

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 court¹. The CM may sit anywhere, within or outside the United Kingdom², and has the jurisdiction to try any Service offence³.

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 advocate⁴ and that person will be selected and then specified for a hearing by or on behalf of the Judge Advocate General⁵.

5. **Minimum number of lay members.** Other than where the judge advocate deals with matters sitting alone⁶ the CM will consist of the judge advocate and other persons who sit as members of the CM, known as 'lay members'⁷ but sometimes referred to as 'board members'.

6. All CM proceedings requiring lay members must have at least three lay members⁸ but no more than five lay members sitting on a CM board⁹. 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 five¹⁰. 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 when¹¹:

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);

¹ Section 154(1) of the Act.

² Section 154(2) of the Act.

³ 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).

⁴ Section 155(1)(a) of the Act.

⁵ Section 155(5) of the Act.

⁶ See [Chapter 29](#) (Court Martial proceedings) for circumstances in which a judge advocate sits alone; see also paragraph 9 below.

⁷ Section 155(1)(b) of the Act.

⁸ Section 155(1)(b) of the Act.

⁹ Section 155(1)(b) of the Act.

¹⁰ Section 155(2)(a) of the Act..

¹¹ 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 varied¹².

7. **Additional lay members.** In certain circumstances an additional one or two lay members may supplement the usual three or five member CM boards¹³. 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 be¹⁴. However, such a direction cannot be made after commencement of the proceedings¹⁵ 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 members¹⁶. 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 except¹⁷:

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 applies¹⁸, 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 members¹⁹); 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;

¹² Armed Forces (Court Martial) Rules 2009 Part 15.

¹³ Section 155(2)(a) of the Act and the Armed Forces (Court Martial) Rules 2009 rule 30.

¹⁴ Section 155(7) of the Act and the Armed Forces (Court Martial) Rules 2009 rule 30(1).

¹⁵ Such as trial, sentencing or variation proceedings.

¹⁶ Armed Forces (Court Martial) Rules 2009 rule 30(4).

¹⁷ Section 155(2)(b) of the Act and the Armed forces (Court Martial) Rules 2009 rule 28.

¹⁸ In the circumstances set out in the Armed Forces (Court Martial) Rules 2009 rule 27(3)(b).

¹⁹ 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 history²⁰; 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 offenders²¹;
- 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 members²²;
- f. During variation proceedings where either of sub-paragraphs d and e above applied in relation to the sentence awarded during previous sentencing proceedings²³;
- 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 proceedings²⁴;
- 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 awarded²⁵; and
- i. For ancillary proceedings²⁶.

Role of the CAO

11. Lay members for proceedings of the CM are specified by or on behalf of the CAO²⁷. 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 CAO²⁸.

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.

²⁰ Youth Justice and Criminal Evidence Act 1999, section 41(2).

²¹ Armed Forces (Court Martial) Rules 2009 rule 27(3)(a).

²² Armed Forces (Court Martial) Rules 2009 rule 27(3)(b).

²³ Armed Forces (Court Martial) Rules 2009 rule 27(4).

²⁴ Armed Forces (Court Martial) Rules 2009 rule 27(4)(b) and rule 120.

²⁵ Armed Forces (Court Martial) Rules 2009 rule 27(5).

²⁶ Armed Forces (Court Martial) Rules 2009 rule 27(6).

²⁷ Section 155(6) of the Act.

²⁸ 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 Service²⁹. 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 basis³⁰. Where the board includes civilian lay members and Service personnel the president of the board will be the senior Service member of the board³¹. 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.)³². 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 board³³.

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 officer³⁴. 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 officer³⁵. Warrant officers may only be lay members where the subject of the proceedings is of or below the rank of warrant officer³⁶.

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

²⁹ For Royal Marines personnel, 'own Service' is the Royal Navy.

³⁰ If necessary, MCS may seek advice from MOD DGLS.

³¹ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

³² The Armed Forces (Court Martial) Rules 2009 rule.34(3).

³³ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

³⁴ Section156(2) of the Act.

³⁵ Section156(3) of the Act.

