

Chapter 8

Criminal conduct offences

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Chapter 8

Criminal conduct offences

Introduction

1. This chapter contains information pertaining to those occasions when Service personnel and/or relevant civilians commit criminal conduct offences which may be dealt with summarily. Some of these offences require prior permission from higher authority before the charge can be heard. However, those of a more serious or complex nature, may be referred for Court Martial trial.

2. Those mentioned below represent some of the most common criminal conduct offences tried within the Service jurisdiction, but do not represent the wide range of offences against the criminal law.

Chapter structure

3. This chapter is structured to address each offence in the following format:

Reference to appropriate Act	Offence as detailed within the relevant Act
Type of offence	Details of how the offence should be dealt with
Specimen charges	Provided to assist in drafting of charges but where in doubt the advice of the DSP or staff legal advice should be sought
Ingredients of the offence	Guidance to the meaning of particular elements of the offence
Defences	Contains defences which are particular to the offence. Other defences will be contained within Chapter 12 (Defences, mitigation and criminal responsibility)
Notes	Further guidance and alternative charges

Transitional guidance

4. Application of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 can be complicated and staff legal advice should always be taken. This guidance is restricted to the more common straightforward cases; however more complex situations will need careful consideration on a case by case basis. In all cases reference should be made to the Order itself, in particular, in the case of charging offences¹.

5. Where a person commits an offence before commencement (i.e. 31st October 09), the suspect cannot be charged with a Service offence (i.e. one of those offences set out in section 50 of the AFA 06). Instead, the suspect must be charged with the relevant SDA offence. For transitional purposes, and for the purposes of the flowchart at [Annex A](#), an 'SDA offence' means any of the following (note that, for those purposes, the expression includes more than just offences under the 1955 and 1957 acts):

- a. Any offence under Part 2 of AA 1955 or AFA 1955;

¹ See Parts 1 to 3 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

- b. Any offence under Part 1 of NDA 1957;
- c. An offence under section 47K of NDA 1957;
- d. An offence under paragraph 4(6) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957 committed before commencement;
- e. An offence under section 18 or 20 of AFA 1991 committed before commencement;
- f. An offence under any of sections 95 to 97 of RFA 1996 committed before commencement; or
- g. An offence under paragraph 5(1) of Schedule 1 to RFA 1996 committed before commencement by a person within a specific category².

6. For example, if a soldier steals something on the 29 Sep 09 (whilst subject to military law) but that offence does not come to light until on or after the 31 Oct 09, the soldier must be charged under section 70 of the AA55. They must not be charged with an offence under section 42 of the AFA 06. Where an accused is charged with a SDA offence, the SDA offence can be tried by a Service court or can be dealt with in a summary hearing under the AFA 06 by virtue of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009.

7. In most cases it will be obvious whether the suspect should be charged with an AFA 06 offence or a SDA offence. There may however be some situations where the matter is not so clear. Where these situations arise COs should seek staff legal advice before bringing a charge. The situations arise where:

- a. **The offence is incomplete at commencement (relevant to offences under paragraphs 5a, b, f or g above).** An offence will be incomplete at commencement if the SDA offence has two or more elements and at least one of the elements occurs prior to commencement and at least one occurs after commencement. Where this occurs the accused can be charged under the relevant SDA offence even though the last element of the offence does not occur until after 31 Oct 09³. So for example, if a soldier deliberately leaves the ignition key in a Service vehicle on 30 Oct 09 with the result that the vehicle is stolen on 31 Oct 09, the soldier can be charged under the relevant SDA provision (in this case section 44(1)(b) of the AA55).
- b. **A course of conduct is still ongoing at commencement (relevant to offences under paragraphs 5a, b or f above).** This situation is most likely to occur where a Service person is AWOL. For example, where a soldier goes absent prior to commencement and does not return until after commencement. The effect of article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 is that the whole course of conduct (both before and after commencement) can be charged under section 38 of the AA55. It will also be permissible to charge the accused with two shorter periods of AWOL; one under the AA55 for the period that terminates at commencement and one under section 9 of the AFA 06 which begins at commencement⁴.
- c. **It is not clear when the conduct occurred.** This situation might arise where a suspect is alleged to have committed an offence within a period that began before 31 Oct 09 but finished after this date, but it is unclear exactly when (during the period) that alleged offence was committed. For example, in January 2010 a recruit might complain that they were assaulted during training a couple of months earlier, but

² See article 2(5) of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

³ See article 9 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

⁴ See article 10 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

cannot remember whether the assault occurred before or after 31 Oct 09. Where this occurs the suspect can be charged under the relevant SDA provision. However, the suspect must only be charged with the relevant SDA offence where the alleged conduct must have been an offence. The only question is when it was committed, and therefore which offence it was. In the example above, the assault must have been either an offence under section 70 of the AA/AFA55 (or section 42 of the NDA57) or an offence under section 42 of the AFA06. If the alleged conduct amounts to an offence under the SDAs but does not amount to any offence under AFA06, it must be proved to have occurred before commencement. Conversely, if it would be an offence under AFA06 but not under the SDAs, it must be proved to have occurred after commencement⁵.

⁵ See article 11 of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009/1059.

Criminal conduct - section 42 Armed Forces Act 2006

- 42. Criminal conduct**
- (1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that—**
 - (a) is punishable by the law of England and Wales; or**
 - (b) if done in England or Wales, would be so punishable.**
 - (2) A person may be charged with an offence under this section even if he could on the same facts be charged with a different service offence.**
 - (3) A person guilty of an offence under this section is liable to—**
 - (a) if the corresponding offence under the law of England and Wales is under that law an offence punishable with imprisonment, any punishment mentioned in the Table in section 164;**
 - (b) otherwise, any punishment mentioned in rows 5 to 12 of that Table.**
 - (4) Any sentence of imprisonment or fine imposed in respect of an offence under this section must not exceed—**
 - (a) if the corresponding offence under the law of England and Wales is a summary offence, the maximum term of imprisonment or fine that could be imposed by a magistrates' court on summary conviction;**
 - (b) if that corresponding offence is an indictable offence, the maximum sentence of imprisonment or fine that could be imposed by the Crown Court on conviction on indictment.**
 - (5) In subsection (4) “a summary offence” and “an indictable offence” mean, respectively, a summary offence under the law of England and Wales and an indictable offence under that law.**
 - (6) In this section and sections 45 to 49 “act” includes an omission and references to the doing of an act are to be read accordingly.**
 - (7) In subsections (1) and (8) and sections 45 to 49 “punishable” means punishable with a criminal penalty.**
 - (8) In this Act “the corresponding offence under the law of England and Wales”, in relation to an offence under this section, means—**
 - (a) the act constituting the offence under this section; or**
 - (b) if that act is not punishable by the law of England and Wales, the equivalent act done in England or Wales.**

3. The effect of this section is to establish an offence creating provision so that an act or omission done by a person subject to Service law or a civilian subject to Service discipline⁶, see [Chapter 3](#) (Jurisdiction and time limits) anywhere in the world will be an offence under Service law if (a) it is a crime under the law of England and Wales or (b) had it been done in England or Wales would have been a crime under that law.

4. As to (a) this is straightforward: if the act or omission is a crime under English law it will be an offence under Service law. As to (b) this does not mean that every offence under English Criminal law is capable of being translated to apply to acts or omissions abroad, for example a regulatory offence relating solely to conditions in the UK or the EU or a road traffic offence which could only be committed by reference to a place in the domestic jurisdiction. Each instance must be assessed on its own merits and advice from an appropriate staff legal adviser may be sought.

⁶ Schedule 15 of the Act.

Violence offences

Common assault and battery

Section 39 of the Criminal Justice Act 1988 provides:-

Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority⁷.

Section 39 of the Criminal Justice Act 1988 creates two separate offences namely assault and battery (see notes on drafting of charges below).

In all cases before bringing a charge a CO should consider whether the circumstances reveal a prescribed circumstance or whether there is an allegation or circumstances which indicate that a Schedule 2 offence has been committed. These may not be dealt with summarily⁸. For the handling of cases in relation to Schedule 2 offences and prescribed circumstances see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these circumstances they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY COMMON ASSAULT CONTRARY TO SECTION 39 OF THE CRIMINAL JUSTICE ACT 1988

[AB] on, assaulted [CD].

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY BATTERY CONTRARY TO SECTION 39 OF THE CRIMINAL JUSTICE ACT 1988

[AB] on, assaulted [CD] by beating him.

3. Ingredients of the offences

Assault

Assault is an act by which a person, intentionally or recklessly, causes another person (the victim) to apprehend immediate unlawful personal violence.

An act

It is necessary to show that the accused did something – an assault cannot be committed by omission. Words alone may constitute an assault, or words accompanied by some threatening act. Mere silence can however constitute an assault if the other elements of the

⁷ Section 53 Schedule 1 Part 1 of the Act.

⁸ Section 53, section 114 and Schedule 2 of the Act.

offence are present e.g. where an accused makes a threatening action but does not say anything.

In view of the requirement that the victim must be caused to fear immediate unlawful violence (see below) a silent telephone call is unlikely to constitute an assault. Words may also deprive an act such as a gesture of its otherwise threatening character.

Intentionally

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessly

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

To apprehend

This phrase should be given its normal dictionary meaning and will require the victim to have been aware of the accused's actions at the time.

Immediate unlawful violence

The threat of violence must be immediate. It is not sufficient for the threat to relate to an occurrence in the future. Therefore a person in Germany who phones a person in the UK and threatens to beat them up when they next meet will not have committed this offence.

The threat must relate to unlawful violence. Thus, it will not be an offence if a person threatens to use force lawfully, for example, where a police officer threatens to lawfully restrain a person who is resisting arrest.

Battery

Battery is the intentional or reckless application of unlawful force by one person upon another, however slight. This offence can be committed intentionally or recklessly.

Intentional

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessly

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Application of unlawful force

The slightest touch may amount to unlawful force for these purposes. The victim must be subject to the application of direct or indirect force for example, being punched or being struck by a bottle thrown by the accused. It would also be a battery if the accused set a dog upon the victim.

The fundamental principle is that every person's body is inviolate. The effect is that everybody is protected against physical injury and any form of molestation. There are however exceptions to this principle for example, where lawful force is applied to arrest a suspect. Additionally, a broader exception also exists to cater for the exigencies of everyday life which results in contact between individuals. Thus, jostling in a crowd or touching someone to get their attention, would not normally come within the remit of battery. The test

to be applied is whether the physical contact is so persistent in the particular circumstances as to go beyond generally accepted standards of conduct.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Self defence

A person may lawfully use force to defend himself (or other people, for guidance on which, see below) from attack or from threatened attack provided that they used force only when it was necessary, and they used no more force than was reasonable in the circumstances.

Although the force used must be reasonable and necessary, it is recognised that a person defending himself cannot always weigh precisely the exact amount of defensive action which is necessary. To be lawful, the amount of force that an accused uses must be proportionate to the immediate threat posed (or that they believe is posed) at the time. This depends on the facts, such as the nature of the attack, whether a weapon was used, and if so what sort of weapon. If it is assessed that an accused did no more than they instinctively thought necessary, that would be very strong evidence that the amount of force used was both necessary and reasonable.

In some cases it may be sensible and possible to take some avoiding action. A failure to retreat from the threat by the accused does not necessarily mean that the accused did not act in self defence. It is simply a factor to take into account when deciding whether it was necessary for the accused to use force and whether the force used was reasonable.

There is no rule of law which requires that the accused must wait until they are struck before using force in self defence. It is lawful to use reasonable force to deal with a threat that is imminent. Even if the accused appears to have been the initial aggressor, his subsequent acts may have been lawful self-defence to retaliatory violence by the victim.

The burden of disproving that this defence is available does not arise unless some admissible evidence of this defence is presented. This evidence may be presented by the accused, or any other witness in the case. Once this defence has been raised, if the officer hearing the charge is convinced of the accused's innocence or is left in doubt as to whether the accused might have acted in self defence, they should find the charge not proven. It is a defence for an accused to act in self defence even if they were mistaken about being the victim of an attack. Thus, if the accused used force because they mistakenly but honestly and reasonably believed they were the victim of an attack, they should be acquitted as long as the force used was reasonable and necessary in the circumstances as they understood them to be.

Defence of others

The same principles that apply in relation to self defence apply where the accused acts in the defence of a third party. Thus his actions must be proportionate in the circumstances as they perceived them to be.

Prevention of crime etc

An accused may also use such force as is reasonable in the circumstances in the prevention of crime or in assisting the lawful arrest of offenders.

Defence of property

An accused may also use force to prevent a person taking his goods or prevent another person trespassing on his property.

