations

- 6.5.1 The range of conduct covered by this offence is wide – from sleeping on watch (but see also [para 6.13.3 below](#)) to surrendering any place or thing to the enemy without reasonable excuse. The misconduct always occurs on operations and in the presence of the enemy so offences under this section affect directly the fighting power of the Armed Forces, and are liable to undermine the morale of the forces. A custodial sentence, of imprisonment or Service detention, is almost inevitable.

- 6.5.2 Aggravating factors:

- i. increased risk to colleagues as a result
- ii. importance of particular action or operation against the enemy
- iii. whether action or operation is ongoing or anticipated

- 6.5.3 Mitigating factors:

- i. absence of real threat or danger
- ii. youth and inexperience of offender
- iii. no intention to sleep, but long hours on duty without sleep prior to offence
- iv. minimal increased risk to colleagues as a result

- 6.5.4 Starting point:

For the more serious offences where a colleague is injured or equipment is handed over to the enemy:

Dismissal + 3 years' imprisonment within a range of 2 - 5 years

For less serious offences where the enemy did not gain any advantage:

Dismissal + 18 months detention

In all cases the offender should be reduced/distrated to the ranks

6.6 Desertion and Absence Without Leave (AWOL) [s 8 & 9]

(Maximum sentences:

Desertion (intent to avoid active service) [s 8(2)(b)] – imprisonment for life
 Desertion (other cases) [s 8(2)(a)] and AWOL [s 9] – imprisonment for 2 years)

Service policy considerations

- 6.6.1 Sentencing in AWOL and Desertion cases has always been difficult because it attempts to reconcile a number of purposes which are not entirely compatible. This sentencing policy is designed to deter absconders, permit retraining, deal with those who are caught or surrender, and prevent recalcitrant Service personnel from using the disciplinary system to support their own aim of leaving the Service early. It also distinguishes desertion which is a much more serious offence. In practice those accused of simple AWOL virtually always plead guilty at the earliest opportunity and the cases are therefore disposed of with the utmost expedition.

Deterrence

- 6.6.2 Absence without leave seriously impacts on operational effectiveness and is an important issue for the Services. Sentencing should reflect this and provide an effective deterrent and an aid to maintaining discipline.

Length of detention

- 6.6.3 There was at one time a policy of awarding one day's custody for each day's absence – known colloquially as “a day for a day.” This was superseded many years ago; the length of absence is only one of the factors in deciding the appropriate period of detention, and not the most important. A long absence where the absentee is very young or junior is often far less serious than a short absence which causes a unit to deploy undermanned and lessens its operational effectiveness. Similarly a long absence where the offender finally musters the courage to surrender himself is usually far less serious than a series of very short absences which are terminated by arrest and followed by repeated absconding, even if the total number of days absent is considerably less than the single absence. The offender's loss of pay during absence and postponement of his end of Service date are calculated directly from the number of days' absence, but the length of the sentence of detention takes into account other factors such as the number of absences, the duty avoided, and the circumstances of both the departure and the return (see [para 6.6.5 below](#)).

Dismissal and Discharge

- 6.6.4 A sentence of (Service) detention without dismissal ensures the offender is retrained in A Company at the Military Corrective Training Centre, and there is a good chance that he will become a satisfactory member of the Armed Forces. If he does not, after return to his unit when it has become clear that retraining has failed, he may be discharged. Such discharge would be for reasons of general misconduct, unsuitability or incompetence, and the AWOL conviction would be one factor taken into consideration by the administrative authority authorising discharge. Dismissal

should be awarded only where that punishment is justified in all the circumstances of the case, not simply for administrative convenience. Where there are exceptionally serious aggravating features, dismissal might be awarded, accompanied by a long period of detention – but such a dismissal is rare and is used only to suit the purposes of the Service not those of the offender.

Sentencing factors

6.6.5 The seriousness of the absence should first be measured by its damage upon the operational effectiveness of the unit. The Court Martial should take account of any aggravating or mitigating factors relevant to the case which may include:

- i. the circumstances under which the offender went absent (e.g. remained absent after leave or sick leave, ran away to avoid alleged harassment)
- ii. the effect of the absence on the unit, and the duty avoided
- iii. the length of absence
- iv. the number of separate absences
- v. whether the offender has already served a previous sentence of detention for absence
- vi. whether the absence ended in voluntary surrender or arrest, and whether arrest was resisted
- vii. where the offender was during absence (e.g. at home address known to the Service)
- viii. response to attempts by the Service to contact the offender
- ix. the offender's disciplinary and service record
- x. any character references in his support
- xi. any relevant medical or psychiatric evidence

6.6.6 AWOL starting point:

If the offender is to be retained: 9 months detention (Reduced to 6 months detention for an early plea of guilty.)

