

## 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 board<sup>1</sup>.
- 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 requested from the court administration officer (CAO). The forms are available electronically and may be amended to suit requirements.

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<sup>1</sup> 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)

## 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 proceedings<sup>2</sup>. The CAO may delegate any of his functions in relation to the court to a member of the MCS<sup>3</sup>.

6. **Court recorders and interpreters.** A sound recording must be made of all proceedings<sup>4</sup>, and therefore a verbatim court recorder will also usually be required unless the judge advocate directs otherwise. In some circumstances an interpreter<sup>5</sup> 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 writing<sup>6</sup> of the time and place appointed for commencement or resumption of the proceedings to the following<sup>7</sup>:

- 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.

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 practicable<sup>8</sup>.

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<sup>2</sup> Armed Forces (Court Martial) Rules 2009 rule 15(1).

<sup>3</sup> Armed Forces (Court Martial) Rules 2009 rule 15(2).

<sup>4</sup> Armed Forces (Court Martial) Rules 2009 rule 23(e).

<sup>5</sup> Armed Forces (Court Martial) Rules 2009 rule 22 and rule 22A.

<sup>6</sup> 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.

<sup>7</sup> Armed Forces (Court Martial) Rules 2009 rule 17(1).

<sup>8</sup> Armed Forces (Court Martial) Rules 2009 rule 17(2) and 17(3)

## 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 copy<sup>9</sup>.

10. **Service on a person to whom the proceedings relate.** For Service personnel, service may be affected in the following ways<sup>10</sup>:

- a. By service on him personally<sup>11</sup>;
- b. If he is a Service person<sup>12</sup>, 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.<sup>13</sup>

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 officer<sup>14</sup>.

13. **Service on other individuals.** For persons to whom none of paragraphs 10 to 12 relate (eg. witnesses, parent, guardian etc), service may be<sup>15</sup>:

- 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 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 practicable<sup>16</sup>;
- b. If he is a Service person, by post in a letter addressed to him at his ship/unit/establishment; or

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<sup>9</sup> Armed Forces (Court Martial) Rules 2009 rule 12.

<sup>10</sup> Armed Forces (Court Martial) Rules 2009 rule 5.

<sup>11</sup> 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.

<sup>12</sup> For subject to Service law – see [Chapter 3](#) (Jurisdiction and time limits).

<sup>13</sup> Armed Forces (Court Martial) Rules 2009 rule 6.

<sup>14</sup> Armed Forces (Court Martial) Rules 2009 rule 7.

<sup>15</sup> Armed Forces (Court Martial) Rules 2009 rule 8.

<sup>16</sup> Armed Forces (Court Martial) Rules 2009 rule 11.

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 served<sup>17</sup>:

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 served<sup>18</sup>.

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 apply<sup>19</sup>:

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.<sup>20</sup>

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<sup>17</sup> Armed Forces (Court Martial) Rules 2009 rule 9.

<sup>18</sup> Armed Forces (Court Martial) Rules 2009 rule 10.

<sup>19</sup> Armed Forces (Court Martial) Rules 2009 rule 13.

<sup>20</sup> 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 Rules<sup>21</sup>. 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.<sup>22</sup> 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 otherwise<sup>23</sup>. 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 determined<sup>24</sup>.

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 public<sup>25</sup>. 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 Court<sup>26</sup>. 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 relate<sup>27</sup>, 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 present<sup>28</sup>. However, personnel in attendance at the proceedings under instruction, and who have been duly sworn<sup>29</sup>, will be allowed to remain with the court when it

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<sup>21</sup> Section 158 of the Act

<sup>22</sup> Armed Forces (Court Martial) Rules 2009 rule 153(1).

<sup>23</sup> Armed Forces (Court Martial) Rules 2009 rule 153(2).

<sup>24</sup> Armed Forces (Court Martial) Rules 2009 rule 153(4)(b).