Consent

An accused will not commit an offence under section 39 of the Criminal Justice Act 1988 if the alleged victim has consented to the force used against them, for example, where force is used against another when participating in sporting activities. However, conduct that goes beyond what a player can reasonably be regarded as having accepted by his or her participation in the sport can render that conduct sufficiently serious to be categorised as criminal. Additionally, it may be lawful to engage in rough and undisciplined horseplay, provided that there is no intention to injure on the part of any of the participants.

Intoxication

Self-induced intoxication or voluntary drug taking is *not* a defence to either assault or battery. If the intoxication is not self induced, for example where the accused claims that his drink has been spiked, advice should be sought from the staff legal adviser.

Lawful correction of a child

It is a defence to a charge of battery for a parent to inflict upon his child such degree of force as is necessary to correct the child. Such force must however be reasonable and must not exceed the bounds of moderation. Regard must be paid to the manner of the infliction, the quantity inflicted and the instrument used for correction. The age and health of the child will also be relevant.

Provocation

This is not a defence to an offence but may, if raised by an accused, amount to mitigation.

5. Notes

Examples of assaults include:

- a. Drawing a weapon on someone in a threatening manner so as to pose an imminent threat to them.
- b. Striking at someone with a fist or a weapon – even though the blow misses its target.
- c. Any other act similar to a. or b. above which indicates an immediate intention to use violence against another person.
- d. Threatening words or gestures towards a person, or a combination of both.

Despite the terms *assault* and *common assault* having been used generally to cover assault and battery, the two offences are separate and therefore when drawing up a charge it is important that the offence being charged is clearly specified.

Joint enterprise

Incidents of violence or disorder, especially those fuelled by alcohol, may appear to have involved a number of personnel. In cases such as these particular care should be taken. While a number of personnel present may have been drunk within the meaning of section 20, they may only be charged together with, for example Assault if the evidence supports the view that they each participated (for example by punching or kicking the victim) or if it is clear that, regardless who actually struck the blows, it was a group action which they were *all in together*. In all such cases staff legal advice should be sought.

Possible alternative non-criminal conduct (disciplinary) offences

In dealing with violent incidents involving Service personnel, it is likely that Service Police and COs might be able to consider a range of Service disciplinary offences - listed below and covered in [Chapter 7](#) (Non-criminal conduct (disciplinary) offences) - as an alternative to the criminal conduct offences dealt with here. The choice of which is appropriate must be an informed one, and staff legal advice should be sought. Each offence contains different points to prove, and staff legal advisers are able to advise on which, in any given case, are capable of proof. They will also provide advice on the consequences of conviction of both disciplinary and criminal conduct offences. Where alternatives are available, consideration should be given to the context in which the offence occurred. This is not just a case of asking whether the offence was committed in a Service establishment, but whether Service issues were a factor.

For example, the ongoing work-related grievance of a Service person which is behind his assault on a superior officer committed in front of other personnel from his unit in a civilian bar could be charged under section 11 (misconduct towards a superior officer) see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). However where actual bodily harm (or greater) is caused, criminal conduct offences would always be appropriate.

- Section 14 (using force against a sentry)
- Section 11 (misconduct towards a superior officer)
- Section 20 (misconduct through alcohol or drugs)
- Section 21 (fighting and threatening behaviour)
- Section 22 (ill treatment of subordinates)
- Section 27 (obstructing a Service policeman)
- Section 28 (resisting arrest)

Assault occasioning actual bodily harm

Section 47 of the Offences against the Person Act 1861 provides that:

Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable...to imprisonment for not more than five years.

1. Type of Offence

This offence **may be** heard summarily **with** permission of higher authority⁹.

In all cases before bringing a charge a CO should consider whether the circumstances reveal a prescribed circumstance or whether there is an allegation or circumstances which indicate that a Schedule 2 offence has been committed. These may not be dealt with summarily¹⁰. For the handling of cases in relation to Schedule 2 offences and prescribed circumstances see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under prescribed circumstances or Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all cases of assault occasioning actual bodily harm, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY SECTION 47 OF THE OFFENCES AGAINST THE PERSON ACT 1861 NAMELY ASSAULT OCCASIONING ACTUAL BODILY HARM.

[AB] on, assaulted [CD], thereby occasioning her actual bodily harm.

3. Ingredients of the offences

Assault

Assault is an act by which a person, intentionally or recklessly, causes another person (the victim) to apprehend immediate unlawful personal violence or to sustain unlawful personal violence. The necessary link between an assault and actual bodily harm must be made so that it must be proved that the assault or battery caused the bodily harm. For example, an assault causing the victim to jump or fall and so injure themselves requires proof that the accused's action or words caused the fall/jump which in turn led to the injury.

An act

It is necessary to show that the accused did something – an assault cannot be committed by omission. Words alone may constitute an assault, or words accompanied by some threatening act. In view of the requirement that the victim must be caused to fear immediate unlawful violence (see below) a silent telephone call is unlikely to constitute an assault. Words may also deprive an act such as a gesture of its otherwise threatening character.

Intentionally

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

⁹ Section 54 Schedule 1 Part 2 of the Act.

¹⁰ Section.54, section 114 and Schedule 2 of the Act.

Recklessly

For recklessness generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

To apprehend

This phrase should be given its normal dictionary meaning and will require the victim to have been aware of the accused's actions at the time.

Immediate unlawful violence

The threat of violence must be immediate. It is not sufficient for the threat to relate to an occurrence in the future. Therefore a person in Germany who phones a person in the UK and threatens to beat them up when they next meet will not have committed this offence.

The threat must relate to unlawful violence. Thus, it will not be an offence if a person threatens to use force lawfully, for example, where a police officer threatens to lawfully restrain a person who is resisting arrest.

Actual bodily harm

This offence is an assault which results in some harm. Although more serious than an assault, the offence of assault occasioning actual bodily harm may be no more complex either legally or factually, and therefore may be appropriate to be dealt with at summary hearing.

The bodily harm need not be permanent, nor need it amount to what would be considered really serious bodily harm, however it must be more than merely transient or trifling. It is appropriate to charge this offence in cases where there is: loss or breaking of a tooth; temporary loss of sensory function (e.g. loss of consciousness); extensive or multiple bruising; minor fractures; minor, but more than superficial, cuts requiring medical treatment. In addition, actual bodily harm is capable of including psychiatric injury. However, it does not include mere emotions such as fear, distress or panic.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Self defence

A person may lawfully use force to defend himself (or other people, for guidance on which, see below) from attack or from threatened attack provided that they used force only when it was necessary, and they used no more force than was reasonable in the circumstances.

Although the force used must be reasonable and necessary, it is recognised that a person defending himself cannot always weigh precisely the exact amount of defensive action which is necessary. To be lawful, the amount of force that an accused uses must be proportionate to the immediate threat posed (or that they believe is posed) at the time. This depends on the facts, such as the nature of the attack, whether a weapon was used, and if so what sort of weapon. If it is assessed that an accused did no more than they instinctively thought necessary, that would be very strong evidence that the amount of force used was both necessary and reasonable.

In some cases it may be sensible and possible to take some avoiding action. A failure to retreat from the threat by the accused does not necessarily mean that the accused did not act in self defence. It is simply a factor to take into account when deciding whether it was necessary for the accused to use force and whether the force used was reasonable.

There is no rule of law which requires that they must wait until they is struck before using force in self defence. It is lawful to use reasonable force to deal with a threat that is imminent.

Even if the accused appears to have been the initial aggressor, his subsequent acts may have been lawful self-defence to retaliatory violence by the victim.

The burden of disproving that this defence is available does not arise unless some admissible evidence of this defence is presented. This evidence may be presented by the accused, or any other witness in the case. Once this defence has been raised, if the officer hearing the charge is convinced of the accused's innocence or is left in doubt as to whether the accused might have acted in self defence, they should find the charge not proven. It is a defence for an accused to act in self defence even if they were mistaken about being the victim of an attack. Thus, if the accused used force because they mistakenly but honestly and reasonably believed they were the victim of an attack, they should be acquitted as long as the force used was reasonable and necessary in the circumstances as they understood them to be.

Defence of others

The same principles that apply in relation to self defence apply where the accused acts in the defence of a third party. Thus his actions must be proportionate in the circumstances as they perceived them to be.

Prevention of crime etc

An accused may also use force as is reasonable in the circumstances in the prevention of crime or in assisting the lawful arrest of offenders.

Defence of property

An accused may also use force to prevent a person taking his goods or prevent another person trespassing on his property.

Consent

An accused will not commit an offence under section 39 of the Criminal Justice Act 1988 if the alleged victim has consented to the force used against them, for example, where force is used against another when participating in sporting activities. However, conduct that goes beyond what a player can reasonably be regarded as having accepted by his or her participation in the sport can render that conduct sufficiently serious to be categorised as criminal. Additionally, it may be lawful to engage in rough and undisciplined horseplay, provided that there is no intention to injure on the part of any of the participants. In the absence of a good reason, consent will not be available where the force has caused actual or grievous injury.

Intoxication

Self-induced intoxication or voluntary drug taking is *not* a defence to assault occasioning actual bodily harm. If the intoxication is involuntary, for example spiking drinks, advice should be sought from the staff legal adviser.

Lawful correction of a child

This can never be a defence to a charge of assault occasioning actual bodily harm.

Notes

Joint enterprise

Incidents of violence or disorder, especially those fuelled by alcohol, may appear to have involved a number of personnel. In cases such as these particular care should be taken. While a number of personnel present may have been drunk within the meaning of section 20, they may only be charged together with, for example, assault if the evidence supports the view that they each participated (for example by punching or kicking the victim) or if it is clear that, regardless who actually struck the blows, it was a group action which they were *all in together*. In all such cases staff legal advice should be sought.

Possession in public place of offensive weapon

Section 1 of the Prevention of Crime Act 1953 provides:

- (1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable –
- (a) on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding the prescribed sum or both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding 4 years or a fine, or both.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹¹.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY HAVING WITH HIM AN OFFENSIVE WEAPON IN A PUBLIC PLACE CONTRARY TO SECTION 1(1) OF THE PREVENTION OF CRIME ACT 1953.

[AB] on, without lawful authority or reasonable excuse, had with him in a public place, namely, an offensive weapon, namely

3. Ingredients of the offence

Has with him

The words *has with him in any public place* mean *knowingly has with him in any public place* and this must be proved to the satisfaction of the officer hearing the charge. Once a person has something knowingly, merely forgetting they have it is not enough to prevent them from continuing to have it.

Public place

A public place includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise.

Offensive weapon

The meaning of offensive weapon can be broken down into two categories:

- a. Those that are offensive *per se*, that is, those either made (e.g. knuckle-duster, dagger, gun) or adapted (e.g. broken bottle) for use for causing injury to the person; and
- b. Weapons not so made or adapted (e.g. kitchen knife, spanner, hammer) but intended by the person having it with them for causing injury to the person.

¹¹ Section 54 Schedule 1 Part 2 of the Act.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Without lawful authority or reasonable excuse.

For lawful and reasonable excuse generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lawful authority would include those people who from time to time carry an offensive weapon as a matter of duty e.g. the soldier and his rifle and the police officer with his baton.

Where the accused carries a weapon as a result of a recent attack which they fear may be repeated it is a question of degree whether they have a reasonable excuse. Carrying the weapon for a day or two after an attack might be reasonable but for a longer period might not. If they arm himself to repel violence which they themselves is about to create they do not establish a reasonable excuse.

An innocent motive for carrying an offensive weapon can sometimes amount to a reasonable excuse.

In the case of weapons which are offensive *per se*, that the accused did not know that the article was made or adapted for causing injury to the person cannot of itself amount to a reasonable excuse for having it in a public place.

5. Notes

As ships and other Service establishments are not public places for the purpose of an offence under section 1 of the Prevention of Crime Act 1953, Service establishments should promulgate standing orders which prohibit behaviour within their confines, equivalent to that set out in this offence i.e. relating to the possession of offensive weapons. However, on days when ships and establishments are opened to the public e.g. Air displays, Navy Days and Army Open Days, they will be public places.

A lesser charge may be brought under section 139(1) of the Criminal Justice Act 1988 which describes an offence of having an article with a blade or point, in a public place.

Possession in public place of point or blade

Section 139 of the Criminal Justice Act 1988 provides:

- (1) Subject to sub-sections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
- (2) Subject to sub-section (3) below, this section applies to any article which has a blade or a sharp point except a folding pocket knife.
- (3) This section applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches.
- (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.
- (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had an article with him –
 - (a) for use at work;
 - (b) for religious reasons; or
 - (c) as part of any national costume.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹².

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

The Criminal Justice Act 1988, Section 139A creates a separate offence for a person to have any article to which Section 139 above applies with them on school premises. This offence however cannot be dealt with summarily.