If the offender is to be Dismissed: 6 months detention (reduced to 4 months detention for an early plea of guilty) or a Service Community Order with unpaid work requirement.

6.6.7 Where there are exceptional mitigating factors for the offender's absence, or he has performed exceptionally well since his return (not in custody) thereby rehabilitating himself, or there has been an exceptionally long delay (not caused by the offender) in bringing the matter before the Court with the matter left hanging over his head, a suspended sentence of detention should be considered.

6.6.8 Royal Navy offenders: AWOL is regarded particularly seriously in the Royal Navy because of the detrimental effect on operational effectiveness of even a very short period of AWOL if a rating misses his ship on sailing. Even one absentee from a

lean-manned ship can cause severe disruption. Slightly longer sentences than would be passed on soldiers and airmen are normal to reflect this factor.

- 6.6.9 Courts should always consider a Service Supervision and Punishment Order as an alternative to custody. This is particularly appropriate in minor cases of AWOL and where the offender is needed by his unit for pre-deployment training.

Desertion [s 8]

- 6.6.10 Desertion is a very serious offence, particularly during periods of active service where the offender's conduct could lead to a unit being short of essential manpower on operations, and ultimately unnecessary loss of life. As noted above the maximum sentence for desertion with intent to avoid active service is imprisonment for life and all sentences for this offence should reflect the abhorrence felt by those let down by the deserter. There is also a public interest as well as a Service interest, because the public are entitled to expect the Services to undertake operational duties for which they are employed and trained and which support Government policy.

- 6.6.11 There is a permission granted in Service Regulations for the chain of command to dispense with proceedings against a long term absentee if he confesses to desertion. Historically absentees who had remained undetected for over 5 years came to expect this dispensation. The Services and the SPA ceased taking such an inconsistent approach some years ago. A prosecution will normally result unless an absence is significantly mitigated and is over 5 years in duration.

- 6.6.12 In assessing the seriousness of a particular offence of desertion the court should take account of all the factors listed in [para 6.6.5](#) together with:

- i. whether the accused went absent with the intention of avoiding active service [s 8(2)(b)] (the mischief being the adverse effect on operational effectiveness) rather than simply forming an intention to remain permanently absent [s 8(2)(a)], which constitute different forms of the offence of desertion
- ii. what service was actually avoided
- iii. the effect on his unit of his desertion

- 6.6.13 Desertion starting points:

- i. Where desertion includes the element of absence to avoid active service – [s 8(2)(b)]:

3 years imprisonment (within a range of 1 - 4 years) + dismissal (may involve detention where sentence is under 2 years)

- ii. Where there is intent to remain permanently absent but no element of avoiding active service – [s 8(2)(a)]

18 months detention + dismissal

- 6.6.14 In cases where the absence is very long, the defendant has integrated into civilian life as a useful citizen, in employment and contributing to society, and where the Service has not made any real efforts to recover him, then the court may consider dismissal with a Service Community Order.

6.7 Misconduct Towards a Superior Officer [s 11]

(Maximum sentences:

Using violence or threatening behaviour towards a superior officer – [s 11(4)(a)]
imprisonment for 10 years

Using disrespectful behaviour towards a superior officer – [s 11(4)(b)]
– imprisonment for 2 years)

Service policy considerations

- 6.7.1 The integrity and effectiveness of the Armed Forces rely on obedience and respect to those in authority. Misconduct towards a superior officer undermines the chain of command and can seriously affect operational effectiveness. The authority of superior officers must be upheld and those who threaten or flout that authority must be dealt with quickly and proportionately but firmly.