<sup>25</sup> Armed Forces (Court Martial) Rules 2009 rule 154.

<sup>26</sup> Armed Forces (Court Martial) Rules 2009 rule 155.

<sup>27</sup> Armed Forces (Court Martial) Rules 2009 rule 19.

<sup>28</sup> Armed Forces (Court Martial) Rules 2009 rule 20(1).

<sup>29</sup> Armed Forces (Court Martial) Rules 2009 Schedule 1.

deliberates on sentence, a dispute of fact after a guilty plea<sup>30</sup> (Newton hearings), whether to make an activation order or any other matter where the judge advocate so directs<sup>31</sup>.

## Live links

26. Persons may attend any CM proceedings of any description by live link if the judge advocate so directs<sup>32</sup>. 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 motion<sup>33</sup>. 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 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.

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<sup>30</sup> Armed Forces (Court Martial) Rules 2009 rule 112.

<sup>31</sup> Armed Forces (Court Martial) Rules 2009 rule 20.

<sup>32</sup> Armed Forces (Court Martial) Rules 2009 rule 18.

<sup>33</sup> Armed Forces (Court Martial) Rules 2009 rule 18(5).

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 advocate<sup>34</sup>. 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.

34. **Special measures.** Live links may be used in conjunction with or as part of a special measures direction<sup>35</sup> (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

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<sup>34</sup> Armed Forces (Court Martial) Rules 2009 rule 18(7).

<sup>35</sup> Armed Forces (Court Martial) Rules 2009 rule 93(5).

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 party<sup>36</sup>. This includes but is not limited to: questions of admissibility of evidence; applications for a summons or warrant<sup>37</sup>, a live link<sup>38</sup>, or to adduce a complainant's previous sexual history<sup>39</sup> submissions of no case to answer<sup>40</sup>; 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 Wales<sup>41</sup>, see paragraph 98. The following are required to swear an oath or affirm before participating in CM proceedings:

- a. Lay members of the court<sup>42</sup>;
- b. Interpreters<sup>43</sup>;
- c. Anyone in attendance under instruction<sup>44</sup> (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 board<sup>45</sup>;
- b. The proceedings are with lay members and the number of lay members falls below the minimum required for the proceedings<sup>46</sup>; or
- c. He considers for any reason that it is in the interests of justice to do so<sup>47</sup> (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 discharged<sup>48</sup>, however, this does not bar further trial, appellate, sentencing or activation proceedings in relation to the same

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<sup>36</sup> Armed Forces (Court Martial) Rules 2009 rule 38.

<sup>37</sup> See paragraph 72.

<sup>38</sup> See paragraphs 26 to 34.

<sup>39</sup> Youth Justice and Criminal Evidence Act 1999 section 41(2).

<sup>40</sup> See paragraph 103.

<sup>41</sup> Armed Forces (Court Martial) Rules 2009 rule 21 and Schedule 1.

<sup>42</sup> Armed Forces (Court Martial) Rules 2009 rule 37.

<sup>43</sup> Armed Forces (Court Martial) Rules 2009 rule 22 and rule 22 A.

<sup>44</sup> Armed Forces (Court Martial) Rules 2009 Schedule 1.

<sup>45</sup> Armed Forces (Court Martial) Rules 2009 rules 25(1) and 34.

<sup>46</sup> Armed Forces (Court Martial) Rules 2009 rule 25(2) and section 155(1)(b) of the Act.

<sup>47</sup> Armed Forces (Court Martial) Rules 2009 rule 25(3).

<sup>48</sup> Armed Forces (Court Martial) Rules 2009 rule 25(5).

offence(s)<sup>49</sup>. 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 include<sup>50</sup>:
- 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 otherwise<sup>51</sup>. 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 proceedings<sup>52</sup>.
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 proceedings<sup>53</sup>.
42. **Disclosure of records.** Provision of copies of records is governed as follows<sup>54</sup>:
- 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 requested<sup>55</sup>. In addition, following a request for a copy of a transcript, the Secretary of State may, for reasons of

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<sup>49</sup> Armed Forces (Court Martial) Rules 2009 rule 25(6) – (8).