2. Specimen charge

COMMITTED A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY HAVING WITH HIM AN ARTICLE WITH A BLADE [POINT] IN A PUBLIC PLACE CONTRARY TO SECTION 139(1) OF THE CRIMINAL JUSTICE ACT 1988.

[AB] at, a public place, on without good reason or lawful authority had with him an article with a blade [point] namely

3. Ingredients of the offence

Has with him

The words *has with him* in any public place mean *knowingly* has with him in any public place and it is proved to the satisfaction of the officer hearing the charge. Once a person knowingly has something, they continue to have it until they do something to rid themselves of it. See however, Defences (below) for circumstances where an accused forgets that they had an article with them. The words *has with him* require proof of contact with the article which will amount to more than mere possession.

Public place

¹² Section 54 Schedule 1 Part 2 of the Act.

Public place for the purposes of this offence includes any place to which at the material time the public have or are permitted to have access, whether on payment or otherwise. It will not be a public place if access is available only to a particular class of the public. For this reason, an offence under this section cannot be committed in ships or Service establishments. See notes (below) on prohibiting similar behaviour through standing orders.

Bladed article

This section applies to any article which has a blade or a sharp point except a folding pocket knife (unless the cutting edge of the pocket knife exceeds 3 inches). A screw-driver is not a bladed article within the meaning of the section.

Without good reason, lawful authority etc

See defences below.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

It will be a defence if the accused can prove on a balance of probabilities that they had the article with them for a good reason, with lawful authority or for any of the reasons set out in 139(5) of the Criminal Justice Act 1988 (see above).

Lawful authority refers to the circumstances where a person from time to time as a matter of duty carries an otherwise prohibited article. For example, a soldier performing ceremonial duties who is required to fix a bayonet to his weapon will have a defence on this basis.

A good reason

A good reason will include circumstances such as where a person is travelling home from the shop after purchasing a knife for a legitimate purpose. Forgetfulness alone cannot amount to a good reason but forgetfulness combined with another reason might. For example, where a parent after buying a knife places it in the glove compartment to keep it out of a child's reach and then forgets to retrieve it on arrival at home.

The Criminal Justice Act 1988 section 139 and Criminal Justice Act 1996 sections 3 and 4 allows anyone to carry a blade exceeding the length of 3 inches for religious, cultural or work related reasons. However the defence of having a bladed article for religious, cultural or work reasons is only a defence if this is offered as the predominant motivation for having the bladed article at the time. If the stated use is in itself unreasonable then this will not be a defence.

It is not necessary to prove that the accused did not have a defence (good reason or lawful authority) unless the accused proves on a balance of probabilities that the defence is available. An accused does not discharge the burden of showing a good reason only by providing an explanation that is not contradicted by the evidence in support of the charge. Rather, the officer hearing the case must be satisfied that the reason is a good reason. If however the accused establishes, to the required standard, that they have a defence, the accused cannot be convicted unless it is proven beyond reasonable doubt that the accused did the act complained of and that they did not have a defence.

5. Notes

As ships and other Service establishments are not public places for the purpose of an offence under section 139 of the Criminal Justice Act 1988, where a person is in possession

of a pointed blade in a Service establishment it may be appropriate to charge under section 13 (contravention of standing orders).

Dishonesty offences

Theft – section 1 Theft Act 1968

1. Basic definition of theft

- (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly.
- (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.
- (3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

2. Dishonestly

- (1) A person's appropriation of property belonging to another is not to be regarded as dishonest—
 - (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

3. Appropriates

- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
- (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

4. Property

- (1) Property” includes money and all other property, real or personal, including things in action and other intangible property.
- (2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say—
 - (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or

(b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or

(c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

For purposes of this subsection “land” does not include incorporeal hereditaments; “tenancy” means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and “let” shall be construed accordingly.

(3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.

For purposes of this subsection “mushroom” includes any fungus, and “plant” includes any shrub or tree.

(4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession.

5. Belonging to another

(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

(2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

(3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

(4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

(5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

6. With the intention of permanently depriving the other of it

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

A person guilty of theft shall on conviction on indictment be liable to imprisonment for a term not exceeding [seven years].

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority¹³.

The above sections of the Theft Act are self explanatory for most occurrences of the offence; if in doubt seek advice from the appropriate staff legal adviser.

2. Specimen Charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968

[AB] on, stole £100 belonging to [CD].

3. Ingredients of the Offence

Dishonesty

The accused must have acted dishonestly at the time of the appropriation.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly, two tests must be applied. Firstly, was what the accused did dishonest by ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both these questions is yes, the element of dishonesty should be proved. If the answer to either question is no, the element of dishonesty is not proved and therefore the charge is not proved.

Section 2 provides circumstances when an appropriation by the accused will not be dishonest. See also *defences* at paragraph 4.

¹³ Section.53 Schedule 1 Part 1 of the Act.

Appropriation

Section 3 provides that *appropriation* is any assumption by the accused of the rights of the owner and this includes any later assumption of a right to it (by keeping or dealing with it as the owner) even where the accused has come by the property (innocently or not) without stealing it. See however *defences* below where an accused purchases goods in good faith.

It is not necessary to establish that the appropriation occurred without the authorisation or consent of the owner, although the issue of authorisation or consent may be relevant for the question of dishonesty.

The following serve as examples of an appropriation:

- a. A NAAFI employee makes a sale to a customer and places the money in their pocket with the intention of spending it; that amounts to an act of appropriation because it is an assumption of ownership by the worker.
- b. A Service person finds a wallet on the street containing money and decides to return to the owner whose identity and address is apparent from information contained in the wallet. That does not amount to an appropriation because it is not an assumption of ownership: they intend at that time to give it back. However, if they later change his mind and decides to spend the money contained in the wallet and throw away the wallet away, at that later stage the Service person will have assumed the rights of an owner in respect of the money and the wallet and will therefore have appropriated them.

Property

Property should be given its normal dictionary meaning and section 4 (property) is self explanatory in relation to its meaning. It includes a thing in action, for example the right to payment from a victim's bank account stolen by means of a forged or stolen cheque.

Belonging to another

Section 5 is self explanatory. The person from whom the property is taken need not be the owner; it is sufficient that the victim had possession or control of the property at the time of its appropriation by the accused. For example, x lends y a cycle which is then taken by z; z may stand accused of theft of the cycle from either x or y.

With intention of permanently depriving

Section 6. This, for example, would be evidenced where an accused appropriated a victim's property and then offered to sell it on or put it to his own use with no intention of returning it. An accused disposing of, or destroying a thing they have taken, or converting it into something else will be evidence of such intention.

The appropriation of something with the intention of giving it back is not an intention to permanently deprive the owner of it. However, borrowing of property can amount to theft if it is for such a period of time and in such circumstances as to make it equivalent to an outright taking or disposal: for example where a person takes a concert ticket but returns it after the date of the concert so that its value has gone.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Abandoned property

Property that is abandoned is not capable of being stolen. If the property had not been abandoned, but the accused believed that it had, then they cannot be guilty of the offence, however unreasonable the belief.

5. Notes

Unknown owner

Where the owner is unknown, the charge will be proved provided it can be established that the property belonged to someone other than the accused and that the accused knew this.

Mistake

Property obtained by an accused from a victim as a result of the victim's mistake, or another's mistake may nevertheless constitute a theft. In such circumstances the victim is likely to be regarded as being entitled to restoration of their property. For example failure to repay an overpaid amount in the knowledge of the circumstances of the overpayment may be theft.

Misuse of property given for a particular purpose

Where a person receives property from or on account of another and is under an obligation to the other person to retain and deal with that property or its proceeds in a particular way, but it is dealt with inconsistently with that purpose may constitute a theft. For example if monies put in the hands of an NCO appointed to organise a Warrant Officers' and Sergeants' Mess Christmas fund are dishonestly misappropriated by the NCO for his own or other purposes, that would be theft. They will have appropriated funds belonging to others.

Taking a motor vehicle or other conveyance without authority

Section 12 of the Theft Act 1968 provides in so far as is relevant in a service context: -

- (1) Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.
- (2) A person guilty of an offence under subsection (1) above shall ... be liable on summary conviction to a fine not exceeding level 5 [£5000] on the standard scale, to imprisonment for a term not exceeding six months, or to both.
- (3) ...*[Repealed by PACE 1984 Schedule 7]*
- (4) If on the trial of an indictment for theft the jury are not satisfied that the accused committed theft, but it is proved that the accused committed an offence under subsection (1) above, the jury may find him guilty of the offence under subsection (1) and if he is found guilty of it, he shall be liable as he would have been liable under subsection (2) above on summary conviction.
[Note: the effect of this is that under the [AFA 2006 the CO can convict of an alternative charge under s12 (1) in the event that they are not satisfied that the accused committed theft but it was proved that he committed an offence under s12(1)]
 - (4A) Proceedings for an offence under subsection (1) above (but not proceedings of a kind falling within subsection (4) above) in relation to a mechanically propelled vehicle—
 - (a) shall not be commenced after the end of the period of three years beginning with the day on which the offence was committed; but
 - (b) subject to that, may be commenced at any time within the period of six months beginning with the relevant day.
[Note: the effect of this is to create a time limit on bringing service proceedings]
 - (4B) In subsection (4A)(b) above "the relevant day" means—
 - (a) in the case of a prosecution for an offence under subsection (1) above by a public prosecutor[CO], the day on which sufficient evidence to justify the proceedings came to the knowledge of any person responsible for deciding whether to commence any such prosecution;
[Note: the effect of this in the service context will be that [public prosecutor] means the CO]
- (5) Subsection (1) above shall not apply in relation to pedal cycles; but, subject to subsection (6) below, a person who, without having the consent of the owner or other lawful authority, takes a pedal cycle for his own or another's use, or rides a pedal cycle knowing it to have been taken without such authority, shall on summary conviction be liable to a fine not exceeding level 3 [£1000] on the standard scale.
- (6) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

- (7) For purposes of this section—
- (a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and "drive" shall be construed accordingly; and
 - (b) "owner", in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the conveyance under that agreement.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority¹⁴.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY TAKING A CONVEYANCE WITHOUT AUTHORITY CONTRARY TO SECTION 12(1) OF THE THEFT ACT 1968

[AB] on, without the consent of the owner or other lawful authority, took a conveyance, namely a Porsche motor car registration number for the use [of himself]

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ALLOWING HIMSELF TO BE CARRIED IN OR ON A CONVEYANCE TAKEN WITHOUT AUTHORITY CONTRARY TO SECTION 12(1) OF THE THEFT ACT 1968

[AB] on, knowing that a conveyance, namely a Porsche motor car registration number, had been taken without the consent of the owner, allowed himself to be carried in or on the said conveyance.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY TAKING A PEDAL CYCLE CONTRARY TO SECTION 12(5) OF THE THEFT ACT 1968

[AB] on, without the consent of the owner or other lawful authority, took a pedal cycle belonging to [CD] for the use [of himself] [of another].

3. Ingredients of the offence

Section 12(1) creates three offences:

- a. Taking a conveyance without consent or lawful authority.
- b. Driving a conveyance without consent or lawful authority.
- c. Being carried in a conveyance that has been taken without consent or lawful authority.

Section 12(5) creates two offences:

- a. Taking a pedal cycle without consent or lawful authority.

¹⁴ Section 53 Schedule 1 Part 1 of the Act.

b. Riding a conveyance without consent or lawful authority

Taking

To constitute the offence of *taking*, there is no requirement for the conveyance to be driven away.

There must be evidence of more than mere unauthorised taking of possession or control adverse to the rights of the owner. Some element of movement (however small) must have been caused by a voluntary act done with the intention of putting the conveyance in motion. Nevertheless, only the *taking* has to be proved and not a taking and *driving away*. In the absence of any evidence as to movement (however small) in respect of the element of *taking*, there may still be sufficient evidence of an attempt, which is itself an offence.

Conveyance

The definition in subsection (7) is self explanatory. The taking of pedal cycles is not included in the offence under subsection (1), but is included under the offence in subsection (5).

Consent

This is given its normal dictionary meaning. It is necessary to prove that the owner of the conveyance did not consent to its taking by the accused. This may be because the accused did not seek the consent of the owner or because the limitation of the consent to use was exceeded, for example if the owner consents to a vehicle being used for a journey of 10 miles but the accused uses it for a journey of 100 miles. The defence under subsection (6) may be available (belief of lawful authority).

Owner

Owner includes the person who is in possession of a conveyance under a hire or hire purchase contract.

Other lawful authority

This relates to situation where the taker of a conveyance knows it is not his own conveyance, but for some reason nevertheless believes they have lawful authority to take it.