- 6.7.2 Aggravating factors:

- i. deliberate malcontent
- ii. offence committed in front of those of inferior rank
- iii. flagrant contempt
- iv. offending while on operations

- 6.7.3 Mitigating factors:

- i. excitable immature youth
- ii. lack of appreciation of seriousness of actions or words
- iii. badly handled by superiors
- iv. disobedience occurs in a place remote from the Service context and does not undermine authority of the superior
- v. single instance not repeated

- 6.7.4 Starting points:

Using violence to a superior:

- i. Where injury is minor – 6 months detention within a range of 3 - 12 months (+ reduction in rank if applicable)
- ii. Where injury is significant – 2 years' imprisonment with a range of 1 - 4 years + dismissal

- iii. Threatening behaviour without violence – detention for 90 days or SSPO for 90 days
- iv. Disrespect and minor offences of insubordination without threats – detention for 30 days or SSPO for 30 days

6.8 Disobedience to Lawful Commands [s 12]

(Maximum sentence: imprisonment for 10 years)

Service policy considerations

6.8.1 The integrity and effectiveness of the Armed Forces rely on obedience to commands. Disobedience undermines the chain of command and can seriously affect operational effectiveness, especially while on operations. The authority of superior officers must be upheld and those who flout that authority must be dealt with quickly and proportionately but firmly. Reduction in rank and a short period of detention should always be considered, and in more serious cases dismissal should also be considered.

6.8.2 Aggravating factors:

- i. deliberate malcontent
- ii. offence committed in front of those of inferior rank
- iii. flagrant contempt
- iv. offending while on operations
- v. disobedience created a security risk or put lives or safety of others in jeopardy

6.8.3 Mitigating factors:

- i. excitable immature youth
- ii. lack of appreciation of seriousness of actions or words
- iii. badly handled by superiors
- iv. disobedience occurs in a place remote from the Service context and does not undermine authority of the superior
- v. single instance not repeated

6.8.4 Starting points:

Reduction in rank and detention for 90 days within a range of 60 – 120 days

6.9 Contravention of Standing Orders [s 13]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.9.1 Standing Orders are written instructions which cover many aspects of Service life, and disobedience of them can be minor, very serious or anything in between. For example a failure to book out of barracks at the guardroom might be punished by a Commanding Officer by way of restriction of privileges and/or stoppage of leave. A failure to carry out a vital procedure in servicing a vehicle or aircraft in circumstances which create a serious risk to others might deserve a sentence of reduction in rank and/or detention. As with other offences of disobedience, the integrity of the chain of command can be adversely affected by those who blatantly or covertly disregard superior instructions. The court should assess the seriousness of the breach of standing orders against the aggravating and mitigating factors in 6.7 above. Examples of common breaches of standing orders are being in an out of bounds area, breaking the no touching rule, and motoring offences

Out of bounds

6.9.2 One category of disobedience to standing orders cases is breach of “out of bounds” orders. In certain part of the world there are areas which are ordered “out of bounds” to Service personnel for safety and security reasons or for the maintenance of order.

No touching rule

6.9.3 In the Royal Navy, particularly in ships, a standing order is often made in the form of a strict “no touching” rule between personnel. Offenders can be charged with contravention of standing orders and are generally dealt with by Commanding Officers. Where it is alleged that the touching was not consensual and amounted to a sexual assault, it would not be appropriate for it to be charged merely as a contravention of standing orders. Serious cases where there is a large disparity in rank, or involving an abuse of authority, may be tried in the Court Martial.

Motoring offences

6.9.4 Offences in connection with the driving of motor vehicles which would be Road Traffic Act offences elsewhere may be charged as breaches of standing orders when committed in a Services base. See [para 5.11 above](#).

6.9.5 *Starting points*

General Standing Orders offences:

- i. for minor breaches – Fine and/or reprimand
- ii. for more serious offences – Reduction in rank/forfeiture of seniority
- iii. for the most serious offences – Detention (+ dismissal if appropriate)

Out of bounds offences:

- i. Short sentence of detention and/or reduction in rank.

No touching rule offences:

- i. for minor breaches – Detention and disrating for ratings/forfeiture of seniority
- ii. for the most serious cases – Dismissal

Motoring offences:
See [para 5.11 above](#).

6.10 Using Force Against a Sentry etc [s 14]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.10.1 The safety of personnel in the Armed Forces is guaranteed by sentries and persons on watch. Those who use force against those colleagues put at risk the safety and security of all. In operational theatres this is a very serious offence.

