

CHAPTER 58**LEGAL ADVICE AND PROCEEDINGS**

(MOD Sponsor: NAVY COMMAND DCS LAW)

This chapter has been equality and diversity impact assessed by the sponsor in accordance with Departmental policy. No direct discrimination or adverse impact was identified. This chapter is due for review at the next routine amendment exercise.

Para

- J.5801. Legal Advisers
- J.5802. Legal Advice
- J.5803. Civil Proceedings
- J.5804. Common Law Claims
- J.5805. Criminal Proceedings
- J.5806. Legal Proceedings against the Ministry of Defence
- J.5807. Institution of Legal Proceedings on Behalf of the Ministry of Defence
- J.5808. Civil Criminal Legal Proceedings involving an Individual's Private Affairs
- J.5809. Civil Legal Proceedings involving an Individual's Private Affairs
- J.5810. Witness Evidence
- J.5811. Third Party Requests for Information for Legal Purposes
- 5812. Inquests
- J.5813. Bail Provision Abroad
- J.5814. Provision of Other General Legal Advice on Civil Law and Proceedings
- J.5815. Affidavits and Statutory Declarations Abroad
- J.5816. Certification of Legal Costs Abroad
- J.5817. Legal Aid for Individuals under Service Arrangements
- J.5818. Employment Tribunals

CHAPTER 58

LEGAL ADVICE AND PROCEEDINGS



Note. *This chapter does not cover*

- a. *Jurisdiction in criminal matters—see Chapter 37 and JSP 830, Manual of Service Law*
- b. *Trial by Service authorities—see JSP 830, Manual of Service Law*
- c. *Accident claims cases—see Chapter 59*
- d. *Salvage and special services—see Chapter 46*

J.5801. Legal Advisers

1. **Civil Matters.** The legal advisers to the Ministry of Defence on civil matters in the United Kingdom are as follows:

England and Wales	Government Legal Department
Scotland	The Legal Secretary to the Lord Advocate (on Scottish law) The Solicitors to the Ministry of Defence in Scotland
Northern Ireland	The Chief Crown Solicitor, Belfast (on Northern Ireland law)

2. **Criminal Matters.** For criminal matters the legal advisers to the Ministry of Defence in the United Kingdom are as follows:

England and Wales	Government legal Department/Director of Public Prosecutions
Scotland	The Crown Agent, Edinburgh
Northern Ireland	The Chief Crown Solicitor, Belfast

3. **Service Law and Procedure.** A list of officers qualified to act in connection with naval Courts-Martial is held by the office of the Director Naval Legal Services. Advice on military law is provided for the Army by the Director of Army Legal Services and on air force law for the RAF by the Director of Legal Services (RAF).

4. **Outside the United Kingdom.** In some countries overseas, Government Legal Department's Agents or legal advisers to the Ministry of Defence are appointed (see Navy List); elsewhere, advice may be sought in colonies from the Law Officers, and in independent Commonwealth and foreign countries from Her Britannic Majesty's Representative, who should be asked by the senior officer of HM (Naval) Forces to recommend a local lawyer. The Government Legal Department's approval of such recommendations should be obtained through the Ministry of Defence.

J.5802. Legal Advice

1. **In the United Kingdom.** When legal advice is required, a clear and concise statement of the facts of the case on which opinion or action is sought is to be sent to the Ministry of Defence DC&L(F&S) (Legal) through the usual channels. In cases of urgency where legal proceedings against the Department or against a member of the Forces are imminent, a direct approach may be made to the appropriate legal adviser (see [Para J.5801](#)). In this event a report of the action taken and a statement of the facts of the case are at the same time to be sent direct to the Ministry of Defence DC&L(F&S)(Legal).

2. **Outside the United Kingdom.** When legal advice is required, it is to be obtained from Government Legal Department's agent or from the legal adviser to the Ministry of Defence; or, where such an adviser has not been appointed in the Command or Territory, from the person recommended under the procedure set out in [Para J.5801 sub para 4](#). Except in cases of urgency, the approach to Government Legal Department's agent or to the legal adviser is to be made through the senior officer of HM Forces in the Command or Territory.

J.5803. Civil Proceedings

1. When an individual has been, or is likely to be, made a defendant in civil proceedings, arising out of an act which was sanctioned by Service authority or which occurred in the course of their duty, they are at once to report the matter to their commanding officer.