³⁶ The Armed Forces (Court Martial) Rules 2009 rule 31(1).

senior within the same rank to the defendant³⁷; as a matter of policy the other lay members should be of no lower rank than commodore, brigadier or air commodore;

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 relate³⁸ 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 board³⁹.

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 is⁴⁰:

- 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' branch⁴¹ or a Naval Chaplain⁴²;
- 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 defendant⁴³. 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 ineligibility⁴⁴);
- b. Has taken part in investigating the charge(s) against the defendant; or

³⁷ The Armed Forces (Court Martial) Rules 2009 rule 34(4).

³⁸ The Armed Forces (Court Martial) Rules 2009 rule 34(3)(c).

³⁹ Section 155(3) of the Act and The Armed Forces (Court Martial) Rules 2009 rule 31(1).

⁴⁰ Sections 156(4) and (5) of the Act.

⁴¹ Section 156(4)(d) of the Act.

⁴² Armed Forces (Naval Chaplains) Regulations 2008.

⁴³ Sections 157(1) and (2) of the Act.

⁴⁴ 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 board⁴⁵. In addition, the following may not be civilian lay members⁴⁶:

- 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 disordered⁴⁷;
- d. Those disqualified from jury service⁴⁸;
- 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 unit⁴⁹. These rules apply to trial, sentencing, variation, appellate and activation proceedings⁵⁰.

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 proceedings⁵¹. 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 members⁵². 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

⁴⁵ The Armed Forces (Court Martial) Rules 2009 rule 33(1).

⁴⁶ The Armed Forces (Court Martial) Rules 2009 rule 33(2).

⁴⁷ Under Part 1 of Schedule 1 to the Juries Act 1974 (The Armed Forces (Court Martial) Rules 2009 rule 33(3)(a)).

⁴⁸ Under Part 2 of Schedule 1 to the Juries Act 1974 (The Armed Forces (Court Martial) Rules 2009 rules 32(1) – (5)).

⁴⁹ 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).

⁵⁰ The Armed Forces (Court Martial) Rules 2009 rules 32(1) – (5).

⁵¹ The Armed Forces (Court Martial) Rules 2009 rule 32(6).

⁵² The Armed Forces (Court Martial) Rules 2009 rule 32(9).

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.

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 proceedings⁵³; 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 offence⁵⁴.

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 grounds⁵⁵. 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 proceedings⁵⁶.

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.

⁵³ The Armed Forces (Court Martial) Rules 2009 rule 32(7).

⁵⁴ The Armed Forces (Court Martial) Rules 2009 rule 32(8) (but see also rule 120).

⁵⁵ The Armed Forces (Court Martial) Rules 2009 rule 35.

⁵⁶ 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 advocate⁵⁷. A judge advocate will be either⁵⁸:
- 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 judge⁵⁹ 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 CM⁶⁰. 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 board⁶¹. 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

⁵⁷ Section 155(1) of the Act.

⁵⁸ Section 362 of the Act.

⁵⁹ '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.

⁶⁰ Section 159(1) of the Act.

⁶¹ The Armed Forces (Court Martial) Rules 2009 rules 34(6) and (7).

person on 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 CM⁶².

34. The CAO may delegate any of his functions in relation to the court to a member of the MCS⁶³, 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 CM⁶⁴. The DSP is appointed by Her Majesty the Queen⁶⁵, and must be a qualified lawyer⁶⁶. The DSP may be a civilian or a Service person.

Prosecuting officers

36. The DSP may appoint officers to be prosecuting officers⁶⁷ and, unless the DSP directs otherwise, a prosecuting officer may exercise any of the DSP's functions⁶⁸. 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 qualification⁶⁹.

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 qualification⁷⁰.

Other court officials

⁶² Section 363 of the Act.

⁶³ The Armed Forces (Court Martial) Rules 2009 rule 15(2).

⁶⁴ 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).

⁶⁵ Section 364(1) of the Act.

⁶⁶ Section 364(2) and (4) of the Act.

⁶⁷ Section 365(1) of the Act.

⁶⁸ Section 365(4) of the Act.

⁶⁹ Section 365(2) and (5) of the Act.

⁷⁰ 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.