<sup>50</sup> Armed Forces (Court Martial) Rules 2009 rule 23.

<sup>51</sup> Armed Forces (Court Martial) Rules 2009 rule 24(3).

<sup>52</sup> Armed Forces (Court Martial) Rules 2009 rules 23(3) and (4).

<sup>53</sup> Armed Forces (Court Martial) Rules 2009 rule 23(5).

<sup>54</sup> Armed Forces (Court Martial) Rules 2009 rules 23(6) – (8).

<sup>55</sup> Armed Forces (Court Martial) Rules 2009 rule 23(7).

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.<sup>56</sup>

### **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 justice<sup>57</sup>.

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<sup>56</sup> Armed Forces (Court Martial) Rules 2009 rule 23(8). See also JSP 400 (Disclosure of Information).

<sup>57</sup> Armed Forces (Court Martial) Rules 2009 rule 26.

## Part 4 – Assistance to defendants and legal representation

### Assistance to defendants

44. Service personnel and relevant civilians<sup>58</sup> 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 behalf<sup>59</sup> 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 circumstances<sup>60</sup>. A defendant may apply for Legal Aid for the conduct of his defence<sup>61</sup>, see JSP 838 (The Armed Forces Legal Aid Scheme). Parties to proceedings must inform the CAO of the name and address of his legal representative<sup>62</sup>, and should do this as soon as is practicable after that person has been appointed.

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<sup>58</sup> See Volume 3 of the MSL.

<sup>59</sup> Armed Forces (Court Martial) Rules 2009 rule 39(1).

<sup>60</sup> 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.

<sup>61</sup> JSP 838 (The Armed Forces Legal Aid Scheme) should be consulted for this purpose.

<sup>62</sup> 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, namely<sup>63</sup>:

- 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)<sup>64</sup>. 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 Rules<sup>65</sup>.

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.

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<sup>63</sup> Armed Forces (Court Martial) Rules 2009 rule 39(2).

<sup>64</sup> Armed Forces (Court Martial) Rules 2009 rule 40.

<sup>65</sup> 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 DSP<sup>66</sup>, 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 defence<sup>67</sup>.

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 defendant<sup>68</sup>.

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 convicted<sup>69</sup>. Additional rules exist for the service of advance information in relation to defendants subject to a conditional discharge or an overseas community order<sup>70</sup>. Having received the advance information the CAO must list the charge for preliminary proceedings<sup>71</sup>, 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 members<sup>72</sup>. 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 proceedings<sup>73</sup>. 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 Court<sup>74</sup>, in which case the order or ruling may be varied or discharged on appeal. 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

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<sup>66</sup> Armed Forces (Court Martial) Rules 2009 rule 45.

<sup>67</sup> Armed Forces (Court Martial) Rules 2009 rule 46.

<sup>68</sup> Armed Forces (Court Martial) Rules 2009 rules 43(1) and (2).

<sup>69</sup> Armed Forces (Court Martial) Rules 2009 rule 44(1).

<sup>70</sup> Armed Forces (Court Martial) Rules 2009 rules 44(2) and (3).

<sup>71</sup> Armed Forces (Court Martial) Rules 2009 rule 45(1).

<sup>72</sup> Armed Forces (Court Martial) Rules 2009 rule 49.

<sup>73</sup> Armed Forces (Court Martial) Rules 2009 rule 49(3).

<sup>74</sup> Armed Forces (Court Martial) Rules 2009 rule 50.

related trial proceedings must not commence until the appeal has been determined or abandoned<sup>75</sup>.

