



**Manual of Service Law
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Equality and Diversity Impact Assessment Statement

This policy has been equality and diversity impact assessed in accordance with Departmental policy. This resulted in:

Part 1 screening only completed (no direct discrimination or adverse impact identified / policy is a reflection of statutory requirements and has been cleared by a Legal Adviser). This policy is due for review in Dec 2012.

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Glossary	
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Phrase	Definition
THE ACT	Armed Forces Act 2006.
ADDUCED	Offered as evidence.
ARRAIGNMENT	The process by and moment at which the accused enters a plea to a charge in a Service court.
APPLICABLE SERVICE OFFENCE	During an investigation the Service Police can only take fingerprints and samples when the alleged offence is an 'applicable Service offence' as listed in the PACE application order
BASIC POWERS	.Sentencing powers of a commanding officer to whom extended powers of punishment (see below) have not been granted by Higher Authority. See Chapter 13 Annex A for individual punishments and whether extended powers are required
BRITISH ISLANDS British Isles is also used in the MSL, see Chapter 3 (Jurisdiction and time limits)	The United Kingdom (England, Scotland, Wales and Northern Ireland) the Channel Islands and the Isle of Man.
COMMANDING OFFICER	The officer who is in command of a person for the purposes of any provision made by or under the Act. Throughout the manual it is used to describe the commanding officer and anyone who is authorised to act on his behalf (see subordinate commander below). Where a paragraph specifically refers to the Commanding officer and him alone it will be highlighted. See Chapter 2 (Meaning of commanding officer) for more detail.
COMMANDING OFFICER'S DELEGATED POWERS	Powers that a commanding officer has delegated under a power granted under the Act or any subordinate legislation under the Act (see subordinate commander below).
COMMANDING OFFICER'S INVESTIGATION	An investigation into a potential offence under AFA 06 section 115(4)(a) which is

	not conducted by Service Police. This process, which may be formal or informal may be used by a commanding officer, or people acting on his behalf, to gather evidence in order to determine whether there is sufficient evidence to charge a person with a Service offence
CRIMINAL CONDUCT OFFENCES	Any Service offence under sections 42 – 49 of the Act which is a criminal offence under the law of England and Wales (or would be punishable if committed in England or Wales), for example, theft, burglary, rape, common assault and inflicting grievous bodily harm.
DESIGNATED AREA	See Chapter 3 (Jurisdiction and time limits) Annex A
DISCIPLINARY (NON-CRIMINAL CONDUCT) OFFENCES	Service offences which can be committed by a Service person as listed under sections 1 – 41 of the Act some of which are also applicable to a civilian subject to Service discipline.
EVIDENTIAL SUFFICIENCY TEST	There is sufficient evidence to charge a person with an offence if, were the evidence suggesting that the person committed the offence to be adduced in proceedings for the offence, the person could properly be convicted.
EXTENDED POWERS	Extended powers of punishment granted to a commanding officer by higher authority that extend his basic powers (see basic powers above).
HIGHER AUTHORITY (HA)	For these purposes higher authority means any office in the commanding officer's chain of command who is superior in that chain of command to the commanding officer
INDICTABLE OFFENCE	An offence that may be heard in a Crown Court. An indictable only offence is one that can only be heard in a Crown Court.
INCHOATE OFFENCES	Where a person has attempted to commit an offence, has incited someone to commit an offence, or has conspired to commit an offence.
MUST / SHOULD	MUST = A mandatory legal requirement based upon the legislation. SHOULD =

	A discretionary requirement that ought to be complied with as a matter of policy.
OBJECTIVE TEST	Where a reasonable person would think it appropriate/inappropriate for someone to do/not do something. The test is applied to the mind of an ordinary, reasonable person rather than to the mind of the person making the decision (compare with subjective test below).
OPERATIONAL PERIOD	The period during which, whilst under a suspended sentence, if an offender commits a further offence the suspended sentence is capable of being activated. See section 190 of the Act.
PRESCRIBED CIRCUMSTANCES	Prescribed circumstances are additional circumstances in which the Service Police must be made aware or in which a decision on charging must be taken by the DSP. See Chapter 6 (Investigation, charging and mode of trial) Annex E
RECORDABLE OFFENCE	Recordable offences are those offences under section 42 of the Act for which the corresponding offences under the law of England and Wales are recordable on the PNC. Additionally, there are also a number of Service offences that are recordable (sections 11(1), 14, 24(1), 27, 28, 29, 30, 39, 40 and 42 of the Act)
RELEVANT CIVILIAN	A (civilian) person who is subject to Service discipline. They must fall into the category of Schedule 15 of the Act. For more detail see Chapter 3 (Jurisdiction and time limits).
RELEVANT OFFENCE	.See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 94 and Annex A.
SERVICE COURT	The Court Martial, the Summary Appeal Court and the Service Civilian Court.
SERVICE OFFENCE	Include both criminal conduct offences and disciplinary offences under Sections 1 - 49 of the Act.
SERVICE PERSON	A Service person is a member of the regular forces or of the reserve forces (when on duty) and is subject to Service

	law.
SCHEDULE 1 OFFENCES (Part 1)	Criminal conduct offences that may be dealt with at summary hearing without permission of HA.
SCHEDULE 1 OFFENCES (Part 2)	Criminal conduct offences that may be dealt with at summary hearing with permission of HA.
SCHEDULE 2 OFFENCES	If an alleged offence is listed in Schedule 2 the CO is under a duty to ensure the Service Police are made aware. See Chapter 6 (Investigation, charging and mode of trial) Annex D
SERIOUS SERVICE OFFENCE	See Chapter 4 (arrest and search, stop and search, entry search and seizure and retention) paragraph 79.
SERVICE CIVILIAN COURT (SCC)	The SCC can only sit outside the UK and has jurisdiction (where it is not a matter for the CM) to try any Service offence committed outside the British Islands by a civilian subject to Service discipline.
SERVICE COMPENSATION ORDER	An order imposed on a person by a commanding officer, the Court Martial, the Summary Appeal Court, the Service Civilian Court or the Court Martial Appeal Court to compensate a victim.
STAFF LEGAL ADVISER	A Service lawyer who is the legal adviser in a person's chain of command.
SUBJECTIVE TEST	Where a person believes he has reasonable grounds for doing/not doing something. The test applies to the mind of the person making the decision (compare objective test, above).
SUBORDINATE COMMANDER	Under the Act an officer to whom powers have been delegated by a commanding officer.

Abbreviations	
AA55	Army Act 1955
AAO	Accused's Assisting Officer
ABH	Actual bodily harm
ADC	Additional duties commitment
AFA55	Air Force Act 1955
AFA96	Armed Forces Act 1996
AFA06	Armed Forces Act 2006
AFCLAA	Armed Forces Criminal Legal Aid Authority
AFCO	Armed Forces Careers Office
AGAI	Army General and Administrative Instruction
ANO	Air Navigation Order
AO	Assisting Officer
AP	Air Publication
ASA	Appropriate Superior Authority
ASP	Authorising Service policeman
AWOL	Absent without leave
BR	Book of Reference
CAA	Civil Aviation Authority
CAO	Court administration officer
CBF	Commander British Forces
CDT	Compulsory drugs testing
Ch	Chapter
CJA	Criminal Justice Act 2003
CM	Court Martial
CMAC	Court Martial Appeal Court
CO	Commanding Officer

CONDO	Contractors on deployed operations
CPIA	Criminal Procedure and Investigations Act
CPS	Crown Prosecution Service
DAO	Defendant's Assisting Officer
DEFCON	Defence Condition
DE&S	Defence Equipment and Support
DIN	Defence Internal Notice
DO	Designated officer
DOB	Date of birth
DSP	Director of Service Prosecutions
DX	Document exchange
ECHR	European Court of Human Rights
EOIT	Equal opportunities inquiry team
FLAGO	Fleet Administrative and General Orders
FLC	Front Line Command
FPEO	Financial penalty enforcement order
FTRS	Full Time Reserve Service
HA	Higher Authority
IL	Increment level
JPA	Joint Personnel Administration
JSP	Joint Service Publication
JSU	Joint Support Unit
LANDSO	LAND Standing Order
LFSO	Land Forces Standing Order
MCS	Military Courts Service
MCTC	Military Corrective Training Centre
MOD	Ministry of Defence

MOU	Memoranda of understanding
MSL	Manual of Service Law
MTD	Manned training days
NAAFI	Navy, Army and Air Force Institutes
NATO	North Atlantic Treaty Organisation
NCAO	Naval court administration officer
NCO	Non-commissioned officer
NDA57	Naval Discipline Act 1957
NOK	Next of kin
NPM	Naval Provost Marshal
NRPS	Non-regular permanent staff
OAO	Offender's assisting officer
OCI	Officer in charge of the investigation
PACE	Police and Criminal Evidence Act
PfP	Partnership for Peace
PIDAT	Post incident alcohol and drug testing
PJHQ	Permanent Joint Head Quarters
PLAGO	Personnel, Legal, Administrative General Orders
PNC	Police National Computer
PW	Prisoner of War
QR	Queen's Regulations
QRRN	Queen's Regulations Royal Navy
r.	Rule
RAF	Royal Air Force
RAH	Record of activation hearing
reg.	Regulation
RFA96	Reserve Forces Act 1996

RAFP	Royal Air Force Police
RM	Royal Marines
RMP	Royal Military Police
RN	Royal Navy
RNMPU	Royal Navy missing persons unit
RNP	Royal Navy Police
RO	Reviewing officer
ROPs	Restriction of privileges order
RRP	Relevant residential premises
RSH	Record of summary hearing
RTA	Road Traffic Act
s.	Section
ss.	Sections
SAC	Summary Appeal Court
SBA	Sovereign Base Areas
SCC	Service Civilian Court
SCE	Service Children's Education
SCO	Service compensation order
SCP	Service Complaint Panel
SDA	Service Discipline Acts
SF	Special Forces
SIB	Special Investigations Branch
SJS	Service Justice System
SNCO	Senior non-commissioned officer
SO	Superior officer
SOFA	Status of Forces Agreements
SPA	Service Prosecuting Authority

SPCB	Service Police Crime Bureau
SPVA	Service Personnel and Veterans Agency
SSAFA	Soldiers, Sailors, Airmen and Families Association
SSBN	Ship Submersible Ballistic Nuclear
SSIC	Single-Service inquiry co-ordinator
SSPO	Service supervision and punishment order
SSVC	Services Sound and Vision Corporation
TACOS	Terms and conditions of service
the Act	The Armed Forces Act 2006
TI	Technical instruction
WO	Warrant officer
XO	Executive officer

Equivalent Service ranks/rates			
NATO Code (STANAG 2116)	RN	Army¹	RAF
OF-10	Admiral of the Fleet	Field Marshal	Marshal of the Royal Air Force
OF-9	Admiral	General	Air Chief Marshal
OF-8	Vice-Admiral	Lieutenant General	Air Marshal
OF-7	Rear Admiral	Major General	Air Vice Marshal
OF-6	Commodore	Brigadier	Air Commodore
OF-5	Captain	Colonel	Group Captain
OF-4	Commander	Lieutenant Colonel	Wing Commander
OF-3	Lieutenant-Commander	Major	Squadron Leader
OF-2	Lieutenant	Captain	Flight Lieutenant
OF-1	Sub Lieutenant	Lieutenant	Flying Officer
	Midshipman	Second Lieutenant	Pilot Officer Acting Pilot Officer ²
OR-9	Warrant Officer Class 1	Warrant Officer Class 1	Warrant Officer Master Aircrew
OR-8	Warrant Officer Class 2	Warrant Officer Class 2	
OR-7	Chief Petty Officer Chief Petty Officer Naval Nurse	Staff Corporal Staff Sergeant Colour Sergeant, RM	Flight Sergeant ³ Chief Technician ⁴
OR-6	Petty Officer	Corporal of Horse	Sergeant
OR-5	Petty Officer Naval Nurse	Sergeant	
OR-4	Leading Rate Leading Naval Nurse	Corporal Bombardier	Corporal

¹ Royal Marine rank structure corresponds to Army structure and seniority

² Junior to Second Lieutenant

³ A qualified RAF Musician appointed to the post of Drum Major retains his normal rank while holding the appointment

⁴ A qualified RAF Musician appointed to the post of Drum Major retains his normal rank while holding the appointment

OR-3		Lance Corporal Lance Bombardier	
OR-2	Able Rate Ordinary Rate Student Naval Nurse	Marine Private however described including: Gunner Sapper Signalman Guardsman Fusilier Kingsman Rifleman Ranger Airtrooper Driver Craftsman	Junior Technician Senior aircraftman(T) Multi-skilled technician Leading aircraftman Aircraftman

Chapter 27

The Summary Appeal Court

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Chapter 27

The Summary Appeal Court

Part 1 - Introduction

Audience

1. This Chapter provides guidance to all personnel who are involved professionally in processing appeals to the Summary Appeal Court (SAC). They include: the commanding officer (CO); the Director of Service Prosecutions (DSP) as the respondent to the appeal⁵; Reviewing Officers (RO); unit administrative staff; and the Military Court Service (MCS). The appellant's legal representative and assisting officer may also derive benefit from its content⁶. Comprehensive procedural guidance for units is contained in the Manual of Service Law (MSL), [Chapter 15](#) (Summary hearing review and appeal), Part 2.

Organisation of the chapter

2. The chapter outlines the constitution and fundamental features of the SAC and the procedures to be followed before, during and after appeals from summary and activation hearings in accordance with Part 6 of the Armed Forces Act 2006 (the Act) and the Armed Forces (Summary Appeal Court) Rules 2009. The earlier parts deal with general matters such as the membership of, and the constitution of the court, uncontested appeals and witness notification and summons. This is followed by the preliminary matters to the appeal hearing and then guidance is provided on the order of procedure at the appeal itself appropriately sub-divided to cover both types of appeal: those against punishment and those against finding. The latter parts cover miscellaneous matters including evidence and service of documents.

Summary Appeal Court – an overview

3. The purpose of the SAC is to hear appeals from summary hearings (including appeals against the activation of a suspended sentence of detention by a CO) where personnel have a universal right of appeal. Appeals may be made against both the finding and punishment, which may be contested or uncontested by the respondent⁷, or against the punishment only. The SAC is a standing court and may sit anywhere, whether within or outside the United Kingdom⁸, and in practice will usually sit in one of the Service courts centres. It works in conjunction with the Service prosecuting authority (SPA) headed by the DSP and the court administration officer (CAO). The key features of the court include: the universal right of appeal; the possibility of the RO referring a finding or punishment to the SAC on behalf of an offender (this requires the Judge Advocate General to give leave to refer the case, after which the appeal is treated as if it were brought by the offender), see [Chapter 15](#) (Summary hearing review and appeal); a complete re-hearing for an appeal against both finding and/or punishment and the restriction of the court's power to pass sentence, in the event the finding is confirmed, that is no more severe than the punishment awarded by the officer who heard the charge.

⁵ Section 141(4) of the Act.

⁶ [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention) provides further detailed guidance.

⁷ See [Chapter 15](#) (Summary hearing review and appeal).

⁸ Section 140(2) of the Act.

The judge advocate

4. A judge advocate presides over the court and ensures that the proceedings are conducted in accordance with the law of England and Wales. Unlike in a CM trial the judge advocate participates in determining the facts and hence whether the finding should be upheld or quashed.

The court administration officer (CAO)

5. The CAO makes the administration arrangements for the SAC and exercises his functions (other than that of specifying the lay members for any proceedings) subject to the direction of the judge advocate. He may delegate any of his functions to a member of the MCS⁹.

Constitution of the SAC

6. The court consists¹⁰ of a judge advocate and two lay members except for preliminary and ancillary proceedings where there are no lay members¹¹. The lay members may comprise 2 officers or one officer and one substantive WO. Officers must have held a commission for at least 3 years and be of the minimum rank of sub lieutenant, military or marine lieutenant or flying officer or have been a substantive WO immediately before receiving a commission. The senior member is to be of minimum rank of lieutenant commander, major or squadron leader. No member of the court is to be of junior rank/rate or junior in the same rank/rate to the appellant. Only one WO may sit as a member of a particular SAC hearing, and then only if he is of equivalent rank/rate or of senior rank/rate to the appellant. Where the court is to hear an appeal from co-appellants one of whom is an officer and the other is of the rank of WO or below, each member must be at least of equivalent rank to the most senior co-appellant. The ranks/rates referred to in this paragraph are substantive.

Officers and warrant officers not qualified or ineligible for membership of the court

7. Sections 143 and 144 of the Act make provision for the professional and particular circumstances when officers and warrant officers are either not qualified or ineligible for membership. In addition a person is ineligible for membership of the court if he has served on the same unit as the appellant since the commission of the offence that is subject to the appeal, or if he was a member of the SAC or of the CM for any previous proceedings involving the appellant¹².

Specifying members of the court and notification of time and place for hearing of the appeal

8. The CAO is responsible for making arrangements for SAC proceedings, including preliminary proceedings if necessary, as soon as practicable after the receipt of advance information from the DSP¹³ (See [Annex A](#) Notice of application for a preliminary hearing T-SL-SAC03). For this purpose the CAO will notify relevant parties of the time and place of the hearing, specify court members and consult the Judge Advocate General who will specify a judge advocate for the proceedings.

⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 21.

¹⁰ Section 142 of the Act.

¹¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 34.

¹² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 36.

¹³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 42 and 43.

Part 2 - Uncontested appeals

DSP to give notice of decision to contest appeal

9. Where the DSP is notified of an appeal¹⁴ against finding he must give written notice to the CAO, within 28 days, indicating whether or not he intends to contest the appeal¹⁵. The DSP may apply to the Judge Advocate General to extend this period: an extension may be granted if it is considered in the interests of justice to do so¹⁶.

10. Having given notice to contest an appeal in accordance with paragraph 9 above, the DSP may give notice to the CAO that he no longer wishes to contest the appeal. Where the DSP does not provide notice within 28 days to contest the appeal, the failure will be deemed notice that he does not intend to contest the appeal¹⁷.

Powers of the court in uncontested appeals

11. Where the DSP has given notice that he does not intend to contest an appeal against finding, the court must quash the finding against which the appeal was brought. The power of the court to quash such a finding¹⁸ may be exercised by the Judge Advocate General without a hearing¹⁹. Any decision of the Judge Advocate General in the exercise of these powers must be recorded in writing and signed by him. The CAO is responsible for notifying such decision to the appellant, the appellant's CO, the DSP and the reviewing authority if the appeal was referred by the reviewing authority²⁰.

¹⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 15, 16 or 17.

¹⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 19(1).

¹⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 19(4).

¹⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 19(3).

¹⁸ Under Section 147(1)(a) of the Act.

¹⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 20(2)(a).

²⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 20(3)(d).

Part 3 - Witnesses and summonses

Notification of witnesses

12. Where any person is required to give evidence in any proceedings before the court²¹, the CAO is responsible for notifying that person of the date, time and place at which he is required to attend²².

13. If the appellant requests the CAO to notify a witness on his behalf, the appellant is to provide the CAO with adequate information in sufficient time to enable notification to be made. If the CAO is unable to notify a witness as requested, or if, in his opinion, it is not reasonable to notify a witness, he is to inform in writing the judge advocate and the appellant.

Privileges of witnesses and others

14. A witness before the SAC or any other person whose duty it is to attend the court is entitled to the same immunities and privileges as a witness before the High Court in England and Wales²³.

Issue of witness summons on application to a judge advocate

15. A party who wishes the judge advocate to issue a witness summons must apply as soon as practicable after becoming aware of the grounds for doing so²⁴ using the form of application for a summons to witness (T-SL-CM04) which can be found at [Chapter 29](#) (Court Martial proceedings), alternatively the application may be made orally²⁵. The party applying must serve the application²⁶ on the CAO in the manner directed by the judge advocate. Where the application is made in writing it must contain the same declaration of truth as a witness statement. Where a person is served with a witness summons, he is entitled to be reimbursed the expenses incurred in respect of his attendance²⁷. Application to withdraw a witness summons may be made under Rule 53 and oral applications in respect of the attendance of witnesses under Rule 54 of the Armed Forces (Summary Appeal Court) Rules 2009.

Warrant to arrest

16. If the judge advocate is satisfied by evidence on oath that a witness summons would not procure a person's attendance, he may issue a warrant to arrest that person and bring him before the court. In addition a judge advocate may issue a warrant to arrest a witness who has failed to attend SAC proceedings²⁸. Where a person has been arrested under a warrant to arrest in these circumstances he is to be transferred to Service custody and brought before a judge advocate for a review of custody as soon as is practicable. If he has not been brought before a judge advocate within 48 hours of his arrest he must be released²⁹. If the person is retained in custody a periodic review will take place before a judge advocate³⁰.

²¹ See [Chapter 29](#) (Court Martial proceedings) Annexes G and H.

²² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 49(1).

²³ Section 150 of the Act.

²⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 50(4).

²⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule s 50, 51 and 54.

²⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 50(8).,Rule 50(5) provides guidance on the content of the application.

²⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 57.

²⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 55.

²⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 55(6)(b).

³⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 56.

Part 4 - Preliminary proceedings

Listing of proceedings

17. When the CAO has received advance information³¹ he must forward it to the judge advocate general and request him to determine whether preliminary proceedings are necessary and to specify a judge advocate for the appeal proceedings (See [Annex A](#) Notice of application for a preliminary hearing T-SL-SAC03). The CAO must then appoint a time and place for the preliminary or appeal proceedings as required³².

Listing of further preliminary proceedings

18. At the direction of a judge advocate or on receipt of an application from the DSP or appellant, the CAO is to appoint the date, time and place at which the preliminary hearing will take place³³ and issue an appropriate notice in writing to those concerned. (See [Annex A](#) Notice of application for a preliminary hearing T-SL-SAC03). During preliminary proceedings the judge advocate may give directions as appear to him to be necessary to secure the proper and efficient management of the appeal³⁴. The judge advocate may make an order or ruling on any question as to the admissibility of evidence; any question as to joinder or severance of charges; and any other question of law, practice or procedure relating to the appeal³⁵.

19. Unless the judge advocate directs otherwise, preliminary proceedings will take place before the judge advocate in open court. The judge advocate may direct that the preliminary hearing take place in chambers and without notice to the appellant³⁶ where he is satisfied it is necessary or expedient in the interests of justice.

Power of the court to hear more than one appeal at the same time - joinder of appeals

20. The court may decide to hear two or more appeals at the same time where it appears to be in the interests of justice to do so. The court may decide this of its own motion or on the application of the respondent or an appellant in one or more of the appeals to which the application relates. The power of the court to make a determination will be exercised by a judge advocate sitting alone.

21. Before refusing an application or making a determination in accordance with paragraph 20, the judge advocate will allow the respondent and the appellant in any of the appeals, to which the application or determination relates, the opportunity of making representations to him. Where a judge advocate makes such a determination, he will direct the CAO to specify the time and place for the hearing of each of the appeals to which the determination relates.

³¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 42.

³² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 43(b).

³³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 44(1). There is no prescribed form for such an application.

³⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 47(1).

³⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 47(2).

³⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 45.

Part 5 - Procedure for hearing an appeal

22. This part provides guidance on matters relating to the administration of the court and some of the matters that may arise before and during the appeal itself.

Sittings of the court

23. Generally the SAC must sit in open court unless the judge advocate directs the court to sit behind closed doors ('in camera')³⁷ on the grounds that it is necessary or expedient in the interests of the administration of justice to do so. Where the SAC sits in closed court only the members of the court and any person under instruction may remain present. If it appears to the judge advocate necessary in the interests of justice, proceedings may be adjourned from time to time. The court must not sit other than on a business day unless in the opinion of the judge advocate it is necessary to do so. After the commencement of the proceedings the judge advocate will direct the times and days on which the court shall sit³⁸.

Objections to lay members

24. At the commencement of any proceedings, the names of the persons specified to sit as lay members of the court (including any person specified as a waiting member) and the name of any interpreter must be read to the appellant. Any party to the proceedings may object to any lay member on any reasonable ground³⁹.

25. The judge advocate must rule on any objection to a lay member before the lay member is sworn. If an objection to a lay member is upheld, the judge advocate must discharge him.

26. Any waiting member in respect of whom no objection has been made or allowed shall take the discharged lay member's place⁴⁰; and, if there is no such waiting member, the hearing of the appeal is to be adjourned. If an objection to the interpreter is allowed⁴¹, the judge advocate must adjourn proceedings until the CAO has appointed a replacement.

Oaths and affirmations

27. After the appellant has been given the opportunity to challenge the members of the court, oaths must be administered to each of the lay members, and to any person in attendance under instruction, in the presence of the appellant⁴². The form and manner of the oaths are outlined at Schedule 1 to the Armed Forces (Summary Appeal Court) Rules. Any interpreter appointed by the CAO must have an oath administered to him before he acts⁴³; see [Annex B](#) for oaths and affirmations.

Termination of proceedings

28. The judge advocate must terminate any proceedings with lay members if he considers it in the interests of justice to do so or a lay member dies or is unable to continue to attend proceedings; lay members shall be discharged under these circumstances. The termination

³⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 90(1).

³⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule s 22(2).

³⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 37(2).

⁴⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 38.

⁴¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 29(3).

⁴² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule s 28 and 39.

⁴³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 29(2).

of proceedings for the reasons outlined above does not bar further appeal proceedings in relation to the relevant appeal⁴⁴.

Procedure to be adopted where more than one appeal against finding

29. Where at a hearing it is necessary for the court to determine more than one appeal against finding, those appeals must be heard at the same time and must be determined before any appeal against punishment, awarded in respect of any finding, is heard.

⁴⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 32(5).

Part 6 - Appeal against punishment

30. This part provides guidance in relation to the practice and procedure of the court with respect to the exercise of its powers for the hearing of an appeal against punishment in relation to: any proceedings where the court has upheld a finding that a charge has been proved; any proceedings where the court has substituted a finding that another charge has been proved⁴⁵; and an appeal against punishment⁴⁶.

Information provided by DSP before punishment

31. Where the proceedings relate only to any punishment awarded, or previous sentencing in respect of the appellant was terminated⁴⁷, the respondent must address the court on the facts of the case. Where practicable the respondent must inform the court of:

- a. The appellant's name, rank or rate, name, age and unit.
- b. The appellant's Service record.
- c. Any recognised acts of gallantry or distinguished conduct and any decoration to which he is entitled.
- d. Any previous convictions⁴⁸ of the appellant for Service and civilian offences and any sentence in respect of such an offence. Relevant offences⁴⁹ committed in another member state are also to be included. Those offences that are spent under the Rehabilitation of Offender's Act are to be indicated as such.
- e. Particulars of any formal police cautions.
- f. The appellant's rate of pay (including allowances and deductions), terminal benefits and pension entitlements⁵⁰.
- g. Whether the CO had extended powers⁵¹.
- h. The punishment awarded by the CO.
- i. Whether the CO made an activation order, if so, the previous offence and the punishment awarded for that offence.
- j. Where the offender is no longer subject to Service law refer to Armed Forces (Summary Appeal Court) Rules 2009, rule 86(5).

Determining disputes on facts (Newton Hearing)

32. Where, on an appeal that relates only to the award of punishment, there are disputed facts in the case, any issue of fact may be tried by the court⁵². Where an issue of fact is tried, the judge advocate may direct the respondent to call any witness to give evidence, and the respondent and the appellant may, with the leave of the judge advocate, adduce

⁴⁵ Section 147(1)(b) of the Act.

⁴⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 83.

⁴⁷ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 86.

⁴⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 86(2)(d).

⁴⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 86(2)(d)(iii).

⁵⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 86(2)(f) and 86(5).

⁵¹ Under Sections 133(1) & (2), 134(1), 135(1), or 136(1)(b) of the Act.

⁵² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 84.

evidence. The court (consisting of both the judge advocate and the members) will sit in closed court while deliberating on its findings on the issue of fact and any such issue will be determined by a majority of the votes of the members of the court. The decision of the court on the issue of fact, and the reasons for it will be announced in open court by the judge advocate.

Mitigation of punishment

33.. The appellant may call witnesses in mitigation of punishment or as to character and may personally address the court in mitigation. The appellant may also produce to the court any document or written report. Unless the respondent requires otherwise, any document or report need not be adduced in compliance with the strict rules of evidence.

Pre-sentence report and previous convictions

34. Where the CAO has arranged for a pre-sentence report to be prepared prior to the proceedings, he must provide the DSP and the appellant with a copy before the start of the hearing. Similarly, where the DSP has obtained a record of the appellant's previous convictions in advance of the proceedings, he is to provide the CAO and the appellant with a copy prior to the hearing⁵³.

Deliberation on, and pronouncement of, punishment

35. The court (consisting of the judge advocate and the members) shall close to deliberate on its decision on any punishment awarded. No other person may be present except a person in attendance for instruction⁵⁴. The vote of each member of the court should be given in reverse order of seniority and before the vote of the judge advocate. Any such decision, and the reasons for it, will be announced in open court by the judge advocate.

⁵³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 85(2).

⁵⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 27(2).

Part 7 - Appeal against finding

36. This part applies to the hearing of an appeal against a finding at a summary hearing that a charge has been proved.

Address to the court

37. Where the appeal is against finding, the respondent and the appellant may each address the court once with respect to the case against the appellant on the charges being heard by the court⁵⁵. If the respondent is to address the court he must do so immediately before adducing any evidence; the appellant may address the court immediately after the close of his case or, where there is more than one appellant, after the close of the case of each of the appellants. The respondent or appellant may, with the leave of the court, address it at any time during the hearing on any matter relating to the appeal or the charges that are being heard by the court. Also see Rule 75(4), Armed Forces (Summary Appeal Court) Rules 2009, in respect of the exercise of the Court's powers under Section 147(1)(b) where the court wishes to substitute another finding.

Provisions that are to apply where there are two or more appellants

38. The following provisions⁵⁶ apply where the court has decided to hear appeals by more than one appellant at the same time. The respondent's case on each of the charges before the court must be put before the case of any of the appellants, and the respondent may generally make only one address.⁵⁷ Where the same legal representative represents two or more appellants, he may make only one address to the court. The judge advocate must decide immediately before the hearing of the appeals the order in which the appellants are to put their case and to address the court.

39. The court must not close to deliberate on its decision in relation to any of the findings until the close of the case for each of the appellants and each of the appellants has had the opportunity to address the court.

Presence of witnesses

40. Except where the person is the appellant, or is present to give expert evidence or evidence as to a person's character, a person who is to be called to give evidence must not, except by leave of the judge advocate, be present at the hearing of an appeal against a finding until he is called to give evidence and examined⁵⁸.

41. If while a witness is under examination a question arises as to the admissibility of an answer following a question put to him or otherwise with regard to the evidence, the judge advocate may direct the witness to withdraw until the question is determined.

42. The judge advocate may direct any person, who is to give expert evidence or evidence as to a person's character, to withdraw from the court if he considers that the person's presence is undesirable.

Examination of witnesses

⁵⁵ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 75.

⁵⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 76.

⁵⁷ In pursuance of Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 75(1).

⁵⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 78.

43. The judge advocate may question any witness or put to a witness a question from a lay member. The judge advocate must give direction on the examination and cross-examination of witnesses. If it appears to the judge advocate to be in the interests of justice, he shall allow postponement and the recall of witnesses by any party⁵⁹.

Witness not called by respondent

44. Where the respondent does not intend to call as a witness:

- a. Any person whose statement has been served on the appellant as part of the evidence for the respondent; or
- b. Any person in respect of whose evidence he has served notice as part of the respondent's papers,

unless the appellant waives the requirement, the respondent is to serve notice in writing on the appellant that he does not intend to call that person or tender that person at the hearing of the appeal for cross-examination by the appellant.

Submission of no case to answer

45. At the close of the respondent's case, the appellant may submit, in respect of any charge, that the respondent has failed to establish a case for him to answer. The judge advocate must hear and rule on such a submission in the absence of the lay members. If the submission is allowed, the judge advocate must direct the court to quash the finding⁶⁰.

Finding for the appellant before conclusion of the case for the appellant

46. The court may at any time after the close of the case for the respondent find for the appellant, provided that the respondent has been given an opportunity to address the court on whether such a finding should be made⁶¹. This power may only be exercised at the invitation of the judge advocate.

The case for the appellant

47. Only when the evidence of the respondent's witnesses has been heard, may the appellant give evidence should he choose to do so; he is not obliged to do so. In the event that he chooses to give evidence he will be liable for cross examination by the respondent and questioning by the judge advocate. Where he does so, the appellant must give evidence first before any other witnesses for the appellant are called.

Evidence in rebuttal

48. With the leave of the judge advocate, the respondent may call or recall a witness to give evidence on any matter raised by the appellant in relation to a charge which the respondent could not properly have dealt with or foreseen before the appellant disclosed his case.

⁵⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 77(2).

⁶⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 79(3).

⁶¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 81.

Deliberation on finding

49. When the court deliberates on its finding in relation to each charge no other person may be present, except a person in attendance for instruction⁶². During its deliberation on any such finding, the court shall not separate until the decision on the finding has been reached, unless the judge advocate directs that, in the interests of justice, the court may separate.

50. The vote of each member of the court must be given orally; and the vote of each member of the court should be given in reverse order of seniority and before the vote of the judge advocate.