2. On receipt of a writ, summons or other legal document naming a Service person or the Department as a defendant in these circumstances, the commanding officer is to take action as follows:

a. If it relates to common law claims for negligence, it should be sent to Claims and Legal (Finance and Secretariat) Claims, see para [J5925](#).

b. If it relates to an Employment Tribunal (Industrial Tribunal in Northern Ireland), the Originating Application (ET1/IT1) should be sent to the office of the Captain Naval Legal Services.

c. For all other civil proceedings, a copy of the legal document is immediately to be sent to Claims and Legal (Finance and Secretariat) Legal 1. A full statement of the facts is to be sent with the legal document whenever possible, but the forwarding of the document must not be delayed on this account. Further action is to be taken only on the instructions of C&L (F&S) Legal 1.

J.5804. Common Law Claims see Chapter 59, Section II

J.5805. Criminal Proceedings

1. Legal Representation of Service Personnel Facing Interviews Under Caution.

The MOD does not pay for legal representation for personnel being interviewed under caution by either the Service or civilian police, or for legal assistance in advance of such interviews. Individuals attending for interview in circumstances where a “duty solicitor” scheme operates will be allowed the services of a solicitor free of charge, if they so wish. If they prefer to retain their own solicitor, this is to be at their own expense and the MOD will not reimburse the cost. Individuals being interviewed under caution by the Health and Safety Executive or the Environment Agency (where a “duty solicitor” scheme is not available) should contact the Directorate of Safety, Environment and Fire Policy (Finance and Secretariat) for advice.

2. Legal Representation of Service Personnel Facing Criminal Charges.

a. The Ministry of Defence has no responsibility in law to provide legal representation for personnel involved in any criminal proceedings. The decision whether or not it should support personnel in such circumstances is one of Departmental policy. Personnel should be reassured, however, that they will not be abandoned by the Department when their work takes them into difficult or unusual circumstances.

b. In certain circumstances the Ministry of Defence will consider paying for the defence of an individual charged with a criminal offence, including payment for legal representation before and during interview under caution. An individual in this position, either at home or abroad, may apply to the Department for funding for legal representation. In considering such applications, the Ministry of Defence will have regard to the following:

(1) Whether the alleged act was committed in the course of the individual’s employment/duties and in accordance with any applicable regulations/instructions or orders (in so far as this can be determined at the time);

(2) The implications for Ministry of Defence policy, regulations instructions (e.g. rules of engagement, operational procedures) and other relevant interests (this would include proceedings before international courts or tribunals); and

(3) The seriousness of the offence, the possible punishment and its impact on the individual’s liberty and livelihood. (Departmental funding will not, as a general rule, be provided for those criminal charges in domestic courts that fall outside of the legal aid scheme such as minor driving offences).

(4) The apparent weight or strength of evidence against an individual is not relevant. The decision to grant or refuse Ministry of Defence funding of legal representation is taken by the Director C&L(F&S), in conjunction with the Ministry of Defence Legal Adviser and the appropriate single Service staffs.

c. The presumption will be that the cost of defence will be borne by the Ministry of Defence if the alleged offence was committed in the course of the individual's duties and the proceedings have implications for Departmental policy, regulations and instructions (e.g. rules of engagement or operational procedures) or other relevant interests. Where the Ministry of Defence does not fund the legal representation, personnel will have to apply for legal aid (if available) under the normal rules of eligibility or pay for their own representation.

d. See [Para J.5817](#) regarding proceedings which do not fall within this regulation.

J.5806. Legal Proceedings against the Ministry of Defence

1. When legal proceedings (including arbitration proceedings) are instituted against the Ministry of Defence the procedure is as follows:

a. **In the United Kingdom.** The Commanding Officer is to take the same action as set out in [Para J.5803](#).

b. **Outside the United Kingdom.** The relevant facts are to be reported immediately to the senior officer of HM Forces, who will notify DC&L(F&S)Legal 1 and forward a full statement. Further action is to be taken as directed by DC&L(F&S)Legal 1, but the senior officer overseas, after consulting the appropriate legal adviser, is to take whatever action is necessary to protect the interests of the Ministry of Defence pending receipt of instructions.

J.5807. Institution of Legal Proceedings on Behalf of the Ministry of Defence

1. The institution of civil proceedings on behalf of the MOD is to be undertaken only on the authority of the Department.

J.5808. Civil Criminal Legal Proceedings involving an Individual's Private Affairs

1. **Legal Advice and/or Representation.** See [Para J.5809 sub para 4](#).