**55. Application for further preliminary proceedings - hearing in open court.** All preliminary proceedings will be in open court unless the judge advocate directs otherwise<sup>76</sup>. Applications for further preliminary proceedings may be made orally to a judge advocate at another preliminary proceeding<sup>77</sup>, or in writing<sup>78</sup> 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 proceedings<sup>79</sup>.

**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 defendant<sup>80</sup> 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 court<sup>81</sup> 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 ([Better Case Management - Case Management Form 1\(T-SL-DH1\)](#)) at Annex F, [which is issued directly to parties by the Military Court Service, and](#) 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.

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<sup>75</sup> Armed Forces (Court Martial) Rules 2009 rule 50(3).

<sup>76</sup> Section 158 of the Act.

<sup>77</sup> Armed Forces (Court Martial) Rules 2009 rule 46(2)(a)

<sup>78</sup> Armed Forces (Court Martial) Rules 2009 rule 46(3).

<sup>79</sup> Armed Forces (Court Martial) Rules 2009 rule 46(4).

<sup>80</sup> Armed Forces (Court Martial) Rules 2009 rule 47.

<sup>81</sup> 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 advocate<sup>82</sup>.

## 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 matters<sup>83</sup> 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 sheet<sup>84</sup>. For this purpose the DSP may<sup>85</sup> consolidate the charges from two or more charge sheets into one charge sheet as long as the charges can lawfully be joined<sup>86</sup>. 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 sheet<sup>87</sup>. 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 injustice<sup>88</sup>. 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 2009<sup>89</sup>.

## Arraignment

64. **Procedure.** The defendant must be arraigned at preliminary proceedings before a judge advocate sitting alone<sup>90</sup>. The defendant is required to plead separately to each charge on which he is arraigned<sup>91</sup>, but need not be arraigned on all the charges in a charge sheet at the same time<sup>92</sup>.

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<sup>82</sup> Armed Forces (Court Martial) Rules 2009 rule 48.

<sup>83</sup> See Annex B for matters which may be suitable for preliminary proceedings.

<sup>84</sup> Armed Forces (Court Martial) Rules 2009 rule 51(1).

<sup>85</sup> Armed Forces (Court Martial) Rules 2009 rule 51(2).

<sup>86</sup> See Indictments Act 1915 and the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

<sup>87</sup> Armed Forces (Court Martial) Rules 2009 rules 52 and 53.

<sup>88</sup> Armed Forces (Court Martial) Rules 2009 rule 54.

<sup>89</sup> Armed Forces (Court Martial) Rules 2009 rule 54(4).

<sup>90</sup> Armed Forces (Court Martial) Rules 2009 rule 56(1).

<sup>91</sup> Armed Forces (Court Martial) Rules 2009 rule 56(2).

<sup>92</sup> Armed Forces (Court Martial) Rules 2009 rule 56(1).

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.<sup>93</sup> 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 guilty<sup>94</sup>.

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 proceedings<sup>95</sup>. 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 Court<sup>96</sup>. 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 recorded<sup>97</sup>. 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 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

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<sup>93</sup> Armed Forces (Court Martial) Rules 2009 rule 56(3).

<sup>94</sup> Armed Forces (Court Martial) Rules 2009 rule 56(5)(a).

<sup>95</sup> Armed Forces (Court Martial) Rules 2009 rule 56(4)(b).

<sup>96</sup> Armed Forces (Court Martial) Rules 2009 rule 57.

<sup>97</sup> Armed Forces (Court Martial) Rules 2009 rule 58.

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 guilty<sup>98</sup>. 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 finding<sup>99</sup>. 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 members<sup>100</sup>.

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 court<sup>101</sup>. 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 leave<sup>102</sup>. 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.

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<sup>98</sup> Armed Forces (Court Martial) Rules 2009 rule 58.

<sup>99</sup> Armed Forces (Court Martial) Rules 2009 rules 59(1) and (2).

<sup>100</sup> Armed Forces (Court Martial) Rules 2009 rules 59(3) and (4).