Substituted finding – power to convict for offence other than that charged

51. The court has the power to acquit the appellant of the charge specifically charged in the charge sheet but if the facts still amount to an allegation of another Service offence, the court may convict on that other offence. If the court exercises the power to substitute a finding it shall specify the charge that has been proved.

Record of decision of the court on finding

52. The decision of the court on each finding, and (except where the decision is to quash the finding) the reasons for it, will be announced separately in open court by the judge advocate. The decision on each finding and the reasons for it, will be recorded in writing. The trial result notification form (T-SL-TRN2) found at [Annex C](#) may be used for this purpose.

Punishment

53. If the appeal is against finding and punishment, the court will consider the finding first and then go on to consider the punishment in light of their decision. If the finding on any charge is confirmed the court will be presented with information relating to the appellant's previous convictions, formal discipline record etc and mitigation, see Part 6.

Wasted costs and closing the court

54. Before closing the court the judge advocate deals with costs, if appropriate. The jurisdiction of the court to make an order:

- a. As to the payment of costs incurred by a party to proceedings as a result of an unnecessary or improper act or omission by or on behalf of another party to the proceedings⁶³; or
- b. Disallowing or ordering the legal or other representative⁶⁴ to meet the whole or any part of any wasted costs

may be exercised by the judge advocate sitting alone, and he may direct the other members of the court to withdraw for the purpose of exercising the jurisdiction.

⁶² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 27.

⁶³ As described in section 26(1) of the Armed Forces Act 2001.

⁶⁴ As defined in section 27(3) of the Armed Forces Act 2001.

Part 8 - Powers of the court

Appeal against finding

55. **Contested appeal.** Where the DSP opposes an appeal against finding, the proceedings take the form of a rehearing of the charge. The SAC may confirm a finding, quash it or substitute it with a finding that another charge has been proved. Where the SAC quashes a finding it must also quash any accompanying punishment. After rehearing the evidence in respect of punishment, the SAC may confirm the punishment or quash it and substitute another punishment. The SAC cannot substitute a punishment unless the substituted punishment was capable of being awarded by the hearing officer who awarded the original punishment at the summary hearing⁶⁵ and it is a punishment that the SAC considers is no more severe than the original punishment. Where the appellant was convicted of multiple charges and decides to appeal against finding and/or punishment on one of the charges, the SAC, should it allow the appeal, will adjust accordingly the global sentence that the appellant originally received⁶⁶.

56. **Uncontested appeal.** If the appeal is uncontested, where the DSP as respondent does not oppose the appeal, the finding being appealed against will be quashed⁶⁷ by the SAC. Where the appeal is uncontested the powers of the SAC are exercised by a judge advocate sitting alone and the Court Administration Officer (CAO) is responsible for informing the appellant, the appellant's CO and the DSP of the outcome.

Appeal against punishment

57. The powers of the court on an appeal against punishment are:

- a. To confirm the punishment awarded; or
- b. To quash the punishment and award in substitution for it any punishment that it would have been in the powers of the officer who held the summary hearing to award and in the opinion of the court is no more severe than the punishment originally awarded. This will be recorded on the trial result notification T-SL-TRN02 ([Annex C](#))

⁶⁵ See section 147(3)(b)(i) of the Act.

⁶⁶ [Chapter 13](#) (Summary hearing sentencing and punishment) provides guidance on global sentences.

⁶⁷ Rule 20(1) of the Armed Forces (Summary Appeal Court) Rules 2008.

Part 9 – Evidence

Rules of evidence

58. The rules as to the admissibility of evidence before the SAC are governed by the Armed Forces (Summary Appeal Court) Rules 2009. The rules of evidence applicable in a trial on indictment in England and Wales generally apply⁶⁸, but there are procedures which are particular to the SAC. See Part 11 of Armed Forces (Summary Appeal Court) Rules 2009, for full details on evidence at the SAC. The following paragraphs summarise a few of the important differences to the civilian system.

59. **Attendance or giving evidence by live link.** Any person, who is not in the place where the proceedings are being held, may attend by live link if the judge advocate so directs. This includes witnesses who may give evidence. An application may be made to the judge advocate for permission to attend by live link or the judge advocate may direct such a course of action⁶⁹.

60. **Use of documents to refresh memory.** The Criminal Justice Act 2003 section 139 does not apply to the SAC, however a person giving oral evidence may refresh his memory from a document made or verified by him at an earlier time or a transcript of a sound recording⁷⁰.

⁶⁸ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 59.

⁶⁹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 25.

⁷⁰ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 63.

Part 10 – Miscellaneous

Custody during proceedings

61. Custody during proceedings is addressed at Volume 1 [Chapter 5](#) (Custody).

Proof of service facts and records

62. **Service of documents.** The appeal process as a whole is time-critical and consequently there are strict time constraints that must be complied with when transmitting documents between parties to the appeal. Documents may be served by a number of acceptable methods including: personally, by post, DX, FAX and other electronic means. The judge advocate may also direct service by any other method if the particular circumstances demand. Proof of service may be achieved in a number of ways. The Armed Forces (Summary Appeal Court) Rules 2009, Part 2 lays out the various time constraints and acceptable methods for the service of documents.

63. **Record of proceedings.** A record must be made of any proceedings. The Armed Forces (Summary Appeal Court) Rules 2009, rule 30 details the contents of the record and the responsibilities of the CAO with regard to despatching the record of preliminary proceedings to the Judge Advocate General and the parties to the appeal. The record of proceedings is to be kept in the custody of the Judge Advocate General for not less than six years from the conclusion of the appeal proceedings or the conclusion of the preliminary proceedings where there are no further proceedings⁷¹. A copy of the record of proceedings, or any part of it, shall be provided to any party to the proceedings without charge. A charge may be levied by the Judge Advocate General for the provision of a copy of the proceedings to any other person⁷². There are exceptions to the provision of copies of the proceedings that were held in camera and disclosure may also be restricted for reasons of security⁷³.

Exhibits

64. Exhibits must be marked sequentially with a number or letter and signed by or on behalf of the judge advocate. If the exhibit cannot be signed, a label is to be attached to it for this purpose. Exhibits are to be kept with the record of proceedings unless the judge advocate directs otherwise⁷⁴.

Application to the court to state a case

65. An application may be made to the SAC to have a case stated for the opinion of the High Court on the grounds that any decision of the SAC is wrong in law or is in excess of jurisdiction. It is to be made in writing and served on the CAO and the appellant or the DSP, as the case may be, within 21 days after the date of the decision in respect of which the application is made. The application is to state the grounds on which the decision of the court is questioned. The CAO is to serve the application on the judge advocate, who presided over the proceedings to which the application relates, as soon as it is practicable for him to do so⁷⁵.

⁷¹ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 30(5).

⁷² Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 30(6)(b).

⁷³ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 30(7) & (8).

⁷⁴ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 31(3).

⁷⁵ Under section 149(2) of the Act; see Armed Forces (Summary Appeal Court) Rules 2009/1211, rules 92 to 94, for further detail on applications and procedure.

OATHS AND AFFIRMATIONS⁷⁶

Part 1 - Manner of administering oaths and affirmations

1. The person taking the oath shall hold the New Testament, or if a Jew the Old Testament, in his uplifted hand and shall say, or repeat after the person administering it, the oath provided in Part 2 of this annex for that category of person.
2. If any person to whom an oath is administered desires to swear in the form and manner in which an oath is usually administered in Scotland, he may do so with uplifted hand and saying or repeating after the person administering it, the Scottish oath provided in Part 3 of this annex for that category of person.
3. If a person objects to swearing an oath he shall be permitted to make a solemn affirmation instead of taking an oath as provided in Part 4 of this Annex. In a case where it is not reasonably practicable, without convenience or delay to administer an oath in the manner appropriate to a person's religious belief, he shall be permitted to make a solemn affirmation instead of taking an oath. Moreover, in such a case the person may be required to make a solemn affirmation.

Part 2 - Forms of oath

Lay members

I swear by Almighty God that I will well and truly try the appellant before the court according to the evidence; I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Summary Appeal Court, unless required to do so in due course of law.

Persons in attendance for instruction

I swear by Almighty God that I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Summary Appeal Court, unless required to do so in due course of law.

Witness

I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

Interpreter

I swear by Almighty God that I will well and faithfully interpret and make true explanation of all such matters and things as shall be required of me according to the best of my skill and understanding.

Part 3 – Form of Scottish oath

The form of Scottish oath for a witness is 'I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth'⁷⁷

⁷⁶ Armed Forces (Summary Appeal Court) Rules 2009/1211, rule 28(3) and Schedule 1.

Part 4 - Form of solemn affirmation

I [full name] do solemnly, sincerely and truly declare and affirm the evidence I shall give shall be the truth, the whole truth, and nothing but the truth.

⁷⁷ For Scottish oaths in criminal proceedings see the Act of Adjournal (Criminal Proceeding Rules) 1996/513.

Chapter 28

Court Martial constitution and roles

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Chapter 28

Court Martial constitution and roles

Introduction

1. This chapter is divided into two parts. Part one provides guidance on the constitution of the Court Martial (CM), including the rules which govern the size and membership of CM boards where lay members are required. Part two introduces court officials and parties to proceedings who perform roles in relation to the CM.

Part 1 - CM constitution

Status and jurisdiction of the CM

2. The Armed Forces Act 2006 (the Act) establishes the CM as a standing, permanent court⁷⁸. The CM may sit anywhere, within or outside the United Kingdom⁷⁹, and has the jurisdiction to try any Service offence⁸⁰.

3. In addition to trial proceedings, CM proceedings encompass preliminary proceedings (relating to trial and sentencing proceedings), sentencing proceedings, variation proceedings ('slip rule'), activation proceedings, ancillary proceedings and appellate proceedings (on appeal from the Service Civilian Court (SCC)), see [Chapter 29](#) (Court Martial proceedings). The constitution of the court may vary depending upon the type of proceedings, status of the defendant or offender, and any previous or proposed constitution of the court for relevant proceedings. The variations in constitution according to these factors are explained in the following paragraphs.

General requirements for CM proceedings constitution

4. **Judge advocate.** For all CM proceedings there must be a judge advocate⁸¹ and that person will be selected and then specified for a hearing by or on behalf of the Judge Advocate General⁸².

5. **Minimum number of lay members.** Other than where the judge advocate deals with matters sitting alone⁸³ the CM will consist of the judge advocate and other persons who sit as members of the CM, known as 'lay members'⁸⁴ but sometimes referred to as 'board members'.

6. All CM proceedings requiring lay members must have at least three lay members⁸⁵ but no more than five lay members sitting on a CM board⁸⁶. In the majority of cases, the board will consist of three members; however, in the most serious cases the minimum number of lay members required will be five⁸⁷. This is in order to bring additional Service experience to the trial and, where necessary, the sentencing of such cases. Five lay members are required when⁸⁸:

- a. In trial proceedings, any defendant is charged with an offence listed within Schedule 2 of the Act;
- b. In trial proceedings, any defendant is charged with an offence for which he could, if convicted, be sentenced to more than seven years' detention under section 209 of the Act (for those aged under 18 at the commencement of the proceedings) or seven years' imprisonment (for those aged 18 or over at the commencement of the proceedings);

⁷⁸ Section 154(1) of the Act.

⁷⁹ Section 154(2) of the Act.

⁸⁰ Section 50(1) of the Act. For definition of 'Service offence' see section 50(2) of the Act and [Chapter 6](#) (Investigation, charging and mode of trial).

⁸¹ Section 155(1)(a) of the Act.

⁸² Section 155(5) of the Act.

⁸³ See [Chapter 29](#) (Court Martial proceedings) for circumstances in which a judge advocate sits alone; see also paragraph 9 below.

⁸⁴ Section 155(1)(b) of the Act.

⁸⁵ Section 155(1)(b) of the Act.

⁸⁶ Section 155(1)(b) of the Act.

⁸⁷ Section 155(2)(a) of the Act.

⁸⁸ Armed Forces (Court Martial) Rules 2009 rule 29.

- c. Any defendant is to be sentenced in relation to an offence to which paragraph 6.a or 6.b applies, unless rule 27 of the Court Martial Rules applies (proceedings without lay members); or
- d. A sentence that was passed by a board consisting of five lay members by virtue of paragraph 6.c is to be varied⁸⁹.

7. **Additional lay members.** In certain circumstances an additional one or two lay members may supplement the usual three or five member CM boards⁹⁰. This provision is designed to help to avoid the situation in which a trial might collapse because a lay member can no longer fulfil the role (eg. due to death, illness or compassionate leave) and the number of remaining lay members therefore falls below the minimum required. This power may only be exercised if, in the opinion of the judge advocate, the proceedings:

- a. Are likely to last more than ten court days; or
- b. If held outside the UK and Germany are likely to last more than five court days.

8. Where necessary in these circumstances, the judge advocate will direct that the number of lay members is to be four, five, six or seven as the case may be⁹¹. However, such a direction cannot be made after commencement of the proceedings⁹² to which they relate unless the judge advocate had previously given a direction for additional members before the proceedings commenced and the number of lay members has been reduced to the minimum number required for those proceedings (either three or five as required) because of objections to the lay members⁹³. In such circumstances the judge advocate is likely to adjourn proceedings until the CAO has appointed the requisite additional one or two lay members.

9. **Judge advocate sitting alone.** A judge advocate can exercise any power of the court sitting alone except⁹⁴:

- a. The power to try a defendant or appellant;
- b. The power to sentence an offender (except for civilian offenders, to whom Part 1 of Schedule 3 of the Act applies, and ex-Service personnel offenders, to whom Part 2 of Schedule 3 of the Act applies⁹⁵, see paragraph 10e below);
- c. The power to vary a sentence (except where there were no lay members for sentencing or the judge advocate directs that variation proceedings are to be conducted without lay members⁹⁶); and
- d. The power to make an activation order (except where there were no lay members for the original sentence).

10. The judge advocate will sit alone in the following situations (this list is not exhaustive):

- a. During all preliminary proceedings, including arraignment;

⁸⁹ Armed Forces (Court Martial) Rules 2009 Part 15.

⁹⁰ Section 155(2)(a) of the Act and the Armed Forces (Court Martial) Rules 2009 rule 30.

⁹¹ Section 155(7) of the Act and the Armed Forces (Court Martial) Rules 2009 rule 30(1).

⁹² Such as trial, sentencing or variation proceedings.

⁹³ Armed Forces (Court Martial) Rules 2009 rule 30(4).

⁹⁴ Section 155(2)(b) of the Act and the Armed forces (Court Martial) Rules 2009 rule 28.

⁹⁵ In the circumstances set out in the Armed Forces (Court Martial) Rules 2009 rule 27(3)(b).

⁹⁶ Armed Forces (Court Martial) Rules 2009 rule 120.

- b. During any proceedings in order to give a ruling on any question of law, practice or procedure to which the lay members should not be party. This includes but is not limited to: questions of admissibility of evidence; applications for a summons or warrant, a live link, or to adduce a complainant's previous sexual history⁹⁷; submissions of no case to answer; questions as to whether a question should be put; and issues of fitness to stand trial;
- c. To make a ruling as to a wasted costs order;
- d. During sentencing proceedings of civilian offenders⁹⁸;
- e. During sentencing proceedings where the offender is a former member of the armed forces who has either been tried by a CM in which no lay member was subject to Service law or in relation to whom a guilty plea or pleas were entered in relation to all charges for which he is to be sentenced, and, had he pleaded not guilty, the nominated board for the trial would have consisted entirely of civilian lay members⁹⁹;
- f. During variation proceedings where either of sub-paragraphs d and e above applied in relation to the sentence awarded during previous sentencing proceedings¹⁰⁰;
- g. During variation proceedings where it is not possible for the minimum number of original lay members who dealt with the sentencing proceedings to which the variation proceedings relate to reassemble, and the judge advocate gives a direction that no lay members should take part in those proceedings¹⁰¹;
- h. For activation proceedings where sub-paragraphs d and e above applied in relation to the sentencing proceedings at which the suspended sentence of imprisonment or detention, or the detention and training order which is the subject of the activation proceedings was awarded¹⁰²; and
- i. For ancillary proceedings¹⁰³.

Role of the CAO

11. Lay members for proceedings of the CM are specified by or on behalf of the CAO¹⁰⁴. The CAO will decide from which pool of potential lay members the lay members can be drawn (the potential pools include MOD civil servants, members of the local ex-patriate community abroad, and members of the RN, RM, Army and RAF). Having drawn the names at random from the selected pool, and having checked that they are not ineligible for board membership for any reason (see paragraphs 19 - 25 below), the CAO will specify who the lay members should be. The nomination of lay members is a matter entirely for the CAO¹⁰⁵.

12. The constitution of each court is dealt with on a case-by-case basis according to statutory requirements, and the principles outlined below. The overriding principle is that the constitution of the court should be fair, with lay members drawn at random from the widest pool of potential members.

⁹⁷ Youth Justice and Criminal Evidence Act 1999, section 41(2).

⁹⁸ Armed Forces (Court Martial) Rules 2009 rule 27(3)(a).

⁹⁹ Armed Forces (Court Martial) Rules 2009 rule 27(3)(b).

¹⁰⁰ Armed Forces (Court Martial) Rules 2009 rule 27(4).

¹⁰¹ Armed Forces (Court Martial) Rules 2009 rule 27(4)(b) and rule 120.

¹⁰² Armed Forces (Court Martial) Rules 2009 rule 27(5).

¹⁰³ Armed Forces (Court Martial) Rules 2009 rule 27(6).

¹⁰⁴ Section 155(6) of the Act.

¹⁰⁵ For this purpose, MCS will be guided by the Military Court Service Standing Operating Instructions.

Constitution of the board

13. **Service personnel.** A Service defendant will ordinarily be tried by lay members wholly of his own Service¹⁰⁶. However, where a defendant is tried with a co-defendant from a different Service, the lay membership of the court will be a mixture of Service personnel from different Services. Each defendant will always have at least one lay member of his own Service on the board of the CM.

14. **Civilians (including ex-Service personnel).** Where a defendant is a civilian, but is not an ex-Service person, the proceedings should take place before an entirely civilian board unless there are exceptional circumstances that justify a mixed board or a Service board. Where the defendant is an ex-Service person, the court may consist of either civilian lay members or Service lay members, or be a mixed board. In each situation the constitution of the court will be assessed on a case-by-case basis¹⁰⁷. Where the board includes civilian lay members and Service personnel the president of the board will be the senior Service member of the board¹⁰⁸. If the board is all civilian there will be no president of the board.

Rank of lay members for CM proceedings

15. **President of the board.** As a matter of law, the ability of any person to act as president of the board is subject to him being of a minimum rank of lieutenant commander, major or squadron leader, and that he is superior in rank to any person to whom the proceedings relate (defendant, offender etc.)¹⁰⁹. The senior Service lay member (including where the lay membership of the board includes both Service personnel and civilians) will be the president of the board¹¹⁰.

16. **Officers.** An officer is not qualified for court membership unless they have held a commission in the armed forces for at least three years, or for periods which aggregate to three years or immediately before being commissioned was a warrant officer¹¹¹. In addition an officer should not be appointed as a lay member unless he is of or above the rank of sub-lieutenant, military or marine lieutenant or flying officer.

17. **Warrant officers.** Warrant officers must hold the substantive, not acting, rank of warrant officer¹¹². Warrant officers may only be lay members where the subject of the proceedings is of or below the rank of warrant officer¹¹³.

18. **Additional restrictions on rank of lay members.** In addition to the general restrictions as to who is qualified to be the president of the board or another lay member, the rank of the president of the board and rank of the lay members will depend on the rank or rate (if any) of the subject of the proceedings (defendant or offender as the case may be) in the following situations:

- a. **Defendant/offender of or above the rank of commodore, brigadier or air commodore.** As a matter of law, the president of the board must be senior in rank or senior within the same rank to the defendant¹¹⁴; as a matter of policy the other lay members should be of no lower rank than commodore, brigadier or air commodore;

¹⁰⁶ For Royal Marines personnel, 'own Service' is the Royal Navy.

¹⁰⁷ If necessary, MCS may seek advice from MOD DGLS.

¹⁰⁸ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

¹⁰⁹ The Armed Forces (Court Martial) Rules 2009 rule.34(3).

¹¹⁰ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

¹¹¹ Section156(2) of the Act.

¹¹² Section156(3) of the Act.

¹¹³ The Armed Forces (Court Martial) Rules 2009 rule 31(1).

¹¹⁴ The Armed Forces (Court Martial) Rules 2009 rule 34(4).

- b. **Defendant/offender of or above the rank of lieutenant commander, major or squadron leader.** As a matter of law the president of the board must be of superior rank to the person to whom the proceedings relate¹¹⁵ and as a matter of policy should be of no lower rank than naval captain, colonel or group captain; and
- c. **Defendant/offender of or below the rank or rate of warrant officer.** As a matter of policy, one lay member may be a warrant officer on a 3-man board and up to two warrant officers may be lay members on a 5-man board¹¹⁶.

Eligibility of lay members

19. Although an officer or warrant officer might otherwise be qualified to be a lay member (see paragraphs 13 - 18 above) he might be ineligible to sit on particular proceedings. To avoid the potential of any real or perceived bias (eg. through his involvement with the Service disciplinary system) an officer or warrant officer is not qualified for CM membership if he/she is¹¹⁷:

- a. A member of the Military Court Service (MCS);
- b. A member of or on the staff of the Service Prosecuting Authority (SPA);
- c. A Service policeman;
- d. A member of the Royal Army Chaplains' Department or the Royal Air Force Chaplains' branch¹¹⁸ or a Naval Chaplain¹¹⁹;
- e. A barrister or solicitor in England and Wales;
- f. An advocate or solicitor in Scotland;
- g. A barrister or solicitor in Northern Ireland; or
- h. The equivalent of a barrister or solicitor in the Channel Islands, Isle of Man, a Commonwealth country or a British Overseas Territory.

20. In addition, notwithstanding that an officer or warrant officer may generally be qualified for membership for CM proceedings, there will be certain circumstances in which he finds himself ineligible because he was involved in investigating the charge or because of his command relationship to the defendant¹²⁰. An officer or warrant officer will be ineligible if he:

- a. Was the CO of the defendant between the offence being committed and the defendant being arraigned (and where a defendant is arraigned for more than one offence, the date of the earliest offence triggers the CO's ineligibility¹²¹);
- b. Has taken part in investigating the charge(s) against the defendant; or

¹¹⁵ The Armed Forces (Court Martial) Rules 2009 rule 34(3)(c).

¹¹⁶ Section 155(3) of the Act and The Armed Forces (Court Martial) Rules 2009 rule 31(1).

¹¹⁷ Sections 156(4) and (5) of the Act.

¹¹⁸ Section 156(4)(d) of the Act.

¹¹⁹ Armed Forces (Naval Chaplains) Regulations 2008.

¹²⁰ Sections 157(1) and (2) of the Act.

¹²¹ Section 157(3) of the Act.

- c. Has conducted an inquiry, either alone or with other persons, into the matter which is the subject of the charge(s) against the defendant.

21. A Service person will also be ineligible for lay membership in the circumstances outlined at paragraphs 23 - 25 below, which apply to both Service and civilian lay members.

Eligibility of civilian personnel

22. Civilians who are subject to Service law at the time of the proceedings are not qualified for lay membership of a board¹²². In addition, the following may not be civilian lay members¹²³:

- a. Those under 18 and those of the age of 70 years or older at the commencement of the proceedings;
- b. Those who are not UK nationals (as defined by paragraph 11 of Schedule 15 of the Act);
- c. The mentally disordered¹²⁴;
- d. Those disqualified from jury service¹²⁵;
- e. Members of the MCS; and
- f. Staff of the SPA.

Eligibility of lay members – both Service and civilian personnel

23. **Personnel serving in/attached to the same unit as any person to whom the proceedings relate.** Any person, Service or civilian, is ineligible for lay membership of a board for any proceedings of the CM if, at any time between the commission of the offence and the proceedings in relation to that offence for which he may be nominated to be a lay member, he and any party to whom the proceedings relate (defendant/offender) were serving in the same unit¹²⁶. These rules apply to trial, sentencing, variation, appellate and activation proceedings¹²⁷.

24. **Membership of court during previous proceedings.** Any person who was a member of the board during previous proceedings in relation to any person to whom the proceedings relate will be ineligible for membership of the court for later proceedings¹²⁸. Thus, a member of a board which sentenced an offender to a suspended sentence of detention will be ineligible to be a member of the board for activation proceedings where the offender has committed an offence during the operational period of that suspended sentence. However, a person is not ineligible for membership where the previous proceedings were terminated as a result of successful challenges to other lay members¹²⁹. Thus, where a member of a board is sworn in for the trial of any matter but the defendant successfully challenges other potential members of the board such that the number of potential members falls below the statutory number required (see paragraphs 5 - 8 above), the sworn member could be selected for membership of the board at a later trial when sufficient lay members are assembled to try the case.

¹²² The Armed Forces (Court Martial) Rules 2009 rule 33(1).

¹²³ The Armed Forces (Court Martial) Rules 2009 rule 33(2).

¹²⁴ Under Part 1 of Schedule 1 to the Juries Act 1974 (The Armed Forces (Court Martial) Rules 2009 rule 33(3)(a).

¹²⁵ Under Part 2 of Schedule 1 to the Juries Act 1974 (The Armed Forces (Court Martial) Rules 2009 rules 32(1) – (5).

¹²⁶ Serving in the same unit in the case of civilians means attached to the same unit see the Armed Forces (Court Martial) Rules 2009 rule 32(10).

¹²⁷ The Armed Forces (Court Martial) Rules 2009 rules 32(1) – (5).

¹²⁸ The Armed Forces (Court Martial) Rules 2009 rule 32(6).

¹²⁹ The Armed Forces (Court Martial) Rules 2009 rule 32(9).

25. There are two exceptions to this rule:

a. **Sentencing proceedings.** Members of the board for any trial or appellate proceedings in which any offender was convicted of any offence for which he is to be sentenced may be members of the board for those sentencing proceedings¹³⁰; and

b. **Variation proceedings.** Members of the board which sentenced the offender will be members of the board for variation proceedings in relation to the sentence awarded for that offence¹³¹.

Objections to lay members or constitution of the court

26. Both the prosecution and defence have the right to object to any lay members on any reasonable grounds¹³². The judge advocate will rule as to whether a lay member should be discharged as result of any objection. This right of objection does not apply to sentencing proceedings where all offenders to be sentenced were tried by those lay members, or to variation proceedings¹³³.

27. In addition to the general right to challenge lay members before they are sworn, parties may object to the constitution of the court if it appears to be unfairly constituted. In such circumstances a party may make representations to the judge advocate either at a preliminary hearing or at the trial or sentencing proceedings before the proposed members are sworn.

¹³⁰ The Armed Forces (Court Martial) Rules 2009 rule 32(7).

¹³¹ The Armed Forces (Court Martial) Rules 2009 rule 32(8) (but see also rule 120).

¹³² The Armed Forces (Court Martial) Rules 2009 rule 35.

¹³³ Armed Forces (Court Martial) Rules 2009 rule 35(5).

Part 2 - CM roles

28. The purpose of this section is to introduce those court officials and parties to proceedings who perform roles relating to the CM. It does not provide detailed descriptions of their functions. These are dealt with in [Chapter 29](#) (Court Martial proceedings).

Judge advocates

29. A CM will always have a judge advocate¹³⁴. A judge advocate will be either¹³⁵:
- a. The Judge Advocate General;
 - b. A person appointed as an assistant to the Judge Advocate General (including the Vice Judge Advocate General); or
 - c. A puisne judge¹³⁶ of the High Court nominated by or on behalf of the Lord Chief Justice to sit as a judge advocate following a request by the Judge Advocate General.

In practice, the judge advocate at a CM will ordinarily be one of the assistants to the Judge Advocate General.

30. The judge advocate is in many ways the equivalent to the judge in a civilian Crown Court in England and Wales. Accordingly, it is the judge advocate who will give rulings and directions on questions of law, procedure and practice at the CM¹³⁷. However, there is one important material difference. Whereas a judge will always sentence alone in a Crown Court, at the CM the defendant will be sentenced by a CM board consisting of the judge advocate and lay members, except in the circumstances described in paragraphs 9 and 10, above.

Lay members - general

31. Lay members may perform two types of role during proceedings of the CM. In the event of a contested trial or during appellate proceedings on appeal from the SCC, they will be required to determine the innocence or guilt of the defendant, in the same way as a jury would at a trial on indictment in the Crown Court. In the event of a conviction, either following a guilty plea or a guilty finding, the lay members may be required, in conjunction with the judge advocate, to determine the sentence to be imposed on the offender. Where they have previously been involved in sentencing proceedings they will have a re-sentencing function during variation proceedings. However, civilian lay members will only perform these functions when they form part of a board which also consists of Service personnel, though not in the case of a civilian offender. Guidance for lay members on their functions at a CM is set out JSP 836 (A guide to Court Martial and the Summary Appeal Court).

President of the board

32. The senior Service lay member (where any Service members are present) will be the president of the board¹³⁸. This applies whether the court consists entirely of Service personnel or is a mixed board of Service personnel and civilians. Where there is no Service person on

¹³⁴ Section 155(1) of the Act.

¹³⁵ Section 362 of the Act.

¹³⁶ 'Puisne' is pronounced 'puny'. A puisne judge is any judge of the High Court other than the heads of each division. The word puisne means junior and is used to distinguish High Court judges from senior judges sitting at the Court of Appeal.

¹³⁷ Section 159(1) of the Act.

¹³⁸ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

the board there will be no president of the board but the lay members will be invited by the judge advocate to elect a spokesperson to deliver the verdict.

Court administration officer

33. The CAO is responsible for the administration of the CM. That person, who is appointed by the Defence Council, is the CAO for the SCC and SAC as well as for the CM¹³⁹.

34. The CAO may delegate any of his functions in relation to the court to a member of the MCS¹⁴⁰, and in practice will delegate most of his administrative functions.

Director of Service Prosecutions

35. The Director of Service Prosecutions (DSP) is the head of the SPA and is responsible for the prosecution of offences at the CM¹⁴¹. The DSP is appointed by Her Majesty the Queen¹⁴², and must be a qualified lawyer¹⁴³. The DSP may be a civilian or a Service person.

Prosecuting officers

36. The DSP may appoint officers to be prosecuting officers¹⁴⁴ and, unless the DSP directs otherwise, a prosecuting officer may exercise any of the DSP's functions¹⁴⁵. In practice, therefore, whilst the DSP is responsible for prosecuting offences at CM, this function will be routinely performed by the prosecuting officers appointed to the SPA. However, whilst a uniformed lawyer must have conduct of the case the DSP may appoint himself or other civilian counsel to be the lead advocate for CM proceedings should the need arise. All prosecuting officers must hold a relevant legal qualification¹⁴⁶.

Defendant's assisting officer

37. The Defendant may nominate a Defendant's Assisting Officer (DAO) to assist him in preparing for CM proceedings. The DAO's role is primarily administrative, although he may assist an unrepresented defendant to prepare a plea in mitigation. He has no legal standing at the proceedings of the CM, has no right to speak unless he appears as a witness (for example as a character witness), and is not there to represent the defendant. A full summary of the DAO's responsibilities is at Annex B to [Chapter 29](#) (Court Martial proceedings).

Defence representation

38. The defendant may appoint a legal representative to act for him. The legal representative may be a civilian legal adviser or a Service legal adviser and must hold a relevant legal qualification¹⁴⁷.

Other court officials

¹³⁹ Section 363 of the Act.

¹⁴⁰ The Armed Forces (Court Martial) Rules 2009 rule 15(2).

¹⁴¹ The DSP's role in directing the bringing of charges allocated for trial by Court Martial is set out in [Chapter 6](#) (Investigation, charging and mode of trial).

¹⁴² Section 364(1) of the Act.

¹⁴³ Section 364(2) and (4) of the Act.

¹⁴⁴ Section 365(1) of the Act.

¹⁴⁵ Section 365(4) of the Act.

¹⁴⁶ Section 365(2) and (5) of the Act.

¹⁴⁷ The Armed Forces (Court Martial) Rules 2009 rule 39(2).

39. The MCS and individual Services will provide a number of court officials to assist at military court centres to ensure the smooth running of trials and other court proceedings. The following paragraphs outline the officials and their duties in broad terms. Further details of the specific duties and ranks/grades of the officials identified in this section can be found in the MCS standing operating instructions.

40. **Court officer.** The responsibility for the administration of the CM at military court centres lies with the court officers who are permanent Civil Service staff of the MCS. Court officers may delegate any of their functions to other members of the MCS staff or Service personnel as required.

41. **Court usher.** The Service of the defendant (or one of the defendants if there are co-defendants from different Services) will provide an individual to act as court usher to the CM. The court usher, as directed by the court officer, will provide basic administrative assistance to the CM equivalent to that of an usher in a civilian Crown Court in England and Wales.

42. **Verbatim court recorder.** A verbatim court recorder will be provided, under contract with the MCS, to maintain an appropriate record of proceedings at the CM.

43. **Escort.** The Service of the defendant will provide an individual to act as escort to the defendant. Where there are co-defendants of different Services, each co-defendant will have an escort of their own Service.

