

**NOT PROTECTIVELY MARKED**

**Application of the Criminal Justice (Scotland) Act 2016 to Arrests of Service Personnel**

**The guidance below is intended to provide quick guidance to custody staff in relation to the rights of persons arrested under the Armed Forces Act 2006.**

**For full information please consult The Armed Forces Act 2006 and Criminal Justice (Scotland) Act 2016**

Section 58 of the Criminal Justice Scotland Act 2016 (CJSA 2016) specifically dis-applies Part 1 of CJSA 2016 from applying to arrests under the Armed Forces Act 2006 (AFA 2006). Notwithstanding, reserved legislation has been introduced to apply some of the provisions of the CJSA 2016 to arrests for service offences.

The applicable service offences under the AFA 2006 are as follows.

- **S 313 AFA 2006 - Arrest under judge advocate warrant**
- **S 314 AFA 2006 - Arrest of deserters and AWOL**
- **S 315 AFA 2006 - Deserters and absentees AWOL - surrendering to constable**
- **S 315(4) (a) AFA 2006 - Surrender of deserters and AWOL transfer to service police custody**
- **S 315 (4) (b) AFA 2006 - Surrender of deserters and AWOL - bringing before summary court**
- **S315 (4) (c) AFA 2006 - Surrender of deserters and AWOL – transfer to service custody**
- **S 317 AFA 2006 Arrest under warrant under S317 (failing to comply)**
- **S 318 AFA 2006 - Arrest of persons unlawfully at large**
- **S 313 AFA 2006 - Arrest by civilian police under warrant of judge advocate**

**SECTION 313 OF THE AFA 2006 (WARRANT OF JUDGE ADVOCATE FOR ARREST FOR SERVICE OFFENCE).**

The following provisions of Part 1 of the CJSA 2016 apply where a person is arrested by a constable under a warrant.

**Section 3** (information to be given on arrest) – In addition to the information that must be given on arrest service personnel must also be told about their right to have intimation sent to another person under section 38 of the CJSA 2016.

**Section 5** (information to be given at police station) applies, other than the custody does not get the right to have access to another person under section 40 of the CJSA 2016 or a consultation with a solicitor under section 44 of the CJSA 2016.

**Section 6** (information to be recorded by police) – The police only require to record information contained in subsection (1) & (2) of Section 6 of the CJSA 2016.

**Section 38** (right to have intimation sent to other person) applies.

**Section 39** (right to have intimation sent: under 18s) applies, although the police would not require the person to which intimation was given under section 38(1) to attend at the station.

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To that end subsection (3) also does not apply. The Police will also cease attempts to intimate to a person under section 38(1) when the person is transferred into service custody if contact has not been successful to that point.

**Section 41** (social work involvement in relation to under 18s) applies apart from the requirement to allow access to the person under section 40 of the CJSA 2016.

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies only in so far as intimating that the service person is in police custody and the place where they are in police custody. They would not be allowed access to the service person.

**Section 45** (use of reasonable force) applies.

**Section 46** (common law power of entry) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although Police Scotland would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

### **SECTION 314 AFA 2006 - ARREST OF DESERTERS AND ABSENTEES WITHOUT LEAVE (AWOL)**

The following provisions of Part 1 of the CJSA 2016 apply where;

(a) a person is arrested by a constable under section 314 of the AFA 2006 (arrest by constable of deserters and absentees without leave), or

(b) a person is arrested by a constable under a warrant under subsection (2) of that section.

**Section 3** (information to be given on arrest) applies.

**Section 4** (arrested person to be taken to police station) applies, although the service person cannot be released on an undertaking

**Section 5** (information to be given at police station) applies.

**Section 6** (information to be recorded by police)—Only subsection (1) & (2) are applicable with the exception of information regarding sexual offence intimation which would not be relevant.