6.10.2 Aggravating factors:

- i. Force used while under the influence of alcohol or drugs
- ii. Injury caused to the sentry
- iii. Sentry unable to continue his duty as result of force used
- iv. On active service

6.10.3 Mitigating factors:

- i. immediate remorse demonstrated
- ii. force very minor and no injury caused to the sentry
- iii. offence committed during basic training
- iv. youth and inexperience of the offender

6.10.4 Starting point:

6 months detention (within a range of 3 – 15 months) + reduction in rank
Where there are no aggravating factors and significant mitigations – SSPO of 90 days

6.11 Failure to Perform a Duty and Negligent Performance of Duty [s 15(1) & (2)]

(Maximum sentence: imprisonment for 2 years)

Services policy considerations

6.11.1 This charge covers a wide range of conduct from very minor (such as a minor bureaucratic failure), through conduct the consequences of which are very expensive (such as failure to carry out the correct navigation procedures leading to a ship running aground), to the most serious where the failure or negligence leads

to serious injury or loss of life. The Court Martial should assess the seriousness of the failure or negligence by reference to the extent of the breach of duty, the age, training and experience of the offender, and the consequences of the breach.

6.11.2 Aggravating factors:

- i. seriousness of the breach of duty e.g. the conduct falls well below level expected of a competent and careful person of defendant's age, rank, experience and training
- ii. the negligence put safety or lives of others at risk
- iii. actual severe consequences, including injury or loss of life, or major loss of equipment or resources
- iv. poor professional record indicating a general lack of professionalism
- v. alcohol or drug induced conduct
- vi. horseplay or misuse of equipment

6.11.3 Mitigating factors:

- i. operational situation which reduces scope for exercising usual care and competence
- ii. isolated momentary lapse
- iii. extreme fatigue caused by long hours on duty
- iv. insufficient training
- v. minor consequences
- vi. no risk to safety or lives of others
- vii. conduct occurred during initial training on joining the Armed Forces (Phases 1 and 2)
- viii. youth and inexperience of offender

6.11.4 Starting points:

Minor breaches – fine and/or reprimand

Repeated minor breaches –SSPO for 30 days

More serious offences – reduction in rank/loss of seniority + detention or SSPO for 60/90 days

Negligent discharge of personal firearms

- 6.11.5 This is a form of negligence in performing a duty which is a prevalent offence in the Armed Forces. Detention is considered in cases where many of the aggravating factors and none of the mitigating factors above are present. The starting point for an ordinary case with no damage or injury and limited danger is a fine of a sum equivalent to between 7 and 14 days' pay. Where injury is caused to another person the extent of the injury does not form part of the charge but is opened by the prosecutor, if necessary calling evidence so that the Court can take it into account. Where a death has been caused but the negligence cannot be classified

as “gross” so as to support a charge of manslaughter, a sentence of 6 months detention is the minimum.

6.12 Making False Records [s 18]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.12.1 The Services rely on accurate record keeping to ensure personal accountability and good process. Poor record keeping or falsification can often have significant consequences and may undermine personal integrity.

6.12.2 These offences can vary widely in seriousness, for instance from falsifying a booking-in sheet to make it look as though an offender booked back into barracks in time, to offences in relation to accounting for arms, ammunition, or large sums of money or quantities of supplies. The sentence in such cases will therefore depend upon the level of importance of the document in the system, and the effect, or intended effect, of the falsehood. If a personal financial advantage is sought or gained, the sentence may be similar to that which might be imposed for a criminal conduct offence of fraud (see [para 5.8 above](#)) and reflect the Services’ view of dishonesty.

6.13 Conduct Prejudicial to Good Order and Service Discipline [s 19]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.13.1 The efficiency, effectiveness and reputation of the Armed Forces depends to a large extent on personnel acting in a disciplined manner. Conduct which falls below the required norms, which are often higher than those of contemporary society, undermines the integrity and high reputation of the Armed Forces.

6.13.2 The essential feature of an offence under this section is that the conduct is prejudicial to good order and Service discipline. The wording of the statute is such that the offence has a very wide ambit and in sentencing the Court Martial should consider not only the conduct proved or admitted, but also to what extent it has been shown that there really was prejudice to good order and Service discipline. Where the conduct publicly undermines discipline or the command chain it is more serious. Care should be taken when sentencing to keep in mind the object of the offence. It was not intended by Parliament that these sections be used simply to punish immoral or objectionable behaviour which falls short of criminal behaviour or misconduct. The Court Martial should therefore be slow to allow this section to be used to create what are in effect new offences otherwise unknown to law.