2. **Attendance of Personnel at Civil Courts.** When an individual is charged by a civil court in respect of a criminal offence relating to their private affairs, they are to report the matter immediately to their commanding officer in order that the necessary arrangements may be made for their attendance at the court and for other relevant Service action to be taken as prescribed in regulations. They are also to inform the commanding officer if they intend, where appropriate, to plead guilty by letter without appearing in court. See also [Para J.5809 sub para 5](#) and [sub para 6](#).

J.5809. Civil Legal Proceedings involving an Individual's Private Affairs

1. **Service of Writs, Summonses or other Processes.** Service authorities are not responsible for the service of process on personnel who, in their private affairs, are a party to legal proceedings in the civil courts either in the UK or abroad. Commanding officers may nevertheless assist solicitors to the extent described below. (For the service of process in respect of maintenance proceedings, however, see JSP 754 Tri-Service Regulations for Pay and Charges.

BRd 2

2. If the individual is serving in the UK, he/she is to be told of the process and, if he/she is willing to accept service, mutually agreeable arrangements are to be made for him/her to meet the process server. If the individual is unwilling to accept service, he/she is to be advised that other means of service may be available, the cost of which they may have to bear if they are the unsuccessful party in any subsequent action. If he/she nevertheless persists in refusing to accept service, the solicitor is to be advised that the commanding officer can do no more to assist.

3. The commanding officer is to provide the same assistance as in Para J.5809 [sub para 2](#) if the individual is serving abroad, provided the solicitor has obtained leave of the court to serve process overseas. Otherwise, the solicitor is to be informed that no assistance can be given pending the individual's return to the UK, the approximate date of which may be given. Similar assistance should be provided in respect of the service of foreign court orders where such a duty exists under the NATO Status of Forces Agreement or a Memorandum of Understanding.

4. **Legal Advice and/or Representation.** Since the actual or potential legal action relates to private affairs, the MOD will not pay for either legal advice or any subsequent legal representation. Legal advice and assistance for personnel in commands abroad may be available from Service lawyers under the terms of their single Service regulations.

5. **Attendance of Personnel at Civil Courts.** If, at a time when required to attend in person at a civil court in whatever capacity, the individual concerned is (or expects shortly to be) under orders to proceed outside the UK or otherwise outside the jurisdiction of the courts, they are to inform their commanding officer without delay. The commanding officer is immediately to notify the facts to higher authority. No assistance by way of payment of expenses is to be made to an individual to appear before a civilian court where the matter is not duty related.

6. Commanding officers are reminded that, in the UK, an individual must attend court when summoned to do so. If they do not attend, he/she may be prosecuted for contempt and action may also lie against anyone who sought to prevent the individual's attendance. The position is not necessarily the same for personnel summoned by foreign courts and commanding officers should be guided by the appropriate legal advisers. It is open to commanding officers to ask the civilian authorities to adjourn a hearing, on the grounds that the date chosen is particularly detrimental to the Service interest, but permission must nevertheless be given for the individual to attend if the summons has not been cancelled by the time it falls due to be answered.

J.5810. Witness Evidence

1. Service personnel may occasionally be asked to give evidence on a variety of matters. There are two categories of witnesses: a witness of fact and an expert witness.

2. **Witness of Fact.** (This category includes both observers of an incident and individuals who have knowledge of Service/MOD procedures). MOD has a duty to assist the Court in the giving of information likely to resolve the issues before it. It is quite permissible for a witness to give such evidence as is required of them at a Court hearing, subject to any security/sensitive considerations. The witness must stick to the facts and refrain from proffering a personal view.

Expressions of opinion must be avoided unless specifically asked. **The criteria to be used in nominating witnesses to attend Court to represent MOD regarding knowledge of Departmental procedures should be their suitability to answer the type of questions likely to be asked and their experience.**

3. **Expert Witness.** The role of an expert witness, acting in an official or private capacity, is to assist the Court by presentation of their evidence, rather than to help either party to the proceedings. This applies to both criminal and civil proceedings, regardless of which party has asked the witness to appear. An expert witness should present their evidence with strict regard to the truth, accuracy and completeness. If the Department is asked by a party to litigation other than the Crown to provide an expert witness, the request should be declined – unless the evidence required is peculiar to the MOD – on the grounds that it is not the Department's policy to supply expert evidence. The enquirer should be advised to seek assistance from a professional consultant.