Chapter 29

Court Martial proceedings

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Chapter 29

Court Martial proceedings

Part 1 - Introduction

- 1. Audience and extent of guidance.** The purpose of this chapter is to provide guidance to all who have a professional interest in the procedure to be followed at trials by the Court Martial (CM) and related proceedings. Among those it is designed to inform are the staff of the Director of Service Prosecutions (DSP), the Military Court Service (MCS) and the legal representatives of defendants and others to whom CM proceedings relate. Anyone who is the subject of proceedings before the CM may also seek guidance from this Chapter, and Defendant's Assisting Officers (DAO) may also derive benefit from its content. This guidance does not seek to prevent, by omission or otherwise, what is allowed in accordance with law. Readers are advised to consult the relevant legislation and legal texts for further information. Separate guidance is published jointly by the Judge Advocate General (JAG) and the MCS for the information of those nominated to serve as members of a CM board¹⁴⁸.
- 2. Scope of CM proceedings.** CM proceedings include the determination of contested cases in which the defendant enters not guilty pleas (trials), the consideration of guilty pleas and the determination of sentence following conviction (sentencing proceedings). Related to these proceedings are preliminary proceedings before a judge advocate sitting alone during which arraignment will take place (i.e. the plea(s) will be taken), trial management issues and points of law and procedure will be dealt with. If not conducted during sentencing proceedings, the CM may hold separate activation proceedings for the activation of suspended sentences of detention and imprisonment. The CM also has the power to conduct variation proceedings to correct errors in sentencing, and ancillary proceedings (before a judge advocate sitting alone) relating to enforcement of sentences awarded by the CM. In addition, the CM has an appellate jurisdiction for appeal from the Service civilian court (SCC).
- 3. Organisation of chapter.** This chapter outlines the procedures to be followed for all proceedings before the CM in accordance with the Armed Forces Act 2006 (the Act) and the Armed Forces (Court Martial) Rules 2009, both of which are reproduced in full in Volume 3 of the MSL. The chapter is divided into 12 parts. Part 1 is the introduction. Part 2 deals with general administrative matters, including service of documents, advance information and listing. Part 3 details matters common to all CM proceedings. Part 4 deals with assistance to defendants and legal representation of parties to the proceedings. Part 5 provides information about preliminary proceedings and the matters which may be dealt with during such proceedings, including joinder and severance of charges and arraignment. Part 6 describes the methods available for securing the attendance of witnesses and the defendant. Part 7 deal with rules of evidence particular to CM proceedings. Parts 8 and 9 outline the trial procedure of the CM and the separate sentencing proceedings. Part 10 gives guidance on activation proceedings. Part 11 deals with appeals from the SCC (appellate proceedings). Finally Part 12 outlines ancillary proceedings.
- 4. Forms.** The forms for use in CM proceedings are contained in the Annexes to this chapter. These forms may be subject to periodic change and up to date forms can be

¹⁴⁸ JSP 836 A guide to Courts Martial and the Summary Appeal Court (Volume 1: Guide to Procedure; and Courts Martial and the Summary Appeal Court Guidance and Volume 2: Guide for Court Members)

requested from the court administration officer (CAO). The forms are available electronically and may be amended to suit requirements.

Part 2 – Administration, service of documents, advance information and listing

Court administration

5. **Court administration officer (CAO).** The CAO is responsible for making arrangements for the CM to sit, any preliminary proceedings, ensuring that all relevant persons are informed of the constitution of the court, time and place of sitting and any other matters relevant to the efficient conduct of the trial as regards administration. In doing so he must follow any direction given by a judge advocate, with the exception of specifying any lay members for proceedings¹⁴⁹. The CAO may delegate any of his functions in relation to the court to a member of the MCS¹⁵⁰.

6. **Court recorders and interpreters.** A sound recording must be made of all proceedings¹⁵¹, and therefore a verbatim court recorder will also usually be required unless the judge advocate directs otherwise. In some circumstances an interpreter may be required. In either case, the CAO is responsible for the appointment of a court recorder or interpreter for any proceedings.

Listing and notification of proceedings

7. **Listing of proceedings.** The CAO is responsible for listing proceedings, in consultation with the judge advocate where necessary. Proceedings will usually be conducted in one of the Military Court Centres, but may be listed to take place elsewhere in order to meet the operational requirements of the armed forces or for other good reason (such as reasons of security, witnesses having disabilities or serious illness, special measures requiring a change of location etc...).

8. **Notification of proceedings.** Whenever proceedings are listed or re-listed, the CAO must give notice in writing¹⁵² of the time and place appointed for commencement or resumption of the proceedings to the following¹⁵³:

- a. Each person to whom the proceedings relate;
- b. The legal representative (if any) of each such person;
- c. The CO of each such person;
- d. The DSP;
- e. Where the proceedings are for the hearing of an application, the applicant and
- f. Any such other person as the JAG may direct.

¹⁴⁹ Armed Forces (Court Martial) Rules 2009 rule 15(1).

¹⁵⁰ Armed Forces (Court Martial) Rules 2009 rule 15(2).

¹⁵¹ Armed Forces (Court Martial) Rules 2009 rule 23(e).

¹⁵² Service of the notice in writing of the time and place of the proceedings by the CAO will be in accordance with the Armed Forces (Court Martial) Rules 2009 rules 5 - 12.

¹⁵³ Armed Forces (Court Martial) Rules 2009 rule 17(1).

Once the lay or waiting members for the proceedings have been identified, their name and rank or rate and ship/unit/establishment (Service personnel) or position (Crown servants) are also to be notified to the above persons as soon as reasonably practicable¹⁵⁴.

Service of documents

9. The requirements as to the service of documents are the same regardless of who issues the document. However, the mode of service varies depending upon the recipient. In each case where service is by an electronic method (e.g. DX, fax or e-mail) there is no requirement to provide a paper copy¹⁵⁵.

10. **Service on a person to whom the proceedings relate.** For Service personnel, service may be affected in the following ways¹⁵⁶:

- a. By service on him personally¹⁵⁷;
- b. If he is a Service person¹⁵⁸, by post in a letter addressed to them at his/her ship/unit/establishment;
- c. If he is not a Service person, by leaving it at or posting it to his usual or last known place of abode;
- d. By post in a letter addressed to his legal representative's place of business; or
- e. By DX, fax, electronic mail or other electronic means to his legal representative where the representative has given such an address and has not refused to accept service by that means.

11. **Service on the CAO.** Service on the CAO may be by post, DX (if available), fax, electronic mail or other electronic means to one of the offices of the Military Court Service, or, with the agreement of a member of the MCS, personally on that member of that service.¹⁵⁹

12. **Service on the DSP.** Documents may be served on the DSP by post, DX (if available), fax, electronic mail or other electronic means to the Service Prosecuting Authority's (SPA) principal office, or with the agreement of a prosecuting officer, the SPA's main office in Germany, or with the agreement of a prosecuting officer, personally on that prosecuting officer¹⁶⁰.

13. **Service on other individuals.** For persons to whom none of paragraphs 10 to 12 relate (eg. witnesses, parent, guardian etc), service may be¹⁶¹:

- a. On the individual personally. For relevant civilians this may be done by delivering the documents to the CO of the recipient and the CO arranging for the document to be

¹⁵⁴ Armed Forces (Court Martial) Rules 2009 rule 17(2) and 17(3)

¹⁵⁵ Armed Forces (Court Martial) Rules 2009 rule 12.

¹⁵⁶ Armed Forces (Court Martial) Rules 2009 rule 5.

¹⁵⁷ This may be done by delivering the documents to the CO of the recipient and the CO arranging for the document to be served on the defendant. Where this method of service is chosen, the CO must arrange for the document to be served as soon as is reasonably practicable – see Armed Forces (Court Martial) Rules 2009 rule 11.

¹⁵⁸ For subject to Service law – see [Chapter 3](#) (Jurisdiction and time limits).

¹⁵⁹ Armed Forces (Court Martial) Rules 2009 rule 6.

¹⁶⁰ Armed Forces (Court Martial) Rules 2009 rule 7.

¹⁶¹ Armed Forces (Court Martial) Rules 2009 rule 8.

served on the recipient. Where this method of service is chosen, the CO must arrange for the document to be served as soon as is reasonably practicable¹⁶²;

b. If he is a Service person, by post in a letter addressed to him at his ship/unit/establishment; or

c. If he is not a Service person, by leaving it or posting it to him at his usual or last known place of abode.

14. **Service on a corporation.** Documents to be served on corporations may be served¹⁶³:

a. By post to:

(1) The corporation's principal office in the UK;

(2) If that address is not readily identifiable, any place in the UK where it carries on its activities or business; or

(3) If neither (i) nor (ii) applies, its principle office (anywhere in the world); or

b. By DX, fax, electronic mail or other electronic means where the corporation has provided such an address and has not refused to accept service by that means.

15. **Service of documents by another method.** The methods of service listed above are not exhaustive and the judge advocate may direct service by another method. In doing so he must make an order specifying the method to be used and the date on which the document is to be served. In addition he may also specify a time by which a document must be served¹⁶⁴.

16. **Date of service.** Generally the date of service is taken to be the day the document is handed over. However, the following provisions also apply¹⁶⁵:

a. Where a document has been served by post within the UK the date of service is deemed to be on the fifth day after it was posted; documents posted from the UK to an address abroad or vice versa are deemed to be served on the tenth day after being posted;

b. Where a document has been served by DX it will be deemed to be served on the fifth day after dispatch;

c. Where a document has been served by fax or other electronic means it will be deemed to be served the day after it was transmitted;

d. Where the addressee responds to a document earlier than any of the days described above it will be deemed to be served the day the response was sent.

17. **Proof of service.** Where any of the methods of service designated at paragraphs 9 to 14 have been used, service by that method must be assumed if the person who served it produces a certificate to that effect and the contrary is not proved.¹⁶⁶

¹⁶² Armed Forces (Court Martial) Rules 2009 rule 11.

¹⁶³ Armed Forces (Court Martial) Rules 2009 rule 9.

¹⁶⁴ Armed Forces (Court Martial) Rules 2009 rule 10.

¹⁶⁵ Armed Forces (Court Martial) Rules 2009 rule 13.

¹⁶⁶ Armed Forces (Court Martial) Rules 2009 rule 14.

Part 3 – Proceedings – general

Proceeding to be held in open court

18. **Presumption of open proceedings.** CM proceedings are held in open court, subject only to the provisions of the Rules¹⁶⁷. This means that the proceedings must be made open to anyone who wishes to observe, including members of the public and press.

19. **Proceedings in camera.** The Rules make provision for restrictions on public access and reporting. The judge advocate may order the court to sit behind closed doors (or '*in camera*') on the grounds that it is necessary or expedient in the interests of the administration of justice to do so.¹⁶⁸ He may take into consideration (but is not limited to) the likelihood that, if no order is made, the DSP will abandon the proceedings or be unlikely to bring comparable proceedings in the future for fear that information useful to an enemy or prejudicial to national security might be disclosed.

20. The application for an order to sit in camera must be determined at an oral hearing and be heard in camera unless the judge advocate directs otherwise¹⁶⁹. Such a hearing may be conducted at any time during proceedings, but it will usually be apparent at an early stage that an application for proceedings in camera will be required and thus may best be dealt with during preliminary proceedings, see paragraphs 51 to 60.

21. Where he makes an order, the judge advocate must postpone or otherwise adjourn the proceedings (or the part of the proceedings to which the order relates) for at least 24 hours after making the order or until an application for leave to appeal the order is dismissed or the appeal against the order has been determined¹⁷⁰.

22. **Withholding of information from the public.** The judge advocate may give leave for any name or other matter given in evidence in any proceedings to be withheld from the public¹⁷¹. This rule may be used in, but is not limited to, protection of witnesses and sources of information.

23. **Appeals against orders for proceedings to be held in camera and withholding information.** Appeal against any order that proceedings will not be held openly is to the Appeal Court¹⁷². Guidance on the procedure is in [Chapter 31](#) (Court Martial appeal).

24. **Proceedings in the absence of the person to whom they relate.** With the exception of arraignment proceedings, the judge advocate may direct that any proceedings may be held in the absence of any person to whom they relate¹⁷³, e.g. because the defendant has absconded. However, anyone to whom the proceedings relate will be entitled to be legally represented at such proceedings unless paragraph 56 applies (preliminary proceedings in chambers without notice to defendant).

25. **Deliberation in private.** When the court deliberates on finding, and as so directed by the judge advocate in any other circumstances, the court will deliberate in private with no other person present¹⁷⁴. However, personnel in attendance at the proceedings under

¹⁶⁷ Section 158 of the Act

¹⁶⁸ Armed Forces (Court Martial) Rules 2009 rule 153(1).

¹⁶⁹ Armed Forces (Court Martial) Rules 2009 rule 153(2),

¹⁷⁰ Armed Forces (Court Martial) Rules 2009 rule 153(4)(b).

¹⁷¹ Armed Forces (Court Martial) Rules 2009 rule 154.

¹⁷² Armed Forces (Court Martial) Rules 2009 rule 155.

¹⁷³ Armed Forces (Court Martial) Rules 2009 rule 19.

¹⁷⁴ Armed Forces (Court Martial) Rules 2009 rule 20(1).

instruction, and who have been duly sworn¹⁷⁵, will be allowed to remain with the court when it deliberates on sentence, a dispute of fact after a guilty plea¹⁷⁶ (Newton hearings), whether to make an activation order or any other matter where the judge advocate so directs¹⁷⁷.

Live links

26. Persons may attend any CM proceedings of any description by live link if the judge advocate so directs¹⁷⁸. This provision, which is broadly drawn in order to meet the particular requirements of the Service justice system, which operates in continually changing circumstances across the world and even within the UK, includes but is not limited to attendance at a hearing by:

- a. Any legal representative;
- b. Any person who is the subject of the proceedings;
- c. Any witness; and
- d. Any interpreter.

27. **Application procedure and principles.** The application of a live link direction and the procedure to be followed for making such an application lies at the discretion of the judge advocate in the interests of justice. The judge advocate is not bound by any statute regulating live links, save where the statute applies to CM proceedings. If given, a judge advocate may vary or discharge such a direction at any time before or during any hearing to which it applies, and when giving, discharging or varying a live link direction, or refusing the application for one, should give his reasons for doing so.

28. **Definition of a live link.** A live link is any arrangement by which a person who is not in the place where the proceedings are being held is able to see and hear, and be seen and heard by, the court during proceedings. Military Court Centres within the UK and Germany and the Offices of the JAG are equipped with modern live link facilities. In addition, the armed forces have access to video telephone conference (VTC) facilities in many other locations, as do some civilian court centres. The widest use of VTC facilities, within the rules and guidance and in such a way as best supports the administration of justice, should be made wherever appropriate but at the discretion of the judge advocate. For the purpose of live links, the place at which the proceedings are being held is the place in which the judge advocate is located.

29. **Application for a live link.** A judge advocate may give a live link direction either on the application of a party to the proceedings or of his own motion¹⁷⁹. Such an application may be made either in the proceedings or, where the proceedings are trial or appellate proceedings, in any related preliminary proceedings. Such an application may be made in writing, and should be made in writing if it is an application to attend preliminary proceedings by live link or if the subject matter of the live link direction is to be considered during any preliminary proceedings using the application for leave to adduce evidence through television link form (T-SL-CM01) at Annex A. When made during proceedings the application may be made orally, but the judge advocate may require written submissions. Any application for a

¹⁷⁵ Armed Forces (Court Martial) Rules 2009 Schedule 1.

¹⁷⁶ Armed Forces (Court Martial) Rules 2009 rule 112.

¹⁷⁷ Armed Forces (Court Martial) Rules 2009 rule 20.

¹⁷⁸ Armed Forces (Court Martial) Rules 2009 rule 18.

¹⁷⁹ Armed Forces (Court Martial) Rules 2009 rule 18(5).

witness to give, by live link, evidence relevant to the determination of guilt or innocence or to the factual basis of sentence should be determined at an oral hearing.

30. **Preliminary proceedings.** Preliminary proceedings may be conducted using a live link if the judge advocate so directs. The judge advocate may decide whether to give a live link direction for subsequent CM proceedings at a preliminary hearing. The defendant, the defendant's legal representative, the prosecutor, any witness required at the preliminary hearing, any interpreter or the CAO may be treated as present at a preliminary hearing by live link if the judge advocate so directs.

31. **Defendant/offender attending a sentencing or activation hearing.** The defendant/offender should usually attend at the place at which a hearing in relation to sentencing, including activation proceedings, is being held. However, circumstances may arise in which this is not possible, and in those circumstances the judge advocate may give a live link direction requiring the defendant/offender to attend the hearing (or any number of sentencing hearings) by live link. The consent of the defendant/offender is not required, but may be a relevant consideration for the judge advocate when determining whether to make the direction. The judge advocate may be more likely to give such a direction if it is likely that the defendant/offender will be held in Service custody during any sentencing or activation hearing, or otherwise not be in the place where the hearing is being held. The direction will not be given unless the judge advocate is satisfied that it is in the interests of justice to give the direction. In addition, if the defendant/offender wishes to give oral evidence at the proceedings to which a potential live link direction applies, the judge advocate may wish to know the defendant/offender's views as to whether he can effectively give evidence through the live link. A judge advocate may rescind the direction at any time, including during the hearing in relation to which it was given, if it is in the interests of justice to do so, but this does not prevent him from making a further live link direction in relation to the defendant/offender. If a judge advocate refuses an application for a live link for the defendant/offender's attendance at a sentencing or activation hearing, or for rescinding such a direction, he should give his reasons for doing so.

32. **Witnesses giving evidence by live link.** A live link direction may be made in relation to any witness, whether as to fact, character or otherwise, and whether the witness is in the country in which the proceedings are being held or otherwise. Where a direction is given that a witness (including a defendant) may attend proceedings by live link, the witness cannot give evidence otherwise than by live link without the leave of the judge advocate¹⁸⁰. In addition, the judge advocate may require a specified person to be present with the witness giving evidence by live link to answer under oath any questions relating to the circumstances in which the evidence is given.

33. **Defendant giving evidence during trial.** A defendant may make an application to a judge advocate to give evidence at trial through a live link, and a direction may be made if it is in the interests of justice to do so. When deciding whether to make such a direction a judge advocate may wish to consider (but is not limited to) such factors as: the defendant's age; any compromise to his ability to participate effectively in the proceedings due to his level of intellectual ability, social functioning or any mental disorder within the meaning of the Mental Health Act 1983; and whether use of a live link would enable him to participate more effectively in the proceedings as a witness.

¹⁸⁰ Armed Forces (Court Martial) Rules 2009 rule 18(7).

34. **Special measures.** Live links may be used in conjunction with or as part of a special measures direction¹⁸¹ (eg. witness gives evidence by live link, and in private, or judge advocate and counsel remove wigs and gowns), see paragraphs 88 to 89.

Judge advocate sitting alone

35. The judge advocate may at any time direct the lay members of the court to leave while he hears submissions or gives a ruling on any question of law, practice or procedure to which they should not be party¹⁸². This includes but is not limited to: questions of admissibility of evidence; applications for a summons or warrant¹⁸³, a live link¹⁸⁴, or to adduce a complainant's previous sexual history¹⁸⁵ submissions of no case to answer¹⁸⁶; questions as to whether a question should be put; issues of fitness to stand trial; and wasted costs order. Such matters should be dealt with in the absence of the lay members, and after all parties have been afforded the opportunity to make representations and, where appropriate, adduce evidence. The judge advocate may require skeleton arguments to be submitted in relation to any such issues.

Administration of oaths and affirmations

36. Oaths and affirmations are administered in a similar form and manner to those used in civilian courts in England and Wales¹⁸⁷, see paragraph 98. The following are required to swear an oath or affirm before participating in CM proceedings:

- a. Lay members of the court¹⁸⁸;
- b. Interpreters¹⁸⁹;
- c. Anyone in attendance under instruction¹⁹⁰ (usually junior officers, but may include civilian personnel with the leave of the judge advocate);
- d. Witnesses before giving evidence.

Termination of proceedings

37. The judge advocate must terminate proceedings if any of the following situations arise:

- a. The proceedings require a president of the board and the president of the board is for any reason unable to continue to attend the proceedings, and there is no other lay member qualified to be the president of the board¹⁹¹;
- b. The proceedings are with lay members and the number of lay members falls below the minimum required for the proceedings¹⁹²; or

¹⁸¹ Armed Forces (Court Martial) Rules 2009 rule 93(5).

¹⁸² Armed Forces (Court Martial) Rules 2009 rule 38.

¹⁸³ See paragraph 72.

¹⁸⁴ See paragraphs 26 to 34.

¹⁸⁵ Youth Justice and Criminal Evidence Act 1999 section 41(2).

¹⁸⁶ See paragraph 103.

¹⁸⁷ Armed Forces (Court Martial) Rules 2009 rule 21 and Schedule 1.

¹⁸⁸ Armed Forces (Court Martial) Rules 2009 rule 37.

¹⁸⁹ Armed Forces (Court Martial) Rules 2009 rule 22.

¹⁹⁰ Armed Forces (Court Martial) Rules 2009 Schedule 1.

¹⁹¹ Armed Forces (Court Martial) Rules 2009 rules 25(1) and 34.

¹⁹² Armed Forces (Court Martial) Rules 2009 rule 25(2) and section 155(1)(b) of the Act.

- c. He considers for any reason that it is in the interests of justice to do so¹⁹³ (e.g. it is discovered that there is some connection between a lay member and a party to the proceedings resulting in perceived unfairness).

Where this happens the lay members must be discharged¹⁹⁴, however, this does not bar further trial, appellate, sentencing or activation proceedings in relation to the same offence(s)¹⁹⁵. The judge advocate should then give such directions for the future conduct of the proceedings as he deems appropriate in the proper administration of justice, including directing new proceedings with an entirely new board where appropriate.

Record of proceedings

38. **Content.** A record must be made of all CM proceedings and must include¹⁹⁶:
 - a. The record of plea offered and whether any plea of guilty was accepted by the judge advocate;
 - b. The record of any finding;
 - c. The record of any sentence passed, order made or direction given by the court;
 - d. The record of any sentence passed, order made and any direction given by the judge advocate; and
 - e. A sound recording of the proceedings and, if one has been produced, a transcript of it, signed by the transcriber.
39. **Exhibits.** Each exhibit must be retained with the record of proceedings, unless the judge advocate directs otherwise¹⁹⁷. Where an exhibit is not retained within the record of proceedings, the judge advocate should ensure that proper steps are taken for its safe custody or proper disposal.
40. **Preliminary proceedings.** Copies of records of preliminary proceedings must be sent to the judge advocate, the DSP and each defendant, however where the preliminary proceedings were held in chambers the defendants will not receive a copy of the record of those proceedings¹⁹⁸.
41. **Custody of records.** The JAG is required to keep the record of the proceedings, any exhibits retained, and any file of correspondence or other papers maintained by the CAO in connection with the proceedings for at least 6 years from the conclusion of the proceedings¹⁹⁹.

¹⁹³ Armed Forces (Court Martial) Rules 2009 rule 25(3).

¹⁹⁴ Armed Forces (Court Martial) Rules 2009 rule 25(5).

¹⁹⁵ Armed Forces (Court Martial) Rules 2009 rule 25(6) – (8).

¹⁹⁶ Armed Forces (Court Martial) Rules 2009 rule 23.

¹⁹⁷ Armed Forces (Court Martial) Rules 2009 rule 24(3).

¹⁹⁸ Armed Forces (Court Martial) Rules 2009 rules 23(3) and (4).

¹⁹⁹ Armed Forces (Court Martial) Rules 2009 rule 23(5).

42. Disclosure of records. Provision of copies of records is governed as follows²⁰⁰:

a. **Parties to the proceedings.** The record of any proceedings or part of it, must, subject to sub-paragraph c below, on request, be supplied to any party to the proceedings at no cost. ;

b. **Any other person.** In addition, records of proceedings may, subject to sub paragraph c. below, be supplied, on request, to anyone who asks for them. This is subject to payment of any charge fixed by JAG.

c. **In camera proceedings and security issues.** Records of proceedings held in camera and related directions do not have to be supplied when requested²⁰¹. In addition, following a request for a copy of a transcript, the Secretary of State may, for reasons of security, certify that the whole or any part of a record of proceedings must not be disclosed. In this situation the applicant is not entitled to a copy of the record or the part of it to which the certificate relates.²⁰²

Circumstances not provided for

43. In any circumstances not provided for by either the Act or the Armed Forces (Court Martial) Rules 2009, the judge advocate must ensure the proceedings are conducted in a way which most closely resembles proceedings in the Crown Court in comparable circumstances and, failing that, in such a way as appears to be in the interests of justice²⁰³.

²⁰⁰ Armed Forces (Court Martial) Rules 2009 rules 23(6) – (8).

²⁰¹ Armed Forces (Court Martial) Rules 2009 rule 23(7).

²⁰² Armed Forces (Court Martial) Rules 2009 rule 23(8). See also JSP 400 (Disclosure of Information).

²⁰³ Armed Forces (Court Martial) Rules 2009 rule 26.

Part 4 – Assistance to defendants and legal representation

Assistance to defendants

44. Service personnel and relevant civilians²⁰⁴ facing CM proceedings are entitled to a proper opportunity to prepare for any hearings and in particular to prepare their defence. To this end they must receive advance information and notification of hearings, and receive appropriate assistance to prepare for the hearings. All are entitled to legal representation at any hearings, whether at public or personal expense, see JSP 838 (The Armed Forces Legal Aid Scheme), and in addition, such assistance as can be provided by a DAO.

45. **Defendant's assisting officer (DAO).** In order to assist the process of preparing for CM proceedings, a Service person may request the support of a DAO. When so requested the CO should ensure at least two people are available for the defendant to nominate, and inform the defendant of their names. One of these potential nominees may be someone specifically chosen by the defendant, subject to the general requirements that the nominee should be subject to Service law, at least the rate or rank of petty officer, military, marine or air force sergeant, and consent to be nominated. The defendant does not have to nominate a DAO, but if he does not wish to do so, he should state in writing that he does not wish an appointment to be made. In the case of relevant civilians, if the defendant requests that he do so, the CO may provide names of people who may be nominated as DAO and should do so if possible.

46. **Role of the DAO.** The DAO's role is that of a facilitator, assisting the defendant to complete forms (eg. legal aid application), obtain legal advice and representation, attend interviews, receive supporting papers, attend charging procedures and hearings, obtain character references and referees, and generally support the defendant. The DAO will not be legally qualified and should not become involved in preparing a defence or conducting the defence, although where a defendant chooses to represent himself the DAO may assist him to prepare a statement in mitigation. The DAO should attend CM proceedings with the defendant in a support role, but is not entitled to represent the defendant in any proceedings. The defendant should be advised that the DAO has no right to speak on the defendant's behalf at any proceedings unless he is called as a character witness. Annex B provides more detailed guidance to the DAO as to his duties and responsibilities.

47. **Legal representation.** Any party to CM proceedings may appoint a legal representative to act on his behalf²⁰⁵ and this may be either a Service or civilian lawyer qualified in accordance with paragraph 48. The entitlement to appoint a legal representative does not mean that the defendant or another party to the proceedings must do so (in particular, a defendant is entitled to represent himself if he wishes). Also, there is no entitlement for a defendant to be represented by a Service lawyer in preference to a civilian lawyer, although a Service lawyer may be available in some circumstances²⁰⁶. A defendant may apply for Legal Aid for the conduct of his defence²⁰⁷, see JSP 838 (The Armed Forces Legal Aid Scheme). Parties to proceedings must inform the CAO of the name and address of his legal representative²⁰⁸, and should do this as soon as is practicable after that person has been appointed.

²⁰⁴ See Volume 3 of the MSL.

²⁰⁵ Armed Forces (Court Martial) Rules 2009 rule 39(1).

²⁰⁶ The Royal Navy may provide a Service barrister in any case for which one is available. Provision of Service lawyers to Army and RAF personnel may be available in Germany and Cyprus and for a CM occurring abroad.

²⁰⁷ JSP 838 (The Armed Forces Legal Aid Scheme) should be consulted for this purpose.

²⁰⁸ Armed Forces (Court Martial) Rules 2009 rule 39(4).

48. Only those with appropriate legal qualifications may represent a defendant at any preliminary proceedings and before a CM, namely²⁰⁹:

- a. A solicitor or barrister in England and Wales;
- b. An advocate or solicitor in Scotland;
- c. A barrister or solicitor in Northern Ireland; or
- d. The equivalent of a barrister or solicitor in any of the Channel Islands, the Isle of Man, a commonwealth country or British overseas territory.

49. **Civilian defendant – special rule for a ‘young person’.** A civilian subject to CM proceedings who is under the age of 18 at the commencement of the proceedings (a ‘young person’), and has not appointed a legal representative, may with the leave of the judge advocate be represented in any CM proceedings by his parent or guardian. That person may exercise all rights and duties imposed on the defendant on his behalf, with the exception of pleading to a charge (a defendant must plead to a charge himself)²¹⁰. In addition, the parent or guardian of the young person must be served with any document which must be served on the young person under the Rules²¹¹.

50. **Conduct of the prosecution.** The DSP will usually be represented during CM proceedings by a barrister or solicitor on the staff of the SPA. These are usually serving officers of the RN, Army or RAF, who will wear dress in court according to the tradition of their Service. Alternatively, the DSP may represent himself, or instruct a civilian barrister or solicitor to act on his behalf as required. Any such person must be qualified in accordance with paragraph 48.

²⁰⁹ Armed Forces (Court Martial) Rules 2009 rule 39(2).

²¹⁰ Armed Forces (Court Martial) Rules 2009 rule 40.

²¹¹ Armed Forces (Court Martial) Rules 2009 rule 40(2).

Part 5 – Preliminary proceedings and arraignment

Preliminary proceedings

51. **Overview.** Preliminary proceedings may be conducted at any time before the trial commences. The CAO must list all charges allocated for CM for preliminary proceedings on receipt of advance information from the DSP²¹², and will usually do so within 4 weeks of receipt of that information, see paragraph 52. Further preliminary proceedings (subsequent to the initial, automatic, preliminary proceedings) may be directed by the judge advocate or the JAG of his own motion or on an application from the prosecution or defence²¹³.

52. **Advance information.** Service of advance information by the DSP is the starting point for all CM trials and sentencing proceedings. Where a charge is allocated for CM trial (i.e. DSP has decided to proceed with the matter) the DSP must as soon as practicable serve advance information in relation to all defendants on the CAO and on each defendant and his legal representative (if any). Such advance information must include:

- a. Copies of the statements of prosecution witnesses on which the prosecution intend to rely;
- b. A list of exhibits, and a statement of where any non-documentary exhibits are held; and
- c. A transcript of any interview with the defendant²¹⁴.

In addition, where there is a possibility of an activation order in the event of conviction on the charge(s) the advance information must also include a notice that the court would have that power if the defendant were convicted²¹⁵. Additional rules exist for the service of advance information in relation to defendants subject to a conditional discharge or an overseas community order²¹⁶. Having received the advance information the CAO must list the charge for preliminary proceedings²¹⁷, see paragraph 51.

53. **Subject matter of preliminary proceedings.** Broadly speaking, preliminary proceedings are called to deal with arraignment, plea and case management issues, and to rule on matters of law which do not require the presence of the lay members of the court. At such a hearing the judge advocate may give any order, ruling or direction on any matter within his jurisdiction to deal with in the absence of the lay members²¹⁸. A non-exhaustive list of matters that might be suitable to be dealt with at such proceedings is at Annex C.

54. **Effect of direction, ruling or order.** Directions given at preliminary proceedings have effect throughout any related preliminary proceedings, trial and sentencing proceedings unless altered by the judge advocate who gave the direction or by the judge advocate for those related proceedings²¹⁹. Orders and rulings made in preliminary proceedings have similar effect, save that orders and rulings may be appealed against, with leave of the CM Appeal Court²²⁰, in which case the order or ruling may be varied or discharged on appeal.

²¹² Armed Forces (Court Martial) Rules 2009 rule 45.

²¹³ Armed Forces (Court Martial) Rules 2009 rule 46.

²¹⁴ Armed Forces (Court Martial) Rules 2009 rules 43(1) and (2).

²¹⁵ Armed Forces (Court Martial) Rules 2009 rule 44(1).

²¹⁶ Armed Forces (Court Martial) Rules 2009 rules 44(2) and (3).

²¹⁷ Armed Forces (Court Martial) Rules 2009 rule 45(1).

²¹⁸ Armed Forces (Court Martial) Rules 2009 rule 49.

²¹⁹ Armed Forces (Court Martial) Rules 2009 rule 49(3).

²²⁰ Armed Forces (Court Martial) Rules 2009 rule 50.

Where an appeal against an order or ruling made in preliminary proceedings is made, preliminary proceedings may continue notwithstanding leave to appeal is granted, but the related trial proceedings must not commence until the appeal has been determined or abandoned²²¹.

55. Application for further preliminary proceedings - hearing in open court. All preliminary proceedings will be in open court unless the judge advocate directs otherwise²²². Applications for further preliminary proceedings may be made orally to a judge advocate at another preliminary proceeding²²³, or in writing²²⁴ to the CAO. The application for preliminary proceedings form (T-SL-CM02) at Annex D may be used for this purpose. When made in writing the application must specify the reason for which further preliminary proceedings are required (i.e. the issues to be addressed), estimate the time required for the proceedings, and should also notify the CAO of any witnesses who will be required. A copy of the application must be sent to any other party to the proceedings²²⁵.