**Section 22** (under-18s to be kept in place of safety prior to court) applies although the power to bring the service person to court is taken from section 314(4) of the AFA 2006 and will only apply to a members of the armed services who is subject to a supervision order, or interim compulsory supervision order. They cannot be released on an undertaking.

**Section 23** (notice to parent that under 18 to be brought before court) applies apart from references to under 16's which are not applicable. The powers to bring an individual before the courts are derived from section 314(4) of the AFA 2006. A person cannot be released on an undertaking and parents would not be required to attend at court.

**Section 24** (notice to local authority that under 18 to be brought before court) applies apart from the power to bring the person before the courts are derived from section 314(4) of the AFA 2006. A

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person cannot be released on an undertaking. References to under 16's are not applicable to service personnel. Any references to an individual being charged with an offence are not applicable.

**Section 38** (right to have intimation sent to other person) applies, omitting any requirements for under 16's as they are not applicable to service personnel.

**Section 39** (right to have intimation sent: under 18s) applies, omitting any requirements for under 16's as they are not applicable to service personnel.

**Section 40** (right of under 18 to have access to other person) applies, omitting the access requirements to under 16's which are not applicable to service personnel.

**Section 41** (social work involvement in relation to under 18s) applies.

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies, omitting any references to the service person being charged as that will not be applicable.

**Section 44** (right to consultation with solicitor) applies.

**Section 45** (use of reasonable force) applies.

**Section 46** (common law power of entry) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although the civilian police would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

### **SECTION 315 AFA 2006 - DESERTERS AND ABSENTEES WITHOUT LEAVE (AWOL) SURRENDERING TO CONSTABLE**

Where a person surrenders to a constable as being a person subject to service law who has deserted or is absent without leave, section 3 of the 2016 Act (information to be given on arrest) applies with these changes—

Any reference to a "constable arresting a person" should be read as "When a person surrenders to a constable as being a person subject to service law who has deserted or is absent without leave" The police are required to inform the individual who surrenders "that the person has surrendered as being a person subject to service law who has deserted or (as the case may be) who is absent without leave", and that they are not obliged to say anything, other than to give the information specified in section 34(4). There is no requirement to inform an individual of the right to intimation or consultation with a solicitor under section 43 & 44 CJA 2016.

### **SECTION 315(4) AFA 2006 - SURRENDER OF DESERTERS AND ABSENTEES: TRANSFER TO SERVICE CUSTODY**

The following provisions of Part 1 of the 2016 Act apply where—

(c) a person's case is considered under subsection (3) of section 315 of the AFA 2006 (deserters and absentees without leave surrendering to civilian police), and

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(d) the person considering the case acts under subsection (4)(a) of that section (power to arrange for person to be transferred to service custody).

**Section 5** (information to be given at police station) applies, with these changes—

The person must be informed that they are in police custody in accordance with section 315(1) of the AFA 2006. There is no right of access under section 40 or consultation with a solicitor under section 44 of the CJSA 2016.

**Section 6** (information to be recorded by police)—

It should be recorded that they have surrendered to the police as opposed to being arrested.

**Section 38** (right to have intimation sent to other person) applies, omitting any requirements regarding under 16s as these will not be applicable to service personnel.

**Section 39** (right to have intimation sent: under 18s) applies, although the police would not require the person to which intimation was given under section 38(1) to attend at the station.

To that end subsection (3) also does not apply. The Police will also cease attempts to intimate to a person under section 38(1) when the person is transferred into service custody if contact has not been successful to that point.

**Section 41** (social work involvement in relation to under 18s) applies apart from the requirement to allow access to the person under section 40 of the CJSA 2016

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies only in so far as intimating that the service person is in police custody and the place where they are in police custody. They would not be allowed access to the service person. There would be no requirement to inform them about the service member being officially accused of an offence as this would not be applicable at this stage

**Section 45** (use of reasonable force) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although the civilian police would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

### **SECTION 315 (4) (B) AFA 2006 - SURRENDER OF DESERTERS AND ABSENTEES: BRINGING BEFORE COURT OF SUMMARY JURISDICTION**

The following provisions of Part 1 of the 2016 Act apply where—

(e) a person's case is considered under subsection (3) of section 315 of the AFA 2006 (deserters and absentees without leave surrendering to civilian police), and

(f) the person considering the case acts under subsection (4)(b) of that section (power to arrange for person to be brought before court of summary jurisdiction).