Sleeping on watch or while on sentry duty

6.13.3 This may be charged as prejudicial conduct.

6.13.4 Aggravating factors:

- i. voluntary consumption of alcohol either while on watch or before duty
- ii. duty is safety-critical
- iii. sentry deliberately leaving his or her post
- iv. sentry having made preparations to sleep, such as fetching a sleeping bag
- v. potential danger caused by the sentry being asleep or leaving his or her post
- vi. active theatre of operations and high existing security state

6.13.5 Mitigating factors:

- i. no intention to sleep – but long hours worked on duty prior to offence
- ii. duty is not safety critical
- iii. offence committed during basic training
- iv. youth and inexperience of the offender

6.13.6 Starting point:

120 days Detention within a range of 28 to 180 days + reduction in rank

6.14 Unfitness or Misconduct through Alcohol or Drugs [s 20]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.14.1 While moderate and sensible drinking is acceptable, abuse of alcohol can reduce efficiency, lead to further offending, and bring discredit on the Service. Many offences result from over-indulgence in alcohol, but to be drunk is not in itself an offence. The offence is committed if as a result of the consumption of alcohol or drugs, whether alone or in combination with any other circumstances, the offender:

- i. is unfit to be entrusted with his duty, or
- ii. is unfit to be entrusted with any duty he might reasonably expect to be called upon to perform, or
- iii. behaves in a disorderly manner, or
- iv. behaves in a manner likely to bring discredit on Her Majesty's Service.

6.14.2 Thus the offence may be minor or very serious depending upon the circumstances. Drunkenness on active service is very serious and the more senior the offender the more serious the offence. Officers who are convicted of even minor offences of drunkenness should be dealt with severely as they have brought discredit on their Service and demonstrated a lack of self-discipline and control.

6.14.3 Aggravating factors:

- i. on duty, unable to perform a specific duty
- ii. on board a ship at sea or aircraft in flight
- iii. at an official function
- iv. in the public eye
- v. put at risk the safety of others
- vi. injury to others
- vii. under age
- viii. alcoholism where the offender has ignored help after diagnosis

6.14.14 Mitigating factors:

- i. offence committed in Service Club or in Single Living Accommodation
- ii. no disturbance and placid behaviour
- iii. off duty
- iv. caused by welfare or personal problems

6.14.15 Starting points:

Minor offences – fine of 10 days’ pay, within a range of 7 – 14 days’ pay + (severe) reprimand (if of appropriate rank)

Medium offences – reduction in rank/short period of service detention or SSPO

Major offences – 120 days detention (within a range of 30 - 180 days)

Repeat offenders – Dismissal

6.15 Fighting or Threatening Behaviour etc [s 21]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.15.1 The most commonly charged offence in this section is “fighting” which is normally dealt with at summary hearing by the Commanding Officer. The essence of fighting is the disturbance of good order, and this offence is very different from the criminal offence of assault, the essence of which is an attack on a victim. The charge of fighting is not brought where the force used amounts to a one-sided attack because that would not be a fight in the ordinary meaning of the word in the statute, that is, a struggle or conflict. For this reason the degree of personal injury resulting is not a weighty consideration and service compensation orders are rarely appropriate.

6.15.2 Starting points:

Minor offences where no injury and no alarm or distress caused – fine of 21 days’ pay within a range of 14 - 28 days’ pay + (severe) reprimand (if of appropriate rank)

Other offences – reduction in rank or 90 days detention (within a range of 30 - 180 days)

6.16 Ill-treatment of Subordinates [s 22]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.16.1 Harassment including bullying in any form gravely undermines morale and discipline in a Service environment, which can cause a loss of confidence in the command chain and harm recruitment.

6.16.2 Aggravating factors:

- i. conduct over a protracted period
- ii. conduct undertaken in concert with others
- iii. physical or severe mental abuse
- iv. mental or physical injury to victim or harm to victim's career
- v. abuse of trainees in basic training
- vi. forcing victims to undertake demeaning or disgraceful conduct
- vii. abuse of rank to obtain financial benefit
- viii. racial or sexual element
- ix. large rank disparity between offender and victim

6.16.3 Mitigating factors:

- i. one-off incident of a minor nature
- ii. over-zealous attempt to reinforce training
- iii. no injury to victim
- iv. genuine remorse and apology to victim

6.16.4 Starting points:

Reduction in rank + 9 months detention (within a range of 6 - 12 months)

The most serious cases: + Dismissal

6.17 Disgraceful Conduct of a Cruel or Indecent Kind [s 23]

(Maximum sentence: imprisonment for 2 years)

Service policy considerations

6.17.1 The object of the section is to preserve proper standards of decency within the Services, and to prevent personnel from bringing the Services into disrepute by publicly or openly behaving in an indecent manner or with cruelty including to animals. Conduct charged under this section may also include an element of abuse

of rank or superior position. The type of offence often charged is “indecent” (such as indecent exposure or indecent words) particularly towards female personnel. This offence is not intended and not adequate to deal with the situation where a sexual assault has been carried out on an unwilling victim; only provided such a case is charged as a sexual offence can the victim be legally protected by the Court and the offender be sentenced properly.