Drives

This is given its normal dictionary meaning in the context of the conveyance concerned, namely that the person driving must be substantially controlling the movement and direction of the conveyance, including having something to do with the conveyance's propulsion. Whether someone is *driving* in the ordinary sense is a question of fact and degree. This involves something more than mere movement of the vehicle (e.g. pushing it), namely that it should be used as a means of transport. An accused cannot be said to be driving a vehicle unless they are in the driving seat or is in control of the steering wheel and also has something to do with the propulsion of the vehicle.

For his own or another's use

In relation to an offence under section 12(1) Theft Act 1968, it is necessary to prove that the accused took the conveyance named in the charge for his own use or for the use of another.

Pedal cycle

Means a bicycle, tricycle or any cycle having more than four wheels, not being in any case a motor vehicle.

Taking, consent, owner, other lawful authority, for his own or another's use

See guidance above under section 12 (1) Theft Act 1968.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A statutory defence is available under section 6 of the Theft Act 1968. As a result, an accused will not commit an offence under this section if they believe they have a lawful authority to do the act alleged or if they believed they would have the owner's consent if the owner knew of his doing it and the circumstances of it.

5. Notes

Spare.

Making off without payment

Section 3 of the Theft Act 1978 provides:

- (1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.
- (2) For purposes of this section "payment on the spot" includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.
- (3) Subsection (1) above shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.
- (4) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, committing or attempting to commit an offence under this section.

1. Type of offence

This offence **may be** heard summarily **only** where the payment required or expected did not exceed £100. In these circumstances permission from higher authority need not be sought. Where the payment required or expected exceeds £100 the matter must be referred to the DSP¹⁵.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY MAKING OFF WITHOUT PAYMENT CONTRARY TO SECTION 3(1) OF THE THEFT ACT 1978

[AB] on, knowing that payment on the spot for a meal costing £43 was required or expected from him dishonestly made off from the [name] Restaurant, without having paid as required or expected.

3. Ingredients of the offence

Knowing that payment ... is required or expected

It must be proved that the accused had actual knowledge of the requirement or expectation that payment should be made. It is not an excuse that the accused wilfully shut his eyes to the truth.

On the spot

On the spot means that payment is to be made *there and then*. This is a question of fact. Section 3(2) of the Theft Act 1978 defines *payment on the spot* as including payment at the time of collecting goods on which work has been done or in respect of which service has been provided.

Dishonestly

¹⁵ Section 53 Schedule 1 Part 1 of the Act.

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they was doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

Making off

These words should be given their normal dictionary meaning in relation to the facts of the particular case. *Making off* involves a departure from the spot where payment is required or expected.

Intended to avoid payment

There must be an intention to permanently avoid payment. An intention to merely delay or defer payment is not sufficient to constitute the offence. However, the length of time that has passed since payment on the spot was required, in the absence of any reasonable excuse by the accused as to the delay or deferment in payment, will be of relevance to the question of whether or not there is in fact any likelihood of the accused making payment at all.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

A person may be able to prove that they had no intention to permanently avoid payment and was merely deferring or delaying it for some reason. The reasonableness or otherwise of any reasons put forward by that person will be a question for the officer hearing the charge to decide.

There is a statutory defence under section 3(3) of the Theft Act 1978. Where the supply of goods or services is contrary to the law, or where a service done is such that payment is not legally enforceable, making off without payment on the spot does not constitute the offence, even if there was no intention of paying. For example, failure by a taxi to drop a person where they requested means the taxi driver is in breach of contract and cannot lawfully demand the fare at any time thereafter.

5. Notes

This section applies where goods or services have been supplied and the person leaves without paying when they know they should have paid. If the goods have not been supplied (e.g. if they are taken from a supermarket shelf) this section does not apply but consideration should be given to a charge of theft.

If a person is stopped before passing the *spot* where payment is expected or required, this may constitute an attempt to commit the offence, provided the other ingredients are established.

Abstraction of electricity

Section 13 of the Theft Act 1968 provides:

A person who dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity shall be guilty of an offence.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁶.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ABSTRACTING ELECTRICITY CONTRARY TO SECTION 13 OF THE THEFT ACT 1968.

[AB] on, dishonestly used without due authority [or dishonestly caused to be wasted or diverted] a quantity of electricity.

3. Ingredients of the offence

Dishonestly

This should be given its normal dictionary meaning. The officer hearing the charge must first decide whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest. If it was not dishonest by those standards the charge must be dismissed. However, if it was dishonest by those standards the officer hearing the charge must then further consider whether the accused himself realised that what they were doing was dishonest by the standards of ordinary people, whatever his own moral principles or standards might be.

Use, waste or diversion

Any use, waste or diversion of electricity will suffice, so a meter does not have to be tampered with. Electricity is abstracted where the electricity supply to a house is reconnected without the consent of the electricity supplier. It is also abstracted where the electricity supply to a house is caused not to be registered by the meter. It may well be an abstraction of electricity to make a call from a telephone that belongs to another person.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Mechanical defect in the meter or associated equipment.

5. Notes

Spare.

¹⁶ Section 54 Schedule 1 Part 2 of the Act.

Dishonestly obtaining electronic communications services

Section 125 of the Communications Act 2003 provides:-

- (1) A person who:
- (a) dishonestly obtains an electronic communication service, and
 - (b) does so with intent to avoid payment of a charge applicable to the provision of that service, is guilty of an offence.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁷.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DISHONESTLY OBTAINING ELECTRONIC COMMUNICATIONS SERVICES CONTRARY TO SECTION 125(1) OF THE COMMUNICATIONS ACT 2003.

[AB] on, dishonestly obtained an electronic communications service namely
[give details] with intent to avoid payment of a charge applicable to the provision of that service.

3. Ingredients of the offence

Dishonestly

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

Obtains

Obtains means *gets*. Therefore, the offence will apply to a situation where the accused taps into another person's telephone or internet connection in order to communicate at the other's expense e.g. using a computer to communicate via another's wireless connection. This may cause further problems for the authorised user of the wireless connection because the authorised user is potentially liable for the unauthorised use of illegal websites.

¹⁷ Section 54 Schedule 1 Part 2 of the Act.

Electronic communication service

The service must be one where the principal feature is the conveyance by means of an electronic communications network of signals. This offence therefore relates primarily to telephones but covers broadband and internet services. It is not an offence under section 125(5) Communications Act 2003 to obtain a broadcasting or cable programme - see notes below. In cases of doubt, advice should be sought from a staff legal adviser.

With intent

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused must have intended to avoid payment of a charge applicable to the provision of that service.

It is necessary to prove that the accused acted with the purpose of evading any or all of the costs that would have been charged for the electronic service had those services been properly obtained.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

5. Notes

Regard should be had to section 126 of the Communications Act 2003 (see below) which makes it an offence for a person to possess or supply apparatus for the contravention of section 125 of the Communications Act 2003.

The offence under section 125 does not apply to the interception of a *content service* – for example a radio or television programme broadcasting service which is covered by section 297 of the Copyright, Designs and Patents Act 1988 – for meaning of electronic communication networks and service see section 32(7) of the Communications Act 2003.

Broadcasting and cable services

It is not an offence under section 125 of the Communications Act 2003 to obtain a service mentioned in section 297 of the Copyright, Designs and Patents Act 1988 (i.e. dishonestly obtaining a broadcasting or cable programme service provided from a place in the UK).

Possession or supply of apparatus which may be used for obtaining an electronic communications service

Section 126 Communications Act 2003 provides:

- (1) A person is guilty of an offence if –
with an intention falling within sub-section (3) he has in his possession or under his control anything that may be used –
 - (a) for obtaining an electronic communications service; or
 - (b) in connection with obtaining such a service.
- (2) A person is guilty of an offence if –
 - (a) he supplies or offers to supply anything which may be used as mentioned in sub-section (1); and
 - (b) he knows or believes that the intentions in relation to that thing of the person to whom it is supplied or offered fall within sub-section (3).
- (3) A person's intentions fall within this sub-section if he intends –
 - (a) to use the thing to obtain an electronic communications service dishonestly;
 - (b) to use the thing for a purpose connected with the dishonest obtaining of such a service;
 - (c) dishonestly to allow the thing to be used to obtain such a service; or
 - (d) to allow the thing to be used for a purpose connected with the dishonest obtaining of such a service.
- (4) An intention does not fall within subsection (3) if it relates exclusively to the obtaining of a service mentioned in section 297(1) of the *Copyright, Designs and Patents Act 1988*.(see notes)
- (5) A person guilty of an offence under this section shall be liable –
 - (a) on summary conviction, to imprisonment for term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment to imprisonment for a term not exceeding five years or to imprisonment, or to both.
- (6) In this section, references in the case of a thing used for recording data, to the use of that thing include references to the use of the data recorded by it.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁸.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY POSSESSION / SUPPLY OF APPARATUS WITH THE INTENTION OF DISHONESTLY OBTAINING AN ELECTRONIC COMMUNICATIONS SERVICE CONTRARY TO SECTION 126(1)(a) OF THE COMMUNICATIONS ACT 2003.

[AB] on, had in his possession [name/describe the device] with the intention of using the said [name/description of device] to dishonestly obtain an electronic communication service.

3. Ingredients of the offence

Intention

¹⁸ Section 54 Schedule 1 Part 2 of the Act.

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The effect of the offence is that if someone has a computer with the intention of using it to use another's wireless connection to gain access to the internet, they will be in breach of this section. When they start so using it they will be guilty of an offence under section 125 of the Communications Act 2003 (see page 1-8-32).

In his possession or under his control

This means they must know that they have the apparatus in his possession or knowledge that they can gain access to it.

Obtaining

This means *gets*. This offence will have been committed where an accused has in his possession equipment capable of tapping into someone's telephone or internet connection to communicate at another's expense. An example would be possessing a computer capable of communicating via another's wireless connection.

Electronic communications service

This covers a wide range of such services and includes telephone, broadband, and other internet services etc.

Supplies or offers to supply

It is sufficient to be guilty of this offence that a person merely offers to supply such apparatus to another person who they know or believe intends to use it dishonestly. They do not actually have to supply the other person with the apparatus.

Knows or believes

Knows or believes should be given their normal dictionary meaning. Actual knowledge or belief on the part of the accused that the apparatus they supplied or offered to supply were intended to be used for one of the dishonest purposes in subsection (3) must be proved. This is a subjective test. This is proved directly by the evidence of the person to whom the apparatus was either supplied or offered to, and/or through circumstantial evidence from which the accused's knowledge or belief can be inferred, see [Chapter 11](#) (Summary hearing – dealing with evidence).

Suspicion that the accused knew or believed that the intention of the person to whom they supplied or offered to supply the apparatus was to use it for one of the dishonest purposes set out in subsection (3) is not enough. It is always open to the officer hearing the charge however, to base a finding of knowledge on evidence that the accused had deliberately shut his eyes to the obvious or refrained from inquiry because they suspected the truth but did not want to have his suspicion confirmed. It is vital therefore that the officer hearing the charge takes all the surrounding circumstances into account when deciding whether or not the necessary knowledge or belief existed.

Dishonestly

The accused must have acted dishonestly at the time the service is obtained. This is a question of fact.

The term *dishonest* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the standards of ordinary reasonable and honest people? (This is

an objective test.) In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (This is a subjective test).

If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either of these questions is no, the element of dishonesty is not proved and the accused is not guilty of the offence.

To allow

This means the person to whom the apparatus is supplied or offered to intends to give access to it to others to use it for dishonest purposes.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Honest mistake/error of judgment

An honest but mistaken belief by the accused that they had used or applied the thing in a proper manner. Additionally, an accused will have a defence if they acted on the order of a superior and they honestly believed the order was lawful.

5. Notes

Section 297(1) of the *Copyright, Designs and Patents Act 1988* states that a person who dishonestly receives a programme included in a broadcasting or cable programme service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable to conviction. That is to say a person, for example, who is receiving a broadcast but has not obtained a TV licence, does not fall under subsection (3) and therefore could not be prosecuted under this section.