<sup>101</sup> Armed Forces (Court Martial) Rules 2009 rule 60(1).

<sup>102</sup> 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 attend<sup>103</sup>. 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 summons<sup>104</sup>. The procedural requirements<sup>105</sup> for the issue of a witness summons must be complied with, otherwise the application may be refused<sup>106</sup>. These requirements include that the application must be made as soon as practicable after becoming aware of the grounds for doing so<sup>107</sup>. If the application is made in writing it must contain a declaration of truth<sup>108</sup>, and be served on the CAO and as directed by the judge advocate<sup>109</sup>, 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.<sup>110</sup>

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 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

<sup>103</sup> Armed Forces (Court Martial) Rules 2009 rule 62(1).

<sup>104</sup> Armed Forces (Court Martial) Rules 2009 rule 63(1).

<sup>105</sup> See Armed Forces (Court Martial) Rules 2009 rule 63 in entirety.

<sup>106</sup> Armed Forces (Court Martial) Rules 2009 rule 63(3).

<sup>107</sup> Armed Forces (Court Martial) Rules 2009 rule 63(4).

<sup>108</sup> Armed Forces (Court Martial) Rules 2009 rule 63(7).

<sup>109</sup> Armed Forces (Court Martial) Rules 2009 rule 63(8).

<sup>110</sup> Armed Forces (Court Martial) Rules 2009 rule 63(5).

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.<sup>111</sup>

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 summons<sup>112</sup>. 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 summons<sup>113</sup>. 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 summons<sup>114</sup>.

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 needed<sup>115</sup>;

(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 summons<sup>116</sup>; 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.<sup>117</sup>

(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.<sup>118</sup>

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

<sup>111</sup> Armed Forces (Court Martial) Rules 2009 rule 64.

<sup>112</sup> Armed Forces (Court Martial) Rules 2009 rule 65(1).

<sup>113</sup> Armed Forces (Court Martial) Rules 2009 rule 65(3)(a).

<sup>114</sup> Armed Forces (Court Martial) Rules 2009 rule 65(3)(b).

<sup>115</sup> Armed Forces (Court Martial) Rules 2009 rule 66(2).

<sup>116</sup> Armed Forces (Court Martial) Rules 2009 rule 66(3).

<sup>117</sup> Armed Forces (Court Martial) Rules 2009 rule 66(4).

<sup>118</sup> Armed Forces (Court Martial) Rules 2009 rules 66(5) and 66(6).

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.<sup>119</sup>

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 applies<sup>120</sup>.

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 attendance<sup>121</sup> or the witness has failed to comply with a witness summons<sup>122</sup>. 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 civilian<sup>123</sup>. 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 released<sup>124</sup>.

## 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 evidence<sup>125</sup>. 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 justified<sup>126</sup>.

76. **Arrest after arraignment.** Once a defendant has been arraigned a judge advocate has power to direct the defendant's arrest<sup>127</sup> 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

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' books<sup>128</sup>, the bank will then be issued an order by the judge advocate to permit

<sup>119</sup> Armed Forces (Court Martial) Rules 2009 rule 67.

<sup>120</sup> Armed Forces (Court Martial) Rules 2009 rules 63(10) and 65(2).

<sup>121</sup> Armed Forces (Court Martial) Rules 2009 rule 68(1).

<sup>122</sup> Armed Forces (Court Martial) Rules 2009 rule 68(2).

<sup>123</sup> Armed Forces (Court Martial) Rules 2009 rule 68(3) and (4).

<sup>124</sup> Armed Forces (Court Martial) Rules 2009 rule 68(b).

<sup>125</sup> Armed Forces (Court Martial) Rules 2009 rule 70.

<sup>126</sup> Armed Forces (Court Martial) Rules 2009 rule 41 and section 111 of the Act.

<sup>127</sup> Section 111 of the Act.