6.17.2 Aggravating factors:

- i. abuse of position of authority
- ii. in public or in front of a group
- iii. racial or sado-masochistic element
- iv. other factors relating to ill treatment

6.17.3 Mitigating factors:

- i. one-off incident of a minor nature
- ii. overzealous attempt to reinforce training
- iii. no injury to victim
- iv. genuine remorse and apology to victim

6.17.4 Starting points:

Very minor cases – SSPO

Most cases – Reduction to the ranks + 9 months detention (within a range of 6 – 12 months)

Serious offences – + Dismissal

6.18 Damaging, Misapplying or Wasting Public or Service Property [ss 24 & 25]

(Maximum sentence: dismissal and detention for 2 years)

Service policy considerations

6.18.1 With increasing pressure on resources all personnel must be aware of the deleterious effect of wasting those resources. Although this sort of offence is unlikely to affect morale or unit cohesion, lack of resource caused by waste or misapplication can cause significant frustration and restrict operations.

6.18.2 These offences cover the misuse of public property where the offender has acted improperly, but not dishonestly. Sentencing considerations may be affected by whether the offender or any other person benefited from the misapplication or waste, but sentences should be much less severe than for dishonesty offences. Imprisonment is not available.

6.18.3 Starting points:

A fine and/or reprimand + Service Compensation Order

In most cases the most important element of sentence is the recovery of the value of the property, or a proportion of it, with a Service Compensation Order. If the loss was too large a sum to be fully recoverable, a SCO for a nominal sum may be made.

6.19 Hazarding of Ship [s 31]

(Maximum sentences:

Intentional or reckless hazarding – imprisonment for life

Negligent hazarding – imprisonment for 2 years)

General

6.19.1 This offence relates to the causing damage to, or the stranding or loss of, one of Her Majesty's ships. "Loss" means total loss; "hazarding" means exposing to danger, and includes collision. S 31 encompasses "stranding" which requires that a ship should run aground, settle on the bottom (or into or on to some object affixed on the ground) and remain fast for a time. Such cases often include allegations of neglect to perform or negligent performance of some duty which played a part in the loss, hazarding or grounding which call into question their professional abilities. Punishments affect the offenders' future careers and promotion, and only the most serious cases of intent require imprisonment.

6.19.2 Starting points:

Negligent hazarding – severe reprimand + fine of 28 days' pay within a range of 14 – 90 days' pay.

Where level of negligence is high – forfeiture of seniority + fine of 28 days' pay within a range of 14 – 90 days' pay

Intentional hazarding – imprisonment for 5 years (within a range of 3 - 7 years) + dismissal.

6.20 Offences in Connection with Flying [ss 33-35]

6.20.1 An offence in this category is "low flying". It normally results in a reprimand or severe reprimand and a substantial fine. If a flying offence was such as to cause an exceptionally high risk and at the same time the degree of neglect or recklessness involved was very high, of the offence was intentional, the starting point would be as at [para 6.19.2 above](#).

ANNEX A – LIST OF OFFENCES UNDER THE ARMED FORCES ACT 2006

Section	Offence	Service Personnel	Civilians	Maximum Penalties
<i>Assisting enemy, misconduct on operations etc</i>				
1	Assisting an Enemy	*		Life
2	Misconduct on Operations	*		Life
3	Obstructing Operations	*		Life – if offence relates to action or operation against an enemy Otherwise, 10 years
4	Looting	*	*	Subsection (1) or (2) - life Subsection (3) - 7 years
5	Failure to escape when captured by an enemy	*		10 years
<i>Mutiny</i>				
6	Mutiny	*		Life
7	Failure to suppress mutiny	*		Life
<i>Desertion and absence without leave</i>				
8	Desertion	*		(i) If to avoid active service, Life (ii) Otherwise, 2 years
9	Absence without leave	*		2 years
10	Failure to apprehend deserters or absentees	*		2 years
<i>Insubordination etc</i>				
11	Misconduct towards a superior officer	*		(i) Involving violence or threatening behaviour, 10 years (ii) Otherwise, 2 years
12	Disobedience to lawful commands	*		10 years
13	Contravention of Standing Orders	*	*	2 years
14	Using force against a sentry	*		2 years
<i>Neglect of duty and misconduct</i>				
15	Failure to attend for or perform a duty	*		2 years
16	Malingering	*		2 years
17	Disclosure of information useful to an enemy	*		2 years
18	Making false records etc	*		2 years
19	Conduct prejudicial to good order and discipline	*		2 years
20	Unfitness or misconduct through alcohol or drugs	*		2 years