Fraud

1. **Section 1 of the Fraud Act 2006 provides:-**
 - (1) **A person is guilty of fraud if he is in breach of any of the sections listed in sub-section (2) (which provide for different ways of committing the offence).**
 - (2) **The sections are -**
 - (a) **section 2 (fraud by false representation),**
 - (b) **section 3 (fraud by failing to disclose information), and**
 - (c) **section 4 (fraud by abuse of position).**
 - (3) **A person who is guilty of fraud is liable - This is relevant in the context of Section 42(3) and (4) of the Act.**
 - (a) **on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);**
 - (b) **on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).**
 - (4) **Sub-section (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.**
2. **Fraud by false representation:-**
 - (1) **A person is in breach of this section if he -**
 - (a) **dishonestly makes a false representation, and**
 - (b) **intends, by making the representation -**
 - (i) **to make a gain for himself or another, or**
 - (ii) **to cause loss to another or to expose another to a risk of loss.**
 - (2) **A representation is false if -**
 - (a) **it is untrue or misleading, and**
 - (b) **the person making it knows that it is, or might be, untrue or misleading.**
 - (3) **“Representation” means any representation as to fact or law, including a representation as to the state of mind of -**
 - (a) **the person making the representation, or**
 - (b) **any other person.**
 - (4) **A representation may be express or implied.**
 - (5) **For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).**
3. **Fraud by failing to disclose information:-**
 - (1) **A person is in breach of this section if he -**
 - (a) **dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and**
 - (b) **intends, by failing to disclose the information -**
 - (i) **to make a gain for himself or another, or**
 - (ii) **to cause loss to another or to expose another to a risk of loss.**

4. Fraud by abuse of position:-

- (1) A person is in breach of this section if he -
- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position -
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.

5. “Gain” and “loss”:-

- (1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.
- (2) “Gain” and “loss”—
- (a) extend only to gain or loss in money or other property;
 - (b) include any such gain or loss whether temporary or permanent; and
- “property” means any property whether real or personal (including things in action and other intangible property).
- (3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.
- (4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority¹⁹.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY FALSE REPRESENTATION CONTRARY TO SECTION 1 OF THE FRAUD ACT 2006.

[AB] on, dishonestly obtained from an employee of (give details) goods to the value of eighty pounds (£80.00) belonging to by falsely representing that he, the accused, was then entitled and authorised to use bank card serial numberin breach of section 2 of the Fraud Act 2006.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY FAILING TO DISCLOSE INFORMATION CONTRARY TO SECTION 1 OF THE FRAUD ACT 2006.

[AB] on, at, dishonestly failed to disclose to the Abbey Bank that he had debts of £50,000 and thereby obtained for himself an overdraft of £5,000, in breach of section 3 of the Fraud Act 2006.

¹⁹ Section 54 Schedule 1 Part 2 of the Act.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY FRAUD BY ABUSE OF POSITION CONTRARY TO SECTION 4 OF THE FRAUD ACT 2006.

[AB] on, when he was pay clerk at with access to the bank account (give details) of [CD], dishonestly abused his position by removing monies to the value of four hundred and fifty pounds (£450) for his own personal use in breach of section 4 of the Fraud Act 2006.

3. Ingredients of the offence

Dishonestly

The term *dishonestly* bears its normal dictionary meaning but if there is any doubt as to whether an accused has acted dishonestly, two tests must be applied. Firstly, was what the accused did dishonest by the ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either question is no, the element of dishonesty is not proved.

Intends

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Gain and loss

Gain includes obtaining a pecuniary or financial advantage such as an overdraft that they would not otherwise have received. It does not have to be proved in such a case that the person actually drew on this facility. It would also include the salary of a post the accused would not otherwise have been appointed to, but for his dishonest act.

Loss includes the victim not receiving property they did not previously have but might have later received had it not been for the accused's actions. For example, where a victim lost his likely entitlement to a dividend on shares as a result of the accused's dishonest disposal of them in his capacity as the victim's stockbroker, before the dividend was due to be paid to the victim.

Property

Property includes money and all other property whether real or personal, including *things in action* (e.g. a bank balance) and other intangible property (e.g. stocks and shares). It does not extend to, for example, under these sections, obtaining a service, which is dealt with separately under section 11 of the Fraud Act 06.

False representation

The accused must make the representation with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place. A representation is false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading. A representation can be stated in words or communicated by conduct, for example by presenting a cheque which is not the good and valid order for the amount entered on the cheque that it is represented to be. A representation can be written or spoken or posted on a website.

Express or implied

An express representation means simply an unequivocal or direct representation as to something. Rather than concerning oneself as to what may amount to an implied representation, the officer hearing the charge should instead simply consider whether the accused *by words or conduct* induces a false belief in the other person's mind.

Failing to disclose

There must be a legal duty to disclose information and the accused must know they have such a duty. For example in an application form for credit, insurance or for an employment post.

Abuse of position

This applies where the accused has been put in a position, for example because of his rank they holds certain responsibilities, or because of his post as a pay clerk or a person's accountant, and by virtue of this position is expected to safeguard another's financial interest or not act against those interests. The offence is committed when the accused abuses his position by dishonestly acting against the victim's financial interest, either for his own personal gain or that of another, and/or in order to cause loss or the risk of loss to the victim.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused may seek to show that they did not act intentionally but that his conduct was accidental or mistaken and that they were not acting dishonestly.

No dishonesty on the part of the accused in these circumstances would entail:

- a. A belief by the accused that they had a right in law to the gain made on behalf of himself or a third party, or to the incurring of the loss or risk of loss to the victim; or
- b. A belief by the accused that they would have had the victim's consent for the gain made on behalf of himself or a third party, or loss or risk of loss caused to the victim, had the victim known of the transaction and the circumstances surrounding it; or
- c. A belief when making the representation that it was true; or
- d. A belief that the actions they took were designed to safeguard, and not to act against, the financial interests of the victim.

5. Notes

If it is alleged that the accused dishonestly made a number of false representations with an intent to make a gain or cause a loss or risk of loss to another, then in order to find the charge proved the officer hearing the charge must either be sure as to the falsity of at least one of those representations (unless they are sure that at least some of the representations were false but is not sure which ones), or that their effect taken together was misleading.

A person may be convicted of an offence contrary to subsections (2) – (4) inclusive although the accused either intended to make or made a gain on behalf of another.

Dishonestly obtaining services

Section 11 of the Fraud Act 2006 provides:-

- (1) A person is guilty of an offence under this section if he obtains services for himself or another -
 - (a) by a dishonest act, and
 - (b) in breach of subsection (2).
- (2) A person obtains services in breach of this subsection if -
 - (a) they are made available on the basis that payment has been, is being, or will be made for or in respect of them,
 - (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and
 - (c) when he obtains them, he knows -
 - (i) that they are being made available on the basis described in paragraph (a), or
 - (ii) that they might be, but intends that payment will not be made, or will not be made in full.
- (3) A person guilty of an offence under this section is liable -
 - (a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both);
 - (b) on conviction on indictment to imprisonment for a term not exceeding 5 years or to a fine (or to both).
- (4) Sub-section (3)(a) applies in relation to Northern Ireland as if the reference to 12 months were a reference to 6 months.

1. Type of offence

This offence **may be** heard summarily **with** permission of higher authority²⁰.

Given the nature of this offence, legal advice should be sought from a staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY OBTAINING SERVICES DISHONESTLY CONTRARY TO SECTION 11(1) OF THE FRAUD ACT 2006.

[AB] on, dishonestly obtained certain services from Limited, namely the hire of a Ford Mondeo motor vehicle by falsely representing that he was in lawful possession of a credit card in the name of [CD] (give details)

3. Ingredients of the offence

Obtains

The offence requires the actual obtaining of the service. Therefore there must be evidence to prove that the accused did obtain the service alleged.

Services

The meaning is wide enough to embrace professional services, commercial services and financial services. The essential conditions are that a service must confer a benefit and be

²⁰ Section 54 Schedule 1 Part 2 of the Act.

rendered on the understanding that it has been or will be paid for. It can therefore include the dishonest obtaining of a bank or building society account, or the dishonest use of a credit card. It could also include the obtaining of a hire purchase agreement, since the finance company confers some benefit by agreeing to enter into such an agreement with the accused on the understanding that this benefit had been or would be paid for.

Dishonest act

The term *dishonest* bears its normal dictionary meaning, but if there is any doubt as to whether an accused has acted dishonestly two tests must be applied. Firstly, was what the accused did dishonest by the ordinary standards of reasonable and honest people? (Objective test). In this regard the officer hearing the charge must form his own view of what those standards are. Secondly, must the accused have realised that what they were doing would be regarded as dishonest by those standards? (Subjective test). If the officer hearing the charge is sure (after taking into account all the evidence) that the answer to both of these questions is yes, the element of dishonesty is proved. If the answer to either question is no, the element of dishonesty is not proved.

Intends

For intention generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Knows

Knows should be given its normal dictionary meaning. Actual knowledge on the part of the accused that the service was being made available to them on the basis that payment had been, was being, or would be made for or in respect of it must be proved, and the officer hearing the charge must be satisfied so that they are sure that this is so, before finding the charge proved. This question is a subjective one. This is proved, either directly, by the evidence of the principal accused, and/or through circumstantial evidence, see [Chapter 11](#) (Summary hearing – dealing with evidence).

Suspicion that the accused knew the basis on which the service was being provided to them is not enough. It is always open to the officer hearing the charge however, to base a finding of knowledge on evidence that the accused had deliberately shut his eyes to the obvious or refrained from inquiry because they suspected the truth but did not want to have his suspicion confirmed. It is vital therefore that the officer hearing the charge takes all the surrounding circumstances into account when deciding whether or not the necessary knowledge or belief existed.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

The accused may seek to show that they did not act intentionally but that his conduct was accidental or mistaken and that they were not acting dishonestly.

No dishonesty on the part of the accused in these circumstances would entail:

- a. A belief by the accused that they had a right in law to the service provided; or
- b. A belief by the accused that they would have had the victim's consent for the provision of the service to himself; or
- c. A belief that full payment for the service had been or would be made.

5. Notes

Where the accused uses a cheque, cheque card or credit card to obtain the service and it subsequently proves to be the case that the accused had no such account, insufficient funds in his account or had exceeded his credit limit, it is perfectly reasonable for the officer hearing the charge to assume that by using these purported means of payment, the accused was representing both that they had an account with the bank or credit card company concerned, and that in the ordinary course of events the cheque, cheque card or credit card would be honoured.

A person may be convicted of an offence contrary to subsections (2) – (4) inclusive although the accused either intended to make or made a gain on behalf of another.

Alternative charges

In certain circumstances, consideration may be given to alternative charges. For example, where an accused's obtaining of a service appears to be motivated more by inexperience or a lack of knowledge of the correct procedures or borne out of naivety, so that his conduct only borders on being dishonest, (in respect of a Service person only) a charge contrary to section 19 (conduct prejudicial to good order and discipline) of the Act may be more appropriate - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences). Alternatively where there is doubt of guilty intention administrative action may be considered.

Miscellaneous offences

Unlawful possession of a controlled drug

Section 5 of the Misuse of Drugs Act 1971 provides: -

- (1) Subject to any regulations under section 7 (relating to authorisation of activities otherwise unlawful) for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.
- (2) Subject to section 28 (relating to proof of lack of knowledge) of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.
- (3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.
- (4) [Defence to s5(2)] In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove [on the balance of probabilities]—
 - (a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or
 - (b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.[4(a) only relevant to an offence under s. 5(3) which may not be heard summarily]
- (5) . . . [Repealed by the Criminal Attempts Act 1981]
- (6) Nothing in subsection (4) ... above shall prejudice any defence which it is open to a person charged with an offence under this section to raise apart from that subsection.

Section 28 applies to s5(2): -

28 Proof of lack of knowledge etc to be a defence in proceedings for certain offences

- (1) [Defence to s5(2)]
- (2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove [on the balance of probabilities] that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

- (3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove [on the balance of probabilities] that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—
- (a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
- (b) shall be acquitted thereof—
- (i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or
- (ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.
- (4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.

1. Type of offence

The offence under subsection (2) (possession of a controlled drug) of the Misuse of Drugs Act 1971 **may be** heard summarily **without** permission of higher authority²¹.

The offence under subsection (3) (possession of a controlled drug with intent to supply) of the Misuse of Drugs Act 1971 is a Schedule 2 offence and may not be heard summarily²². For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under this section they must, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY UNLAWFUL POSSESSION OF A CONTROLLED DRUG CONTRARY TO SECTION 5(2) OF THE MISUSE OF DRUGS ACT 1971

[AB] on, unlawfully had in his possession a controlled drug of Class, namely, in contravention of section 5(1) of the Misuse of Drugs Act 1971.

3. Ingredients of the offence

Controlled drug

A controlled drug is defined by section 2 of the Misuse of Drugs Act 1971(c.38). These include for example; Cannabis, Cocaine, Ecstasy and Heroin. Further guidance on controlled drugs may be found in JSP 835 (Alcohol and Substance Misuse and Testing).

²¹ Section 53 Schedule 1 Part 1 of the Act.

²² Section 53 Schedule 2 of the Act.