56. Application for further preliminary proceedings – hearing in chambers in the absence of the defence. An application for further preliminary proceedings to be held in chambers without notice to the defendant²²⁶ may be made either orally at preliminary proceedings (in the absence of the defence) or in writing. This procedure is exceptional and governed by the application of law to matters such as, but not limited to, overriding public interest and security. The same rules as apply to applications for proceedings in open court²²⁷ apply, save that a written application is not to be copied to the defendant(s). The application for preliminary proceedings in chambers form (T-SL-CM03) at Annex E may be used for this purpose. In either situation, a written application is sent to the CAO who will forward it the judge advocate for consideration. The judge advocate will then give directions for a hearing, if one is required.

57. Administrative matters. Either automatically or on receipt of a direction by the judge advocate, the CAO will make all necessary administrative arrangements for a preliminary hearing, including appointing the date, time and place at which the hearing will take place and notifying the parties. The notice will also inform the parties (or, for a preliminary hearing in the absence of the defence, the prosecution) of the matters to be addressed at the hearing, as requested by the judge advocate. CAO will arrange for a verbatim court recorder and, if so requested by the judge advocate, prosecution or defence, an interpreter to be present at the hearing. CAO will arrange for any live links to be operated, and will notify witnesses as required.

58. Preliminary proceedings should automatically be listed 4 weeks after the CAO has received the prosecution papers. For simple AWOL cases, in anticipation of a guilty plea the CAO will normally make arrangements for sentencing proceedings to take place immediately on completion of the preliminary proceedings. Where automatic preliminary proceedings are listed, the CM preliminary hearing plea and case management hearing (PCMA) form (T-SL-DH1) at Annex F is to be completed by both the prosecution and defence in advance of the proceedings, and if possible a copy is to be sent to the CAO, by electronic means if necessary, as well as to the other parties, not later than 24 hours before the hearing is due to take place.

²²¹ Armed Forces (Court Martial) Rules 2009 rule 50(3).

²²² Section 158 of the Act.

²²³ Armed Forces (Court Martial) Rules 2009 rule 46(2)(a)

²²⁴ Armed Forces (Court Martial) Rules 2009 rule 46(3).

²²⁵ Armed Forces (Court Martial) Rules 2009 rule 46(4).

²²⁶ Armed Forces (Court Martial) Rules 2009 rule 47.

²²⁷ See paragraph 55.

59. **Outline of the prosecution case.** The judge advocate may direct the prosecution to prepare an outline of the prosecution case in advance of any preliminary hearing, and to serve a copy of such an outline on each defendant and the judge advocate²²⁸.

Procedure

60. The procedure to be followed at preliminary proceedings is determined by the judge advocate. The prosecutor and defendant may address the judge advocate on such matters²²⁹ indicated in the notice listing the hearing, and the judge advocate or any party present may raise any other matter. The judge advocate may then make directions necessary for the proper and efficient management of the case, and make an order, ruling or direction on any matter. This includes for example, directions for joinder, severance and amendment of charge sheets, and rulings as to admissibility of evidence.

Joinder, severance and amendment

61. **Joinder of charges.** Questions as to joinder of charges should usually be dealt with at a preliminary hearing. The CM may try two or more charges together as long as they are included in the same charge sheet²³⁰. For this purpose the DSP may²³¹ consolidate the charges from two or more charge sheets into one charge sheet as long as the charges can lawfully be joined²³². In addition, two or more defendants may be jointly charged with the same offence on the same charge sheet.

62. **Severance.** A judge advocate may direct that two or more offences in the same charge sheet should be separated into two or more charge sheets for separate trial in relation to each charge sheet. In addition, the judge advocate may direct that two or more defendants be tried separately in separate charge sheets. Such directions may be made at any time before commencement of trial proceedings in relation to the original charge sheet²³³. They will usually be made where the judge advocate considers that a fair trial of a defendant may be prejudiced if the charges are not severed, taking into consideration also the requirement for fairness to the prosecution who represent the public interest.

63. **Amendment of charges.** A judge advocate may order the amendment of a charge sheet or charge, whether at preliminary proceedings or trial, and whether or not the defendant has been arraigned, where the charge sheet or charge is defective. However, a judge advocate cannot make such an order unless the amendment can be made without injustice²³⁴. Where such an order is made the DSP must comply with any requirements for service on the defendant under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009²³⁵.

Arraignment

64. **Procedure.** The defendant must be arraigned at preliminary proceedings before a judge advocate sitting alone²³⁶. The defendant is required to plead separately to each

²²⁸ Armed Forces (Court Martial) Rules 2009 rule 48.

²²⁹ See Annex B for matters which may be suitable for preliminary proceedings.

²³⁰ Armed Forces (Court Martial) Rules 2009 rule 51(1).

²³¹ Armed Forces (Court Martial) Rules 2009 rule 51(2).

²³² See Indictments Act 1915 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

²³³ Armed Forces (Court Martial) Rules 2009 rules 52 and 53.

²³⁴ Armed Forces (Court Martial) Rules 2009 rule 54.

²³⁵ Armed Forces (Court Martial) Rules 2009 rule 54(4).

²³⁶ Armed Forces (Court Martial) Rules 2009 rule 56(1).

charge on which he is arraigned²³⁷, but need not be arraigned on all the charges in a charge sheet at the same time²³⁸.

65. **Guilty plea.** If the defendant pleads guilty to any charge, the judge advocate must decide whether he should accept the plea. He must not do so unless he is sure the defendant understands the nature of the charge, the general effect of the plea (including that it is binding and cannot usually be changed to not guilty), and the difference in procedure following a plea of guilty.²³⁹ The judge advocate should not accept a plea of guilty if in all the circumstances he considers he should not accept the plea, for example when pleading the accused has put forward a defence to the charge or otherwise entered an equivocal plea. If he does not accept the plea he must record a plea of not guilty²⁴⁰.

66. **Not guilty plea.** If the defendant pleads not guilty, does not plead (or enters an equivocal or unintelligible plea, or a plea of guilty is not accepted by the judge advocate), the judge advocate must record a plea of not guilty.

67. **Procedure following arraignment.** The procedure followed after arraignment will depend on a number of factors, including whether the defendant is charged with more than one offence, whether there is more than one charge sheet and whether there is more than one defendant.

a. **Guilty pleas to all charges.** Where the defendant pleads guilty to all charges the CAO must appoint a time and place for the related sentencing proceedings²⁴¹. For simple AWOL charges, this will usually take place the same day, sentencing proceedings having been listed in advance of the preliminary hearing dealing with arraignment. In other circumstances sentencing proceedings will be listed as directed by the judge advocate.

b. **Not guilty pleas to all charges.** Where the judge advocate has recorded pleas of not guilty to the charge(s) the matter will proceed to trial. The judge advocate will either direct the CAO to list the matter for trial, or, if the arraignment occurs immediately before the time listed for trial the court will try the case.

c. **Alternative charges.** A defendant may be charged with two or more alternative charges, listed in order of seriousness. If the judge advocate records a guilty plea to the first of one or more alternative charges, he may (with the DSP's consent) order that the alternative charge(s) should lie on the file, not to be proceeded with without leave of the CM or the Appeal Court²⁴². A trial of any remaining charges to which the accused has pleaded not guilty may take place (see sub-paragraph d. below) or, if there are no other charges to be tried, the case will be listed for sentencing proceedings. If the defendant pleads guilty to any of the less serious alternative charges, and not guilty to the remaining alternative charge(s) the procedure will depend on whether that plea is acceptable to the prosecution. If the plea is acceptable, i.e. the prosecution considers that it is not in the interests of justice to proceed with the alternative charge(s), the prosecution may offer no evidence on the more serious alternative charge(s) and a finding of not guilty will be recorded²⁴³. Any less serious alternative charges may (with the DSP's consent) be ordered to lie on the file. A trial of any remaining charges to which the accused has pleaded guilty may take place, or the case will be listed for

²³⁷ Armed Forces (Court Martial) Rules 2009 rule 56(2).

²³⁸ Armed Forces (Court Martial) Rules 2009 rule 56(1).

²³⁹ Armed Forces (Court Martial) Rules 2009 rule 56(3).

²⁴⁰ Armed Forces (Court Martial) Rules 2009 rule 56(5)(a).

²⁴¹ Armed Forces (Court Martial) Rules 2009 rule 56(4)(b).

²⁴² Armed Forces (Court Martial) Rules 2009 rule 57.

²⁴³ Armed Forces (Court Martial) Rules 2009 rule 58.

sentencing proceedings as appropriate. However, if the prosecution determines that the plea is unacceptable and does not give his consent to the judge advocate recording the plea of guilty, the judge advocate will enter not guilty pleas to all the alternative charges, and trial of the charges for which not guilty pleas have been entered will take place.

d. **Mixed pleas.** Where the judge advocate has recorded mixed pleas (guilty to one or more and not guilty to one or more other charges), unless the judge advocate directs otherwise, the trial of any charge to which the defendant has pleaded not guilty will proceed on a separate charge sheet before sentencing proceedings for the guilty plea(s) are conducted. The judge advocate will give directions for the future conduct of the case, and sentence for the guilty pleas will not take place until the not guilty pleas have been tried. A charge should only be left on the file if the prosecution do not wish to proceed on that charge or if it is an alternative charge. In either case the charge can only be left on the file with the DSP's consent.

e. **Offer of no evidence.** Where a plea of not guilty has been recorded and the prosecutor indicates that he intends to offer no evidence in relation to that charge, the judge advocate must record a finding of not guilty²⁴⁴. This procedure does not require the lay members to find the accused not guilty.

68. **Change of plea.** A defendant may change his plea from not guilty to guilty at any time before the lay members of the CM withdraw to deliberate on their finding²⁴⁵. The defendant will then be re-arraigned, and the charge to which he has pleaded guilty may be the subject of sentencing proceedings before the lay members for the trial. A change of plea from guilty to not guilty may, with the leave of the judge advocate, be made at any time before the court begins to deliberate on sentence. However, if the guilty plea is withdrawn during sentencing proceedings or trial in relation to another charge, those proceedings must be terminated and the matter heard by a court consisting of new lay members²⁴⁶.

69. **Restrictions on DSP's powers after arraignment.** Once the defendant has been arraigned the DSP cannot exercise any of his powers under section 125(2) of the Act (amend or substitute a charge, bring an additional charge etc.) without the leave of the court²⁴⁷. However, where the defendant, having elected CM trial and having been arraigned, gives his consent under section 130(2) of the Act for a charge capable of being tried summarily to be referred to his CO, the DSP may refer the charge to the CO without the court's leave²⁴⁸. If the DSP does, with leave, amend or substitute a charge, bring an additional charge etc under section 125(2) of the Act, he must comply with any requirements for service on the defendant under the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

²⁴⁴ Armed Forces (Court Martial) Rules 2009 rule 58.

²⁴⁵ Armed Forces (Court Martial) Rules 2009 rules 59(1) and (2).

²⁴⁶ Armed Forces (Court Martial) Rules 2009 rules 59(3) and (4).

²⁴⁷ Armed Forces (Court Martial) Rules 2009 rule 60(1).

²⁴⁸ Armed Forces (Court Martial) Rules 2009 rule 60(2).

Part 6 – Securing attendance of witnesses and defendants

Securing the attendance of witnesses

70. There are three formal methods of securing the attendance of witnesses: notification, issue of a witness summons and issue of a warrant for arrest. Each method is briefly outlined in the following paragraphs. The Rules should be consulted as to the detailed requirements.

71. **Notification of a witness.** Where any person is required to give evidence at any proceedings (including but not limited to preliminary proceedings, the trial, sentencing and activation proceedings) the CAO will notify that person of the time and place at which he is required to attend²⁴⁹. If a defendant requests the CAO to notify a witness, the CAO will do so. If the CAO is unable to notify any witness he must inform the judge advocate and the party seeking to call the witness, preferably in writing.

72. **Witness summons.** The rules as to the issue of witness summons and the circumstances in which they may be issued and withdrawn vary according to whether the summons is requested by a party using the form of application for a witness summons form (T-SL-CM04) at Annex G, issued of the judge advocate's own motion, and whether there are any issues as to duties, rights and confidentiality.

a. **Issue of witness summons on the application of any party to the proceedings.** A judge advocate may if necessary, on the application of a party to the proceedings at any time, issue a witness summons, using the summons to witness form (T-SL-CM05) at Annex H, but only if he is satisfied that the person is likely to be able to give evidence, or to produce a document or thing, that is likely to be material evidence, and that it is in the interests of justice to issue a summons²⁵⁰. The procedural requirements²⁵¹ for the issue of a witness summons must be complied with, otherwise the application may be refused²⁵². These requirements include that the application must be made as soon as practicable after becoming aware of the grounds for doing so²⁵³. If the application is made in writing it must contain a declaration of truth²⁵⁴, and be served on the CAO and as directed by the judge advocate²⁵⁵, for example on the person to whom the application relates, or on a person affected by the application (such as someone about whom information is held in confidence). Any application must identify the witness and explain what evidence the proposed witness can give or produce, why it is likely to be material evidence, and why it is in the interests of justice to issue a witness summons.²⁵⁶

b. **Witness summons to produce a document or thing – judge advocate's assessment of relevance and confidentiality.** Where a witness has been summonsed to produce a document or thing, the potential witness may object to its production on the grounds that it is not likely to be material or, even it is likely to be material, the duties or rights, including rights of confidentiality, of the witness or any person to whom the evidence relates outweigh the reasons for issuing the witness

²⁴⁹ Armed Forces (Court Martial) Rules 2009 rule 62(1).

²⁵⁰ Armed Forces (Court Martial) Rules 2009 rule 63(1).

²⁵¹ See Armed Forces (Court Martial) Rules 2009 rule 63 in entirety.

²⁵² Armed Forces (Court Martial) Rules 2009 rule 63(3).

²⁵³ Armed Forces (Court Martial) Rules 2009 rule 63(4).

²⁵⁴ Armed Forces (Court Martial) Rules 2009 rule 63(7).

²⁵⁵ Armed Forces (Court Martial) Rules 2009 rule 63(8).

²⁵⁶ Armed Forces (Court Martial) Rules 2009 rule 63(5).

summons. The judge advocate may require the proposed witness to produce the evidence for the objection to be assessed. The judge advocate will then assess the objection, seeking assistance from the proposed witness or his representative, or a person to whom the evidence relates, and viewing the document or thing as required.²⁵⁷

c. **Issue of a witness summons of the judge advocate's own motion.** A judge advocate may of his own motion issue a witness summons to give evidence or produce a document or thing specified in the summons²⁵⁸. A witness issued with a witness summons of the judge's own motion may apply for it to be withdrawn on the grounds that he cannot give or produce evidence likely to be material evidence, or, even if he can, his duties or rights including rights of confidentiality, or those of any person to whom the evidence relates outweigh the reasons for the issue of the summons²⁵⁹. In addition, any person to whom the proposed evidence relates may make an application for such a summons to be withdrawn on the grounds that the evidence is not likely to be material, or even if it is, his duties or rights, including rights of confidentiality, or those of the witness outweigh the reasons for the issue of the witness summons²⁶⁰.

d. **Application to withdraw a witness summons**

(1) The following people may apply for withdrawal of a witness summons on the grounds specified:

(a) Any party who applied for the witness summons may apply for its withdrawal on the grounds that it is no longer needed²⁶¹;

(b) The witness summonsed may apply for the witness summons to be withdrawn on the grounds that he was not aware of any application for it and either he cannot give or produce evidence likely to be material or, even if he can, his duties or rights, including rights of confidentiality, or those of the person to whom the evidence relates outweigh the reasons for the issue of the summons²⁶²; or

(c) Any person to whom the evidence relates may apply for the witness summons to be withdrawn on the grounds that he was not aware of the application, and either the evidence is not likely to be material, or even if it is, his duties or rights, including rights of confidentiality, or those of the witness outweigh the reasons for the issue of the witness summons.²⁶³

(2) Application on any of these grounds must be made in writing as soon as practicable after becoming aware of the grounds for doing so, explaining the grounds on which the summons should be withdrawn. The application must be served on, as appropriate, the witness, the party who applied for the witness summons (where he is not the applicant) and any other person who he knows was served with the application for the witness summons.²⁶⁴

²⁵⁷ Armed Forces (Court Martial) Rules 2009 rule 64.

²⁵⁸ Armed Forces (Court Martial) Rules 2009 rule 65(1).

²⁵⁹ Armed Forces (Court Martial) Rules 2009 rule 65(3)(a).

²⁶⁰ Armed Forces (Court Martial) Rules 2009 rule 65(3)(b).

²⁶¹ Armed Forces (Court Martial) Rules 2009 rule 66(2).

²⁶² Armed Forces (Court Martial) Rules 2009 rule 66(3).

²⁶³ Armed Forces (Court Martial) Rules 2009 rule 66(4).

²⁶⁴ Armed Forces (Court Martial) Rules 2009 rules 66(5) and 66(6).

e. **Hearings, oral applications, variation of requirements etc.** The judge advocate may issue or withdraw a witness summons with or without a hearing. Where the application must be made in writing, the judge advocate may give leave for the application to be made orally instead. However the person who wishes to make an application orally must give as much notice as the urgency of the application permits to those to whom he would otherwise have served notice and, whilst doing so, explain the reasons for the application and for requesting the judge advocate consider it orally.²⁶⁵

f. **Form of summons.** A proposed form of witness summons (T-SL-CM05) is at Annex H. The only statutory requirement of the summons is that it must contain a warning that failure to comply with the summons may result in the issue of a warrant for the arrest of the person to whom it applies²⁶⁶.

73. **Warrant to arrest.** A judge advocate may issue a warrant to arrest a witness where a witness summons would probably not procure a person's attendance²⁶⁷ or the witness has failed to comply with a witness summons²⁶⁸. Such warrants must be addressed to the Service Police and/or a civilian police force, but can only be addressed to the Service Police where the warrant to arrest relates to a Service person or relevant civilian²⁶⁹. Any witness arrested for failing to comply with a witness summons must be transferred to Service custody as soon as practicable, and then be brought before a judge advocate to decide whether he should continue in custody until he appears as a witness at proceedings. If he has not been brought before a judge advocate within 48 hours of his arrest, he must be released²⁷⁰.

Witness expenses

74. Witnesses notified of the requirement to give evidence (see paragraph 71) or served with a witness summons (see paragraph 72a and c) are entitled to travel and other expenses associated with the requirement to give evidence. This may take the form of a travel warrant or voucher entitling them to travel free of charge, and an undertaking by the CAO to pay any other expenses incurred in respect of giving evidence²⁷¹. For civilian witnesses, the CAO will liaise with the witness as to travel requirements. Service witnesses will make their own arrangements for attendance through ship/unit/establishment travel offices.

Securing the attendance of the defendant

75. **Arrest before arraignment.** Once a charge has been allocated for CM trial the judge advocate has power to direct the arrest of the defendant if he is satisfied that taking him into custody is justified²⁷².

76. **Arrest after arraignment.** Once a defendant has been arraigned a judge advocate has power to direct the defendant's arrest²⁷³ at any time before the proceedings are concluded if he is satisfied that taking him into custody is justified. In addition, he has the power to issue a warrant for the defendant's arrest by a civilian police force.

Inspection of bankers' books

²⁶⁵ Armed Forces (Court Martial) Rules 2009 rule 67.

²⁶⁶ Armed Forces (Court Martial) Rules 2009 rules 63(10) and 65(2).

²⁶⁷ Armed Forces (Court Martial) Rules 2009 rule 68(1).

²⁶⁸ Armed Forces (Court Martial) Rules 2009 rule 68(2).

²⁶⁹ Armed Forces (Court Martial) Rules 2009 rule 68(3) and (4).

²⁷⁰ Armed Forces (Court Martial) Rules 2009 rule 68(b).

²⁷¹ Armed Forces (Court Martial) Rules 2009 rule 70.

²⁷² Armed Forces (Court Martial) Rules 2009 rule 41 and section 111 of the Act.

²⁷³ Section 111 of the Act.

77. Where there is a requirement for bank records to be made available for inspection, any party to the proceedings may apply to a judge advocate for an order for the inspection of the bankers' books²⁷⁴, the bank will then be issued an order by the judge advocate to permit inspection of bankers' books (T-SL-CM06) using the form at Annex I. A summons to a bank manager form (T-SL-CM07) is at Annex J.

Part 7 – Evidence

Rules of evidence

78. The rules as to the admissibility of evidence of any fact at any CM proceedings are the same as those observed in trials on indictment²⁷⁵ in England and Wales, in so far as they are capable of being applied but subject to some modifications outlined below. No person appearing before the CM can be required to answer any question or produce any document which he could not be required to answer or produce in similar proceedings in a trial on indictment in England and Wales²⁷⁶.

79. Evidence must be given on oath or affirmation²⁷⁷, subject to particular rules regarding the admission of evidence given under a special measures direction²⁷⁸ (see paragraphs 88 to 89) and unsworn evidence given by a witness who cannot be sworn²⁷⁹.

Rules of evidence particular to CM proceedings

80. **Judicial notice.** In addition to the usual rule regarding notoriety, the CM may take judicial notice of all matters within the general service knowledge of the court²⁸⁰.

81. **Application of the Criminal Justice Act 1967 (CJA67).** Section 9 (proof of written statements) and section 10 of CJA67 (proof by formal admission) apply to the CM subject to modifications²⁸¹. In addition to the usual rules on admissibility under section 9 of CJA67 statements are admissible when made by a person outside the UK who at the time of making the statement was subject to Service law or discipline²⁸².

82. **Memory refreshing documents.** Section 139 of CJA67 does not apply to CM proceedings. However, comparable provisions have been incorporated into CM proceedings in identical terms to those of that section²⁸³. A witness is therefore entitled whilst giving evidence to refresh his memory from a document made or verified by him at an earlier stage, or from a transcript of a previous oral account given by him, if he states that the document or oral account records his recollection of the matter at that earlier time and his recollection was likely to have been significantly better at that time. For these purposes, a document may include a recording (visual or sound).

83. **Admission of bad character evidence.** The rules as to admissibility of bad character evidence for CM trials mirror substantially those applicable to a trial on indictment in England and Wales, including where applicable the requirement to give notice:

- a. **Notice of intention to adduce evidence of a defendant's bad character.** If the prosecution intends to adduce evidence of a defendant's bad character or another defendant intends to adduce evidence of a defendant's bad character or to cross-examine him with a view to eliciting such evidence, he must give all parties and the CAO notice of that intention. A notice served by the DSP must be served within 14 days of the DSP serving advance information. A notice served by a defendant must be

²⁷⁵ Trial on indictment means trial by the Crown Court.

²⁷⁶ Armed Forces (Court Martial) Rules 2009 rule 73(3).

²⁷⁷ Armed Forces (Court Martial) Rules 2009 rule 74.

²⁷⁸ Armed Forces (Court Martial) Rules 2009 rule 74(2)(a).

²⁷⁹ Armed Forces (Court Martial) Rules 2009 rule 74(2)(b) and Youth Justice and Criminal Evidence Act 1999 section 56.

²⁸⁰ Armed Forces (Court Martial) Rules 2009 rule 73(4).

²⁸¹ Armed Forces (Court Martial) Rules 2009 rules 75 and 76.

²⁸² Armed Forces (Court Martial) Rules 2009 rule 75(1).

²⁸³ Armed Forces (Court Martial) Rules 2009 rule 77.

served within 14 days of the DSP complying or purporting to comply with the initial disclosure provisions of the Criminal Procedure and Investigations Act 1996 (CPIA96)²⁸⁴, or the date on which the DSP disclosed the previous convictions of the co-defendant to whose misconduct the notice if relates, if later. If it is not reasonably practicable to serve the notice within these time limits, the notice must be served as soon as reasonably practicable to do so, and the judge advocate may dispense with the requirement for such notice if satisfied that no injustice would result. Any notice must be served on the CAO and all other parties to the proceedings, and must include the following information²⁸⁵:

- (1) A description of the misconduct to which the evidence relates;
- (2) A statement of the evidence of misconduct the party serving the notice intends to adduce or elicit;
- (3) If served by the DSP, the details of any witness he intends to call about the misconduct; and
- (4) The paragraph(s) of section 101(1) of Criminal Justice Act 2003 (CJA03) on which the party intends to rely.

The notice of intention to adduce evidence of bad character form (T-SL-CM08) can be found at Annex K and should be used for this purpose.

b. **Application to exclude defendant's bad character.** Unless the judge advocate gives leave for an oral application, a defendant who wishes to apply under section 101(3) of CJA03 to exclude his bad character must apply in writing to the CAO and serve a copy on all other parties to the proceedings. The application to exclude evidence of the defendant's bad character form (T-SL-CM09) found at Annex L should be used for this purpose. When made in writing the application to do so must be served not more than 14 days after receiving notice under paragraph 83a, and must state the date on which the relevant notice was served. If either the court has dispensed with the requirement for written notice or it is not reasonably practicable to make the application within the 14 days limit, the application must be made as soon as is reasonably practicable²⁸⁶.

c. **Application for leave to adduce the bad character of a person other than the defendant.** Unless the judge advocate gives leave for the application to be made orally, an application for leave to adduce the bad character of a non-defendant must be made in writing to the CAO and served on all other parties. An application served by the DSP must be served within 14 days of service of advance information. An application served by a defendant must be served within 14 days of the DSP complying or purporting to comply with the initial disclosure provisions of CPIA96 or the date on which the DSP disclosed the previous convictions of the non-defendant to whose misconduct the application relates, if later. If it is not reasonably practicable to make the application within these time limits, the application must be made as soon as reasonably practicable to do so. Any written application must be served on the CAO and all other parties to the proceedings, and must include the following information²⁸⁷:

- (1) A description of the misconduct to which the evidence relates;

²⁸⁴ The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009/988

²⁸⁵ Armed Forces (Court Martial) Rules 2009 rule 78.

²⁸⁶ Armed Forces (Court Martial) Rules 2009 rule 79.

²⁸⁷ Armed Forces (Court Martial) Rules 2009 rule 78.

- (2) A statement of the evidence of misconduct the party making the application intends to adduce or elicit;
- (3) If made by the DSP, the details of any witness he intends to call about the misconduct; and
- (4) A statement of the grounds on which the applicant asserts the evidence is admissible.

The application for leave to adduce evidence of the bad character of a person other than the defendant form (T-SL-CM10) can be found at Annex M and should be used for this purpose.

84. Where any notice or application is required to be in writing it may be served in accordance with the procedures at paragraphs 9 to 15.

85. **Admission of hearsay evidence.** A hearsay statement is a statement which is not made in oral evidence by a witness during a trial but which is relied upon in the trial as evidence of the matter²⁸⁸. As a matter of common law such evidence is inadmissible, but it may be admissible under the CJA03²⁸⁹.

a. **Notice requirements.** Any party wishing to adduce such hearsay evidence under section 114(1)(d) CJA03 (interests of justice), section 116 (maker of statement unavailable), or section 117 (statement made in a document) must give notice to that effect to the CAO and all other parties to the proceedings. The following procedural requirements must be met:

- (1) **Time limits:** the time limits for compliance with this requirement are:
 - (a) Defendant or co-defendant – not more than 14 days after the prosecutor has purported to comply with initial disclosure requirements (i.e. service of advance information); and
 - (b) Prosecutor – not more than 14 days after the DSP has served advance information.
- (2) **Content of notice:** the notice must give the following detailed information:
 - (a) Details of the statement the party serving the notice proposes to tender in evidence;
 - (b) A copy of the document containing the statement, if not already served on all other parties;
 - (c) Details of the witness who will give evidence, where the notice is served by the DSP and oral evidence of the statement is to be adduced;
 - (d) Details of the section under which the hearsay evidence is admissible in evidence;

²⁸⁸ Armed Forces (Court Martial) Rules 2009 rule 81(6).

²⁸⁹ Armed Forces (Court Martial) Rules 2009 rule 81.

(e) Where adduced under Criminal Justice Act 2003 s.114(1)(d), which factors under Criminal Justice Act 2003 s.114(2) are relevant, and why; and

(f) Where the statement is evidence that an earlier hearsay statements was made, for what purpose it is tendered under Criminal Justice Act 2003 s.121(1)(a),(b) or (c).

The notice of intention to introduce hearsay evidence form (T-SL-CM11) can be found at Annex N and should be used for this purpose.

b. **Effect of serving notice.** Providing these requirements are met, and no counter-notice (see paragraph 85c) has been served, the statement will be treated as admissible by agreement of the parties and the judge advocate will not be required to rule on admissibility.

c. **Counter-notice.** A party receiving such a notice may oppose it by serving notice within 14 days of receiving the notice of intention²⁹⁰. The counter-notice must include the following information:

- (1) The date the notice was served;
- (2) Whether the objection is to the whole or part of the hearsay evidence, and if only part, which part; and
- (3) The grounds for objection.

The notice of intention to oppose admission of hearsay evidence form (T-SL-CM12) can be found at Annex O and should be used for this purpose. Where a counter-notice is received the judge advocate will rule as to admissibility.

86. **Evidence of service matters.** The Rules make special provision for the proof enlistment²⁹¹, history of service in the Armed Forces, decorations, orders and various other armed forces-specific issues²⁹². They also make provision for proof of instructions, regulations and certificates, and decorations badges and emblems²⁹³. Standing and routine orders may be proven by a certificate signed by the CO (or an officer authorised by him to give the certificate) of the person to whom they apply²⁹⁴, but this rule of evidence does not replace the requirement to produce copies of standing or routine orders where applicable and available.

87. **Expert evidence.** The following procedures apply to evidence from expert witnesses.

a. **Admissibility.** Expert evidence may be adduced at the CM with the leave of the judge advocate. Leave is not required if the party proposing to rely on the evidence has served a statement of the substance of the evidence²⁹⁵ on every other party and the CAO at least 14 days before the trial. This must be in writing unless every other party consents to the statement being made orally.²⁹⁶

²⁹⁰ Armed Forces (Court Martial) Rules 2009 rule 82.

²⁹¹ Armed Forces (Court Martial) Rules 2009 rule 83.

²⁹² Armed Forces (Court Martial) Rules 2009 rules 84 and 85.

²⁹³ Armed Forces (Court Martial) Rules 2009 rule 86.

²⁹⁴ Armed Forces (Court Martial) Rules 2009 rule 87.

²⁹⁵ Armed Forces (Court Martial) Rules 2009 rule 88(1).

²⁹⁶ Armed Forces (Court Martial) Rules 2009 rule 88(2).

b. **Limiting the number of expert witnesses.** Where more than one party wishes to adduce expert evidence the judge advocate may direct the experts to discuss the expert issues and prepare a statement of the matters on which they agree and disagree, providing reasons for such agreement or disagreement.²⁹⁷ In order to avoid a proliferation of experts, where more than one defendant wishes to call an expert witness the judge advocate may direct that the evidence be given by one expert only. If the defendants cannot agree which expert to call, the judge advocate may select one expert from a list of experts provided by them, or give direction as to how they should select the expert themselves.²⁹⁸ Where only one expert is called by more than one defendant, each is entitled to give the expert instructions but must copy those instructions to the other co-defendant(s).²⁹⁹

c. **Supporting evidence.** An expert may base his opinion or inference on evidence given in a statement by a person reasonably supposed to have personal knowledge of the matters stated, provided the statement is served along with notice of the expert evidence not less than 14 days before the trial and notice is given of the intention for the expert to base his opinion or inference on that evidence.³⁰⁰ The relevant supporting statement must have been prepared for the purposes of the proceedings of the CM or the investigation into the alleged offence. In this circumstance the statement on which the expert bases his opinion or inference is evidence of what it states. However, the judge advocate may, on the application of a party to the proceedings, order that these provisions should not apply. Such an order may be made taking into consideration (but not limited to) the following matters: the expense of calling of the witness; whether relevant evidence could be given by that person which could not be given by the expert; and whether that person can reasonably be expected to remember the matters stated well enough to give oral evidence of them.³⁰¹

Special measures directions

88. Special measures are a procedure whereby a witness (including a defendant), the value of whose evidence may be diminished due to young age, incapacity (mental or physical), fear or distress can give evidence other than when facing the defendant from the witness stand. Special measures are always under the control of the judge advocate and must be conducted fairly so as not to prejudice any defendant. This includes giving the lay members of the CM such direction as he considers necessary to prevent prejudice³⁰².

89. The special measures available depend upon in relation to whom and for what reason the special measures direction is given. The provisions of the Youth Justice and Criminal Evidence Act 1999 are applied to the CM³⁰³, and the Rules³⁰⁴ describe the procedural requirements and safeguards for the application of special measures as well as some of the factors to be taken into consideration by a judge advocate when deciding whether to make a special measures direction. Special measures may be taken in conjunction with live links³⁰⁵, see paragraph 34.

²⁹⁷ Armed Forces (Court Martial) Rules 2009 rule 88(3).

²⁹⁸ Armed Forces (Court Martial) Rules 2009 rule 88(5) and (6).

²⁹⁹ Armed Forces (Court Martial) Rules 2009 rule 88(8) and (9).

³⁰⁰ Armed Forces (Court Martial) Rules 2009 rule 89(1) and (2).

³⁰¹ Armed Forces (Court Martial) Rules 2009 rule 88(9).

³⁰² Armed Forces (Court Martial) Rules 2009 rule 100.

³⁰³ Youth Justice and Criminal Evidence Act 1999 (Application to the Armed Forces) Order 2009.