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**Section 5** (information to be given at police station) applies, with these changes—

The person must be informed that they are in police custody in accordance with section 315(1) of the AFA 2006.

**In section 6** (information to be recorded by police)—

Only subsection (1) & (2) are applicable with the exception of information regarding sexual offence intimidation which would not be relevant and references to arrest should be recorded as surrender.

**Section 22** (under-18s to be kept in place of safety prior to court) applies with these changes—

The power to bring the service person to court is taken from section 315(1) of the AFA 2006 and will only apply to a members of the armed services who is subject to a supervision order, or interim compulsory supervision order. They cannot be released on an undertaking

**Section 23** (notice to parent that under 18 to be brought before court) applies with these changes— apart from references to under 16's which are not applicable. The powers to bring an individual before the courts are derived from section 315(4)(b) of the AFA 2006. A person cannot be released on an undertaking and parents would not be required to attend at court.

**Section 24** (notice to local authority that under 18 to be brought before court) applies apart from the power to bring the person before the courts are derived from section 315(4) (b) of the AFA 2006. A person cannot be released on an undertaking. References to under 16's are not applicable to service personnel. Any references to an individual being charged with an offence are not applicable.

**Section 38** (right to have intimation sent to other person) applies, omitting any requirements regarding under 16s as these will not be applicable to service personnel.

**Section 39** (right to have intimation sent: under 18s) applies, omitting any references to under 16s as this will not be applicable to service personnel

**Section 40** (right of under 18s to have access to other person) applies,

**Section 41** (social work involvement in relation to under 18s) applies.

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies, omitting any references to the person having the status of officially accused of an offence.

**Section 44** (right to consultation with solicitor) applies.

**Section 45** (use of reasonable force) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although the civilian police would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

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**SECTION 315 (4) (C) AFA 2006 SURRENDER OF DESERTERS AND ABSENTEES: TRANSFER TO SERVICE CUSTODY**

The following provisions of Part 1 of the 2016 Act apply where—

(g) a person's case is considered under subsection (3) of section 315 of the AFA 2006 (deserters and absentees without leave surrendering to civilian police), and

(h) the person considering the case acts under subsection (4)(c) of that section (power to release person subject to condition to enable the person to be taken into service custody).

**Section 5** (information to be given at police station) applies, apart from they do not get the right to have access to another person under section 40 of CJSA 2016 or a consultation with a solicitor under Section 44 of the CJSA 2016. They are also informed that they have surrendered and are being kept in police custody section 315(1) of the AFA 2006.

**In section 6** (information to be recorded by police)—

Only subsection (1) & (2) are applicable with the exception of information regarding sexual offence intimidation which would not be relevant.

**Section 38** (right to have intimation sent to other person) applies, omitting any requirements regarding under 16s as these will not be applicable to service personnel.

**Section 39** (right to have intimation sent: under 18s) applies, although the police would not require the person to which intimation was given under section 38(1) to attend at the station. To that end subsection (3) also does not apply. The Police will also cease attempts to intimate to a person under section 38(1) when the person is transferred into service custody if contact has not been successful to that point.

**Section 41** (social work involvement in relation to under 18s) applies, omitting the access requirements to under 16's which are not applicable to service personnel.

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies, only in so far as intimating that the service person is in police custody and the place where they are in police custody. They would not be allowed access to the service person. There would be no requirement to inform them about the service member being officially accused of an offence as this would not be applicable at this stage.