Section	Offence	Service Personnel	Civilians	Maximum Penalties
21	Fighting or threatening behaviour etc	*		2 years
22	Ill-treatment of subordinates	*		2 years
23	Disgraceful conduct of a cruel or indecent kind	*		2 years
<i>Property offences</i>				
24	Damage to or loss of public or service property	*		(i) If contrary to s24(1), 10 years (ii) Otherwise, 2 years
25	Misapplying or wasting public or service property	*		Dismissal with disgrace
<i>Offences against service justice</i>				
27	Obstructing or failing to assist a service policeman	*	*	2 years
28	Resistance to arrest etc	*	*	2 years
29	Offences in relation to service custody	*	*	2 years
30	Allowing escape, or unlawful release or prisoners etc	*		(i) If within s 30(4), 10 years, (ii) Otherwise, 2 years
<i>Ships and aircraft</i>				
31	Hazarding of ship	*		(i) If contrary to s 31(1), life, (ii) Otherwise, 2 years
32	Giving false air signals etc	*		Life
33	Dangerous flying etc	*		(i) If contrary to s 33(1), life, (ii) Otherwise, 2 years
34	Low flying	*		2 years
35	Annoyance by flying	*		Dismissal
36	Inaccurate certification	*		2 years
37	Prize offences by officer commanding ship or aircraft	*		2 years
38	Other prize offences	*		2 years
<i>Attempts, incitement, and aiding and abetting</i>				
39	Attempts to commit service offences	*	*	Same as that for the completed offence
40	Encouraging or assisting	*	*	Same as that for the relevant offence
<i>Criminal conduct</i>				
42	Criminal conduct	*	*	Those corresponding to the relevant civilian offence
<i>Custody offences</i>				
107	Failing to attend a hearing after release from custody	*	*	2 years
<i>Service restraining orders</i>				

Section	Offence	Service Personnel	Civilians	Maximum Penalties
229	Breach of restraining order requirement	*	*	5 years
<i>Orders to enter into a recognizance</i>				
233	Unreasonable refusal to consent to an order	*	*	Fine on level 3
<i>Financial Statement Orders</i>				
266	Failing to provide financial information etc.	*	*	Fine on level 4
<i>Testing for alcohol and drugs</i>				
305	Failing to provide sample for analysis to a drug testing officer	*		6 months
306	Failing to provide sample after a serious incident	*	*	6 months
<i>Misbehaviour in court</i>				
309	Misbehaviour in court <i>NB</i> Persons not subject to service law or service discipline can only commit this offence in the UK	*	*	<i>Persons subject to service law or civilians subject to service discipline:</i> (i) Service Custody 28 days, (ii) Fine not exceeding level 4, or (iii) Both <i>Other persons:</i> Fine not exceeding level 4
<i>Enlistment</i>				
328 + Regs	False answers on enlistment <i>NB</i> This offence can be committed by anyone - whether or not they become subject to service law or discipline	*	*	<i>In the Court Martial:</i> Dismissal with disgrace <i>In a civilian court:</i> Fine on level 1
<i>Service Inquiries</i>				
343 + Regs⁵⁹	Failing to comply with instructions; distorting or preventing evidence; suppressing or destroying documents	*	*	[<i>NB</i> Available punishments limited by s 343(5) to fine or below] Fine up to level 3
<i>Offences relating to service matters punishable by civilian courts</i>				
344	Aiding or abetting desertion or absence without leave	*	*	(i) On summary conviction, imprisonment or fine not exceeding

⁵⁹ The Armed Forces (Service Inquiries) Regulations 2008 (SI 2008/1651) reg 16

Section	Offence	Service Personnel	Civilians	Maximum Penalties
	<i>NB</i> These offences can be committed by anyone, whether or not they are subject to service law or discipline			relevant statutory maximum, or both (ii) On conviction on indictment, 2 years, Fine, or both
345	Aiding or abetting malingering	*	*	As for section 344
346	Obstructing persons subject to service law	*	*	On summary conviction 51 weeks imprisonment or a fine up to level 3 or both

NB In the column headed **Maximum Penalties** the penalty shown is that listed in s 164 on the row with the lowest number. Therefore, if Imprisonment is excluded, Dismissal with Disgrace becomes the maximum penalty on this Schedule – even though the punishments are not listed in s 164 in order of seriousness.