³⁰⁴ Armed Forces (Court Martial) Rules 2009 rules 89 – 100.

³⁰⁵ Armed Forces (Court Martial) Rules 2009 rules 93(5) and 18.

Part 8 – Trial procedure

Introduction

90. This part deals with the procedure to be followed where a defendant is to be tried on any charge for which a not guilty plea has been recorded. This is a separate procedure to sentencing proceedings, although sentencing proceedings may take place on completion of a contested trial.

91. Proceedings following a not guilty plea are similar to those in a Crown Court. The judge advocate presides over the proceedings and determines all questions of law, practice and procedure. The lay members determine issues of fact. In the event of a finding of guilty, the judge advocate or the judge advocate and lay members as appropriate determine the issue of sentence at the separate sentencing proceedings. See [Chapter 28](#) (Court Martial constitution and roles).

Opening the proceedings

92. While the ceremonial which accompanies the assembling of the court is not strictly speaking part of the actual trial, it is described below for ease of reference. However, definitive guidance on the procedures to be followed is contained in Courts Martial and the Summary Appeal Court Guidance Volume 1: Guide to Procedure; and Courts Martial and the Summary Appeal Court Guidance Volume 2: Guide for Court Members (JSP 836).

93. No later than 5 minutes before the appointed start time for the trial the Court Usher will open the Court. The defendant, DAO, legal representatives and court recorder will take their places in the court room. Public and press enter and take their places.

94. When those parties to the proceedings who are present at the court have taken their places, the judge advocate will enter and deal with any remaining preliminary matters in the absence of the president of the board and the lay members. This may include the arraignment of the defendant at preliminary proceedings where no previous preliminary proceedings have taken place, the accused has not previously been arraigned on a charge, or the accused wishes to change his plea, see paragraphs 64 to 69. The judge advocate having dealt with any preliminary matters, the president of the board and other lay members enter the courtroom and take their places.

Objections to/replacement of members of court or interpreter

95. Before the trial commences, the names of the persons specified to sit as lay members of the court (including any person specified as the waiting member) are read to the defendant³⁰⁶. At this stage the defendant and prosecution will be asked whether they have any objection to any of the members of the court.

96. Any party to the proceedings may object, on any reasonable grounds, to any lay member or interpreter before that person is sworn³⁰⁷. Objections will be determined by the judge advocate who will announce his decision in open court³⁰⁸. If an objection to a lay court member is allowed that lay member will be discharged by the judge advocate and leave the court, and any waiting member in respect of whom no objection has been made or allowed

³⁰⁶ Armed Forces (Court Martial) Rules 2009 rule 35(1).

³⁰⁷ Armed Forces (Court Martial) Rules 2009 rules 35(2) and 22(3).

³⁰⁸ Armed Forces (Court Martial) Rules 2009 rules 35(3) and 22(3).

will take his place³⁰⁹. If the president of the board is objected to and no other lay member is qualified to be the president of the board the proceedings will be adjourned until another lay member has been specified³¹⁰.

97. Each defendant has the right to object in this manner on any reasonable grounds. Where there are two or more defendants who are to be tried separately by the same court, and one objects to any lay member, it is open to the judge advocate to adjourn the trial of that defendant and proceed with the trial of the other. However, the procedure to be followed in this event is a matter for the judge advocate.

Administration of oaths and affirmations

98. After the defendant has been given the opportunity to challenge the members of the court and interpreter, oaths or affirmations are administered to the lay members of the court, any person under instruction and any interpreter in the presence of the defendant³¹¹, in the form and manner set out in sections 1 and 3 to 6 of the Oaths Act 1978 as modified by Schedule 1 to the Armed Forces (Court Martial) Rules 2009. See the form of oaths and affirmations at Annex P.

Trial procedure

99. **Commencement of trial.** The trial commences immediately after the last lay member has been sworn. The lay members cannot be sworn until the defendant has been given an opportunity to challenge them³¹².

100. **Opening addresses.** Before calling the witnesses for the prosecution, the prosecutor may make an opening address.³¹³ The judge advocate may also give leave for the defence to make an opening address, after the prosecution opening and before the first prosecution witness is called.

101. **Examination of witnesses.** A witness who appears before the CM or any other person who has a duty to attend the court is entitled to the same immunities and privileges as a witness who appears before the High Court in England and Wales³¹⁴. Examination, cross-examination and re-examination of witnesses is conducted according to the law of England and Wales, and under the control of the judge advocate. The prosecution will usually call each of its witnesses in turn, examining each in chief, and then tendering each for cross-examination before re-examining them. In addition to the prosecution and defence asking questions of witnesses, the judge advocate may question any witness or put any question from a lay member³¹⁵. The defence will then call their witnesses, the defendant giving his evidence first if he is to give evidence. Examination of witnesses follows the same pattern as for the prosecution witnesses. However, the judge advocate may do any of the following things if it is in the interests of justice to do so³¹⁶:

- a. Allow a request by the prosecution or defence that cross-examination or re-examination be postponed;

³⁰⁹ For the procedure to be followed in the event of the number of lay members being reduced below the minimum number required for the proceedings see [Chapter 28](#) (Court Martial constitution and roles).

³¹⁰ Armed Forces (Court Martial) Rules 2009 rules 34(8) and (9).

³¹¹ Armed Forces (Court Martial) Rules 2009 rules 37 and 22(2).

³¹² Armed Forces (Court Martial) Rules 2009 rule 35.

³¹³ Armed Forces (Court Martial) Rules 2009 rule 101.

³¹⁴ Section 162 of the Act.

³¹⁵ Armed Forces (Court Martial) Rules 2009 rule 102(1).

³¹⁶ Armed Forces (Court Martial) Rules 2009 rule 102(2).

- b. Call any witness from whom the court has not already heard;
- c. Recall a witness or permit the prosecution or defence to recall a witness;
- d. Permit the prosecution to call a witness after the close of the prosecution case; or
- e. Permit the defendant to give evidence after calling another witness.

102. Presence of witnesses. Witnesses should give evidence in person and while present in court, and for this purpose a witness may with the leave of the judge advocate attend by live link³¹⁷, such that he is able to see and hear and be seen and be heard by the court³¹⁸. See paragraph 32 for witnesses giving evidence by live link. Except for the defendant and any expert or character witness, a witness as to fact must not, except by leave of the judge advocate, be in court while not under examination³¹⁹, and the judge advocate may ask any witness under examination to withdraw while he considers whether a question is admissible³²⁰. The judge advocate may direct any expert or character witness to withdraw where he considers his presence is undesirable.

103. No case to answer. Once the prosecution case has closed, the defendant may make a submission of no case to answer in relation to any charge³²¹. Such an application must be made to the judge advocate, sitting alone. If the submission is successful the judge advocate must direct the court to find the defendant not guilty on the charge in relation to which the submission has succeeded, and if the submission is not successful, or there are other charges for which no such submission was made, the trial will continue.

104. Defence case. Following the closure of the case for the prosecution, the defence case proceeds in the usual manner. Where the defendant intends to adduce evidence as to fact other than by giving evidence himself, he may make an opening address outlining the case for the defence before the evidence is given, but if he has already made an opening speech at the beginning of the trial he may only make a further opening address at this time with the leave of the judge advocate³²². The defendant may give evidence in his defence if he wishes, but is not obliged to do so. If he does not, inferences may be drawn from his silence. In the event that he chooses to give evidence he will be liable for cross-examination by the prosecution and questioning by the judge advocate. Where the defendant chooses to give evidence he must usually do so before calling any other witnesses as to fact³²³ (but see paragraph 101). The defendant may also choose to call witnesses on his behalf.

105. Finding of not guilty before the conclusion of the defence. The judge advocate may invite the court to consider finding the accused not guilty at any time after the close of the case for the prosecution, provided the prosecutor has been given an opportunity to address the court on such a finding.³²⁴

106. Further evidence called by the prosecution - evidence in rebuttal. The prosecution may call or recall a witness to give evidence, but only with the leave of the court³²⁵. This is an exceptional procedure and will usually only be appropriate in relation to

³¹⁷ Armed Forces (Court Martial) Rules 2009 rule 18.

³¹⁸ Armed Forces (Court Martial) Rules 2009 rule 103(4).

³¹⁹ Armed Forces (Court Martial) Rules 2009 rule 103(1).

³²⁰ Armed Forces (Court Martial) Rules 2009 rule 103(2).

³²¹ Armed Forces (Court Martial) Rules 2009 rule 104. This is subject to the Domestic Violence, Crime and Victims Act 2004 section 6 (submission of no case to answer not permitted in case of murder and manslaughter of a child or vulnerable adult).

³²² Armed Forces (Court Martial) Rules 2009 rule 105(1).

³²³ Armed Forces (Court Martial) Rules 2009 rule 105(2).

³²⁴ Armed Forces (Court Martial) Rules 2009 rule 106.

³²⁵ Armed Forces (Court Martial) Rules 2009 rule 102.

matters raised by the defence which the prosecution could not properly have dealt with before the defendant disclosed his defence or could not have foreseen. Where the prosecutor is permitted to call evidence in this manner, examination must be limited to the purpose for which the witness was called or re-called with the leave of the judge advocate and cross-examination and re-examination will take place in the usual manner.

107. Closing addresses. The prosecution may only make a closing speech if any defendant has called a witness as to fact or given evidence himself. The defence is always entitled to make a closing speech, and will make his closing speech after the prosecutor. In the event that a defence advocate is representing two or more defendants, he may only make one closing speech³²⁶.

108. Summing up and directions by judge advocate. After the closing speeches, the judge advocate will direct the court upon the law relating to the case and summarise the evidence³²⁷. At the conclusion he must direct the court to withdraw to deliberate on each charge. The judge advocate takes no part in deliberation on finding and will not be present with the lay members during that process. If the court requires any further direction on the law during their deliberations it must be given by the judge advocate in open court unless the proceedings are being held in camera³²⁸, see paragraphs 19 to 21 for proceedings in camera.

109. Deliberation on finding. During its deliberation on a finding, the court must stay together until the finding has been reached unless the judge advocate directs that they may separate³²⁹, e.g. overnight. Where there are two or more lay members who are Service personnel, the votes of those members must be taken in reverse order of seniority³³⁰. The finding of the CM on a charge must be determined by a simple majority³³¹, and in the event of an equality of votes on the finding the court must acquit the defendant³³².

110. Alternative verdicts. Where a person is acquitted of an offence specifically charged in the charge sheet but the allegations still amount to or include (expressly or by implication) an allegation of another Service offence, the court may convict on that other offence³³³, subject to the judge advocate directing the board that they may do so. For example, if robbery cannot be proven because of the absence of sufficient evidence of use or threat of force, theft may be found.

111. Announcement and record of finding. Having determined guilt or innocence in relation to each charge, the findings of the court must be announced by the president of the board, on each charge separately. However, this is subject to the judge advocate directing the court that where they find the defendant guilty of one charge they need not record a finding on another charge³³⁴, and if in relation to any charge no finding is recorded the judge advocate may direct that it should lie on the file³³⁵. If the judge advocate is satisfied that the findings announced are acceptable in law, he and the president of the board must sign the record of findings³³⁶. The CM record of proceedings and trial result notification form (T-SL-TRN1) found at Annex Q may be used for this purpose. If the findings are not acceptable in

³²⁶ Armed Forces (Court Martial) Rules 2009 rule 107.

³²⁷ Armed Forces (Court Martial) Rules 2009 rule 108(1).

³²⁸ Armed Forces (Court Martial) Rules 2009 rule 109(1).

³²⁹ Armed Forces (Court Martial) Rules 2009 rule 109(2).

³³⁰ Armed Forces (Court Martial) Rules 2009 rule 109(3).

³³¹ Section 160(1) of the Act.

³³² Section 160(3) of the Act.

³³³ Section 161(1) of the Act.

³³⁴ Armed Forces (Court Martial) Rules 2009 rule 108(2).

³³⁵ Armed Forces (Court Martial) Rules 2009 rule 110(5).

³³⁶ Armed Forces (Court Martial) Rules 2009 rule 110(3).

law, the judge advocate will give the court further direction as to the findings which are open to them and the court will then retire to reconsider their finding.

Part 9 – Sentencing proceedings

Introduction

112. In the event a finding of guilty is recorded, either after a guilty plea or as a result of a trial, sentencing will take place in accordance with [Chapter 30](#) (Sentencing principles, powers and effect) and the JAG sentencing guide (see Volume 3 of the MSL). Proceedings separate from any trial are required for this purpose. Where the court consists of any lay members who are subject to Service law, the full court (including the judge advocate) will consider sentence, and for this purpose the president of the board and lay members will sit with the judge advocate. However, where a trial was conducted wholly with a civilian board, the judge advocate will sentence alone. Similarly where all the offenders are civilians to whom part 1 to Schedule 3 of the Act applies³³⁷ the judge advocate will sentence alone. See [Chapter 28](#) (Court Martial constitution and roles).

113. **Timing of sentencing proceedings.** Where sentencing proceedings follow from a trial they may commence immediately on completion of the trial. However, in some cases it may be necessary to adjourn pending completion of a pre-sentence report or for other reasons. In particular, where two or more defendants are tried separately by the court upon charges arising out the same circumstances, the court may postpone its deliberation on sentence to be awarded to any one or more defendants until it has recorded findings in relation to all of them.

114. **Presence of the offender.** The offender should usually be physically present for all sentencing hearings. This will be particularly important if the sentencing proceedings follow a guilty plea where there has been no previous trial because the offender must be given the opportunity to challenge any court members or interpreter before they are sworn, see paragraphs 95 to 97. In addition, where there is a dispute on the facts after a guilty plea evidence must be called to prove the facts, see paragraph 120. In such circumstances it is desirable the offender is present at the place at which the proceedings take place. However, the offender, as may any other party to the proceedings, witness or other person may with the leave of the judge advocate attend by live link.

Opening the proceedings

115. The ceremonial which accompanies the assembling of the court for sentencing proceedings is outlined in JSP 836 (A guide to Courts Martial and the Summary Appeal Court Volume 1: Guide to Procedure; and Courts Martial and the Summary Appeal Court Guidance and Volume 2: Guide for Court Members).

116. There will be an interval between the completion of a trial and sentencing proceedings in order to allow the defence to finalise mitigation and for the lay members to assemble on the bench with the judge advocate. No later than 5 minutes before the appointed start time for the sentencing proceedings the court usher will open the court. The offender, DAO, legal representatives and court recorder will take their places in the court room. Public and press enter and take their places.

117. When those parties to the proceedings who are present at the court have taken their places, the judge advocate enters and deals with any remaining matters in the absence of the president of the board and the lay members. The judge advocate having dealt with any

³³⁷ Armed Forces (Court Martial) Rules 2009 rule 27(3)(a).

such matters, the president of the board and lay members will enter the courtroom and take their places with the judge advocate.

Objections to/replacement of members of court or interpreter

118. Before the sentencing proceedings commence, unless this has previously taken place as part of the trial proceedings, the names of the persons specified to sit as lay members of the court (including any person specified as the waiting member) and any interpreter are read to the defendant³³⁸. At this stage the offender will be asked whether he objects to any of the members of the court or the interpreter. Thereafter the same procedure regarding objections to lay members and administration of oaths applies as for trial proceedings, see paragraphs 95 to 98.

Sentencing procedure

119. **Statement of the prosecution case.** Unless sentencing proceedings follow from a trial of all offenders who are to be sentenced together, the prosecutor will address the court on the facts of the case. The prosecutor must make a such a statement where the offender was convicted on a guilty plea (other than when offered in the course of a trial), the proceedings are on appeal against sentence from the SCC, or the offender was convicted in trial proceedings but previous sentencing proceedings in respect of him were terminated³³⁹. The statement of the prosecution case is essentially a summary of the facts on which the prosecution rely to explain the case against the offender.

120. **Dispute on facts (Newton hearing) following guilty plea.** Where the judge advocate has recorded a finding of guilty but there are disputed facts in the case, the judge advocate may direct that any issue of fact may be tried by the court, which consists of the judge advocate and lay members sitting together.³⁴⁰ The procedure to be followed is essentially the same as for a contested trial. Having heard the evidence, the court will sit in closed court while deliberating on its finding on the issue of fact. The finding will be determined by a majority of votes, and in the event of equality of votes the court must find for the offender. The finding of fact which will be the basis for sentencing will then be announced in open court by the judge advocate.³⁴¹

121. **Additional Information to be provided by the prosecutor.** Once the facts have been presented, or the court has announced its finding of fact, the prosecutor is required to provide certain information, some of which it is mandatory he supply, other of which he must supply if practicable. Where practicable, the prosecutor must present the following information:³⁴²

- a. The offender's age and rank or rate (rank and rate of Service and ex-Service personnel only);
- b. The offender's Service record (Service and ex-Service personnel only);
- c. Any recognised acts of gallantry or distinguished conduct on the part of the offender and any decoration to which he is entitled (Service and ex-Service personnel only);

³³⁸ Armed Forces (Court Martial) Rules 2009 rules 35(1) and 22(3).

³³⁹ Armed Forces (Court Martial) Rules 2009 rule 114(1).

³⁴⁰ Armed Forces (Court Martial) Rules 2009 rule 112(1).

³⁴¹ Armed Forces (Court Martial) Rules 2009 rule 113.

³⁴² Armed Forces (Court Martial) Rules 2009 rule 114(2).

- d. In respect of any previous convictions of the offender for:
- (1) Service offences;
 - (2) Offences in the UK; or
 - (3) Relevant³⁴³ offences under the law of another European Union member State,

any sentence awarded for such offence. The prosecutor must indicate clearly any conviction that is spent for the purposes of the Rehabilitation of Offenders Act 1974 (this is usually marked on a list of antecedents);

- e. Particulars of any formal police caution administered to the offender by a constable in England and Wales or Northern Ireland;
- f. Particulars of the length of time the offender has been in custody awaiting trial;
- g. Details of the offender's pay, terminal benefits and future pension entitlements (or, for civilians who have not previously been subject to Service law, details of his employment (if any)³⁴⁴; and
- h. For civilian offenders who have not previously been subject to Service law, if the offender was under 18 when convicted, whether he has a Service parent or Service guardian.

Much of this information will be recorded on the information for Service courts form (T-SL-SC01) found at Annex R

122. Where the offender has elected trial by the CM, the prosecutor must tell the court whether any offence for which he is to be sentenced is a relevant offence under s 165 of the Act³⁴⁵. The provision restricts the sentencing powers of the court following election to those of the CO who could have heard the charge summarily if the offender had not elected trial by the CM. In addition, where the court has the power to make an activation order, to deal with an offence for which the offender was awarded a conditional discharge or an overseas community order was in force, the prosecutor must make this clear to the court and present any facts relating to the previous offence³⁴⁶.

123. Unless the judge advocate so directs this information need not be adduced in accordance with the strict rules of evidence. In addition, where (as is usually the case) the prosecutor has obtained a record of the offender's antecedents in advance of the hearing, he must serve a copy on the offender and the CAO before the hearing takes place³⁴⁷.

124. **Pre-sentence reports.** A pre-sentence report (PSR)³⁴⁸ is an independent report prepared to assist the court during its sentencing deliberations. It is usual for the CAO to arrange for a PSR in advance of any sentencing hearing, and where this has been done, he

³⁴³ For this purpose, an offence is relevant if the act that constituted the offence would have been an offence under UK law if committed in the UK at the time the prosecutor presents the information about the offence to the court. Armed Forces (Court Martial) Rules 2009 rules 114(2)(d)(iii) and 114(3).

³⁴⁴ Armed Forces (Court Martial) Rules 2009 rule 114(7).

³⁴⁵ Armed Forces (Court Martial) Rules 2009 rule 114(4).

³⁴⁶ Armed Forces (Court Martial) Rules 2009 rule 114(5).

³⁴⁷ Armed Forces (Court Martial) Rules 2009 rule 113(2).

³⁴⁸ As defined by section 257 of the Act.

must serve a copy on the prosecution, the offender and the judge advocate before the time appointed for the sentencing hearing³⁴⁹. The prosecution and defence will then be in a position to assess whether there is anything in the PSR which should be challenged or explained.

125. In some circumstances (eg. AWOL cases in which the preliminary hearing may not have taken place until immediately before the sentencing hearing) a PSR may have been prepared before the defendant's plea is known. In this case, the prosecution must not be served with a copy of the PSR until a plea of guilty has been recorded by the judge advocate or, in the case of a contested trial, the accused has been found guilty.

126. **Mitigation.** The offender may give evidence on oath or affirmation and call witnesses in mitigation of sentence and as to his character. He may produce any document, including written reports, testimonials and references, and also address the court in mitigation of sentence.³⁵⁰

127. **Offences taken into consideration.** The offender may request the court to take into consideration any other offence committed by him of a similar nature to that to which he has pleaded guilty or has been found guilty. This is a convention under which if a court is informed that there are outstanding charges against an accused who is before the court for a particular offence, the court can, if the offender admits the offences and asks that they be taken into consideration, take them into account when sentencing on all the charges together. The court may agree to take into consideration any such offence as the judge advocate so directs³⁵¹ and which the court would be empowered to try. A list of the offences which the offender admits having committed and which the court agrees to take into consideration must be signed by the offender and attached to the record of proceedings.³⁵²

128. **Decision on sentence.** Having heard from both the prosecution and the defence matters relevant to sentencing, the court, consisting of the judge advocate and lay members, must sit in closed court to deliberate on sentence³⁵³. In this event the only person who may accompany the court is any person under instruction. The presence of personnel under instruction is at the discretion of the judge advocate, having consulted the president of the board. Sentence is determined by a majority of the votes of all members of the court³⁵⁴, and in the event of an equality of votes on the sentence, the judge advocate has the casting vote³⁵⁵.

129. Sentencing principles are addressed in [Chapter 30](#) (Sentencing principles, powers and effects). Where the CM convicts a person, the court must pass a separate sentence in respect of each offence of which he is convicted³⁵⁶. The sentence must be recorded in writing, dated and signed by the president of the board and the judge advocate³⁵⁷, except where the judge advocate sentences alone, see paragraph 112. The reasons for sentence and the explanation of sentence required by section 252(1) of the Act must be given in open court by the judge advocate³⁵⁸, and the sentence must be formally announced in open court by the president of the board³⁵⁹ unless the judge advocate is sentencing alone, in which case the judge advocate will announce the sentence. With leave of the judge advocate, the

³⁴⁹ Armed Forces (Court Martial) Rules 2009 rule 113(1).

³⁵⁰ Armed Forces (Court Martial) Rules 2009 rule 116.

³⁵¹ Armed Forces (Court Martial) Rules 2009 rule 115(1).

³⁵² Armed Forces (Court Martial) Rules 2009 rule 115(2).

³⁵³ Armed Forces (Court Martial) Rules 2009 rule 20.

³⁵⁴ Section 160(1) of the Act.

³⁵⁵ Section 160(4) of the Act.

³⁵⁶ Section 255 of the Act.

³⁵⁷ Armed Forces (Court Martial) Rules 2009 rule 117(1).

³⁵⁸ Armed Forces (Court Martial) Rules 2009 rule 117(2).

³⁵⁹ Armed Forces (Court Martial) Rules 2009 rule 117(3).

president of the board (if a Service person) may make additional remarks to the defendant about the effects of his offending on his Service to which he belongs and the likely effects of the sentence on his Service career³⁶⁰.

130. **Closing the court.** On completion of the sentencing proceedings the lay members will be discharged.

Part 10 – Variation proceedings

Scope of the ‘slip rule’

131. **Common law principles apply.** Variation proceedings are a means by which the CM may, within a short space of time after sentencing proceedings (56 days), correct errors made in sentencing. It includes the power to increase sentence or to activate a suspended sentence. Accordingly its use is confined to errors in certain circumstances including: where new information is received; where it becomes clear that the defendant caused false information to be put before the court; where the court overlooked a statutory provision; and where the sentence has taken effect in some other way than anticipated by the court. It is not designed for use where the sentencing tribunal, on reflection, thinks the sentence is inadequate. The Rules do not specifically prescribe the circumstances in which variation proceedings may take place, and the general principles applicable in civilian proceedings, developed under common law may therefore be applied³⁶¹. The procedure to be followed for the exercise of the power to vary is provided for by the Rules³⁶².

132. **Limitation and time limits.** The power to vary a sentence extends to the sentence itself and any order or direction in relation to the sentence. If it considers the sentence to be incorrect, the court may vary that sentence or vary or rescind the order or direction. However, the power can only be exercised within 56 days of the sentence being imposed or the order or direction being made. In addition, the power cannot be exercised in relation to any sentence or order after an appeal or an application for leave to appeal has been determined.

Constitution of the court³⁶³

133. Where lay members participated in the sentencing or appellate proceedings at which the sentence to be varied was awarded, they should be reassembled to exercise the power. However, the power can only be exercised by the entire original lay board and a judge advocate, or by a judge advocate sitting alone³⁶⁴. Lay members may attend the proceedings by live link³⁶⁵.

134. If the lay members cannot all be re-assembled for variation proceedings the judge advocate may direct that there are to be no lay members, but only in the following circumstances:

- a. One or more of the original lay members cannot, without substantial inconvenience, attend the proceedings at the time and place appointed;
- b. If the proceedings were postponed until the earliest time at which the judge advocate and all original lay members and the offender could, without substantial inconvenience, attend the proceedings (whether at the place originally appointed or any other place, and including by live link); and
- c. If the sentence were then varied in the way in which it would most likely be varied if all the original lay members were present at the variation proceedings,

³⁶¹ Archbold Criminal Proceeding Evidence and Practice or other practitioners' texts and case law should be consulted.

³⁶² Armed Forces (Court Martial) Rules 2009 rule 118.

³⁶³ See [Chapter 28](#) (Court Martial constitution and roles) for details of the constitution of the court for variation proceedings.

³⁶⁴ Wherever possible the judge advocate for the sentencing proceedings should preside, but if this is not possible the JAG may specify another judge advocate for the variation proceedings.

³⁶⁵ Armed Forces (Court Martial) Rules 2009 rules 121 and 18.

the offender would be unfairly prejudiced by the postponement. For this purpose 'inconvenience' includes expense and adverse effect on the operational effectiveness of HM forces.

135. For example, an offender is sentenced to 42 days detention having elected CM trial. He has served 24 days of his sentence, and if he is released immediately he can rejoin his ship/unit/establishment which is about to deploy. If he does not return to his ship/unit/establishment immediately, it will have an impact on his future career. If he deploys he will be unable to attend variation proceedings for 2 months. The court made a mistake in that its powers of punishment were limited to 28 days' detention (the CM's powers being capped at CO's powers of punishment without extended powers). The lay members cannot all be reassembled for 15 days, by which time the offender will have deployed if released from custody. The judge advocate may direct that there be no lay members and then substitute a sentence of 28 days' detention or less so that he is not only released from custody but the variation proceedings are complete. See paragraph 138 for an order that the offender be released from custody pending variation proceedings.

Application and procedure for variation proceedings

136. The judge advocate may direct the CAO to constitute the court for the purpose of exercising the power of his own motion or on the application of the prosecution or defence³⁶⁶. In the latter case, the application must be in writing and set out the grounds for the application³⁶⁷, including the reasons why the applicant believes the sentence, order or direction to have been made in error. The judge advocate may allow or refuse an application for variation proceedings, but when refusing must notify the defence and prosecution of the decision³⁶⁸, and should give reasons for the decision.

137. The CAO will list the variation proceedings as soon as practicable on receipt of a direction for variation proceedings. The procedure to be followed at the hearing will be determined by the judge advocate. Any decision to vary the sentence will be by majority of votes, and in the case of equality of votes the judge advocate has a casting vote³⁶⁹. The sentence will then be announced and reasons given for it, and the president of the board may with leave make additional remarks about the effects of the offence on the Service to which he belongs and on his career, in like manner to normal sentencing proceedings, see paragraph 129³⁷⁰.

Release from custody

138. If it appears to a judge advocate that a custodial sentence or sentence of detention was imposed unlawfully or that the maximum term that could have been imposed has expired, a judge advocate may order that the offender be released immediately. Such an order cannot be made if an appeal or application for leave to appeal has been determined. If such an order is made the judge advocate may direct that variation proceedings take place subsequently³⁷¹, but is not required to do so.

³⁶⁶ Armed Forces (Court Martial) Rules 2009 rule 119(3).

³⁶⁷ Armed Forces (Court Martial) Rules 2009 rules 119(4)(a) and 119(4)(b) and (c) for the requirement to serve the application on the other party.

³⁶⁸ Armed Forces (Court Martial) Rules 2009 rule 119(5).

³⁶⁹ Armed Forces (Court Martial) Rules 2009 rule 122.

³⁷⁰ Armed Forces (Court Martial) Rules 2009 rule 123.

³⁷¹ Armed Forces (Court Martial) Rules 2009 rules 124(4) and 119(2).

Part 11 – Appellate proceedings

139. **Notice of appeal and time limits.** The CM has jurisdiction to hear appeals against both finding and sentence awarded by the SCC. Such appeals are initiated by a notice to the CAO, and the CAO then serving the notice on the DSP³⁷². Notices of appeal must be served on the CAO within 28 days of the sentence being awarded by the SCC, but this time limit may be extended on application to the JAG before the time limit expires³⁷³.

140. **Leave to appeal out of time.** Where the appeal has not been lodged within the initial 28 day period or such additional time as has been granted by the JAG, an application may be made to the JAG for leave to appeal out of time³⁷⁴. Such an application must be made to the CAO, must state why the notice of appeal was not served in time, and must be accompanied by a notice of appeal so that if leave to appeal is granted the notice of appeal can be lodged without further delay. Where an application for leave to appeal out of time is made the CAO will forward it (and the accompanying notice of appeal) to both the JAG and the DSP. The JAG will then decide whether to grant the application on the papers, reject it without a hearing, or direct a hearing of the application. If the application is rejected without a hearing the applicant has 14 days beginning with notice of the rejection during which he may serve notice that he requires a hearing of the application. In this circumstance the applicant is entitled to a hearing, which will take place before a judge advocate.

141. **Procedure on appeal.** If the JAG or a judge advocate grants leave to appeal out of time, or a notice of appeal is served within the requisite timescales, CM appellate proceedings will be listed by the CAO, and the hearings will take place in the same way as ordinary CM trials (for appeal against finding) and sentencing proceedings (for appeal against sentence, or sentence following a guilty verdict on appeal), including as to composition of the board. However, preliminary proceedings will not be automatically listed by the CAO and the appellant will not be re-arraigned on the charge. This does not prevent the judge advocate from directing that preliminary proceedings should be heard either of his own motion or on the application of the appellant or the DSP (respondent)³⁷⁵, but the first hearing of the case is likely to be the trial (appellate proceedings) or the sentencing proceedings.

142. **Multiple appellants from the SCC.** If two or more defendants are tried by the SCC and more than one of them appeals, the appeals must be heard together³⁷⁶.

143. **Abandonment of appeal.** An appellant will be treated as having abandoned his appeal if he fails without reasonable excuse to appear for the appeal³⁷⁷, or if he withdraws his appeal in writing.

³⁷² Armed Forces (Court Martial) Rules 2009 rule 125(1) and (2).

³⁷³ Section 285(3)(b) of the Act and Armed Forces (Court Martial) Rules 2009 rule 127.

³⁷⁴ Armed Forces (Court Martial) Rules 2009 rule 127(1).

³⁷⁵ Armed Forces (Court Martial) Rules 2009 rules 128(1)(b) and 46.

³⁷⁶ Armed Forces (Court Martial) Rules 2009 rule 128(4).

³⁷⁷ Armed Forces (Court Martial) Rules 2009 rule 129.

Part 12 – Activation proceedings

Introduction

144. Where an offender has been awarded a suspended sentence of imprisonment or detention, or is in the period of release under a detention and training order, and commits an offence (the ‘trigger offence’) during the operational period of the suspended sentence or whilst on release, the CM may conduct activation proceedings in relation to the suspended sentence or the detention and training order. This Part outlines the procedure to be followed during activation proceedings. It does not deal with the procedure to be followed during sentencing proceedings before the CM in relation to the offence committed during the operational period of a suspended sentence or while on release. Consideration of activation of suspended sentences and further detention under a detention and training order will be made during sentencing proceedings in those circumstances, see Part 9 of this chapter. Sentencing principles and procedures are dealt with in [Chapter 30](#) (Sentencing principles, powers and effects).

Application for activation proceedings

145. **Report of ‘trigger’ offence to the CAO.** The first stage of convening activation proceedings is the receipt by the CAO of information indicating that activation proceedings should be considered. The relevant information will usually be obtained by the CO as a result of a report to him, either by the offender or the Service Police, of a conviction for an offence in a civilian court in the UK. However, such circumstances may be reported directly to the CAO by any person with the relevant information, including any magistrates’ court, the Crown Court or another civilian court which convicted the offender of the ‘trigger offence’.

146. **Trigger offences for the purpose of CM activation proceedings.** These trigger offences vary depending upon whether a Service court or the CO awarded the sentence and the sentence awarded, as follows:

a. **Suspended sentence of imprisonment awarded by the CM or SCC.** A suspended sentence of imprisonment may be activated as a result of:

- (1) A conviction in a civilian court in the British Islands of an offence committed during the operational period of the suspended sentence; or
- (2) A conviction of a Service offence committed during that period. For these purposes, ‘conviction of a Service offence’ includes conviction by the CM, the SCC, and charges found proved by the CO or the SAC³⁷⁸. However, in the event a person has been awarded a suspended sentence of imprisonment and retained in the Service, charges capable of being tried summarily by the CO will usually be referred to the DSP with a view to CM trial. The suspended sentence would then be dealt with during the normal sentencing procedure for the ‘trigger offence’.