<sup>128</sup> Rule 71 and Bankers' Books Evidence Act 1879 section 7.



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 indictment<sup>129</sup> 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 Wales<sup>130</sup>.

79. Evidence must be given on oath or affirmation<sup>131</sup>, subject to particular rules regarding the admission of evidence given under a special measures direction<sup>132</sup> (see paragraphs 88 to 89) and unsworn evidence given by a witness who cannot be sworn<sup>133</sup>.

### 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 court<sup>134</sup>.

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 modifications<sup>135</sup>. 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 discipline<sup>136</sup>.

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 section<sup>137</sup>. 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 served within 14 days of the DSP complying or purporting to comply with the initial

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<sup>129</sup> Trial on indictment means trial by the Crown Court.

<sup>130</sup> Armed Forces (Court Martial) Rules 2009 rule 73(3).

<sup>131</sup> Armed Forces (Court Martial) Rules 2009 rule 74.

<sup>132</sup> Armed Forces (Court Martial) Rules 2009 rule 74(2)(a).

<sup>133</sup> Armed Forces (Court Martial) Rules 2009 rule 74(2)(b) and Youth Justice and Criminal Evidence Act 1999 section 56.

<sup>134</sup> Armed Forces (Court Martial) Rules 2009 rule 73(4).

<sup>135</sup> Armed Forces (Court Martial) Rules 2009 rules 75 and 76.

<sup>136</sup> Armed Forces (Court Martial) Rules 2009 rule 75(1).

<sup>137</sup> Armed Forces (Court Martial) Rules 2009 rule 77.

disclosure provisions of the Criminal Procedure and Investigations Act 1996 (CPIA96)<sup>138</sup>, 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 information<sup>139</sup>:

- (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 practicable<sup>140</sup>.

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 information<sup>141</sup>:

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

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<sup>138</sup> The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009/988

<sup>139</sup> Armed Forces (Court Martial) Rules 2009 rule 78.

<sup>140</sup> Armed Forces (Court Martial) Rules 2009 rule 79.

<sup>141</sup> 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 matter<sup>142</sup>. As a matter of common law such evidence is inadmissible, but it may be admissible under the CJA03<sup>143</sup>.

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;
  - (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

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<sup>142</sup> Armed Forces (Court Martial) Rules 2009 rule 81(6).

<sup>143</sup> Armed Forces (Court Martial) Rules 2009 rule 81.

- (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 intention<sup>144</sup>. 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 enlistment<sup>145</sup>, history of service in the Armed Forces, decorations, orders and various other armed forces-specific issues<sup>146</sup>. They also make provision for proof of instructions, regulations and certificates, and decorations badges and emblems<sup>147</sup>. 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 apply<sup>148</sup>, 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 evidence<sup>149</sup> 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.<sup>150</sup>
- 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

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<sup>144</sup> Armed Forces (Court Martial) Rules 2009 rule 82.

<sup>145</sup> Armed Forces (Court Martial) Rules 2009 rule 83.

<sup>146</sup> Armed Forces (Court Martial) Rules 2009 rules 84 and 85.

<sup>147</sup> Armed Forces (Court Martial) Rules 2009 rule 86.

<sup>148</sup> Armed Forces (Court Martial) Rules 2009 rule 87.

<sup>149</sup> Armed Forces (Court Martial) Rules 2009 rule 88(1).

<sup>150</sup> Armed Forces (Court Martial) Rules 2009 rule 88(2).

disagree, providing reasons for such agreement or disagreement.<sup>151</sup> 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.<sup>152</sup> 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).<sup>153</sup>

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.<sup>154</sup> 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.<sup>155</sup>

## 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 prejudice<sup>156</sup>.

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 CM<sup>157</sup>, and the Rules<sup>158</sup> 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 links<sup>159</sup>, see paragraph 34.

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<sup>151</sup> Armed Forces (Court Martial) Rules 2009 rule 88(3).