Possession

A person is in possession of a drug if they have both control over it and the knowledge that it was under his control. Knowledge is an essential element for an offence under this section and a person cannot be said to be in possession of something without his knowledge. For example an offence would not be made out where drugs are put by another into an accused's house or pocket and the accused had no knowledge that they were there. However, a mistake as to the nature of the substance under the accused's control is not enough to prevent them being in possession, for example, believing heroin to be a lesser class of drug such as cannabis or a legal substance such as aspirin does not prevent the offence.

The possession of a package or a box leads to a strong inference of possession of the contents. However, if the contents are quite different in kind from what the accused believed them to be then they may not be in possession of them. In this case the accused must prove that either:

- a. They had no right to open the package and no reason to suspect that its contents were drugs; or
- b. They had no knowledge of, or had made a genuine mistake as to the nature of the contents even though they were the owner, and they had received the package innocently and had no opportunity to acquaint himself with the contents.

A person will not be out of possession merely because the drug concerned is not physically held by them or about his person. They will remain in possession even when it is in the custody of another (e.g. in the accused's locker or elsewhere) if they have effective control over it.

A person will not be in possession of a controlled drug if at the material time they had consumed it, although traces were found in their urine. This is because, when consumed, the drug's character will change and as such is not then in a person's possession.

Quantity

It is not necessary to prove possession of a usable quantity of the drug; possession of any quantity, provided it is measurable, will suffice. However, a mere droplet which can only be seen under a microscope is not sufficient. Quantity may also be relevant to the issue of evidence. For example where the issue is the accused's knowledge and the amount of the illegal drug found is minute (grains of heroin powder on clothing) this may support the accused's defence that they did not know they possessed it.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Defences are provided by section 5(4) and section 28 of the Misuse of Drugs Act 1971. Section 5(4) is subject to section 28.

5. Notes

Spare.

Criminal damage

Section 1 of the Criminal Damage Act 1971 provides: -

- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.**
- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—**
 - (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and**
 - (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;****shall be guilty of an offence.**
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.**

Section 2

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried, -

- (a) To destroy or damage any property belonging to that other or a third person; or**
- (b) To destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person; shall be guilty of an offence.**

Section 3

A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it-

- (a) To destroy or damage any property belonging to some other person; or**
- (b) To destroy or damage his own or the users property in a way which he knows is likely to endanger the life of some other person; shall be guilty of an offence.**

(Section 4 (omitted))

Section 5

- (1) This section applies to any offence under section 1(1) ...(remainder of this subsection is omitted).**
- (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—**

- (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; or
 - (b) if he destroyed or damaged the property in question in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—
 - (i) that the property, right or interest was in immediate need of protection; and
 - (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
- (3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.
- (4) For the purposes of subsection (2) above a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.
- (5) This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

(Section 6-9 omitted)

Section 10

- (1) In this Act “property” means property of a tangible nature, whether real or personal, including money and—
- (a) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but
 - (b) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.
- For the purposes of this subsection “mushroom” includes any fungus and “plant” includes any shrub or tree.
- (2) Property shall be treated for the purposes of this Act as belonging to any person—
- (a) having the custody or control of it;
 - (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
 - (c) having a charge on it.
- (3) Where property is subject to a trust, the persons to whom it belongs shall be so treated as including any person having a right to enforce the trust.
- (4) Property of a corporation sole shall be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.
- (5) For the purposes of this Act a modification of the contents of a computer shall not be regarded as damaging any computer or computer storage medium unless its effect on that computer or computer storage medium impairs its physical condition.

(Subsequent sections omitted)

1. Type of offence

An offence under section 1(1) may be heard summarily without permission of higher authority²³.

An offence under section 1(2) of the Criminal Damage Act 1971 i.e. damaging or destroying property with the intent to endanger life is listed in Schedule 2 of the Act and may not be heard summarily²⁴. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate a Schedule 2 offence may have been committed they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An offence under section 1(3), section 2 or section 3 may not be heard summarily. As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed under these sections they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DAMAGING PROPERTY CONTRARY TO SECTION 1(1) OF THE CRIMINAL DAMAGE ACT 1971

[AB] on, did without lawful excuse damage a caravan belonging to [CD], intending to damage such property or being reckless as to whether such property would be damaged, thereby occasioning a loss to [CD] of £300.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DESTROYING PROPERTY CONTRARY TO SECTION 1(1) OF THE CRIMINAL DAMAGE ACT 1971

[AB] on, did without lawful excuse destroy a Sparto Airjet pair of skis belonging to [CD], intending to destroy such property or being reckless as to whether such property would be destroyed, thereby occasioning a loss to [CD] of £500.

3. Ingredients of the offence

Destroys or damages

Damage is interpreted widely to include not only permanent or temporary physical harm, but also permanent or temporary impairment of value or usefulness. Destroy goes beyond damage and has its normal dictionary meaning, including total demolition.

Property

See section 10 (above) of the Criminal Damage Act 1971.

Belonging to another

For the purposes of this offence, property *belongs* to any person who has custody or control of it, has any proprietary right or interest in it or has a charge on it.

Intending

²³ Section 53 Schedule 1 Part 1 of the Act.

²⁴ Section 53 Schedule 2 of the Act.

For intention generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Recklessness

An accused acts recklessly with respect to:

- a. A circumstance when they are aware of a risk that it exists or will exist; and
- b. A result when they are aware of a risk that it will occur and it is, in the circumstances known to them, unreasonable to take the risk.

For example, if an accused throws a stone at a person walking past a glass window and the stone breaks the window. Assuming the accused is aware that there is a risk that given the circumstances the result will be that the window will shatter, they will be reckless if, in the circumstances, it was unreasonable for them to throw the stone.

Without lawful excuse

For lawful excuse generally see [Chapter 12](#) (Defences, Mitigation and Criminal Responsibility).

See section 5 (above) of the Criminal Damage Act 1971 and comments under defences below.

4. Defences

For defences generally see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Intoxication

The statutory defence under section 5(2) can be applicable to an accused even if they were voluntarily intoxicated at the time. Therefore an accused may have a defence if through drink they mistakenly but honestly believed that they owned the property that they damaged or destroyed.

Where the defence under section 5(2)(b)(i) of the Criminal Damage Act 1971 is raised by an accused, the requirement of immediacy is satisfied if the threat to the accused's property etc is already happening.

5. Notes

Where the destruction or damage of the property appears to be racially or religiously motivated (see section 30 Crime and Disorder Act 1998), the advice of a staff legal adviser should be sought.

Interference with vehicles

Section 9 of the Criminal Attempts Act 1981 provides:

- (1) A person is guilty of the offence of vehicle interference if he interferes with a motor vehicle or trailer or with anything carried in or on a motor vehicle or trailer with the intention that an offence specified in subsection (2) below shall be committed by himself or some other person.
- (2) The offences mentioned in subsection (1) above are—
 - (a) theft of the motor vehicle or trailer or part of it;
 - (b) theft of anything carried in or on the motor vehicle or trailer; and
 - (c) an offence under section 12(1) of the Theft Act 1968 (taking and driving away without consent);and, if it is shown that a person accused of an offence under this section intended that one of those offences should be committed, it is immaterial that it cannot be shown which it was.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority²⁵.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY INTERFERENCE WITH VEHICLES CONTRARY TO SECTION 9 OF THE CRIMINAL ATTEMPTS ACT 1981

[AB] on, at interfered with the front passenger window of a motor vehicle registration HC98 XCB with intent to steal from that vehicle.

3. Ingredients of the offence

Interferes with

Interferes has no statutory definition and should be construed using the normal dictionary meaning as it relates to the facts of the particular case. For example, looking into a vehicle is not interference, but looking in and applying pressure to the door handle may constitute interference.

Motor vehicle

This is defined as *a mechanically propelled vehicle intended or adapted for use on roads*²⁶. Whether a vehicle is intended for use on roads does not depend on the intent of the user or manufacturer. It is a question of fact for the officer hearing the charge to determine from the evidence whether a vehicle is intended or adapted for use on roads. In most cases this will be obvious.

Trailer

This is defined as *a vehicle drawn by a motor vehicle*²⁷. To be drawn, a trailer must be attached to a motor vehicle.

4. Defences

²⁵ Section 53 Schedule 1 Part 1 of the Act.

²⁶ Road Traffic Act 1988 section 185(1).

²⁷ Road Traffic Act 1988 section 185(1).

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Lack of intention

Mere recklessness on the part of the accused as to whether they are committing an offence under section 9 of the Criminal Attempts Act 1981 is not sufficient.

The accused may assert that they intended to interfere with a vehicle, but not with the intention of committing one of the stipulated offences, for example, due to some reason of necessity.

5. Notes

This offence is not applicable to pedal cycles, however, a pedal cycle fitted with an engine is a motor vehicle as would be a motor cycle²⁸.

²⁸ Road Traffic Act 1988 section 185(1).

Road traffic offences

Careless and inconsiderate driving

Section 3 of the 1988 Road Traffic Act provides:

- (1) If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.²⁹ A person convicted of an offence under this section shall be liable to a fine not exceeding level 5 on the standard scale (£5000).

1. Type of offence

An offence under section 3 of the Road Traffic Act 1988 (c.52) **may be** heard summarily **without** permission of higher authority³⁰.

Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42 because they are not public roads. Where local orders or standing orders create driving offences a charge of contravening standing orders drawn under section 13 of the Act may be preferred see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on, drove a mechanically propelled vehicle on a road [or other public place] namely without due care and attention.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY INCONSIDERATE DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988.

[AB] on, drove a mechanically propelled vehicle on a road [or other public place] namely without reasonable consideration for other persons using the said road [or place].

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS DRIVING CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on, drove a mechanically propelled vehicle, namely a Red Vauxhall Astra Vehicle Registration Number HV52 HOT1 on a road [or other public place] without due care and attention.

²⁹ This section is printed as substituted by Road Traffic Act 1991, section 2.

³⁰ Section 53 Schedule 1 Part 1 of the Act.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITHOUT REASONABLE CONSIDERATION CONTRARY TO SECTION 3 OF THE ROAD TRAFFIC ACT 1988

[AB] on, drove a mechanically propelled vehicle, namely a Red Vauxhall Astra Vehicle Registration Number HV52 HOT1 on a road [or other public place] without reasonable consideration for other persons using the road [or place].

3. Ingredients of the offence

The offence may take one of two forms:

Careless driving ('driving without due care and attention')

The test is whether the accused was exercising the degree of care and attention that a reasonable, competent and prudent driver would exercise in the circumstances. If the conduct was not inconsistent with that of a reasonably prudent driver, the offence is not proved. Therefore the test is an objective one where the safety of other road users should be considered. The police and CPS have issued an agreed Driving Offences Charging Standard in which the following are given as examples which may support an allegation of careless driving: overtaking on the inside, driving too close to another vehicle, driving through a red light, reading a map, nodding off etc.

Driving without reasonable consideration

The test is whether other road users were actually inconvenienced by the accused's inconsiderate driving. Therefore if no one was actually inconvenienced the offence will not be made out. While such driving will usually also constitute driving without due care and attention (described in (a) above) this is not necessarily the case. For example a motorist who jumps a queue of vehicles in order to force his way to the head of a line of waiting vehicles; such behaviour might constitute driving without reasonable consideration, depending on the evidence available from other road users. Other examples include: flashing of lights to force drivers in front to give way, braking without good cause, or driving through a puddle causing pedestrians to be splashed. The *other persons using the road or place* will include the accused's own passengers.

The facts of a particular case (e.g. failing to negotiate a curve in the road and hitting a telegraph pole) may be such that, in the absence of any explanation (e.g. skidding on a patch of oil that was impossible to foresee), the only proper inference is that the driving was careless.

Drives

The test of whether a person is driving a vehicle is whether they are controlling the movement and direction of the vehicle. A passenger could be said to be driving a vehicle if they take control of the steering wheel, but the determinant as to whether someone is driving a vehicle is a question of fact and degree. The word *drives* must be construed in accordance with its normal dictionary meaning.

Mechanically propelled vehicle

Whether a vehicle is mechanically propelled is a question of fact and is for the prosecution to prove, but has a broad meaning and can cover mopeds and motorcycles.

Road or other public place

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*³¹. There is no separate definition of public place and this should be given its normal dictionary meaning.

Although there may be exceptional circumstance in which roads on Service establishments can be regarded as accessible to the public, this will rarely be the case. Where an accused has driven carelessly on a road within a Service establishment, consideration should be given to charging them under section 13 (contravention of standing orders) or section 19 (conduct prejudicial to good order and discipline) of the Act. MOD property will not generally qualify as a public place.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Automatism

In an ordinary case, once it has been shown that the accused was in the driver's seat of a vehicle, there is a strong inference that they were the driver. The accused may have a defence if they can bring evidence that tends to support his contention that they were rendered incapable of controlling the car, e.g. by being knocked unconscious. Falling asleep at the wheel may constitute reckless driving.