In any of the circumstances at (1) and (2) above, where the offender has not been dealt with in relation to the suspended sentence, activation proceedings may be appropriate and therefore the matter should be reported to the CAO who should then notify the DSP, see paragraph 148³⁷⁹.

³⁷⁸ It is also possible for civilian courts to deal with certain service offences. In this unlikely event that conviction could also trigger activation of a suspended sentence of imprisonment.

³⁷⁹ Armed Forces (Court Martial) Rules 2009 rules 131 and 134.

b. **Suspended sentence of detention awarded by the CM.** A suspended sentence of detention awarded by the CM³⁸⁰ may be activated as a result of:

- (1) A conviction in a civilian court in the British Islands of an offence committed during the operational period of the suspended sentence; or
- (2) A conviction of another Service offence committed during the operational period of the suspended sentence³⁸¹. The conviction for another Service offence could be by the CM, the CO, the SCC or the SAC. However, in the case of charges capable of being tried summarily the CO will usually refer those charges to the DSP to be dealt with by the CM rather than dealing with them summarily. The suspended sentence would then be dealt with during the normal sentencing procedure for the 'trigger offence'. (Note that a CO does not have the power to activate a suspended sentence of detention awarded by the CM.)

c. **Offence committed during the release period of a detention and training order (awarded by the CM or the SCC).** Offences will only 'trigger' activation in the following circumstances:

- (1) The new offence was committed after his release, but before the term of the order ends, and the offender has been convicted of the new offence; and
- (2) The new offence is a service offence or an offence in the British Islands; and
- (3) The new offence is punishable by imprisonment³⁸².

If the 'trigger' offence is dealt with by the CM or the SCC, that court should also deal with the detention and training order issue. However, where the offender is convicted of the new offence otherwise than by the CM or SCC, activation proceedings before the CM may be appropriate.

147. **Circumstances in which CM activation proceedings do not apply.** Whilst the CM has power to activate suspended sentences of detention awarded summarily when dealing with 'trigger' offences referred to the DSP by the CO, it does not have the power to deal with suspended sentences of detention awarded summarily during separate CM activation proceedings. If a CO hears a charge for an offence committed during the operational period of a suspended sentence awarded summarily he must also deal with the suspended sentence.

148. **CAO notification to the DSP.** On receipt of information indicating that any of the situations in paragraph 146 have arisen and the relevant sentence (suspended sentence or detention and training order) has not been dealt with, the CAO must notify the DSP, forwarding to him any of the following information not already in the DSP's possession:

- a. the record of the proceedings at which the original sentence was passed;
- b. information concerning the 'trigger' offence and any other offence proved to have been committed by the offender during the relevant period, and the sentence passed for each such offence; and

³⁸⁰ CM for this purpose includes the Appeal Court and the Supreme Court (House of Lords), see section 191(7) of the Act.

³⁸¹ Section 191(2) of the Act and Armed Forces (Court Martial) Rules 2009 rule 132.

³⁸² Sections 214(1) and (2) of the Act and Armed Forces (Court Martial) Rules 2009 rule 133.

- c. the record of any proceedings in which a court made, or gave reasons for not making an activation order in respect of the original sentence or a order that the offender be detained, as the case may be.³⁸³

149. **DSP's decision whether to apply for activation proceedings.** The decision whether activation proceedings are appropriate is that of the DSP. On receipt of the information at paragraph 148, the DSP should consider whether, taking all relevant factors into consideration, the CM might activate the suspended sentence or make an order that the offender be detained, see paragraph 155. The following factors may be relevant for this purpose (this list is not exclusive):

- a. The details of the offence(s) for which the suspended sentence of imprisonment or detention, or detention and training order was imposed, and any affinity with the 'trigger' offence, which may indicate a lack of rehabilitation;
- b. Details of the sentence awarded for the original offence; this is indicative of the seriousness of the offence;
- c. Such details that are known of all proved offences committed by the offender during the operational period of the original sentence, and any reasons given for the sentences awarded in relation to those matters;
- d. The reasons given for any decision(s) not to activate the suspended sentence;
- e. The offender's antecedents, including all previous Service offences;
- f. Any mitigation known to have been presented in relation to the suspended sentence or detention and training order; and
- g. Any other matters the DSP considers relevant. For example, the degree of compliance with the suspended sentence, i.e. how far into the operational period the subsequent offence was committed.

150. If the DSP decides that activation proceedings are appropriate he is to submit an application for such a hearing to the CAO and serve it on the offender not later than 28 days after being notified by the CAO of the matters at paragraph 148³⁸⁴. The CAO must then forward the application to the JAG, along with all the documentation at paragraph 148. On receipt of the application the JAG, or a delegated judge advocate must either:

- a. Issue a summons requiring the offender to appear before the court for activation proceedings; or
- b. Issue a warrant for the offender's arrest³⁸⁵.

Warrant for offender's arrest

151. If a judge advocate issues a warrant for the offender's arrest it will be addressed either to a civilian police force or the Service Police, or both, depending whether the offender is a Service person or a civilian. On arrest the offender must be transferred to Service custody

³⁸³ Armed Forces (Court Martial) Rules 2009 rule 134(2).

³⁸⁴ Armed Forces (Court Martial) Rules 2009 rule 134(4).

³⁸⁵ Armed Forces (Court Martial) Rules 2009 rule 134(6).

as soon as practicable and then be brought before a judge advocate for a review of whether he should be retained in custody until he can be brought before the court. If a review has not taken place within 48 hours of arrest the offender must be released³⁸⁶. The criteria for keeping the offender in custody is that there are substantial grounds for believing that the offender, if released from custody, will fail to attend the court as required. If retained in custody, the offender will be subject to review of custody at not longer than 8 days intervals. If released, the judge advocate may apply conditions see [Chapter 5](#) (Custody) such as are necessary to ensure the offender attends court as required³⁸⁷. Any such requirements may be varied or discharged by the judge advocate on application by the offender³⁸⁸. Meanwhile the CAO will make arrangements for the activation proceedings to take place as soon as possible.

Procedure for activation proceedings

152. **Disclosure by the DSP.** Not less than 7 days before the time appointed for activation proceedings the DSP must serve on the offender any information detailed at paragraph 148 in his possession³⁸⁹.

153. **Procedure during the hearing.** The order of procedure to be followed for activation proceedings will vary depending on the circumstances and will be determined by the judge advocate. Where lay members form part of the court for the proceedings, they will be sworn in (lay members of the court which passed the suspended sentence or detention and training order are disqualified from membership of the court for activation proceedings³⁹⁰ - see [Chapter 28](#) (Court Martial constitution and roles). The offender will then be asked whether he admits those facts. If the offender does not admit the facts the prosecution will adduce evidence of them and cross-examination and re-examination of witnesses will take place in the usual manner. The judge advocate will then determine whether the relevant facts have been proven³⁹¹.

154. If the facts are admitted by the offender or proven, the judge advocate will then invite the prosecutor to make a statement of the relevant facts, including the circumstances of the offence for which the original sentence was awarded and of the new offence. The information provided at paragraph 148 may be used for this purpose. The offender will then be given an opportunity to call character witnesses and produce any document, including written reports, testimonials and references, as evidence of his character. He or his legal representative may then address the court as to whether the court should make an order relevant to the sentence to which the activation proceedings relate.

155. **Orders available at activation proceedings.** The relevant orders available to the court for activation proceedings are as follows:

a. **Suspended sentence of imprisonment:**

- (1) An order that the suspended sentence of imprisonment is to take effect with its original term unaltered;

³⁸⁶ Armed Forces (Court Martial) Rules 2009 rule 136.

³⁸⁷ The process of applying conditions is akin to that of applying bail conditions in the civilian jurisdiction, but the term 'bail' is not applicable under the Act.

³⁸⁸ Armed Forces (Court Martial) Rules 2009 rule 136(7).

³⁸⁹ Armed Forces (Court Martial) Rules 2009 rule 137.

³⁹⁰ Armed Forces (Court Martial) Rules 2009 rule 32(6).

³⁹¹ Armed Forces (Court Martial) Rules 2009 rules 138(3) and (4).

(2) An order that the suspended sentence of imprisonment is to take effect with the substitution of a lesser term for the original term; or

(3) If it would be unjust to order either (1) or (2), no order;

b. **Suspended sentence of detention:**

(1) An order that the suspended sentence of detention is to take effect with its original term unaltered;

(2) An order that the suspended sentence of detention is to take effect with the substitution of a lesser term for the original term; or

(3) No order;

c. **Detention and training order.** An order that the offender be detained in secure accommodation for any part of a period which is equal to the period between the date on which the new offence was committed and the date on which the detention and training order ends.

Each order must include any terms of the order, e.g. for the period for which the sentence is activated.

156. When determining whether to make an order and if so in what terms, a decision must be made on a majority of votes (unless the judge advocate is sitting alone) and in the case of an equality of votes the judge advocate has the casting vote. In similar manner to the announcement of sentence during CM sentencing proceedings³⁹², the judge advocate will then explain the reasons for the order, and the president of the board (if any) will announce the order and its terms (this will be done by the judge advocate if there is no president of the board). However, unlike during sentencing proceedings the president of the board will not make any additional remarks about the effects of his offence on the Service to which he belongs or the likely effect on his career.

³⁹² Armed Forces (Court Martial) Rules 2009 rule 117.

Part 13 – Ancillary proceedings

157. A judge advocate sitting alone may exercise judicial functions in relation to a number of ancillary matters in relation to the CM and SCC (and related appellate) proceedings. These matters are outlined below. For detailed provisions the Rules should be consulted.

Community order proceedings (overseas community order)

158. Where an offender has been awarded by the CM, the Appeal Court (CMAC) or the SCC an overseas community order, and breaches a requirement of that order, an application may be made for a summons or warrant for the arrest of the offender. A judge advocate may issue a summons or a warrant to arrest the offender for the purposes of bringing him before the court, and may at subsequent community order proceedings revoke the order with or without re-sentencing for the offence for which the overseas community order was awarded. He also has the power to dismiss an application for community order proceedings, with or without a hearing³⁹³.

159. In addition, a judge advocate may on an application for amendment, amend the requirements of an overseas community order, with or without a hearing³⁹⁴. He may also, on application, extend an unpaid work requirement, with or without a hearing³⁹⁵.

160. Where the offender is arrested, he must be transferred into Service custody as soon as practicable and brought before a judge advocate for a review of custody, or released not later than 48 hours after his arrest. The criteria for keeping the offender in custody is that there are substantial grounds for believing that the offender, if released from custody, will fail to attend the court as required. If retained in custody, the offender will be subject to review of custody at not longer than 8 days intervals. If released, the judge advocate may apply conditions such as are necessary to ensure the offender attends court as required³⁹⁶. Any such requirements may be varied or discharged by the judge advocate on application of the offender³⁹⁷. Meanwhile the CAO will make arrangements for the community order proceedings, or application in relation to those proceedings as the case may be, to take place as soon as possible³⁹⁸.

Review of Service compensation order (SCO)

161. The CM has the power to review a SCO awarded by the CM, the SAC or the SCC, and orders made by a CO where the person against whom the order was made is no longer subject to Service law, a member of a volunteer reserve force, or a member of an ex-regular reserve force who is subject to an additional duties commitment³⁹⁹. Such a review may take place where the offender who was awarded the order applies for it to be discharged or reduced, but only where there is no further right of appeal in relation to the proceedings at which the order was made, and only in the following circumstances:

- a. The injury, loss or damage in respect of which the order was made has been held in civil proceedings (e.g. a civil law suit for damages for personal injury) to have been less than the court awarding the order took it to be;

³⁹³ Armed Forces (Court Martial) Rules 2009 rules 140 and 142.

³⁹⁴ Armed Forces (Court Martial) Rules 2009 rule 143.

³⁹⁵ Armed Forces (Court Martial) Rules 2009 rule 144.

³⁹⁶ The process of applying conditions is akin to that of applying bail conditions in the civilian jurisdiction, but the term 'bail' is not applicable under the Act.

³⁹⁷ Armed Forces (Court Martial) Rules 2009 rules 141(7), 142(9).

³⁹⁸ Armed Forces (Court Martial) Rules 2009 rule 141(8) and 142(10).

³⁹⁹ Section 177 of the Act.

- b. When made in respect of loss of property, the property has been recovered by the beneficiary of the order; or
- c. The person against whom the order was made has suffered a substantial reduction in his means.

162. An application for review of a SCO in these circumstances must be made in writing to the CAO, copy to the beneficiary of the order, and state whether the applicant wishes the order to be discharged or reduced, and if reduced by how much. It must also state the grounds on which the court has power to discharge or reduce the order. On receipt of such an application the JAG may grant the application, dismiss the application or exercise the power under section 177 of the Act in some other way than that applied for. Alternatively he may direct a hearing of the application. However, he may not without a hearing exercise any of the powers to discharge or reduce the order unless at least 14 days have passed since the application was served on the beneficiary, and the beneficiary has not served notice on the CAO of his wish to oppose the application. The CAO will notify both the applicant and beneficiary of the JAG's decision on the papers. Alternatively he will make arrangements for a hearing of the application before a judge advocate sitting alone⁴⁰⁰. The procedure to be followed will be determined by the judge advocate, but it is unlikely that any representation from the DSP will be required.

Application for time to pay financial penalty

163. The CM has the power⁴⁰¹ to allow payment of a fine or SCO to be paid by instalments or to allow the offender time to pay the amount due. This power applies to fines and SCOs awarded by the CM, the SAC or the SCC, and orders made by a CO where the person against whom the order was made is for the time being subject to Service law, a member of a volunteer reserve force, or a member of an ex-regular reserve force who is subject to an additional duties commitment. An application by an offender for such an order must be made in writing to the CAO, copied to the beneficiary, and state whether the applicant wishes the court to allow time for payment, and if so, how much time, or direct payment by instalments, and if so of what amount and when. On receipt of such an application the JAG has the power to make the proposed order or any other order under section 251 of the Act, dismiss the application or direct a hearing of the application. However, the JAG may only make an order under section 251 of the Act without a hearing if at least 14 days have passed since the application was served on the beneficiary and the beneficiary has not served notice on the CAO of his wish to oppose the application. The CAO will notify both the applicant and beneficiary of the JAG's decision on the papers. Alternatively he will make arrangements for a hearing of the application before a judge advocate sitting alone⁴⁰². The procedure to be followed will be determined by the judge advocate, but it is unlikely that any representation from the DSP will be required.

Remission of fine

164. Where the CM, the SAC or the SCC has awarded a fine in circumstances in which the offender failed to co-operate with the investigation into his financial circumstances, and thus determined his financial circumstances without full information, it may be appropriate for the CM to remit all or part of the fine after a later inquiry into his financial circumstances⁴⁰³.

⁴⁰⁰ Armed Forces (Court Martial) Rules 2009 rule 145.

⁴⁰¹ Section 251 of the Act.

⁴⁰² Armed Forces (Court Martial) Rules 2009 rule 146.

⁴⁰³ Sections 267 and 249 of the Act.

Such action can be taken either on an application for such remission⁴⁰⁴, or as a result of an application under paragraph 163. Where the application is for remission of the fine, the application must be made in writing to the CAO, and state the financial circumstances of which the sentencing court was unaware and explain why the applicant failed to co-operate with the court when it investigated his financial circumstances under section 249 of the Act. The application should be dealt with by the judge advocate for the proceedings in which the fine was imposed, and the judge advocate may remit the fine in whole or in part, dismiss the application or direct a hearing of the application. The procedure to be followed will be determined by the judge advocate, but it is unlikely that any representation from the DSP will be required.

Service restraining orders

165. Where the Appeal Court allows an appeal from the CM it may remit the case back to the CM for consideration of a Service restraining order under section 229 of the Act. These orders prohibit the defendant from doing anything described in the order for a fixed period or until a further order is made, and do not require the defendant to have been convicted of an offence. They only apply to those subject to Service law or discipline. On receipt of such a referral the CAO will appoint a time and place for a hearing before a judge advocate sitting alone⁴⁰⁵. The procedure to be followed will be determined by the judge advocate, who is likely to invite the DSP and the defence to lead evidence admissible in proceedings in the High Court for an injunction under section 3 of the Protection from Harassment Act 1997⁴⁰⁶. The defendant need not be present for the proceedings, and the court is allowed to make a Service restraining order in his absence.

166. In addition, the DSP, the defendant or any other person mentioned in the order may apply for a variation or revocation of the order⁴⁰⁷. Such an application must be made in writing to the CAO and specify whether the applicant wishes the court to revoke or vary the order and the grounds for doing so. The judge advocate may dismiss the application, but cannot vary or revoke the order without a hearing. If he dismisses the application without a hearing the applicant will be notified of the decision in writing. If a hearing is required, the CAO will make all necessary arrangements and the procedure to be followed will be determined by the judge advocate, taking into consideration such evidence as would be admissible when making the original order, see paragraph 165.

Variation or revocation of order for a Service parent or guardian to enter into recognizance

167. A Service parent or guardian ordered to enter into recognizance to take proper care of an offender and exercise control of him⁴⁰⁸ may apply for the variation or revocation of the order⁴⁰⁹. Such an application must be made in writing to the CAO and specify whether the person wishes the court to vary or revoke the order, and why. The judge advocate may vary or revoke the order, or dismiss the application, with or without a hearing. If a hearing is required, the CAO will make all necessary arrangements. The hearing will take place before a judge advocate sitting alone, and the procedure will be determined by the judge advocate. It is unlikely the DSP will be required to be represented at such a hearing.

Contempt of court

⁴⁰⁴ Armed Forces (Court Martial) Rules 2009 rule 147.

⁴⁰⁵ Armed Forces (Court Martial) Rules 2009 rule 148.

⁴⁰⁶ Section 229 of the Act.

⁴⁰⁷ Section 232 of the Act.

⁴⁰⁸ Section 233 of the Act.

⁴⁰⁹ Section 235(4) of the Act and Armed Forces (Court Martial) Rules 2009 rule 150.

168. The CM has the power to deal quickly and effectively with a person who commits contempt of court⁴¹⁰. This includes the power to keep the person in custody until the end of the day's proceedings before dealing with the contempt of court. These powers may be exercised against any person in the UK, but are only exercisable against a person outside the UK if he is a Service person or a relevant civilian⁴¹¹. The powers may be used in relation to anyone who commits an offence by⁴¹²:

- a. Refusing to take an oath or make an affirmation when required by the court to do so;
- b. When a witness, refusing to answer any question which the court has lawfully required him to answer;
- c. When attending or brought before the court refusing to produce any document or other thing which is in his custody or under his control and which the court has lawfully required him to produce;
- d. Intentionally interrupting the proceedings of the court or otherwise misbehaving in court; or
- e. Intentionally insulting or intimidating:
 - (1) Any member of the court while that member is acting as such a member or is going to or returning from the court; or
 - (2) Any witness or other person whose duty it is to attend the court, while that witness or other person is attending the court or going to or returning from the court⁴¹³.

169. If the offender is a Service person or a relevant civilian the court may commit the offender to Service custody for a specified period not exceeding 28 days; impose a fine not exceeding level 4⁴¹⁴ on the standard scale, or do both⁴¹⁵. If the offender is not a Service person or a relevant civilian, the court may impose on him a fine not exceeding level 4 on the standard scale⁴¹⁶.

170. Where any offence under these contempt of court provisions appears to have been committed, the judge advocate may certify the offence, if it took place in the UK, to a court of law in the UK with power to commit the contemnor for contempt, or, in any other case, to the High Court. However, the certification must take place at a hearing⁴¹⁷. For this purpose the CAO will appoint a time and place for the hearing and notify the contemnor and the DSP, each of whom is entitled to make representations at the hearing. The court to which the person has been certified as being in contempt may then deal with contemnor as if he had committed the offence in that court, see [Chapter 33](#) (Contempt of Service courts).

⁴¹⁰ Section 309 of the Act.

⁴¹¹ A person who misbehaves in CM proceedings outside the UK and who is not a Service person or relevant civilian is not subject to the contempt of court provisions of the Act.

⁴¹² Section 309(6) of the Act.

⁴¹³ Section 309(1) of the Act.

⁴¹⁴ Level 4 is the scale set in civilian courts.

⁴¹⁵ Section 309(2) of the Act.

⁴¹⁶ Section 309(3) of the Act.

⁴¹⁷ Armed Forces (Court Martial) Rules 2009 rule 151 and section 311(2) of the Act.

NOTES FOR THE GUIDANCE OF DEFENDANT'S ASSISTING OFFICER AT THE CM

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NOTES FOR THE GUIDANCE OF DEFENDANT'S ASSISTING OFFICER AT THE COURT MARTIAL

Introduction

1. You have been asked to act as the Defendant's assisting officer (DAO) at Court Martial proceedings. These notes give you general guidance on the duties of a DAO. They are not intended to take the place of sensible and appropriate liaison between you as the DAO and the defendant's legal representative. In addition, they have been prepared on the assumption that the defendant intends to appoint a legal representative. You should advise the defendant that it is in his best interests to do so. If the defendant decides not to appoint a legal representative, as is his right, then you as DAO may wish to seek further guidance from an appropriate legal representative in the chain of command.

Eligibility to act as DAO

2. Before undertaking the duties of a DAO you must decide whether you are able to act as the DAO, bearing in mind that certain individuals should not be selected as a DAO, namely;

- a. Any officer who holds delegated powers to act in custody matters within the defendant's chain of command;
- b. Any individual who arrested the defendant for the alleged offence;
- c. Any individual otherwise connected with the case under investigation or any other case in which the defendant is under investigation;
- d. Any individual who has been involved personally in advising the CO about the case;
- e. Legal officers;
- f. Discipline staff;
- g. The medical officer; and
- h. The chaplain/padre.

3. It is preferable that wherever possible a defendant should retain the same DAO until final conclusion of the case. It may take several months from your appointment as DAO to the end of any CM proceedings. If you know that you are likely to be posted before the case concludes or are likely to be away from your ship/unit/establishment for significant periods it may be advisable to suggest that someone else is appointed, but you should in any event first discuss the situation with the defendant.

Process to CM

4. The typical sequence of major events in a case is as follows:
- a. Alleged offence;
 - b. Investigation by CO or Service Police;

- c. Police interview with defendant;
- d. Report of the investigation to DSP (in which case go to 4.f) or CO;
- e. Reference by CO to DSP, or election for CM trial by defendant;
- f. Preferring of charges by the DSP;
- g. Prosecution Papers are served by the CO on behalf of the DSP;
- h. Preliminary Hearing;
- i. Trial proceedings; and
- j. Sentencing proceedings.

See [Chapter 6](#) (Investigation, charging and mode of trial) and [Chapter 9](#) (Summary hearing and activation of suspended sentence of detention)

5. The DAO should be selected when it becomes likely that a defendant will be dealt with by the CM, either for a full trial or for sentencing proceedings. This may not be a clearly defined point in the discipline process and therefore your selection may come at any stage but should be made as soon as possible after it is known the defendant will be dealt with by the CM see [Chapter 29](#) (Court Martial proceedings) paragraph 45 on how a DAO is selected.

Duties of the DAO

6. **Role of the DAO.** The function of a DAO is to support and assist the defendant in preparing for CM proceedings. You should also assist his legal representative in any way that supports the defendant. You are neither legally qualified nor entitled to conduct his defence, and you should ensure the defendant understands that if he is not legally represented he will have to represent himself. In the vast majority of cases the defendant will (and would be well advised to) have a legal representative to conduct his defence in court. You should explain to the defendant that regardless of whether legal aid is granted or not, the employment of a legal representative may be critical in determining the outcome of any trial or sentencing proceedings. This is most important where charges are of a serious nature and it is possible the defendant may lose their rank/rate, career or liberty and, in serious cases, all three. Legal advice can in some circumstances be given by Service lawyers, however in the majority of cases a civilian legal representative will be engaged by the defendant. How legal advice is sought can be found in the pamphlet 'Your Rights if You are Accused of an Offence under the Service Justice System'.

7. Your role as DAO is to assist the defendant and any legal representative instructed by acting as the administrative liaison between the legal representative and the ship/unit/establishment and, only where required, to help prepare the defendant's defence or mitigation if you are requested to do so. It is important that you, the defendant and the legal representative, work as a team towards a common goal. To do this effectively you will need to communicate before action is taken. One of the most common complaints from a defendant awaiting trial is that he does not know what is going on.

8. Whatever your Service relationship to the defendant your role as DAO is somewhat different. You are advising and assisting, not telling the defendant what to do; the

defendant is free to reject your suggestions and to dispense with your assistance. You should always make it clear that the defendant has the final say in any choices made in regard to his defence.

9. **Confidentiality.** You should treat anything said to you by the defendant in relation to his defence as confidential. Such confidentiality exists as a matter of policy in order to ensure all defendants are properly advised. You must not, without the defendant's permission, disclose to anyone what the defendant tells you or any other information you discover whilst assisting him to prepare his case. You cannot lawfully be ordered by a senior officer to disclose such information. You should only reveal what has been said to you by the defendant in due process of law (e.g. if required to do so in legal proceedings). Such confidentiality continues after the case has ended and/or your involvement as DAO has ceased for whatever reason. If in doubt, you may seek legal advice from a lawyer, preferably from the defendant's legal representative if he has one, but you should not seek such advice from the chain of command. Additionally you must be particularly careful in what you say to those directly involved in the prosecution of the case, for example, disciplinary staff, Service Police, staff legal advisers, prosecutors etc and you should not become involved in 'off the record' conversations with them.

10. **Conflict of duty.** If you find there is a conflict between your duty as a Service person and your duty as DAO then you may withdraw from the case. If a legal representative is involved you should consult him first.

11. As DAO you also have a duty to the court. If you are involved in preparing any documents in relation to the case (eg. helping to prepare a plea in mitigation) you must not put forward a factual version of events which the defendant has told you is untrue. This does not mean you have to check the truth of everything you are told by the defendant, as your job requires you to accept his explanations regardless of whether you consider them unlikely.

12. Defence statements should always be prepared by the legal representative if the defendant has one. Where the defendant is pleading not guilty to a charge, the defence statement is very important. If he does not have a legal representative, you should reinforce to the defendant the importance of legal representation for the purpose of preparing the defence statement.

13. **Avoiding and managing delay.** Delay will create uncertainty in the defendant and every effort must be made to keep him informed as to what stage the legal proceedings have reached. If the defendant is being adversely affected by any delay you should inform the defendant's legal representative immediately. You have a duty to the Service and the court to make sure things proceed as quickly as possible. You must not contribute to delay and therefore the process must continue regardless of leave, exercise etc. You should consider such matters when consenting to be nominated as the DAO. You should also assist the defendant to engage with the legal process in order to avoid unnecessary delay.

14. **Assisting the defendant.** When assisting the defendant you should:

- a. Encourage and assist him to appoint and meet with a legal representative. The first meeting should ideally take place prior to any preliminary hearing of the CM;
- b. Make notes of your discussions with the defendant, his legal representative and others to whom you speak about the case, in case a record is needed at a later

stage. These notes, dated and signed by you, should be kept with any other papers held by you relating to the case; and

c. Seek advice and guidance from others where appropriate.

15. **Documentation and familiarisation.** As soon as you are selected to be a DAO you should obtain the following MSL chapters, or copies of them, from your ship/unit/establishment discipline staff:

- a. [Chapters 6](#) (Investigation, charging and mode of trial);
- b. [Chapter 9](#) (Summary hearing and activation of suspended sentence of Service detention);
- c. [Chapter 29](#) (Court Martial proceedings);
- d. [Chapter 30](#) (Sentencing principles, powers and effects); and
- e. [Chapter 31](#) (Court Martial appeal).

These chapters will assist you to familiarise yourself with how the Service Justice System works and the aspects of it that may be faced by the defendant. It is important that you do this in order to support the defendant who will not always understand the process.

16. In the unlikely situation where a defendant chooses not to seek legal assistance and to represent himself you should ensure that he has access to the MSL.

Initial consultation

17. Ensure that any consultation between you and the defendant, and his legal representative where appropriate, is conducted in complete privacy and free from distraction. Remember, you do not have a right to be present when the defendant meets with his legal representative; it is a matter for the defendant and the legal representative as to whether they wish you to attend their meetings. If you do attend meetings with the defendant and the legal representative you must leave at any time they ask you to do so.

18. Once you have familiarised yourself with the procedure you should arrange to meet with the defendant. Ask the defendant to bring any paperwork relating to the case with him. Ask him to read the 'Your rights if you are accused of an offence under the Service justice system' booklet before he arrives, and ensure he is in possession of an application for Legal Aid (JPA Forms T002 A to C). He should return his application for Legal Aid form to you completed as far as he can at the initial meeting with you. Take a note of basic details e.g. name, rank/rate and number, family, home circumstances and background. You will require this information if you are assisting the defendant in preparing his plea in mitigation. Retain the JPA Forms T002 A to C as they may be needed later, see paragraph 24.

19. **Representation.** One of the first points for discussion in your initial consultation is that of legal representation. The defendant has 3 choices for representation:

- a. Representation by a civilian legal representative;

- b. Representation by a Service lawyer (if available); or
- c. Represent himself.

The decision on these options rests with the defendant but he may often rely on you for advice, and you should advise him of his options, drawing on the information in the following paragraphs as necessary.

20. AFCLAA are in a position to help the defendant choose a legal representative and can provide details of independent lawyers (who may be barristers or solicitors) for you to approach on his behalf if asked to do so. The legal representative will not be able to carry out any work until Legal Aid is granted unless the defendant is paying privately. When he does start you should explain your role to the legal representative outlining what work you have in hand and ascertain if the legal representative wishes you to undertake any additional work.

21. Employing a lawyer may not be free of charge, even with Legal Aid. If the defendant is pleading not guilty is an able rating, marine, private or airman, it generally will be free but senior ranks or rates will usually have to make a contribution to the legal costs. Therefore, the defendant has to weigh the costs against the possible consequences of not being properly defended. Even where there is a guilty plea, a lawyer may well be able to make a difference to the sentence passed by the court simply by knowing what information the court needs and how to present it. This could make the difference between, for example, dismissal and continuing to serve, or detention in the Military Corrective Training Centre (Colchester) and a fine.

22. The situation in Cyprus, Northern Ireland, Germany and operational theatres is slightly different due to the difficulties in access to civilian legal representatives. The principal difference is that there are Service lawyers stationed there or who have a responsibility to attend in those theatres specifically to provide free legal assistance to Service and dependant personnel. If the defendant has not already engaged the assistance of such a lawyer, see paragraph 26, immediately upon service of the prosecution papers by the CO you should telephone the nearest appropriate Service legal branch⁴¹⁸ and arrange an appointment for the defendant as soon as possible. The defendant may wish you to attend with him. It should however be noted that it can prove difficult for such legal branches to provide legal representatives for complex and lengthy cases that will occupy a considerable amount of time.

23. The defendant may already have spoken to a Service lawyer if he was interviewed by the Service Police overseas. If this has happened you should try to arrange a consultation with the same officer for the defendant. It should however be remembered that representation by a Service lawyer is a matter for the discretion of the Service legal authority (DNLS/DGALS/DLS(RAF)) according to the resources available.

24. **Legal aid and legal aid application.** Explain to the defendant that it will not cost him anything to apply for Legal Aid if he intends to be represented by a civilian legal representative. In addition, it is not an indication of guilt or innocence, and neither does it commit him to anything. If he wishes to engage a civilian legal representative it will therefore almost invariably be in his interests to apply for legal aid. Whatever his views on plea and representation, and whether applying for financial assistance or not, for administrative reasons every defendant should submit an application on JPA Form T002, for details of the procedure see JSP 838 (The Armed Forces Legal Aid Scheme).

⁴¹⁸ For Army defendants this must be an RAF legal branch and vice versa.

25. If the application for Legal Aid is accepted then an offer will be made by AFCLAA detailing what financial contribution the defendant may have to make towards the cost of his defence. The defendant can accept or reject the offer but you should advise the defendant to apply and see what the costs will be. The legal representatives available on the scheme are independent lawyers in private practice who have agreed to handle cases at Legal Aid payment rates. They are not employed by or on the side of the armed forces and some have considerable experience of the CM process.

26. **Absence of legal representation.** If the defendant does not already have a legal representative and there is no immediate prospect of the defendant engaging one, you should make a note of the defendant's recollections of the incident and any police interview, and most importantly take the details of any potential witnesses. Warn the defendant against approaching prosecution witnesses, discussing the case with them or asking them to 'drop the charges'. Once the matter is reported the case is out of their hands and any such approach could be deemed a criminal offence (e.g. attempting to pervert the course of justice or witness interference/intimidation). In addition to being an offence, such approaches could also be misconstrued as an admission of guilt of the main offence with which he is charged, even though the approach was made innocently.

27. If the defendant has not yet sought the assistance of a legal representative you should make him aware of the requirement to return various legal papers to the CAO and the SPA within strict time limits see [Chapter 29](#) (Court Martial proceedings). These papers include the defence statement and details of alibi (where applicable). You should strongly advise the defendant to engage a legal representative in order to help him complete these documents.