<sup>152</sup> Armed Forces (Court Martial) Rules 2009 rule 88(5) and (6).

<sup>153</sup> Armed Forces (Court Martial) Rules 2009 rule 88(8) and (9).

<sup>154</sup> Armed Forces (Court Martial) Rules 2009 rule 89(1) and (2).

<sup>155</sup> Armed Forces (Court Martial) Rules 2009 rule 88(9).

<sup>156</sup> Armed Forces (Court Martial) Rules 2009 rule 100.

<sup>157</sup> Youth Justice and Criminal Evidence Act 1999 (Application to the Armed Forces) Order 2009.

<sup>158</sup> Armed Forces (Court Martial) Rules 2009 rules 89 – 100.

<sup>159</sup> 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 defendant<sup>160</sup>. 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 sworn<sup>161</sup>. Objections will be determined by the judge advocate who will announce his decision in open court<sup>162</sup>. 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

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<sup>160</sup> Armed Forces (Court Martial) Rules 2009 rule 35(1).

<sup>161</sup> Armed Forces (Court Martial) Rules 2009 rules 35(2), 22(3) and 22A

<sup>162</sup> Armed Forces (Court Martial) Rules 2009 rules 35(3), 22(3) and 22A.

will take his place<sup>163</sup>. 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 specified<sup>164</sup>.

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 defendant<sup>165</sup>, 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 them<sup>166</sup>.

100. **Opening addresses.** Before calling the witnesses for the prosecution, the prosecutor may make an opening address.<sup>167</sup> 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 Wales<sup>168</sup>. 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 member<sup>169</sup>. 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 so<sup>170</sup>:

- a. Allow a request by the prosecution or defence that cross-examination or re-examination be postponed;
- b. Call any witness from whom the court has not already heard;

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<sup>163</sup> 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).

<sup>164</sup> Armed Forces (Court Martial) Rules 2009 rules 34(8) and (9).

<sup>165</sup> Armed Forces (Court Martial) Rules 2009 rules 37, 22(2) and 22A

<sup>166</sup> Armed Forces (Court Martial) Rules 2009 rule 35.

<sup>167</sup> Armed Forces (Court Martial) Rules 2009 rule 101.

<sup>168</sup> Section 162 of the Act.

<sup>169</sup> Armed Forces (Court Martial) Rules 2009 rule 102(1).

<sup>170</sup> Armed Forces (Court Martial) Rules 2009 rule 102(2).



- 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 link<sup>171</sup>, such that he is able to see and hear and be seen and be heard by the court<sup>172</sup>. 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 examination<sup>173</sup>, and the judge advocate may ask any witness under examination to withdraw while he considers whether a question is admissible<sup>174</sup>. 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 charge<sup>175</sup>. 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 advocate<sup>176</sup>. 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 fact<sup>177</sup> (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.<sup>178</sup>

**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 court<sup>179</sup>. This is an exceptional procedure and will usually only be appropriate in relation to 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

<sup>171</sup> Armed Forces (Court Martial) Rules 2009 rule 18.

<sup>172</sup> Armed Forces (Court Martial) Rules 2009 rule 103(4).

<sup>173</sup> Armed Forces (Court Martial) Rules 2009 rule 103(1).

<sup>174</sup> Armed Forces (Court Martial) Rules 2009 rule 103(2).

<sup>175</sup> 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).

<sup>176</sup> Armed Forces (Court Martial) Rules 2009 rule 105(1).

<sup>177</sup> Armed Forces (Court Martial) Rules 2009 rule 105(2).

<sup>178</sup> Armed Forces (Court Martial) Rules 2009 rule 106.

<sup>179</sup> Armed Forces (Court Martial) Rules 2009 rule 102.