4. Further guidance can be obtained from DC&L(F&S)Legal 1.

J.5811. Third Party Requests for Information for Legal Purposes

1. Where the request relates either to an action or potential action to which the MOD is not a party, or to criminal proceedings, the advice of DC&L(F&S)Legal 1 is to be sought in the first instance.

2. *(Navy only)*. Request for information, documents or records concerning Service matters or members of the Services which are received from solicitors or others in the United Kingdom in connection with actual or potential litigation or criminal proceedings are to be submitted to DC&L(F&S)Legal 1 and the enquirer is to be informed of the action taken.

3. *(Navy only)*. Overseas, Commanding Officers should submit the request to the senior officer of HM Forces in the Command or Territory, who will, as necessary, consult the local legal adviser. Where there is no senior officer, Commanding Officers are to consult the local legal adviser as to the action to be taken.

4. *(Navy only)*. See also Section III, on enforcement of maintenance liabilities, JSP 440 on disclosure of addresses, and QRRN Article 7705 on disclosure of medical records.

5812. Inquests

1. Inquests in the United Kingdom are dealt with in **J.5305** and inquests abroad in **J.5307**.

J.5813. Bail Provision Abroad

1. Where Service personnel charged with criminal offences in civil courts abroad can obtain release from custody on providing bail, the senior Service officer in the command or territory or the commanding officer of an HM Ship may, if necessary, make advances from public funds in respect of the sum required for bail and any incidental fees. Each case is to be considered on its merits, depending on the nature of the alleged offence and the character of the person concerned.

BRd 2

2. The following conditions apply:
 - a. The individual concerned must be unable to find the money themselves or obtain it from any other source.
 - b. There is to be no unreasonable risk that the recognizance might be forfeited.
 - c. The individual concerned is to sign an acknowledgement at the time when the bail is paid into court that they have received the loan, which is repayable on demand, and that immediate recovery may be commenced by deduction from their pay by instalments. They are also to acknowledge that upon return of the bail money or any part thereof they will then pay such money to the Service or such part thereof as may be required to repay the loan and in the event of forfeiture of the bail the amount outstanding shall be immediately repaid, unless forfeiture was caused by reasons outside their control, in which case recovery should be by monthly instalments over a period described in single Service regulations.
 - d. Action is to be taken by the commanding officer of the individual concerned to ensure that the bail money is duly handed over to the court authorities at the appropriate time and, whenever such procedure permits, in the presence of the individual concerned.
 - e. The bail money must be paid to the court by or in the name of the individual concerned and not in the name of the Service, the commanding officer or any other person.
3. Bail should only be advanced if it is in the interests of the Service that the individual concerned be released from custody of the overseas court. Bail should not be advanced if there is a likelihood of the individual's discharge from the Service before the debt could be repaid.

J.5814. Provision of Other General Legal Advice on Civil Law and Proceedings

1. When other legal advice on civil law and proceedings is required, the question should be phrased as clearly as possible and supported by a concise statement of the facts of the case. The request is to be sent to C&L(F&S)Legal, who will consult the Department's legal advisers as appropriate.

J.5815. Affidavits and Statutory Declarations Abroad

1. Outside the United Kingdom, officers subject to the Service Discipline Acts, of the regular forces of or above the rank of Lieutenant-Commander/Major/Squadron Leader (and Service Legal Officer of the rank of Lieutenant/Captain/Flight Lieutenant are empowered in certain circumstances to take affidavits and statutory declarations from members of Her Majesty's Forces or of a civilian component of those forces.
2. Instructions on the procedure for taking affidavits and statutory declarations are given in JSP 830, Manual of Service Law.

J.5816. Certification of Legal Costs Abroad

1. When the Ministry of Defence or a member of the Services has been advised or represented at places abroad in accordance with the preceding regulations, the bill in respect of the lawyer's fees is to be dealt with as follows:

a. It is to be endorsed before being passed for payment locally or before dispatch to the Ministry of Defence, as indicated in d, with a certificate from the instructing officer to the effect that:

- (1) The instructing officer gave instructions for the work to be performed; and
- (2) The work was done by the lawyer in accordance with instructions.

b. When the bill is over £50 and it is not covered by c, it is to be taxed locally before it is passed for payment (see [Note](#)).

c. Where the bill is over £50 and the fee is within the contractual scale agreed between the Government Legal Department, the Ministry of Defence and the lawyer concerned, the bill need not be taxed locally before being passed for payment.

d. Where the bill is over £50 and cannot be taxed locally because there are no facilities for this to be done, the bill together with all disbursements, which are to be separately vouched, is to be forwarded to the Ministry of Defence DCS LAW DISC which will obtain the authority of the Government Legal Department for local payment of the bill.

e. Where the bill is £50 or less there is no need for it to be taxed locally. Provided the instructing officer is satisfied that the charges are reasonable the bill may be paid locally.