OTHER OFFENCES AGAINST SERVICE LAW

Statute	Section	Offence	Service Personnel	Civilians	Punishment
Armed Forces Act 1991	18	Obstructing person exercising power under Assessment Order	*	*	(i) <i>Service Personnel:</i> Forfeiture downwards (ii) <i>Civilians:</i> Fine downwards (iii) <i>Ex-service personnel:</i> Reduction in rank downwards
	20	Obstructing person exercising power under Protection Order	*	*	As for Section 18
Reserve Forces Act 1996	95	Breaches of regulations made under Section 4 RFA 1996	*		<i>NB</i> Refer to Schedule 14 §39 for penalties which depend on exact nature of offence committed
	96-97	Offences akin to Desertion and AWOL	*		As for AFA 2006 equivalents.

ANNEX B – PUNISHMENTS AVAILABLE IN THE COURT MARTIAL

Punishment	Available for	<i>Officer</i>	<i>WO</i>	<i>NCO</i>	<i>O.R.</i>	<i>Ex-service</i>	<i>Civilian</i>	Limitations
Imprisonment		*	*	*	*	*	*	
Mandatory life imprisonment / Detention during Her Majesty's pleasure (under 18 at offence)		*	*	*	*	*	*	Only where the offence is murder or some other offence where the sentence is fixed by law as imprisonment for life
Life imprisonment		*	*	*	*	*	*	Equivalent sentences for over 18s for second listed offend CJA 2003 ss 224A
Extended sentence for certain violent or sexual offences (new extended sentence)		*	*	*	*	*	*	Equivalent to CJA 2003 s 226A – over 18s
Detention for life					*	*	*	Equivalent sentences to those offenders under CJA 2003 s 226A – under 18s
Extended sentence for certain violent or sexual offences (new extended sentence)					*	*	*	Equivalent to CJA 2003 s 228A – under 18s
Detention for specified serious offences					*	*	*	(i) Under 18s only (ii) Not to exceed maximum prison for offence
Detention and Training Order					*	*	*	(i) Under 18s only (ii) 12-15s must be persistent offenders (iii) General restrictions on length etc. apply
Dismissal with / without disgrace		*	*	*	*	*		Only available for ex-service personnel if officers or members of the reserve forces
Service detention			*	*	*	*		Not available for ex-officers
Forfeiture of seniority		*						
Reduction in rank / disrating			*	*		*		See SI 2009/1215 ⁶⁰ which limits the power to reduce RAF offenders
Fine		*	*	*	*	*	*	
Service Community Order ⁶¹		*	*	*	*	*	*	Only available as follows:

⁶⁰ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 (SI 2009/1215)

⁶¹ and

Punishment	Available for	Officer	WO	NCO	O.R.	Ex-service	Civilian	Limitations
								(i) If offender over 18 and will reside in UK when order in force, and (ii) If Service personnel, are dismissed
Overseas Community Order ⁶²							*	(i) Only available if offender will reside outside UK when order in force (ii) Schedule 6 restrictions for under 18s
Severe reprimand / reprimand		*	*	*		*		
Service Supervision and Punishment Order					*			Must be for 90, 60 or 30 days
Minor punishments: (i) Stoppage of leave (ii) Restriction of privileges (iii) Admonition		*	*	*	*			See SI 2009/1215 ⁶³ for (i) the full effect of these punishments, and (ii) restrictions on combinations of punishments awarded by COs
Conditional discharge							*	Only a service compensation order may be combined with both forms of discharge
Absolute discharge						*	*	
Service Compensation Order		*	*	*	*	*	*	See s 175 for limits on SCOs

NB In the cases of all punishments listed above, the powers available to the Court Martial after an **election** for trial are limited to those available to the Commanding Officer who would have heard the charge had there been no election for trial [s 165(4)], and AFA06 s 131 & AF(CM)R09 r 161 require a global sentence for all offences. The court when determining the powers that were available to the Commanding Officer should establish whether or not he had applied for and been granted extended powers [ss 133 – 136].

If trial was **directed**, AFA06 s 255 requires a separate sentence for each offence – see [para 2.13 above](#).

⁶² Further restrictions on the imposition of all Community punishments are in sections 270, 270A and 270B

⁶³ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009 (SI 2009/1215)