28. If the defendant decides not to engage a legal representative you should make it clear that you are unable to proceed with assisting in the preparation of the case for presentation in court unless the defendant is not contesting the charge(s) in a relatively straight-forward case (such as absence) and you are being asked simply to assist the defendant in preparing a plea of mitigation. In all other cases, you should leave matters to the defendant, offering to give what other support you can in accordance with paragraph 29.

Action after initial consultation

29. Whether or not the accused has legal representation you may be required to undertake a number of tasks in order to assist the defendant in preparation for the CM proceedings. The following outlines some of those tasks.

a. **Defence witnesses.** You may on occasions have to contact defence witnesses on behalf of the defendant or his legal representative. You should ask them if they are willing to give evidence at the CM. Ensure you obtain their contact details.

b. **Tape recording of the Service Police interview.** Ensure the defendant has access to any tape recording of a police interview by using the appropriate form⁴¹⁹.

⁴¹⁹ The forms handed to a suspect at the conclusion of each interview are:

MOD F955A – Service Police - Notice to a Person whose Interview has been tape recorded.

MOD F955B – Service Police - Application for a copy of the working copy of a Service Police interview tape.

MOD F955C – Service Police - Application for access to the Master Tape(s) of an interview tape recorded by the Service Police.

If the form is not available request a copy of the tape by writing to the Service Police at the location where he was interviewed specifying the date and other details of the interview. The letter should be signed by the defendant.

c. **Character witnesses.** You should be prepared to assist the defendant to identify and contact character witnesses. Character witnesses may be called whether the defendant is pleading guilty or not guilty. There is no conflict of interest if you wish to act as a character witness yourself.

d. **Defence statement.** Once the prosecution papers have been served, the defence must give a defence statement to the CAO and prosecutor within 28 days. This should only be prepared by the defendant's legal representative, or by the defendant himself if he has chosen not to be legally represented. Failure to provide this information may result in adverse comments being made and adverse inferences being drawn during the trial. If a defendant insists on defending himself, you are not in a position to help him prepare a defence statement. You should advise the defendant to ensure his defence statement is submitted on time.

Action to be taken between service of prosecution papers and end of CM proceedings

30. **General.** Once the prosecution papers have been served on the defendant the case should proceed to trial or sentencing proceedings fairly rapidly⁴²⁰. During this time the defendant and his legal representative (if he has one) should prepare for the court appearance(s), and you should assist that process.

31. **Meetings with legal representative.** It is important for you to attend the case conferences if the defendant and his legal representative are content for you to do so. Be prepared to make administrative arrangements for the defendant to meet his legal representative even if you are not attending the conference yourself. Make sure the meeting with the legal representative is fully arranged prior to his arrival. Time may be short and this may be the last opportunity to clear up any problems before the CM starts. Where there is a difficulty due to location, remember that the MCS makes extensive use of VTC equipment and that these facilities can be booked if one party cannot attend in person.

32. In Germany or Cyprus you may find time is very short and the legal representative may only arrive the evening before the CM proceedings start. This may be the first face to face meeting between the legal representative and the defendant so there may be more than usual to discuss.

33. **Travel and accommodation.** You should be in close liaison with the defendant's legal representative, especially if overseas. You may have to assist with the booking of accommodation (in liaison with the CAO) but the legal representative is responsible for his own travel arrangements. You are, however, responsible for arranging transport within the country in which the CM is taking place overseas.

34. **Information for Service court.** Before any trial or sentencing proceedings, obtain a copy of the completed information for Service courts form (T-SL-SC01), see Annex R, that your ship/unit/establishment discipline staff provides to the SPA and pass it on to the legal representative. In the event of a conviction the form is normally presented to the CM by the prosecutor and contains the following information:

⁴²⁰ It is usual for the first hearing to take place within 4 weeks of service of the prosecution papers.

- a. The defendant's age and rank or rate;
- b. The defendant's Service record;
- c. Any recognised acts of gallantry or distinguished conduct on the part of the defendant and any decoration to which he is entitled;
- d. Particulars of any offence and any sentence awarded (whether under the Act or otherwise) of which the defendant has been found guilty (during his Service or otherwise);
- e. Particulars of any formal police caution administered to the defendant by a constable in England and Wales or Northern Ireland;
- f. Particulars of the length of time the defendant has been in custody awaiting trial or in custody under a current sentence; and
- g. Details of the defendant's pay, terminal benefits and future pension entitlements.

35. Check the information on the form with the defendant and note any discrepancies. If the defendant has convictions that are not shown you should bring this to the attention of any legal representative.

36. If the defendant has a poor disciplinary record but did not at a previous ship/unit/establishment, try to obtain a reference from his old ship/unit/establishment and discover if the assignment has caused the current problems. Such information can be used as mitigation.

37. **Character witnesses.** In the absence of a legal representative and once you have a firm idea of the trial or sentencing date you should make contact with the character witnesses and request their statements and inform them if you would like them to appear at the CM.

38. The defendant or his legal representative may either present written statements from character witnesses or the witnesses may appear and give evidence in person if they are available and willing. Evidence given in person may have more impact on the court and the witness will be able to answer any additional questions the court may have.

39. **Witness administration.** It is the role of MCS to notify prosecution and defence witnesses to attend at court for the trial. Administration of witnesses should be undertaken in conjunction with MCS and the defendant's legal representative. You should advise the MCS as soon as possible if the defendant or his legal representative wish a witness to attend so that they can notify him of the date on which he will be required.

40. **Pre-sentence reports (PSR).** In cases where a guilty plea is entered or a finding of guilt follows from the trial, the judge advocate may request a PSR. In some circumstances a PSR may be prepared before the defendant's plea is known or before a CM trial. A probation officer will usually interview the defendant and prepare a PSR. The defendant will be asked for his version of events and this will be put into the report. This will be given to the court before the defendant is sentenced. It is vital the defendant co-operates in the production of the report, and you should advise him of this. Ask the

defendant for permission to see the report, then obtain a copy. A copy of the report will be sent direct to the defendant's legal representative if he has one. An advance copy of the PSR may assist in the preparation of the plea in mitigation.

41. **Preparing a plea in mitigation.** In all cases where the defendant is representing himself you should assist him to prepare a written plea in mitigation. This should be done, as far as possible, before any sentencing proceedings, and before a trial if the defendant intends to plead not guilty, for advice on decision see paragraphs 51 – 53.

42. The written plea in mitigation should usually be brief and only include relevant material. Ideally, the plea in mitigation should deal with the following matters:

a. **The offence.** Include any explanation as to why the incident happened and the defendant's perception of the circumstances. Also mention any remorse the defendant has and any apologies he may have made either to the victim or the Service Police. If he has paid compensation to the victim, returned stolen property or made any other recompense to the victim, this should also be mentioned.

b. **The defendant.** Give details of the defendant's Service and disciplinary record if a Service person (including any civilian convictions) and for a civilian any previous convictions. There is no requirement to reveal any Service or civilian offences not mentioned by the prosecution; however, you must not mislead the court on this issue. Comment should be made as to any contribution he has made to life in the unit or society, his personal life and family background including any difficulties at home. Ascertain, for example, whether there are any marital difficulties or recent operational experiences. If the defendant consents, obtain and check his annual reports and refer to these entries in the plea (and attach these documents to the copies of the written plea). In particular, you may wish to refer to favourable entries, and to explain any adverse comments.

c. **The sentence.** Deal with the likely sentence to be passed. Where this is known (the PSR might give an indication of this) you should research the likely impact of that sentence on the defendant, e.g. effect on career, employability etc., and inform the defendant's legal representative.

43. The defendant may wish to support his plea in mitigation with character witness testimony in which case you should liaise with the defendant's legal representative (if he has one) and MCS.

44. The defendant is entitled to address the court in mitigation. He may also provide a written copy of his plea in mitigation together with any character witness statements as long as copies are also provided to the prosecution. The written plea in mitigation should be headed 'Plea in Mitigation of Punishment in the case of...' and should be signed and dated by the defendant.

45. **Preparation for custodial sentence.** If a custodial sentence is a possibility should the defendant be found guilty (or is pleading guilty), you should try to ensure the defendant is prepared for it financially, mentally and physically – particularly if he does not have a legal representative. You should inform the defendant that he will not receive any pay during a custodial sentence and (especially if he has a family) may wish to contact welfare staff to find out what assistance is available. On the day of sentence you should try to ensure that the defendant has full military kit prepared in case he receives a sentence of detention at MCTC.

46. **Final meeting before attending court.** Make sure that you have a final meeting with the defendant the day before the first hearing. You should use this to ensure he has not changed his mind about plea, see paragraphs 51 - 53, representation etc. and that you are both clear on how things are to proceed.

47. **Other checks before attending court.** Read the administration instruction for the trial or sentencing proceedings carefully and make sure you and the defendant are dressed appropriately for the hearing you are to attend. See JSP 836 (A guide to Court Martial and the Summary Appeal Court).

Preliminary proceedings

48. The first stage of any CM proceedings is the preliminary hearing. Such hearings may be ordered by the judge advocate to take the defendant's plea (during a process called arraignment) and determine matters and actions required in order to bring the case to trial, such as clarifying the number of witnesses required to attend court. The most important thing to be dealt with at such a hearing is the defendant's plea. This will usually be dealt with at the first hearing before the judge advocate, and it is therefore very important that the defendant is properly prepared for this hearing.

49. As soon as you are notified that a preliminary hearing will be held if you haven't done so already assist the defendant to apply for legal aid and seek legal representation. If the defendant decides to represent himself, you should ensure that he has access to the MSL and in particular the references in paragraph 15.

50. In court all matters are addressed through the respective advocates for the prosecution and the defence, although you may be required to provide some immediate advice to the defendant's legal representative. If the defendant is not represented he should speak for himself.

51. **Decision on plea.** The defendant should be made aware that a lesser sentence will almost always be imposed for a guilty plea as opposed to a finding of guilt after a contested trial. An early guilty plea can add force to his mitigation. However, the defendant should not plead guilty to an offence for which he is not responsible.

52. Ask which way the defendant intends to plead (guilty or not guilty). You must not, however, try to persuade the defendant one way or another. How he pleads or presents his case is entirely his own decision. If he is in doubt or wishes to plead not guilty a Service lawyer or a civilian legal representative should represent him. If, after your advice, an unrepresented defendant insists on pleading not guilty after admitting the offence to you and insists on presenting facts to the court that he has told you are untrue, you must tell the defendant that you can no longer be his DAO. He can ask other persons willing to act as DAO to replace you. You must not tell your CO, the new DAO nor anyone else the reason for this. If you find yourself in difficulties seek advice from a staff legal adviser unconnected to the case.

53. If the defendant admits guilt but says the circumstances were substantially different to those set out by the prosecution, for example, he accepts punching the victim but not kicking him or insists he only hit him once rather than several times, you should strongly urge him to seek legal advice. In the absence of a legal representative there is a strict limit on how far you can assist the defendant in the preparation of his case, see paragraph 28, because you are not legally qualified.

During the CM proceedings

54. **Attendance at court.** It may be necessary for you to attend the CM proceedings, and to assist the legal representative as required. Ensure that you will be available for the trial or sentencing proceedings. Discuss in advance of any hearing whether the legal representative wishes you to assist him during the hearing. You may be asked to make precise notes of all the evidence but you might be asked to do other things as well. Noting the evidence can be taxing but is an important task as the legal representative may not be able to record answers to his own questions in a complex case.

55. Once the proceedings have concluded you should meet with the defendant whatever the outcome. If a legal representative is involved, attend with him if he is content for you to do so. If the defendant is in custody ask if there is anyone he would like to have informed.

Appeals

56. The defendant may wish to discuss the possibility of an appeal. Provide a copy of [Chapter 31](#) (Court Martial appeal) to the defendant and his legal representative. If there is no legal representative you should advise the defendant to engage one if he wishes to submit an appeal.

57. **Time limit.** An appeal to the CM Appeal Court should be presented within 28 days. If a legal representative is involved he will deal with any appeal but you should confirm if there are any matters on which he would like your assistance.

58. **Legal aid.** Legal aid may be available for the appeal (if applied for), even if the defendant did not seek such aid for the trial. By its nature, an appeal will often involve complex legal points and the defendant should be strongly advised to apply for legal aid if they wish to appeal. Due to the strict time limits for appeals, any application must be dealt with expeditiously.

PRELIMINARY PROCEEDINGS

1. The matters which may be addressed at preliminary proceedings include, but are not limited to:
 - a. The issues in the case;
 - b. Issues, if any, as to the mental or medical condition of any defendant or witness;
 - c. The number of witnesses whose evidence will be placed before the court either orally or in writing;
 - d. The defence witnesses whose statements have been served and whose evidence the prosecution will agree and accept in writing;
 - e. Any prosecution witnesses whom the defence require to attend the trial;
 - f. Any additional witnesses who may be called by the prosecution and the evidence that they are expected to give;
 - g. Whether any of the parties propose to adduce expert witness evidence and any issues arising from that;
 - h. Facts that are to be admitted and which can be reduced into writing in accordance with section 10(2)(b) Criminal Justice Act 1967, within such time as may be directed at the hearing, and of any witness whose attendance will not be required at the trial;
 - i. Any exhibits and schedules which are to be admitted;
 - j. The order and pagination of the papers to be used by the prosecution at the trial and the order in which the prosecution witnesses are likely to be called;
 - k. Any point of law which it is anticipated will arise in the course of the proceedings;
 - l. Any question as to the admissibility of evidence which appears on the face of the papers, and any authority on which the party intends to rely;
 - m. Any application for an order that all or part of a trial be held in camera;
 - n. Any application for an order relating to reporting restrictions under section 4 or 11 of the Contempt of Court Act 1981;
 - o. Any application to be made for evidence to be given or a person to attend a hearing through live link;
 - p. Any application for a special measures direction under section 19 of the Youth Justice and Criminal Evidence Act 1999;
 - q. Any application for screens, for use by witnesses seeking a visual break between themselves and any relevant parties;
 - r. Whether any video, tape recorder or other technical equipment will be required during the proceedings;
 - s. Where a tape recorded interview has taken place, of any dispute or agreement as to the accuracy of any transcript or summary;
 - t. Any other significant matter which might affect the proper and convenient trial of the case, and whether any additional work needs to be done by the parties;

- u. Any matters concerning the proper and efficient management of the case including giving directions to the court administration officer for the listing of the case for trial;
- v. The estimated length of any proceedings, to be agreed more precisely taking account of any views expressed by the judge advocate and the other parties;
- w. Witness availability and the approximate length of witness evidence;
- x. Availability of legal representatives;
- y. Orders prohibiting or restricting the publication of any matter or excluding the public from any proceedings;
- z. Challenges to the jurisdiction of the court;
- za. Objection to a charge on the grounds that it is not correct in law;
- zb. Plea that the court is debarred from trying a charge; and
- zc. Whether there is a need for any further directions.

Chapter 30

Sentencing principles, powers and effects

Sentencing principles

1. The Armed Forces Act 2006 (the Act) makes provision⁴²¹ in respect of sentencing principles that must be applied at the Court Martial (CM). These principles largely reflect those to be found in the Criminal Justice Act 2003 and which are followed in the civilian criminal courts in England and Wales.
2. Sentencing principles that are applied at the CM are set out in 'Sentencing in Courts Martial: A Short Guide' (The Guide) which is issued by the Office of the Judge Advocate General. That guide is intended to help all concerned in the sentencing of those found guilty at the CM and has been updated to reflect the legislative changes made by the Act in respect of sentencing principles. The Guide can be found in Volume 3 of the MSL.

Sentencing and orders – powers

3. The Act sets out the punishments and orders available to the CM and Service Civilian Court (SCC) when passing sentence. Guidance on these provisions⁴²² is contained in The Guide, see paragraph 2 above.

Sentencing – effect of certain sentences

4. Provisions⁴²³ of the Act and subordinate legislation⁴²⁴ clarify the effects consequent upon the passing by the CM or SCC of certain sentences. Guidance on these provisions is contained in The Guide, see paragraph 2 above.

⁴²¹ Sections 237 to 259 of the Act.

⁴²² Sections 164, 173 to 236, 282 to 284 and Schedule 3 of the Act.

⁴²³ Sections 289 to 304 of the Act.

⁴²⁴ The Armed Forces (Minor Punishments and Limitation on Power to Reduce in Rank) Regulations 2009/1215.

Chapter 31

Court Martial appeal

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Chapter 31

Court Martial appeal

Part 1 - Introduction

1. This chapter summarises the situations in which appeals may be made from the Court Martial (CM) to the Court Martial Appeal Court (CMAC), and outlines the powers of the CMAC on appeal. It also summarises the procedure to be followed when making an appeal and time limits for appeal, but it does not contain detailed guidance on the law relating to appeal. It is intended primarily for the use of those convicted and sentenced by the CM as a guide to their options for appeal, and for those facing CM proceedings to understand the effect on those proceedings of appeals by others (e.g. the prosecution). Appeal from the CM is a specialist area of law and in all cases legal advice should be sought before submitting an appeal.

2. The CMAC was established by the Courts-Martial (Appeals) Act 1951 for the purpose of hearing appeals from Naval, Army and RAF Courts Martial and is a superior court of record. The judges of the CMAC are normally two or three judges drawn from the Court of Appeal (Criminal Division) and they sit in the High Courts of Justice on The Strand in London. The circumstances in which appeals may be made to this court and the procedures to be followed are contained in the Courts-Martial (Appeals) Act 1968 (c.20) as amended, and the Court Martial (Appeal) Rules 2009. The procedural rules for appeal to the CMAC are contained in the Armed Forces (Court Martial) Rules 2009.

3. Part 1 of this chapter is the introduction. Part 2 deals with the situations in which an application for leave to appeal may be made and the powers of the CMAC in each circumstance, including references made by the Criminal Cases Review Commission and the Attorney General. Part 3 deals with the appeal procedure, bail, costs, legal aid and reporting restrictions relating to appeal. Part 4 deals with special references to the CMAC by a judge advocate. Finally, Part 5 explains the circumstances for appeal from the CMAC to the Supreme Court.

Part 2 - Rights of appeal

Appeal against conviction

4. **Leave to appeal and referral.** A person convicted by a CM may only appeal to the CMAC with the leave of the CMAC. The appeal may be against conviction and against any sentence (where the sentence is not fixed by law) passed on him for the offence for which he was convicted⁴²⁵. This includes where the conviction or sentence arose as a result of an appeal from the Service Civilian Court⁴²⁶. In addition the Criminal Cases Review Commission may refer a case to the CMAC⁴²⁷, see [Chapter 35](#) (The powers of the Criminal Cases Review Commission).

5. **Power to quash conviction.** If the CMAC gives an appellant leave to appeal, the appeal will be heard by the CMAC. At a hearing of the appeal, the CMAC must allow an appeal against conviction if it thinks that the finding of the CM in all the circumstances of the case is unsafe⁴²⁸. In all other cases the CMAC must dismiss the appeal.

6. **Power of the CMAC on quashing a conviction.** If the CMAC allows an appeal against a conviction it will quash the conviction and the appellant will be treated as if he had been acquitted by the CM unless there is a re-trial⁴²⁹. The CMAC has the power to authorise a re-trial, in which case it will be a matter for the Director of Service Prosecutions (DSP) to decide whether a re-trial is appropriate. The CMAC also has the power to direct a re-trial. If it does so it may direct a re-trial on a different charge(s) to that on which the appellant was originally convicted. Where the appellant was convicted of two or more charges and the CMAC quashes some convictions but not all, it may substitute any sentence(s) which the CM could have passed. However, the sentences for the remaining convictions, taken together, must not be more severe than those passed by the CM (including those passed in respect of convictions that are now quashed)⁴³⁰.

7. **Alternative finding.** Where the appellant has been found guilty of an offence to which he did not plead guilty, the CMAC has the power to substitute a finding of guilty to another offence on which the CM could have found the appellant guilty, provided the CM must have been satisfied of the facts which prove him guilty of that other offence. It may then award an appropriate sentence for that offence, but the court cannot pass a sentence of greater severity than the original sentence⁴³¹.

8. **Insanity and unfitness to stand trial.** The CMAC has the power to make various findings on appeal in relation to insanity and unfitness to stand trial. Legal advice should be sought in all cases in which such matters arise⁴³².

Appeal against sentence and commencement of sentence on appeal

9. As with appeal against conviction, appeal against sentence of the CM requires the leave of the CMAC. If the appeal is successful the CMAC may substitute any sentence the Court thinks is appropriate, but it must not be of greater severity than that for which the sentence is substituted. An appeal against a sentence passed on single occasion by the CM will be treated as an appeal in respect of sentences passed in relation to all of the sentences

⁴²⁵ Courts-Martial (Appeals) Act 1968 (c.20) section 8.

⁴²⁶ Armed Forces Act 2006 (The Act) section 287(4).

⁴²⁷ Criminal Appeal Act 1995 section 9, and section 321 and Schedule 2 of the Act.

⁴²⁸ Courts-Martial (Appeals) Act 1968 (c.20) section 12.

⁴²⁹ Courts-Martial (Appeals) Act 1968 (c.20) section 19.

⁴³⁰ Courts-Martial (Appeals) Act 1968 (c.20) section 13.

⁴³¹ Courts-Martial (Appeals) Act 1968 (c.20) section 14.

⁴³² See Courts-Martial (Appeals) Act 1968 (c.20) sections 16, 21 and 22.

passed on that occasion. In this circumstance the CMAC may not substitute a sentence with one which, when taking the case as a whole, causes the appellant to be dealt with more severely on appeal than he was dealt with by the CM⁴³³.

10. Unless the CMAC orders otherwise, a sentence passed on appeal takes effect from the day on which the CM passed sentence. However, if the CMAC, on dismissing an application for leave to appeal, considers the application to have been frivolous or vexatious, it may direct that any sentence passed on the applicant by the CM shall begin to run again from the day on which the CMAC dismisses the application. This sanction acts as a disincentive to submitting hopeless appeals.

Appeals against restrictions on public access and reporting

11. Any aggrieved person may, with the leave of the CMAC, appeal against any order or direction restricting access or reporting⁴³⁴. Such appeals are usually made by the media, but potentially any person can appeal, including the prosecution where the result of the order or the direction is that it will be unable to present its case (eg. because of a risk to national security) or for any other appropriate reason. Where leave to appeal has been sought during preliminary proceedings those proceedings may continue pending the determination or abandonment of the appeal, but related proceedings cannot begin until that time⁴³⁵. The effect of such an appeal is therefore that a CM trial cannot take place until the CMAC has determined the appeal. See the Court Martial Appeal Court Rules 2009 for the powers of the CMAC on an appeal against such an order or direction.

Prosecution appeals against rulings

12. The prosecution has the right of appeal to the CMAC where a judge advocate makes a ruling in relation to a trial by the CM⁴³⁶. If the prosecution appeal against a ruling is unsuccessful, the defendant will be acquitted on the charge(s) to which the ruling relates. For this reason such an appeal is sometimes referred to as an appeal against a terminating ruling. The prosecution may request an adjournment to consider whether to appeal against a ruling made during a trial by CM. If the prosecution does appeal against a ruling, that ruling will have no effect while the appeal against it is pending. Proceedings may, however, be continued in respect of any other charge which is not the subject of the appeal whilst awaiting the appeal or the prosecution's decision whether to appeal. The CMAC may confirm, reverse or vary any ruling to which the appeal relates⁴³⁷.

Referral by the Criminal Cases Review Commission

13. The Criminal Cases Review Commission is an independent public body, set up in 1997 by the Criminal Appeal Act 1995. The Commission reviews possible miscarriages of justice in the criminal courts, including Courts Martial's of England, Wales and Northern Ireland and refers appropriate cases to the appeal courts⁴³⁸. A reference to the CMAC by the Criminal Cases Review Commission is treated as an appeal by the person under section 285 of the Armed Forces Act 2006 (the Act) against the conviction or sentence as appropriate. See also [Chapter 35](#) (The powers of the Criminal Cases Review Commission).

Unduly lenient sentences

⁴³³ Courts-Martial (Appeals) Act 1968 (c.20) section 16A.

⁴³⁴ Armed Forces (Court Martial) Rules 2009 rule 154.

⁴³⁵ Armed Forces (Court Martial) Rules 2009 rule 50.

⁴³⁶ The Court Martial (Prosecution Appeals) Order 2009, article 4.

⁴³⁷ The Court Martial (Prosecution Appeals) Order 2009, article 7.

⁴³⁸ Criminal Appeal Act 1995 section 9 and Schedule 11 article 1 of the Act.

14. If the Attorney General considers that a sentence or any other order made by a CM in dealing with an offender in respect of an AFA 06 s.42 offence (criminal conduct) is unduly lenient and either:

- a. The corresponding offence under the law of England and Wales, if committed by an adult, is triable only on indictment, or
- b. The case is of a description specified for the purposes of AFA 06 s.273 in an order made by the Secretary of State

he may, with leave of the CMAC, refer the case to the CMAC for it to review the sentencing of the offender⁴³⁹. However, this power does not extend to a sentence passed by the CM on appeal from Service Civilian Court. If the Attorney General makes such a reference to the CMAC, the CMAC may quash the sentence passed by the CM and substitute another sentence.

Implementation of sentence whilst awaiting appeal

15. The initiation of an appeal does not affect the validity of the sentence of a CM. CM sentences take effect from the date of award unless the sentence is suspended, postponed or to be served consecutive to another sentence of imprisonment or detention.

⁴³⁹ Section 273 of the Act.

Part 3 - Appeal Procedure

Procedural rules

16. The rules for making an application for leave to appeal, time limits and the conduct of appeals to the CMAC are contained in the Court Martial Appeal Court Rules 2009.

Bail pending appeal

17. The CMAC may grant or revoke bail pending appeal and vary the conditions of bail⁴⁴⁰. A single judge may exercise the powers of the court in relation to bail but in the event that the single judge refuses an application by an appellant, the appellant⁴⁴¹ is entitled to have the application reconsidered by a full CMAC. Application for bail to be granted, revoked or varied may be made by the appellant, the DSP or a surety or on reference to the court by the Registrar. Bail cannot be granted, except in exceptional circumstances, to appellants convicted of any of the offences listed in section 25(2) of the Criminal Justice and Public Order Act 1994 (c.33) or an offence under other legislation corresponding to such an offence, where the appellant has previously been convicted of such an offence⁴⁴². The time during which an appellant is released on bail does not count as part of the term of detention or imprisonment.

Costs

18. Where the CMAC upholds the appeal, it may, if it thinks fit, direct the payment by the Secretary of State of such sums as appear to the Court reasonably sufficient to compensate the appellant for any expenses properly incurred by him in the pursuance of his appeal (including any proceedings preliminary or incidental thereto) and in carrying on his defence before the CM by which he was convicted. Similarly, where the CMAC dismisses an appeal or an application for leave to appeal, it may, if it thinks fit, order the appellant or applicant to pay the Secretary of State the whole or part of the costs of the appeal or application.

Legal aid

19. An appellant may apply to the CMAC for legal aid for an appeal. See JSP 838 (The Armed Forces Legal Aid Scheme).

Restrictions on reporting of appeals during CM proceedings

20. Reporting restrictions apply where the prosecution appeal or make an application for leave to appeal against a ruling unless either the judge advocate, the CMAC or the Supreme Court orders otherwise. The restrictions apply until the conclusion of the CM proceedings.

⁴⁴⁰ The Court Martial Appeal Court (Bail) Order 2009/992.

⁴⁴¹ Using the Form at the Schedule to The Court Martial Appeal Court (Bail) Order 2009/992.

⁴⁴² The Court Martial Appeal Court (Bail) Order 2009 SI 2009/992, article 4.

Part 4 - Special reference to the court

21. The Judge Advocate General may make a special reference⁴⁴³ to the CMAC if it appears to him that the finding of a CM involves a point of law of exceptional importance. The Secretary of State may also make a special reference to the CMAC if it appears to him, on consideration of matters appearing to him to have not been brought to the notice of the CM at the trial, to be expedient that the finding of the CM should be considered or reconsidered by the CMAC. A special reference to the CMAC in this manner is treated, except for costs, as an appeal by the person convicted against his conviction. The Secretary of State may refer the sentence passed on any person convicted by a CM to the CMAC and any such reference is treated, except for costs, as an appeal by the person convicted against sentence.

⁴⁴³ Courts-Martial (Appeals) Act 1968 section 34.

Part 5 - Appeal to the Supreme Court

22. Either the accused or the DSP may appeal to the Supreme Court against any decision of the CMAC⁴⁴⁴. Leave to appeal to the Supreme Court may be granted by the CMAC or the Supreme Court but shall not be granted unless it is certified by the CMAC that a point of law of general public importance is involved in the decision and it appears to the Court or the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

23. An application for leave to appeal to the Supreme Court must be made to the CMAC in the first instance, generally within a period of 28 days beginning with the date of the decision which it is desired to appeal⁴⁴⁵. If the CMAC determines that the appeal is a point of law of general public importance but rules that it is not a point that ought to be considered by the Supreme Court, then application may be made to the Supreme Court within a period of 28 days from the date of the CMAC's refusal. If the CMAC determines that the appeal does not concern a point of law of general public importance, no further proceedings may be taken. The CMAC or the Supreme Court may grant an appellant an extension of time to make an application.

⁴⁴⁴ Court-Martial (Appeals) Act 1968 (c.20) section 39.

⁴⁴⁵ The Courts-Martial (Appeals) Act 1968 section 40.

Chapter 32

Service Civilian Court

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Chapter 32

Service Civilian Court

Introduction

1. **Legal status.** The Service Civilian Court (SCC) is a court created by statute⁴⁴⁶, which may sit anywhere outside the UK to try a case allocated to it by the Director of Service Prosecutions (DSP). It consists of a judge advocate sitting alone and resembles the situation of a magistrates' court sitting with a District Judge instead of a lay bench.
2. **Functions and powers.** The SCC is restricted to trying civilians subject to Service discipline (relevant civilian) (for definitions of civilians subject to Service discipline, see [Chapter 3](#) (Jurisdiction and time limits), paragraphs 17 – 33. In the main, especially when trying adults, the SCC will deal with less serious criminal conduct offences (i.e. those which are not indictable in the courts of England and Wales⁴⁴⁷ or do not have aggravating features), and other Armed Forces Act 2006 (the Act) offences which are applicable to relevant civilians⁴⁴⁸. However when it tries a juvenile, the SCC has the same powers as the Youth Court in England and Wales and therefore has the power to try all but a small handful of homicide and firearms offences.
3. **Referral to the Court Martial (CM).** The DSP will allocate more serious offences, or offences where there are relevant civilian and Service co-accused, for CM trial. However, even when the DSP has allocated a case for trial at the SCC, the judge advocate may decline jurisdiction if he considers it appropriate to do so (see paragraph 17 below). In this situation the case will be tried by the CM.
4. **Time limits.** For any offence committed under section 42 of the Act (criminal conduct), the trial must start within the time limit that exists for that offence within the criminal law of England and Wales. In addition, where a person subject to Service discipline ceases to be so subject after having allegedly committed an offence, any trial must start within six months from the date on which the offender ceased to be subject to Service discipline⁴⁴⁹, unless special dispensation is granted by the Attorney General⁴⁵⁰.

Preliminaries

5. **Charging.** A case will not be allocated to the SCC unless the DSP has issued a direction to a CO that a specified charge is to be brought. For details of charging relevant civilians, see [Chapter 6](#) (Investigation, charging and mode of trial), Part 5 and [Annex K](#).
6. **Advance Information.** Once the case is allocated for SCC trial, the DSP will serve the following⁴⁵¹ on defendants, defendant's legal representatives and the Court Administration Officer (CAO):
 - a. Copies of statements of witnesses on which the DSP intends to rely.
 - b. A list of all exhibits, with locations, which the DSP intends to use.
 - c. A transcript of any recording of an interview with the defendant.

⁴⁴⁶ Section 277 of the Act.

⁴⁴⁷ See [Chapter 3](#) (Jurisdiction and time limits), paragraph 43.

⁴⁴⁸ See [Chapter 3](#) (Jurisdiction and time limits), paragraph 41.

⁴⁴⁹ Section 58(2) of the Act.

⁴⁵⁰ Section 61(2) of the Act.

⁴⁵¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 30.

Where after the DSP has served advance information he intends to adduce evidence not previously served he must, as soon as is practicable, serve that evidence on the defendant and the CAO. Where this occurs during trial proceedings the evidence must be served on the judge advocate instead of the CAO⁴⁵².

7. **Listing.** On receipt of advance information from the DSP the CAO will forward that information to the Judge Advocate General, list the case for a preliminary hearing and request him to specify a judge advocate for the hearing⁴⁵³. The CAO will appoint court officials, including interpreters if required.

8. **Notification of hearings.** The defendant will be served with a notice informing him of the date of his hearing. If the defendant is under 18 or the offence concerned is alleged to have been committed during a period of parental recognizance following a previous conviction⁴⁵⁴, then the CAO will also notify the parent(s) or guardian(s) of the hearing⁴⁵⁵.

9. The CAO will notify any person identified by either party as needing to attend a preliminary hearing or the trial, and any person so notified will be entitled to reimbursement of expenses incurred by him as a result of attendance. In respect of any witness whom the CAO is unable to notify, or if he thinks it is not reasonably practicable to notify that person, he must inform the judge advocate, the prosecutor and the defendant of this in writing, giving his reasons for not notifying the person⁴⁵⁶.