Note. *'Taxing' in this context means certification by an official of the court that the lawyer's costs are reasonable for the work performed.*

J.5817. Legal Aid for Individuals under Service Arrangements

1. **Criminal Proceedings.** Legal aid, i.e., representation by a civilian solicitor or counsel, may in appropriate cases be made available through Service channels:

a. For the defence of service personnel, members of the civilian component and dependants charged before criminal courts abroad (but for offences committed on duty, see [Para J.5803](#));

b. For the legal representation of persons subject to service law at custody hearings;

c. For the defence of service personnel, charged before courts-martial;

d. For the defence of civilians subject to Service law who are charged before standing civilian courts and/or courts-martial abroad; and

BRd 2

e. For the preparation of petitions, appeals and applications for leave to appeal in respect of persons convicted by standing civilian court, court-martial or for appeals to the Summary Appeal Court

2. When it appears to the Commanding Officer that an accused or convicted person for whom he/she is responsible may be eligible for a grant of legal aid, he/she is to arrange for that person to apply for legal aid to the appropriate Service legal aid section.(see JSP 838: The Armed Forces Legal Aid Scheme).

3. *(Navy only.)* **Advice Concerning Service police Investigations.** A person subject to Service law interviewed by Service police abroad, when under suspicion of having committed a serious offence contrary to Service law, may be advised by a Service lawyer if available and, in any event, granted a free telephone call to a UK civilian in accordance with a suspect's rights under the provisions of the Police and Criminal Evidence Act 1984. In Great Britain advice during such interviews is available from civilian lawyers, and only in exceptional circumstances will advice be provided by Service lawyers.

4. **Non-Criminal Proceedings (i.e., Matrimonial Matters, Traffic Accident Claims, etc.)**. The Royal Navy, Army Legal Aid (Civil) and the Directorate of Legal Services (Royal Air Force) operate schemes for the assistance of service personnel abroad and, to a lesser extent, those at home, in legal matters of non-criminal nature, i.e., matrimonial matters, traffic accident claims, etc. Help is also given to next-of-kin who may have a legal course of action as the result of the death of a service person. Advice given by Service lawyers is free of charge. The Services do not, however, provide financial assistance to cover travel to and from legal offices or other expenses and fees, e.g., the cost of obtaining marriage certificates or other evidence and the fees of inquiry agents or solicitors.

5. The schemes referred to in Clause 4 above include procedural guidance for claims made under the MOD Criminal Injuries Compensation Scheme and the provision of the names and addresses of civilian solicitors who may be willing to act in the preparation of a claim which may arise out of injuries sustained while on duty. Apart from those matters, the schemes referred to Clause 4 do not cover any claim by service personnel against MOD or any other Government department, on any matter concerning discipline courts-martial, pay and allowances, or any matter affecting the service person in their capacity as such.

J.5818. Employment Tribunals

1. Service (and civilian) personnel have certain rights to pursue complaints at Employment Tribunals (Industrial Tribunals in Northern Ireland). However, Service personnel are required to have made a complaint on the same matter under the Service redress procedures and that complaint must not have been withdrawn. The Service (or civilian) person bringing the case has to arrange for an Originating Application (an ETI/IT1) to be issued at a Tribunal Office. This sets out in detail the complaint and the remedy being sought, and will be sent to the named Respondent, normally "the Ministry of Defence". The MOD has only 21 days from receipt of the ETI/ITI to respond. Any applications received by a unit must be sent immediately to the office of the Captain Naval Legal Services who on receipt of the ET1/TT1 will arrange with the MOD's legal representative for the MOD's Grounds of Resistance (the ET3/IT3) to be issued.

2. Where the MOD accepts liability for the actions of its personnel, its legal representation will subsume the interests of individuals defendants. However, if the MOD's legal representative declares a conflict of interest, the MOD's legal representative can no longer represent those defendants whose interests are in conflict with those of the Department. In such cases, the MOD will not arrange or pay for separate legal representation. Any legal representation that individuals may feel is necessary will be at their own expense.