**Section 45** (use of reasonable force) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although the civilian police would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

**SECTION 317 AFA 2006 ARREST UNDER WARRANT UNDER S317 (FAILING TO COMPLY)**

The following provisions of Part 1 of the 2016 Act apply where a person is arrested by a constable under a warrant under section 317 of the AFA 2006 (failure to comply with condition to enable person to be taken into service custody).

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**Section 3** (information to be given on arrest) applies. In addition to the information that must be given on arrest service personnel must also be told about their right to have intimation sent to another person under section 38 of the CJSa 2016. They will not be informed of the nature of the offence as this is not applicable and they will not be informed of any right to intimation or consultation with a solicitor under section 43 and 44 CJSa 2016.

**Section 5** (information to be given at police station) applies, with these changes—

They must be informed that they are under arrest in accordance with section 317 of the AFA 2006. There is no right of access under section 40 or consultation with a solicitor under section 44.

**In section 6** (information to be recorded by police)—The police only require to record information contained in subsection (1) & (2) omitting references to the arrest being in relation to an offence.

**Section 38** (right to have intimation sent to other person) applies, omitting any requirements regarding under 16s as these will not be applicable to service personnel.

**Section 39** (right to have intimation sent: under 18s) applies although the police would not require the person to which intimation was given under section 38(1) to attend at the station. To that end subsection (3) also does not apply. The Police will also cease attempts to intimate to a person under section 38(1) when the person is transferred into service custody if contact has not been successful to that point.

**Section 41** (social work involvement in relation to under 18s) applies apart from the requirement to allow access to the person under Section 40 of the CJSa 2016.

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies, only in so far as intimating that the service person is in police custody and the place where they are in police custody. They would not be allowed access to the service person. There would be no requirement to inform them about the service member being officially accused of an offence as this would not be applicable at this stage.

**Section 45** (use of reasonable force) applies.

**Section 46** (common law power of entry) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although the civilian police would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

### **SECTION 318 AFA 2006 - ARREST OF PERSONS UNLAWFULLY AT LARGE**

The following provisions of Part 1 of the 2016 Act apply where a person is arrested by a constable under section 318(1) of the AFA 2006 (person sentenced to service detention and unlawfully at large).

**Section 3** (information to be given on arrest) applies, with these changes—

In addition to the information that must be given on arrest service personnel must also be told about their right to have intimation sent to another person under Section 38 of the CJSa 2016.

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They will not be informed of the nature of the offence as this is not applicable and they will not be informed of any right to consultation with a solicitor under Section 44.

**Section 5 (2)** (information to be given as soon as reasonably practicable) applies when the person is in police custody. There is no right of access under section 40 or consultation with a solicitor under section 44.

**Section 6** (information to be recorded by police)— The police only require to record information contained in subsection (1) & (2) omitting references to the arrest being in relation to an offence.

**Section 38** (right to have intimation sent to other person) applies, omitting any requirements regarding under 16s as these will not be applicable to service personnel.

**Section 39** (right to have intimation sent: under 18s) applies although the police would not require the person to which intimation was given under section 38(1) to attend at the station.

To that end subsection (3) also does not apply. The Police will also cease attempts to intimate to a person under section 38(1) when the person is transferred into service custody if contact has not been successful to that point.

**Section 41** (social work involvement in relation to under 18s) applies apart from the requirement to allow access to the person under section 40 of the CJSA 2016.

**Section 42** (support for vulnerable persons) applies.

**Section 43** (right to have intimation sent to a solicitor) applies, only in so far as intimating that the service person is in police custody and the place where they are in police custody. They would not be allowed access to the service person. There would be no requirement to inform them about the service member being officially accused of an offence as this would not be applicable at this stage.

**Section 45** (use of reasonable force) applies.

**Section 46** (common law power of entry) applies.

**Section 50** (duty not to detain unnecessarily) applies.

**Section 51** (duty to consider child's wellbeing) applies, although Police Scotland would not charge or interview a child so these parts of this section are not relevant.

**Section 52** (duties in relation to children in custody) applies.

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