10. **Service of documents.** Documents may be served by a number of acceptable methods including: personally, by post, DX, FAX and other electronic means. The judge advocate may also direct service by any other method if the particular circumstances demand. Proof of service may be achieved in a number of ways. Part 2 of SCC Rules describes the various acceptable methods for the service of documents and the effective date of service. Proof of service may be provided by a signed certificate explaining how and when the document or notice was served.

Methods of securing attendance of witnesses

11. **Summons.** A judge advocate may issue a witness summons on an application by a party to the proceedings or of his own volition⁴⁵⁷. The application may be made orally or in writing and is to explain:

- a. What evidence the witness can give;
- b. Why the evidence is material; and
- c. Why the issue of a summons is in the interests of justice.

12. **Arrest.** Where a judge advocate is satisfied that a witness summons would not procure attendance or a person fails to attend before the court in answer to a witness summons without just excuse, the judge advocate may issue a warrant to arrest the witness and bring him before the court. A warrant must⁴⁵⁸ be addressed to a member of a civilian police force if the witness is not subject to Service discipline. A warrant shall only be addressed to a member of a Service Police force if the witness is subject to Service law or a relevant civilian, or to an officer of a British overseas territory police force if the court is sitting in such a territory. Note that a warrant cannot be addressed to a foreign police force.

⁴⁵² The Armed Forces (Service Civilian Court) Rules 2009, rule 30(3) and (4)

⁴⁵³ The Armed Forces (Service Civilian Court) Rules 2009, rule 32.

⁴⁵⁴ Section 233-236 of the Act.

⁴⁵⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 27.

⁴⁵⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 48.

⁴⁵⁷ The Armed Forces (Service Civilian Court) Rules 2009, rules 49-53.

⁴⁵⁸ The Armed Forces (Service Civilian Court) Rules 2009, rule 54(4).

13. **Custody.** Where a witness has been arrested by civil police under a warrant issued by a judge advocate, he is to be transferred to Service custody as soon as practicable or released. If transferred to Service custody, he must be brought before a judge advocate as soon as practicable for a review of whether he should continue to be kept in Service custody. If he does not appear in front of a judge advocate within 48 hours of the arrest, he must be released⁴⁵⁹. If the judge advocate is satisfied that there are substantial grounds for believing that the witness would fail to attend the court as required, he may authorise that the witness is kept in custody for a maximum of 8 days, unless a further review takes place. The judge advocate may alternatively require the witness to comply with such requirements as appear necessary to secure his attendance before the court. Failure to comply creates an offence under Section 107(5) of the Act.

14. **Legal representation.** The defendant is entitled to appoint his own appropriately qualified⁴⁶⁰ legal representative to act for him throughout the proceedings and must inform the CAO of the name and address of his legal representative as soon as is practicable after the appointment takes place. For the granting of legal aid, see JSP 838 (The Armed Forces Legal Aid Scheme).

15. **Additional evidence.** Having already received the prosecution papers, the defendant is entitled to copies of any additional evidence (or details of its whereabouts) that the prosecutor, prior to commencement of trial, wishes to adduce at the trial.

16. **Witnesses not being called.** Where the DSP no longer intends to call a witness whose statement he has served as part of the advance information he must as soon as practicable notify that fact to each defendant⁴⁶¹.

17. **SCC as appropriate trial venue.** Before the arraignment of the defendant the judge advocate must decide whether to decline jurisdiction and refer the case to the CM for trial⁴⁶². Before making its decision, the SCC must provide the DSP with an opportunity to inform the court of any previous convictions that the defendant might have and allow both the DSP and the defendant to make representations about the appropriate venue for trial⁴⁶³. When making its decision the court must consider the nature of the case; the seriousness of the offence; whether its powers of punishment are sufficient should the charge be proved; any other circumstances it considers relevant; and any representations made by the parties⁴⁶⁴. If the court decides that the charge should be tried by the CM, it must refer the charge to the CM⁴⁶⁵.

18. **Right to elect trial by the CM.** If the SCC accepts jurisdiction to try a charge the defendant must then be offered the right to elect CM trial⁴⁶⁶. This right of election must be exercised before the defendant is arraigned on any charge by the SCC.

19. **Effect of election.** If a defendant elects CM trial then the SCC must refer the charge(s) to the CM for trial by that court. No further action in respect of the charge(s) takes place at the SCC and the election is reported in writing to the CAO. Election on one charge affects other charges and defendants as follows:

a. **One defendant, multiple charges.** Where the SCC is to try together two or more charges against a single defendant, the defendant must be given the opportunity to elect CM trial in respect of each charge against him. An election in

⁴⁵⁹ The Armed Forces (Service Civilian Court) Rules 2009, rule 54(6).

⁴⁶⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 26.

⁴⁶¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 30(5).

⁴⁶² Section 279(1) of the Act.

⁴⁶³ Section 279(2) of the Act.

⁴⁶⁴ Section 279(3) of the Act.

⁴⁶⁵ Section 279(4) of the Act.

⁴⁶⁶ Section 280 of the Act and The Armed Forces (Service Civilian Court) Rules 2009, rule 42(2).

respect of any of the charges is deemed to be an election on all the charges and hence they must all be referred for CM trial⁴⁶⁷.

b. **More than one defendant.** If one of the defendants charged on the same charge sheet elects CM trial the SCC must refer all charges to the CM so all the defendants will be tried by that court⁴⁶⁸.

20. **Withdrawal of election.** A defendant who elected CM trial may withdraw that election at any time up until arraignment by that court by giving written notification to the CAO, DSP and any other defendants⁴⁶⁹.

Preliminary proceedings

21. Preliminary proceedings deal with arraignment, plea and case management issues, and to rule on matters of law. The powers of the court are contained in SCC Rules, rule 36.

22. **Arraignment.** Preliminary proceedings may take place in the absence of the defendant, but a defendant cannot be arraigned in his absence⁴⁷⁰. Once any pre-arraignment matters are resolved the charge sheet will be put to the defendant and he will be asked whether he pleads guilty or not guilty to each charge against him⁴⁷¹. A refusal to plead or an unintelligible plea will be entered as a “not guilty” plea, as will any guilty plea that is not accepted by the court⁴⁷². Any plea of guilty may, before the plea is accepted by the court, result in an explanation to the defendant of the nature of the charge and the general effect of the plea, especially the different procedures involved between guilty and not guilty pleas. It is for the judge advocate to decide if such an explanation is necessary (e.g. the defendant is a juvenile and/or is not legally represented) and it is designed to enable the court to be satisfied that the defendant is pleading guilty with a proper knowledge of what that means.⁴⁷³

23. **Mixed pleas.** Where there are two or more charges against one defendant and pleas of guilty and not guilty have been entered in relation to those charges, sentencing in relation to the charges to which guilty pleas have been entered shall not proceed (unless the judge advocate directs otherwise) until findings have been announced in respect of each charge to which a not guilty plea has been entered. This applies where, at a joint trial, one defendant has entered a plea of guilty and the other defendant has entered a not guilty plea.

24. **Change of plea.** A defendant may withdraw any not guilty plea and substitute for it a guilty plea⁴⁷⁴. He can do this at any time during proceedings before the court determines the finding on the charge in question. A defendant may, with the leave of the court, withdraw a guilty plea and replace it with a not guilty plea at any time before the judge advocate passes sentence for the relevant charge.⁴⁷⁵

Procedure during trial

25. **Changes to charge sheet during trial.** Once the trial has started, if the court considers that it is in the interests of justice to amend a charge (having due regard to the fairness to the defendant in so amending) then the court may do so. If the DSP wishes to amend or substitute a charge, discontinue proceedings on a charge or prefer an additional

⁴⁶⁷ Section 280(5) of the Act.

⁴⁶⁸ Section 280 (3) and (5) of the Act and SCC Rules, Rule 42(8).

⁴⁶⁹ The Armed Forces (Service Civilian Court) Rules 2009, rule 42(6) and (7).

⁴⁷⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 19(2).

⁴⁷¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 43(2).

⁴⁷² The Armed Forces (Service Civilian Court) Rules 2009, rule 43(5).

⁴⁷³ The Armed Forces (Service Civilian Court) Rules 2009, rule 43(3).

⁴⁷⁴ The Armed Forces (Service Civilian Court) Rules 2009, rule 46(1).

⁴⁷⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 46(3).

charge, after the trial has commenced then leave must be sought from the court.⁴⁷⁶ Additionally, in respect of any additional charge the prosecution may wish to bring, notice of this intention must be served on the defendant⁴⁷⁷.

26. **Procedure after guilty plea.** Once the court has accepted and recorded a guilty plea, the DSP will inform the court of the facts of the case and all relevant information. An opportunity will also be given for mitigation on behalf of the defendant to be heard. Thereafter, the court goes on to pass sentence.

27. **Procedure after not guilty plea.** Before calling the prosecution witnesses, the DSP may make an opening address. Defendants may make an opening address only with leave of the judge advocate⁴⁷⁸. Thereafter, each prosecution witness in turn will be called to give their evidence on oath, with the rules of evidence being those that apply in the Crown Court in England and Wales.

28. **Misbehaviour in court.** Any person, whether a witness or otherwise, who misbehaves at the SCC is liable to be fined and/or committed to Service custody for contempt of court⁴⁷⁹, see [Chapter 33](#) (Contempt of Service courts).

29. **Submission of no case to answer.** At any time after the close of the prosecution case, the defendant can submit, in respect of any charge, that the prosecution has failed to establish a case for the defendant to answer. If the court allows any such submission then the defendant will be found not guilty of the charge to which the submission relates⁴⁸⁰.

30. **Case for the defence.** Following the close of the prosecution case and assuming that the preceding paragraph does not apply, the defendant may give evidence in his defence and also call witnesses but he is under no obligation to do so. Depending on the course adopted, the judge advocate must satisfy himself that the defendant understands the consequences of remaining silent, as well as the liability that he (and any witnesses) will have to being cross-examined by the DSP and that he may face questioning by the judge advocate.

31. **Closing addresses.** A defendant or the DSP may make a closing address, unless they have already made an opening address, where leave of the judge advocate is required. If two or more defendants have the same legal representative, that legal representative can only make one closing address.⁴⁸¹

32. **Findings.** Deliberation on findings occurs after any closing addresses, and for each charge the judge advocate will record – in writing, signed and dated - a finding of either guilty or not guilty on the trial result notification. See [Annex A](#) (Trial result notification T-SL-TRN01). The finding on each charge is announced in open court in the presence of the defendant, who may – on any finding of guilty – request the court to take into consideration any other Service offence committed by him of a similar nature to that which relates to the guilty finding in question.⁴⁸²

33. **Power to convict of offence other than that charged.** The SCC has a statutory power to convict any offender of a Service offence other than the one specifically charged in the charge sheet.⁴⁸³ Therefore, although an individual may be acquitted of the offence charged, the SCC can – provided that the allegations in the charge sheet amount to or include (either expressly or by implication) an allegation of a different Service offence –

⁴⁷⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 47.

⁴⁷⁷ The Armed Forces (Service Civilian Court) Rules 2009, rule 47(2).

⁴⁷⁸ The Armed Forces (Service Civilian Court) Rules 2009, rule 85.

⁴⁷⁹ Section 309 of the Act.

⁴⁸⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 88.

⁴⁸¹ The Armed Forces (Service Civilian Court) Rules 2009, rule 91.

⁴⁸² The Armed Forces (Service Civilian Court) Rules 2009, rule 97.

⁴⁸³ Section 281 of the Act.

convict the individual of that other offence. 'Offence' in this sense also includes an attempted offence.

Rules of evidence

34. The rules as to the admissibility of evidence before the SCC are governed by Part 12 of the SCC Rules. The rules of evidence applicable in a trial on indictment in England and Wales generally apply⁴⁸⁴, but there are procedures which are particular to the SCC. The following paragraphs summarise a few of the important differences to the civilian system.

35. **Attendance or giving evidence by live link.** Any person, who is not in the place where the proceedings are being held, may attend by live link if the judge advocate so directs. This includes witnesses who may give evidence. An application may be made to the judge advocate for permission to attend by live link or the judge advocate may direct such a course of action⁴⁸⁵.

36. **Use of documents to refresh memory.** The Criminal Justice Act 2003 section 139 does not apply to the SAC, however a person giving oral evidence may refresh his memory from a document made or verified by him at an earlier time or a transcript of a sound recording⁴⁸⁶.

37. **Evidence through live link.** Any person may give evidence by live link if the judge advocate so directs, either of his own volition, or on an application⁴⁸⁷.

38. **Special measures.** A judge advocate may give a special measures direction of his own volition or on an application by a party to the proceedings⁴⁸⁸.

Sentencing and appeal

39. **Mitigation.** An offender, or his legal representative, may call witnesses as to his character, or produce any documentary evidence and address the court in mitigation of sentence.

40. **Available punishments.** The SCC may award the following punishments:

a. **Imprisonment.** The SCC may not award imprisonment for more than 12 months in respect of any one offence and where the SCC imposes 2 or more terms of imprisonment to run consecutively, their aggregate must not exceed 65 weeks.⁴⁸⁹ A person who is under the age of 18 cannot be sentenced to imprisonment.⁴⁹⁰ The SCC may suspend a sentence of imprisonment.⁴⁹¹

b. **Detention and Training Orders.** Offenders under the age of 18 at conviction may be subjected to a detention and training order.⁴⁹²

c. **Fine.** The SCC may not award a fine for a section 42 offence (Criminal Conduct), which a magistrates' court in England and Wales could not have imposed.⁴⁹³

⁴⁸⁴ The Armed Forces (Service Civilian Court) Rules 2009, rule 58.

⁴⁸⁵ The Armed Forces (Service Civilian Court) Rules 2009, rule 18.

⁴⁸⁶ The Armed Forces (Service Civilian Court) Rules 2009, rule 62.

⁴⁸⁷ The Armed Forces (Service Civilian Court) Rules 2009, rule 18.

⁴⁸⁸ The Armed Forces (Service Civilian Court) Rules 2009, rules 74-84.

⁴⁸⁹ Section 283 of the Act.

⁴⁹⁰ Section 208 of the Act.

⁴⁹¹ Section 200 of the Act.

⁴⁹² Section 211 of the Act.

⁴⁹³ Section 284(2) of the Act.

- c. **Service compensation order (SCO).** The SCC may not award a SCO exceeding the limits prescribed for a Magistrates Court.
- d. **Service community order.** A Service community order imposes one or more of the requirements in Section 177(1) of the 2003 Act and specifying the local justice area in England and Wales, the locality in Scotland or the petty sessions district in Northern Ireland where the offender resides or will reside⁴⁹⁴.
- e. **Overseas community order.** An overseas community order imposes one or more requirements in Section 177(1) of the 2003 Act and does not specify the area where the offender resides or will reside. The SCC must be satisfied that the offender will be able to comply with the requirement and that arrangements will be made for supervision of his compliance.⁴⁹⁵
- f. **Conditional or absolute discharge.** A conditional discharge is an order discharging the offender subject to the condition that he commits no Service offence in a specified period. An absolute discharge discharges the offender without conditions.⁴⁹⁶
41. **Activation of a suspended sentence.** Where the offender is subject to a suspended sentence of imprisonment, the DSP will inform the court. The SCC may then make an activation order in relation to that suspended sentence⁴⁹⁷.
42. **Conditional discharge or overseas community order in force.** Where the offender is subject to a conditional discharge or there is an overseas community order in force, the DSP shall inform the court.⁴⁹⁸
43. **Judge Advocate General's Sentencing Guide.** Sentencing will be carried out in accordance with the Judge Advocate General's Sentencing Guide (see volume 3 Sentencing in Court Martial: A Short Guide).
44. **Announcement and recording of sentence.** Unless the award of a sentence is to be deferred, it will be announced, together with the reasons for it, in open court and in the presence of the defendant. The judge advocate will record the sentence in writing and sign and date the record⁴⁹⁹.
45. **Start of sentence.** Apart from suspended sentences, which take effect only when subsequently activated, any sentence passed by the SCC takes effect from the beginning of the day on which it is passed, unless the court invokes some other statutory provision (be it in the Act or any other Act) which confers upon it a power to direct otherwise.
46. **Appeal.** Appeals from the SCC lie to the CM. The procedures are contained in [Chapter 29](#) (Court Martial proceedings).
47. **Application for remission of a fine.** The SCC may consider an application in writing for remission in whole or part of a fine previously imposed by the court, where the offender's financial circumstances are different from those determined by the court when the amount of the fine was fixed.⁵⁰⁰
48. **Ancillary Proceedings.** Where the court has imposed an overseas community order, the officer responsible for supervision may make an application in writing to the court for a

⁴⁹⁴ Section 178 of the Act.

⁴⁹⁵ Section 182 of the Act.

⁴⁹⁶ Section 185 of the Act.

⁴⁹⁷ The Armed Forces (Service Civilian Court) Rules 2009, rule 96(3).

⁴⁹⁸ The Armed Forces (Service Civilian Court) Rules 2009, rule 96(3)(b).

⁴⁹⁹ The Armed Forces (Service Civilian Court) Rules 2009, rule 99.

⁵⁰⁰ The Armed Forces (Service Civilian Court) Rules 2009, rule 107.

summons, or warrant for arrest, where the requirements of the order have been breached. The responsible officer or the offender may make an application in writing to revoke, amend or extend the order.⁵⁰¹

⁵⁰¹ The Armed Forces (Service Civilian Court) Rules 2009, rules 100-106.

Chapter 33

Contempt of Service courts

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Chapter 33

Contempt of Service courts

Introduction

1. This section sets out the jurisdiction and powers of Service courts to deal with misbehaviour in Service courts, often referred to as contempt of court⁵⁰². It includes guidance on the power of Service courts to detain a person before dealing with offences of misbehaviour in court and to certify, for disposal by an appropriate civil court, any act⁵⁰³ that would constitute contempt of court if the proceedings were before a court having power to commit⁵⁰⁴ for contempt.

Jurisdiction

2. The contempt provisions apply in respect of the qualifying Service courts set out below⁵⁰⁵:

- a. Court Martial (CM).
- b. Summary Appeal Court (SAC).
- c. Service Civilian Court (SCC).

For the remainder of this section these qualifying courts are referred to as 'the court'.

3. The following categories of person are subject to the court's powers in relation to offences of contempt⁵⁰⁶:

- a. Any person in the United Kingdom, whether subject to Service law or not.
- b. A person outside the United Kingdom who is subject to Service law (a Service person).
- c. A person outside the United Kingdom who is a civilian subject to Service discipline (a relevant civilian).

4. In relation to offences of contempt, the decisions of the court will be taken by the judge advocate alone⁵⁰⁷.

Offences

5. The following is deemed to be misbehaviour in court that is capable of constituting an offence of contempt of court⁵⁰⁸:

⁵⁰² Sections 309 to 312 of the Act.

⁵⁰³ Contempt of court is not confined to the offences specified section 309 of the Act.

⁵⁰⁴ Only certain courts, such as the High Court in England and Wales, have the power to commit (send to prison) a person for contempt of court unless express provision is made in a statute (see sections 309 to 312 of the Act)

⁵⁰⁵ Section 309(5) of the Act.

⁵⁰⁶ Section 309(6) of the Act.

⁵⁰⁷ Section 312(2) of the Act.

⁵⁰⁸ Section 309(1) of the Act.

- a. Refusal by a person to take an oath or make an affirmation when duly required by the court to do so;
- b. Refusal of a witness to answer any question which the court has lawfully required him to answer;
- c. Refusal by a person attending the court, or who is brought before the court, to produce any document or other thing which is in his custody or under his control and which the court lawfully requires him to produce;
- d. Intentional interruption of the proceedings of the court or other misbehaviour in court by a person; or
- e. Intentional insults or intimidation by a person of:
 - (1) Any member of the court while that member is acting as such, or is going to or returning from the court; or
 - (2) Any witness or other person whose duty it is to attend the court, while that person is attending the court or going to or returning from the court.

Power to punish

6. The court's powers to deal with the above forms of misbehaviour depend on the status of the person who is in contempt of court.

- a. If the person is a Service person or a relevant civilian, the court may⁵⁰⁹:
 - (1) Commit the offender to Service custody for a specified period not exceeding 28 days; and/or
 - (2) Impose on the offender a fine not exceeding level 4 on the standard scale⁵¹⁰.
- b. If the person is not subject to Service law or a civilian subject to Service discipline, the court may impose a fine not exceeding level 4 on the standard scale⁵¹¹.

7. A court may order that the committal to Service custody for contempt takes place after the end of any sentence of Service detention that a Service court has ordered on a previous occasion or, in the case of the CM, that the court orders on the same occasion⁵¹². The court may at any time revoke an order of committal for contempt and, if the person in contempt is in Service custody, order his release⁵¹³. Therefore if, for example, the offender made an appropriate apology to the court or gave an undertaking as to his future behaviour, the judge advocate might order the offender's release from custody. The rules regarding custody of persons can be found in the Service Custody and Service of Relevant Sentences Rules 2009/1096 and JSP 837 (Service code of practice for the management of personnel in Service custody and committal to Service custody premises and civil prisons).

⁵⁰⁹ Section 309(2) of the Act.

⁵¹⁰ Section 309(3) of the Act.

⁵¹¹ See Archbold 5-403 for standard scale fines section.

⁵¹² Sections 312(3) and (4) of the Act.

⁵¹³ Section 309(4) of the Act.

8. The court may allow any fine imposed for contempt to be paid in instalments⁵¹⁴. The court can also allow such time for payment of the fine as it specifies. Additionally, the court has the power, if the person fined makes an application to the court, to vary any order that it makes in relation to that fine.

Power to detain

9. Where a court does not immediately deal with an offence of contempt it may order the offender to be detained in Service custody until the court rises. The offender can therefore be detained until such time as the court decides to adjourn the proceedings which are currently before it. This could be to adjourn for a break over the lunch period or at the end of the day's proceedings. So, for example, when a person interrupts proceedings or otherwise misbehaves in court, the court may order the offender to be detained in Service custody until those proceedings are adjourned.

10. When the court rises, it is to decide whether a further hearing is required and, if not, it will deal immediately with the offence of contempt in accordance with its powers at paragraphs 6 - 12⁵¹⁵. If a further hearing is deemed necessary, the court may either release the offender or order that he be held in Service custody for a further period. This period must end not more than 48 hours from the time at which the offender was first detained for an offence specified in section 309 (see paragraph 5 above)⁵¹⁶. The court may only authorise a period of further custody if one of the following conditions applies⁵¹⁷:

- a. The court is satisfied that there are substantial grounds for believing that the offender, if released from Service custody, would:
 - (1) Fail to attend any hearing in the proceedings against him; or
 - (2) Commit an offence while released; or
 - (3) Interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
- b. The court is satisfied that the offender should be kept in Service custody for his own protection or, if he is aged under 17, for his own welfare or in his own interests; or
- c. The court is satisfied that it has not been practicable to obtain sufficient information for the purpose of deciding whether the conditions in sub-paragraphs (a) or (b) above apply.

11. Where a court with power to deal with a person under section 309 of the Act decides not to exercise that power immediately, it may order the following categories of person to detain an offender in custody⁵¹⁸:

- a. A Service policeman.
- b. An officer of a UK police force.
- c. A member of the court staff.

⁵¹⁴ Sections 312(5) and 251 of the Act.

⁵¹⁵ Section 310(2) of the Act.

⁵¹⁶ Section 310(3) of the Act.

⁵¹⁷ Section 310(4) of the Act.

⁵¹⁸ Section 310(1) of the Act.

Those categories of person listed above may use reasonable force, if necessary, when ordered by the court to detain an offender in Service custody for an offence of contempt.

Certification to civil courts

12. If a person commits an offence listed in paragraph 5 above, for which a civil court has the power to commit for contempt and the Service court has not exercised the powers set out at paragraphs 6 to 8 above, it may certify the offence of contempt⁵¹⁹:

a. If it took place in the United Kingdom, to any court of law in that part of the United Kingdom which has power to commit for contempt; or

b. If it took place outside the United Kingdom, to the High Court of England and Wales.

13. The civil court to which the offence is certified may inquire into the matter. After hearing any witnesses produced against or on behalf of the person and any statement that may be offered in defence, the civil court may deal with the offender in the same manner as if the offence had occurred during proceedings before that court⁵²⁰. Where the Service court certifies an offence to a civil court, it is not permitted to exercise any powers in respect of that contempt.

⁵¹⁹ Sections 311(1) and (2) of the Act.

⁵²⁰ Section 311(3) of the Act.

Chapter 34

Compensation for miscarriages of justice

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Chapter 34

Compensation for miscarriages of justice

Introduction

1. This chapter sets out the circumstances in which the Secretary of State has a duty to pay compensation for miscarriages of justice. It also specifies the person in the MOD to whom applications for such compensation should be submitted and the factors that will be considered in assessing the amount of compensation payable. This chapter also lists the qualifications needed to be an assessor.

Right to compensation

2. It is for the Secretary of State to determine whether a person has a right to compensation for a miscarriage of justice. If he determines that there is such a right, the amount of compensation is to be determined by an assessor to be appointed by the Secretary of State. Subject to certain exceptions, if a person has been convicted by the Court Martial (CM) and subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State must pay him compensation⁵²¹. Where the person who is the subject of the miscarriage of justice is dead, compensation must be paid to his personal representatives. The exceptions to this general rule are that compensation is not payable:

- a. If the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted⁵²²; and
- b. Unless an application for compensation has been made to the Secretary of State⁵²³ before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed or he is pardoned.⁵²⁴

3. For these purposes, a conviction is deemed to have been reversed if it has been quashed⁵²⁵:

- a. On an appeal out of time;
- b. On a reference under the Court Martial Appeals Act 1968 section 34; or
- c. On a reference under the Criminal Appeal Act 1995 section 12A.

However, in a case where a person's conviction for an offence is quashed on an appeal out of time and the person is subject to a retrial, the conviction is not to be treated for these purposes as 'reversed' unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial.

⁵²¹ Section 276(1) of the Act.

⁵²² Section 276(2) of the Act.

⁵²³ Section 276(3) of the Act.

⁵²⁴ The Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so. See section 296(3) of the act.

⁵²⁵ Section 276(7) of the Act.

Submission of claims for compensation

4. Claims for compensation for miscarriages of justice at the Court Martial should be submitted to the Senior Claims Officer, DS&C (Claims), Zone A, 7th Floor, St George's Court, 2-12 Bloomsbury Way, London WC1A 2SH. An assessor will be appointed on a case by case basis in line with the qualifications outlined at paragraph 7 below to deal with any claim.

Assessment of compensation

5. In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages in civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and any loss of liberty. Further provision is made⁵²⁶ as to the limits on the amount of compensation payable. In assessing the amount of compensation payable for suffering, harm to reputation or similar damage, the assessor must have regard in particular to the following⁵²⁷:

- a. The seriousness of the offence of which the person was convicted and the severity of the resulting punishment; and
- b. The conduct of the investigation and prosecution of the offence.

6. The assessor may take from the total amount of compensation that he would otherwise have assessed as payable any deduction or deductions that he considers appropriate by reason of either or both of the following:

- a. Any conduct of the person appearing to the assessor to have directly or indirectly caused, or contributed to, the conviction concerned; and
- b. Any other convictions of the person and any punishment resulting from them⁵²⁸.

If, having had regard to any matters falling within (a) or (b), the assessor considers that there are exceptional circumstances which justify doing so, he may determine that the amount of compensation is to be a nominal amount only.

Qualifications to be an assessor

7. A person is qualified to be an assessor if he⁵²⁹:
- a. Has a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990;
 - b. Is an advocate or solicitor in Scotland;
 - c. Is a member of the Bar of Northern Ireland, or a solicitor of the Court of Judicature of Northern Ireland, of at least seven years' standing;
 - d. Holds or has held judicial office in any part of the United Kingdom;
 - a. Is a member (whether the chairman or not) of the Criminal Injuries Compensation Board; or

⁵²⁶ Section 276A(5) of the Act.

⁵²⁷ Section 276(6) of the Act.

⁵²⁸ Section 276A(3) of the Act.

⁵²⁹ Schedule 9 Para 1(1) of the Act.

b. Has in a relevant territory⁵³⁰ rights and duties similar to those of a barrister or solicitor in England and Wales, has had those rights and duties for at least seven years and is subject to punishment or disability for breach of professional rules.

⁵³⁰ A relevant territory for the purposes of Paragraph 7(f) above is⁵³⁰: (a) any of the Channel Islands; (b) the Isle of Man; (c) a Commonwealth country; (d) a British Overseas Territory. Schedule 9 paragraph 1(2) of the Act.

Chapter 35

The powers of the Criminal Cases Review Commission

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Chapter 35

The powers of the Criminal Cases Review Commission

Introduction

1. **Independent public body.** The Criminal Case Review Commission (CCRC) is an independent public body which was set up under the Criminal Appeals Act 1995 to review possible miscarriages of justice in magistrates courts and the Crown Courts of England, Wales and Northern Ireland. The Armed Forces Act 2006 (the Act), section 321 and Schedule 11, extend the jurisdiction of the CCRC to the Court Martial (CM) and the Service Civilian Court (SCC).
2. **Powers.** The CCRC has powers to refer cases to the appropriate court for an appeal to be heard. The CCRC does not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of a decision. The CCRC has wide-ranging investigative powers and can obtain and preserve documentation held by any public body (including the Services). The CCRC will also investigate and report to the Court Martial Appeal Court (CMAC) on any matter referred to them by the Court.
3. **Impact on victims.** The CCRC is mindful of the impact that the review of cases can have on the original victims of a crime and their families. It therefore has an established policy that sets out the circumstances in which victims are informed about case reviews and the process for doing so.
4. **Sources.** Reference should be made to the following sources:
 - a. Section 321 and Schedule 11 of the Act (relating to powers of CCRC);
 - b. The Court Martial Appeals Act 1968, section 29A (power to order investigation by CCRC);
 - c. The Criminal Appeal Act 1995 (Part II, as amended by the Act) ;
 - d. The current edition of Archbold, Criminal Pleading Evidence & Practice; and
 - e. CCRC's website: <http://www.ccrcc.gov.uk>.

Powers of the CCRC

5. **General.** The CCRC may make a reference to the CMAC for appeal of a conviction, verdict, finding or sentence with or without an application being made by the person to whom it relates.
6. **Court Martial Appeal Court (CMAC).** On an appeal against conviction or an application for leave to appeal against conviction, the CMAC may direct the CCRC to investigate and report to the court in order to resolve any matter relating either to an appeal or an application for leave to appeal
7. **Cases dealt with by the CM.** Where a person has been convicted by the CM (including on an appeal brought from the SCC) the CCRC may at any time refer the conviction to the CMAC.
8. **Sentence.** Where a person has been convicted by the CM and (whether or not the conviction is referred) the CCRC may at any time refer to the CMAC any sentence (other

than one fixed by law) imposed by the CM on, or in subsequent proceedings relating to, the conviction. Where a person has been convicted by the SCC and sentenced by the CM on an appeal against sentence only, the CCRC may at any time refer to the CMAC that sentence of the CM and any other sentence imposed by the CM in respect of a connected conviction being a conviction of the same person by the same court on the same day.

9. **Related conviction.** On a reference of a person's conviction the CCRC may give notice to the CMAC that any related conviction (being a conviction of the same person in the same proceedings) is to be treated as referred to the CMAC.

10. **Disability.** Where the CM has found that a person is under a disability and that he did the act or made the omission charged against him, the CCRC may at any time refer either or both of those findings to the CMAC.

11. **Insanity.** Where a finding of not guilty by reason of insanity has been made by the CM, the CCRC may at any time refer the finding to the CMAC.

12. **Cases dealt with by SCC.** Where a person has been convicted of an offence by the SCC the CCRC may, at any time, refer the conviction to the CM and (whether or not they refer the conviction) may at any time refer any sentence on, or in subsequent proceedings relating to, the conviction.

13. **Sentencing after reference.** On a reference to the CM from the SCC, the CM may not impose a sentence more severe than that imposed by the SCC.

14. **References treated as appeals.** A reference of a conviction, sentence or finding will be treated as an appeal by the person against whom it is made.

15. **Supplementary powers.** The main supplementary powers of the CCRC are set out in the Criminal Appeal Act 1995, sections 17 to 22 (relating to obtaining documents and mounting investigations). In relation to a CM or SCC case the CCRC may require a Service to produce documents and materials to the CCRC or give the CCRC access to them and it may require the appointment of the Service Police or another police force to carry out an investigation to assist it.

Conditions of reference

16. **Conditions for making a reference.** A reference will not be made unless:

- a. The CCRC considers that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made;
- b. The CCRC so consider:
 - (1) In the case of a conviction, verdict or finding because of an argument or evidence not raised in the proceedings which led to it or on any appeal or application for leave to appeal, or
 - (2) In the case of a sentence, because of an argument on a point of law or information not so raised, and
- c. An appeal has been dismissed or leave to appeal refused.

However, nothing in b(1) or c above will prevent the making of a reference if it appears to the CCRC that there are exceptional circumstances which justify it. For example, inadequate

representation of the defence case to the court at trial or on appeal or where the court has developed the law by accepting an argument which has been previously rejected.