Mechanical defect

Where the apparently careless driving was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the driver.

No offence is committed under section 3 where the driving took place in the course of an authorised motoring event³² under regulations made from time to time by the Secretary of State by Statutory Instrument.

5. Notes

Spare.

³¹ Road Traffic Act 1988, section 192(1).

³² Road Traffic Act 1988, section 13A..

Driving or being in charge with excess alcohol

Section 5 of the Road Traffic Act 1988 provides:

- (1) A person is guilty of the offence of driving or being in charge of a motor vehicle if:
 - (a) drives or attempts to drive a motor vehicle on a road or other public place, or
 - (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.
- (2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.
- (3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³³. Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42 because they are not public roads. Where local orders or standing orders create driving offences a charge under section 13 (contravention of standing orders) of the Act may be preferred - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITH EXCESS ALCOHOL CONTRARY TO SECTION 5(1)(a) OF THE ROAD TRAFFIC ACT 1988

[AB] on, [drove] [attempted to drive] a motor vehicle on [a road][at, a public place] having consumed alcohol in such a quantity that the proportion thereof in his [blood][urine][breath] exceeded [80 milligrammes of alcohol in 100 millilitres of blood][107 milligrammes of alcohol in 100 millilitres of blood][35 microgrammes of alcohol in 100 millilitres of breath] the prescribed limit.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DRIVING WITH EXCESS ALCOHOL CONTRARY TO SECTION 5(1)(b) OF THE ROAD TRAFFIC ACT 1988

[AB] on, was in charge of a motor vehicle on [a road][at, a public place] having consumed alcohol in such a quantity that the proportion thereof in his [blood][urine][breath] exceeded [80 milligrammes of alcohol in 100 millilitres of blood][107 milligrammes of alcohol in 100 millilitres of blood][35 microgrammes of alcohol in 100 millilitres of breath] the prescribed limit.

³³ Section 53 Schedule 1 Part 1 of the Act.

3. Ingredients of the offence

Drives

The test of whether a person is driving a vehicle is whether they are in a substantial sense controlling the movement and direction of the vehicle. Where a passenger intentionally grabs the wheel, they are not driving, but interfering with the driving of the vehicle.

Attempts

See notes under Sections 39, 43, 44 and 48 for offence of Attempt.

Mechanically propelled vehicle

Whether a vehicle in question is mechanically propelled is a question of fact and it is for the prosecution to prove that it was.

Road or other public place

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*³⁴. The question of whether or not a particular road is one to which the public has access is one of fact and degree. There is no separate definition of public place, this should be given its normal dictionary meaning. For example, if a restricted class of person only is permitted or invited to have access, the place is a private place, whereas if only a restricted class of person is excluded, the place is a public place. For a dual use place – sometimes with private access, sometimes with public access – the offence can only be committed during the time there is public access.

In charge

A person is in charge of a vehicle if they act in a manner which shows that they assume control or intends to assume control of the vehicle preparatory to driving it. A person can be in charge of a vehicle that is immobile, e.g. through clamping. It is not necessary for the person to be in the vehicle to be in charge of it. The circumstances to be taken into account for determining whether a person is in charge will vary infinitely, but the following will be relevant: (a) whether and where the accused is in the vehicle or how far they are from it; (b) what they are doing at the relevant time; (c) whether they are in possession of a key that fits the ignition; (d) whether there is any evidence of an intention to take or assert control of the car by driving it or otherwise; and (e) whether any other person is in, at or near the vehicle and, if so, the like particulars in respect of that person.

The prescribed limit

The prescribed limits are (a) 35 microgrammes of alcohol in 100 millilitres of breath; (b) 80 milligrammes of alcohol in 100 millilitres of blood; (c) 107 milligrammes of alcohol in 100 millilitres of urine.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

There is a statutory defence at subsection (2) above to the offence of being in charge. The burden of proof is on the accused and it is for them to prove on the balance of probability that there was no likelihood of them driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

³⁴ Road Traffic Act 1988 section 192(1).

5. Notes

The charge must state which specimen (breath/blood/urine) is to be relied on for the purposes of proving the charge.

Tampering with motor vehicles

Section 25 of the Road Traffic Act 1988 provides:

If, while a motor vehicle is on a road or on a parking place provided by a local authority, a person—

- (a) gets on to the vehicle, or
- (b) tampers with the brake or other part of its mechanism,

without lawful authority or reasonable cause he is guilty of an offence.”

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³⁵. Offences committed in the UK outside MOD property should normally be tried in the civil courts which have powers of disqualification and endorsement of licences which are not available in Service proceedings.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create driving offences a charge under section 13 (contravention of standing orders) of the Act may be preferred, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas cannot be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY [GETTING ON TO] [TAMPERING WITH] A MOTOR VEHICLE WITHOUT LAWFUL AUTHORITY OR REASONABLE CAUSE CONTRARY TO SECTION 25 OF THE ROAD TRAFFIC ACT 1988

[AB] on, without lawful authority or reasonable cause [got on to a motor cycle] [released the handbrake of motor vehicle], registered number in [Victory Road] [Hardy municipal car park].

3. Ingredients of the offence

Road

Road means *any highway and any other road to which the public has access, and includes bridges over which a road passes*³⁶. The question of whether or not a particular road is one to which the public has access is one of fact and degree.

A parking place provided by a local authority

The parking place must have been provided by a recognised local authority, and in connection with avoiding congestion etc. on a road. Car parks will not generally qualify as parking places. May not include a parking place provided by a local authority abroad. Legal advice should be sought as to whether a parking space is a qualifying parking space for the purposes of RTA 88 s.25.

³⁵ Section 53 Schedule 1 Part 1 of the Act.

³⁶ Road Traffic Act 1988 section 192(1).

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility). It is a defence that the person had lawful authority or reasonable excuse. For example, a person would not be liable to be convicted of the offence if they had the authority of the owner or released the hand brake of the vehicle in order to move it when it was causing an obstruction.

5. Notes

Spare.

Dangerous cycling

Section 28 of the Road Traffic Act 1988 provides:

- (1) A person who rides a cycle on a road dangerously is guilty of an offence.
- (2) For the purposes of subsection (1) above a person is to be regarded as riding dangerously if (and only if) —
 - (a) the way he rides falls far below what would be expected of a competent and careful cyclist, and
 - (b) it would be obvious to a competent and careful cyclist that riding in that way would be dangerous.
- (3) In subsection (2) above ‘dangerous’ refers to danger either of injury to any person or of serious damage to property; and in determining for the purpose of that subsection what would be obvious to a competent and careful cyclist in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to be in the knowledge of the accused.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³⁷.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create cycling offences a charge under section 13 (contravention of standing orders) of the Act may be preferred, see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY DANGEROUS CYCLING CONTRARY TO SECTION 28 OF THE ROAD TRAFFIC ACT 1988

[AB] on, rode a cycle dangerously on a road.

3. Ingredients of the offence

Rides

This term is to be given its normal dictionary meaning but an offence will not be committed where the accused is merely *wheeling* the cycle.

Cycle

Cycle means a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle.

³⁷ Section 53 Schedule 1 Part 1 of the Act.

Road

Road for the purposes of this offence means any highway and any other road to which the public has access, and includes bridges over which a road passes.

In this context, *the public* means the general public and not members of a limited class and access must be lawful access. In many instances therefore this will exclude roads that go through a Service establishment.

Whether a particular area of land is a road is a matter of fact but guidance might be found by considering its physical character and function. The proper function of a road is to enable traffic to move along it to a destination. Therefore a car park does not qualify as a road as its primary function is to enable vehicles to stop and wait within it.

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Automatism

The accused may have a defence if they can bring evidence that tends to support his contention that they were rendered incapable of controlling the cycle, e.g. by being distracted by a swarm of bees.

Mechanical defect

Where the apparently dangerous cycling was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the cyclist.

5. Notes

This offence takes no account of the accused's personal circumstances, for example his age, proficiency or experience as a cyclist. For this charge to be proved, the accused must ride a cycle in a manner that falls below the standards that would be expected of a competent and careful cyclist. This is an objective test. It focuses on the manner that a bicycle is ridden and not on the accused's state of mind. It is however also necessary to prove that in riding the bicycle in the manner alleged it would have been obvious to a competent and careful cyclist that riding in the way alleged was dangerous. In determining this matter, the officer hearing the charge must therefore take into account the circumstances at the time of the incident.

Minor cycling errors would not amount to an offence under this section of the Road Traffic Act 1988 but might amount to careless or inconsiderate cycling, see Careless and Inconsiderate Cycling.

Careless and inconsiderate cycling

Section 29 of the Road Traffic Act 1988 provides:

If a person rides a cycle on the road without due care and attention, or without reasonable consideration for other persons using the road, he is guilty of an offence.

1. Type of offence

This offence **may be** heard summarily **without** permission of higher authority³⁸.

Offences committed on MOD property cannot normally be tried under section 42. Where local orders or standing orders create cycling offences a charge under section 13 (contravention of standing orders) of the Act may be preferred - see [Chapter 7](#) (Non-criminal conduct (disciplinary) offences).

Offences committed on public roads overseas can be charged under this section.

2. Specimen charges

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY CARELESS CYCLING CONTRARY TO SECTION 29 OF THE ROAD TRAFFIC ACT 1988

[AB] on, rode a cycle on a road without due care and attention.

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY RIDING A CYCLE WITHOUT CONSIDERATION FOR OTHER ROAD USERS CONTRARY TO SECTION 29 OF THE ROAD TRAFFIC ACT 1988

[AB] on, rode a cycle on a road without reasonable consideration for other persons using the road.

3. Ingredients of the offence

Cycle

Cycle means a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor vehicle.

Road

Road for the purposes of this offence means any highway and any other road to which the public has access, and includes bridges over which a road passes. In this context, 'the public' means the general public and not members of a limited class and access must be lawful access. In many instances therefore this will exclude roads that go through a Service establishment.

Whether a particular area of land is a road is a matter of fact but guidance might be found by considering its physical character and function. The proper function of a road is to enable traffic to move along it to a destination. Therefore a car park does not qualify as a road as its primary function is to enable vehicles to stop and wait within it.

³⁸ Section 53 Schedule 1 Part 1 of the Act.

Due care and attention

It must be proven that the accused's standard of cycling fell below that which could be expected of a reasonable, prudent and competent cyclist in all the attendant circumstances and that his actions were voluntary. An objective standard is applied and so the, proficiency or experience of the cyclist is irrelevant. However, the officer hearing the charge may take into account local factors for example the level of traffic, the conditions of the road etc.

Inconsiderate cycling

In order to prove that an accused cycled in an inconsiderate manner, it must be proven that some other persons on the road were inconvenienced.

Other persons on the road

This will include other road users and might also include pedestrians who are affected by the manner of cycling. It refers to persons actually on the road at the material time and not those who might reasonably be expected to be there

4. Defences

For defences generally, see [Chapter 12](#) (Defences, mitigation and criminal responsibility).

Automatism

The accused may have a defence if they can bring evidence that tends to support his contention that they were rendered incapable of controlling the cycle, e.g. by being distracted by a swarm of bees.

Mechanical defect

Where the apparently careless and inconsiderate cycling was caused by a sudden and total loss of mechanical control which was in no way due to the fault of the cyclist.

5. Notes

Careless cycling and inconsiderate cycling are distinct offences and therefore when drafting the charge, it is necessary to indicate which form of misconduct the accused is alleged to have carried out. A charge which alleges that an accused has cycled on a road without due care and attention and without reasonable consideration for other road users is bad for duplicity.

The officer hearing the charge may find a charge proven if in the absence of a satisfactory explanation, and in the absence of a reasonable explanation to the contrary, the facts point inferentially to carelessness beyond reasonable doubt.

Section 43 – 48 offences (Armed Forces Act 2006)

Attempting criminal conduct

43. Attempting Criminal Conduct

- (1) Subsection (2) applies for the purpose of determining whether an attempt is an offence under section 42.
- (2) For that purpose section 1(4) of the Criminal Attempts Act 1981 (c. 47) (offences that it is an offence to attempt) has effect as if for the words from “offence which” to “other than” there were substituted “offence under section 42 of the Armed Forces Act 2006 consisting of an act punishable by the law of England and Wales as an indictable offence or an act that, if done in England or Wales, would be so punishable by that law; but “indictable offence” here does not include”.
- (3) Section 42(6) applies for the purposes of section 1(4) of the Criminal Attempts Act 1981 as modified by this section.

1. Type of offence

An offence under this section **may be** heard summarily **as long as** the full offence may also be heard summarily³⁹.

Where the offence appears in Schedule 2 (paragraphs 12 and 13(a)) of the Act, or an offence which has been committed in prescribed circumstances, it may not be heard summarily⁴⁰. For the handling of cases in relation to Schedule 2 and prescribed circumstances offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed in prescribed circumstances or be a Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence attempted is not in Schedule 2 or committed in prescribed circumstances but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter. In all cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

An attempt to commit an offence which is listed at Schedule 1 Part 1 of the Act may be dealt with summarily. Permission is required from HA to deal summarily with an attempt to commit an offence set out in Schedule 1 Part 2 of the Act.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ATTEMPTING TO COMMIT [state crime e.g. THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968 CONTRARY TO SECTION 1(1) OF THE CRIMINAL ATTEMPTS ACT 1981]

[AB] on, did attempt to steal a watch, the property of.....

³⁹ Section 53 of the Act.

⁴⁰ Section 53, section 114 and Schedule 2 of the Act.

3. Notes

The effect of this section substitutes the words in section 1 of the Criminal Attempts Act 1981, so that it reads:

- (1) If, with intent to commit an offence to which this Attempting section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.**
- (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.**
- (3) In any case where—**
 - (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but**
 - (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.**
- (4) This section applies to any offence under section 42 of the AFA 06 consisting of an act punishable by the law of England and Wales as an indictable offence or an act that, if done in England and Wales, would be so punishable by that law; but “indictable offence” here does not include-**
 - (a) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment);**
 - (b) aiding, abetting counselling and procuring or suborning the commission of an offence;**
 - (c) offences under section 4(1) and 5(1) of the Criminal Law Act 1967.**

(s.1 CAA 1981)

This section applies to any attempt to commit a civil offence under section 42 of the Act. An attempt is where an accused has embarked upon an offence but where the offence has not been completed. To be guilty of this offence an accused must intend to commit the offence and in relation to that offence, they must have done acts which are more than merely preparatory. For example, if an accused arms himself with a gun and forces his way into an office block and subsequently draws his gun towards his intended victim but is disarmed before they could shoot his victim, they would be charged with attempted murder. An accused who uses a crow bar to prise a window but is arrested before they can enter the building could be charged with attempted burglary.

The case can be found proved even where the accused was attempting the impossible. For example, if an accused attempted to sell what they believed to be ecstasy tablets, however they were in fact paracetamol, although it would be impossible for them to supply a class A drug contrary to section 4(3) of the Misuse of Drugs Act 1971, the case would be found proved in respect of attempting to supply a controlled drug.

Any attempt to commit a non-criminal conduct (disciplinary) offence as detailed in section 53(2) is dealt with under section 39 above.

Trial of section 42 offence of attempt

44. Trial of section 42 offence of attempt

- (1) Where, in proceedings for a section 42 offence of attempt, there is evidence sufficient in law to support a finding that the defendant did an act falling within subsection (1) of section 1 of the Criminal Attempts Act 1981, the question whether his act fell within that subsection is a question of fact.
- (2) In this section “a section 42 offence of attempt” means an offence under section 42 consisting of an act that is, or that would be if done in England or Wales, an offence under section 1(1) of the Criminal Attempts Act 1981 (c. 47).
- (3) References in subsections (1) and (2) to section 1(1) of the Criminal Attempts Act 1981 are to that provision as it has effect by virtue of section 43 above.

1. Notes

See the notes at section 43 of this chapter for further information on the offence of attempt.

Where there is evidence to support a finding that the accused did an act which amounted to an attempt contrary to section 42, it is a question for the officer hearing the charge or the CM as to whether the act was an attempt, as distinct from mere preparation for the commission of an offence.

Conspiring to commit criminal conduct

45. **Conspiring to commit criminal conduct**
- (1) **For the purpose of determining whether an agreement that a course of criminal conduct be pursued is an offence under section 42—**
- (a) **sections 1(1) and 2 of the Criminal Law Act 1977 have effect as if any reference to an offence included a reference to an act that, if done in England or Wales, would be punishable by the law of England and Wales; and**
- (b) **section 1(2) of that Act has effect as if it read—**
- “(2) **Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of it, a person is nevertheless not guilty by virtue of subsection (1) above of conspiracy to commit—**
- (a) **that offence, or**
- (b) **an act that would amount to that offence if done in England or Wales, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence, or the act, is to take place.”**
- (2) **Section 42(6) applies for the purposes of section 1(2) of the Criminal Law Act 1977 as substituted by this section.**

1. Type of offence

An offence under this section **may be** heard summarily **as long as** the full offence may also be heard summarily⁴¹.

Where the offence appears in Schedule 2 (paragraphs 12 and 13(b)) of the Act, or an offence which has been committed in prescribed circumstances, it may not be heard summarily⁴². For the handling of cases in relation to Schedule 2 and prescribed circumstances offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate an offence may have been committed in prescribed circumstances or be a Schedule 2 offence they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

Where a CO becomes aware that the offence is not in Schedule 2 nor committed in prescribed circumstances but nevertheless may not be dealt with summarily, they should, as soon as is practicable, make the Service Police aware of the matter.

In all cases, legal advice should be sought at an early stage. Framing of conspiracy charges is especially complex and COs should not bring a conspiracy charge without legal advice. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Notes

In an offence of conspiracy agreement is essential. The agreement must propose a course of action that results in one of the parties to the agreement committing an offence.

The effect of the above section amends the Criminal Law Act 1977 to read:

⁴¹ Section 53 of the Act.

⁴² Section 53, section 114 and Schedule 2 of the Act.

1. (1) Subject to the following provisions of this Part of this Act if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.
 - (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of it, a person is nevertheless not guilty by virtue of subsection (1) above of conspiracy to commit—
 - (a) that offence, or
 - (b) an act that would amount to that offence if done in England or Wales, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence, or the act, is to take place.
-
2. (1) A person shall not by virtue of section 1 above be guilty from liability of conspiracy to commit any offence if he is an intended victim for conspiracy of that offence.
 - (2) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say—
 - (a) his spouse;
 - (b) a person under the age of criminal responsibility; and
 - (c) *an intended victim of that offence or of each of those offences.*
 - (3) A person is under the age of criminal responsibility for the purposes of subsection (2)(b) above so long as it is conclusively presumed, by virtue of section 50 of the Children and Young Persons Act 1933, that he cannot be guilty of any offence

Encouraging or assisting criminal conduct

46. Encouraging or assisting criminal conduct

- (1) Subsection (2) applies if a person subject to service law, or a civilian subject to service discipline, encourages or assists the doing of an act (or one or more of a number of acts) that, if done in England or Wales would be punishable by the law of England and Wales.
- (2) Regardless of where that act (or those acts) might be done and of his state of mind with respect to that question, his encouragement or assistance shall be treated for the purposes of section 42(1) as an act that is punishable by the law of England and Wales (so far as it is not such an act in any event).
- (3) Reference in this section to encouraging or assisting is to an act that would constitute an offence under Part 2 of the Serious Crime Act 2007 disregarding any provision in that Part about the place where the act (or acts) being encouraged or assisted might be done or the accused's state of mind with respect to that question.

(AFA06 s.46)

1. Type of offence

Encouragement and assistance to commit an offence which is listed at Schedule 1 Part 1 **may be** heard summarily. Encouragement and assistance to commit an offence which is listed at Schedule 1 Part 2 of the Act may be dealt with summarily with permission from HA. Given the nature of this offence, legal advice should be sought from a staff legal adviser.

Encouragement and assistance to commit an offence which is listed in Schedule 2 (paragraph 12 and 13(c)) may not be heard summarily⁴³. For the handling of cases in relation to Schedule 2 offences see [Chapter 6](#) (Investigation, charging and mode of trial). As soon as a CO becomes aware of an allegation or circumstances that indicate a Schedule 2 offence may have been committed they must, as soon as is practicable, make the Service Police aware of the matter. In all such cases, legal advice should be sought at an early stage. For the Service Police this will be the DSP and for the CO the appropriate staff legal adviser.

2. Specimen charge

COMMITTING A CRIMINAL CONDUCT OFFENCE CONTRARY TO SECTION 42 OF THE ARMED FORCES ACT 2006 NAMELY ENCOURAGING OR ASSISTING THE COMMISSION OF [state crime e.g. THEFT CONTRARY TO SECTION 1(1) OF THE THEFT ACT 1968 CONTRARY TO SECTION 44(1) OF THE SERIOUS CRIME ACT 2007].

[AB] on, did unlawfully encourage or assist to steal, property belonging to

3. Notes

A charge of encouraging or assisting may be found proved if:

- a. They encourage or assist another to do or cause to be done an act or acts which would amount to an offence by the other; and
- b. They intend or believe that the other, if they acts as encouraged or assisted, shall or will do so with the fault required for the offence or offences.

⁴³ Section 53 Schedule 2 of the Act.

This is not limited to urging or spurring on with advice or persuasion but includes encouraging or assisting another to do an act by threats or by pressure or by bribing a person to commit an offence.

Aiding, abetting, counselling or procuring criminal conduct

47. **Aiding, abetting, counselling or procuring criminal conduct**
- (1) **Subsection (2) applies if—**
- (a) **any person (“A”) does an act that is punishable by the law of England and Wales or would be so punishable if done in England or Wales; and**
 - (b) **a person subject to service law, or a civilian subject to service discipline, aids, abets, counsels or procures A’s doing of that act.**
- (2) **Regardless of where the act aided, abetted, counseled or procured was done, the aiding, abetting, counseling or procuring shall be treated for the purposes of section 42(1) as an act that is punishable by the law of England and Wales.**
- (3) **For the purpose of determining whether an attempt is an act that falls within subsection (1)(a) above, section 1(4) of the Criminal Attempts Act 1981 (c. 47) has effect with the modification made by section 43.**

1. Type of offence

An individual who aids, abets, counsels or procures the commission of any criminal conduct offence (section 42) is treated under section 47 as though they committed the offence himself (as a principal offender) and charged with the principal offence. Therefore the guidance for the principal offence in this chapter applies.

2. Specimen charges

No offence will be charged under this section. The accused will always be charged as the principal offender under the section of the principal offence.

3. Notes

A person may be responsible for criminal action, either as the person who commits the offence or as an accessory. An accessory may aid, abet counsel or procure the commission of the offence.

The words *aid* or *abet* describe the action of a person who is present at the time of the commission of the offence and takes some part in it. However it could include, for example, providing equipment to use in a burglary, which has already been decided upon. In these circumstances a person is aiding and abetting even though they are not present at the scene of the offence. Therefore, where a person (the principal offender) damages Service property (section 24) then an accused who has aided or abetted the damaging of the property would also be charged with the same offence, a person who aids and abets a theft under section 1 of the Theft Act 1968 will be charged as committing an offence contrary to section 42 of the Act, that is to say theft under that section. If a person is present at the scene and has the right and ability to control the person committing the offence, if they fail to exercise that control, it could make them an accomplice to the offence.

Counselling relates to advice to the offender which takes place before the commission of the offence, and *procuring* means to produce by endeavour.

An example of procuring is the *spiking* of drinks following which the victim drives and commits the offence of driving a motor vehicle with an alcohol concentration above the prescribed limit.

Provisions supplementary to sections 43 to 47

- 48. Provisions supplementary to sections 43 to 47**
- (1) This section applies where—**
- (a) an attempt, agreement or encouragement or assistance, or a person’s aiding, abetting, counselling or procuring, is an offence under section 42 by reason of section 43, 45, 46 or 47; and**
 - (b) the act to which it relates (“the contemplated act”) is not an act that is (or that if done would have been) punishable by the law of England and Wales.**
- (2) For the following purposes it shall be assumed that the contemplated act amounted to the offence under the law of England and Wales that it would have amounted to if it had been the equivalent act in England or Wales.**
- (3) Those purposes are—**
- (a) the purpose of determining what punishment may be imposed for the offence under section 42;**
 - (b) the purpose of determining for the purposes of any of the following provisions of this Act whether the act constituting the offence under section 42, or the equivalent act done in England or Wales, is or would be—**
 - (i) an offence under the law of England and Wales;**
 - (ii) any particular such offence;**
 - (iii) such an offence of any particular description.**

1. Notes

The effect of this section is that for the purposes set out in section 48(3) it is assumed that a contemplated act (as defined) amounted to an offence in England and Wales, it would have been equivalent to had it occurred there. It means that an offence can be committed under section 42 by virtue of an attempt, agreement or encouragement or assistance, or a person’s aiding, abetting, counselling or procuring even though the contemplated act was outside of the jurisdiction.

TRANSITIONAL GUIDANCE