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 make a closing address after either the close of the defendant's evidence, or where there is more than one defendant, the close of the last defendant's evidence, or if rebutting evidence is permitted, the close of that evidence (whichever is the latest). This general rule is subject to the following qualifications; where a defendant,

- a. is legally represented and has called evidence as to fact or given evidence on his or own behalf, the prosecutor may always make a closing address;
- b. is legally represented but does not adduce evidence of fact or does not give evidence on his behalf, the prosecutor may also make a closing address but should not do so routinely. This discretion to make a closing address should be exercised sparingly and after careful consideration but could for example be exercised in long or complex cases or in cases where it is appropriate for the prosecutor to suggest that inferences might be properly be drawn from the defendant's failure to give evidence, or for another sound reason justified by the unusual circumstances arising in the case;
- c. is the sole defendant and is not legally represented, it would be improper for the prosecutor to make a closing address whether or not the defendant adduces evidence of fact or gives evidence on his or own behalf;
- d. is one of two or more defendants, one or more of whom are legally represented, but is not represented himself, this does not prevent the prosecutor from making a closing address in relation to any represented defendant but in such circumstances the address must only focus on the evidence relating to those who are legally represented.

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 speech<sup>180</sup>.

**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 evidence<sup>181</sup>. 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 camera<sup>182</sup>, 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 separate<sup>183</sup>, 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 seniority<sup>184</sup>. The finding of the CM on a charge must be determined by a simple majority<sup>185</sup>, and in the event of an equality of votes on the finding the court must acquit the defendant<sup>186</sup>.

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<sup>180</sup> Armed Forces (Court Martial) Rules 2009 rule 107.

<sup>181</sup> Armed Forces (Court Martial) Rules 2009 rule 108(1).

<sup>182</sup> Armed Forces (Court Martial) Rules 2009 rule 109(1).

<sup>183</sup> Armed Forces (Court Martial) Rules 2009 rule 109(2).

<sup>184</sup> Armed Forces (Court Martial) Rules 2009 rule 109(3).

<sup>185</sup> Section 160(1) of the Act.

<sup>186</sup> Section 160(3) of the Act.

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 offence<sup>187</sup>, 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 charge<sup>188</sup>, and if in relation to any charge no finding is recorded the judge advocate may direct that it should lie on the file<sup>189</sup>. 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 findings<sup>190</sup>. 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 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.

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<sup>187</sup> Section 161(1) of the Act.

<sup>188</sup> Armed Forces (Court Martial) Rules 2009 rule 108(2).

<sup>189</sup> Armed Forces (Court Martial) Rules 2009 rule 110(5).

<sup>190</sup> Armed Forces (Court Martial) Rules 2009 rule 110(3).

## 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 applies<sup>191</sup> 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 such matters, the president of the board and lay members will enter the courtroom and take their places with the judge advocate.

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<sup>191</sup> Armed Forces (Court Martial) Rules 2009 rule 27(3)(a).

## 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 defendant<sup>192</sup>. 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 terminated<sup>193</sup>. 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.<sup>194</sup> 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.<sup>195</sup>

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:<sup>196</sup>

- 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);
- d. In respect of any previous convictions of the offender for:
  - (1) Service offences;

<sup>192</sup> Armed Forces (Court Martial) Rules 2009 rules 35(1), 22(3) and 22A.

<sup>193</sup> Armed Forces (Court Martial) Rules 2009 rule 114(1).

<sup>194</sup> Armed Forces (Court Martial) Rules 2009 rule 112(1).

<sup>195</sup> Armed Forces (Court Martial) Rules 2009 rule 113.

<sup>196</sup> Armed Forces (Court Martial) Rules 2009 rule 114(2).

- (2) Offences in the UK; or
- (3) Relevant<sup>197</sup> 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)<sup>198</sup>; 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.
- i. Any statement to the effect of the offence on the victim, the victim's family or others. This is generally known as the Victim Personal Statement (see further in JSP 839).

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 Act<sup>199</sup>. 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 offence<sup>200</sup>.

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 place<sup>201</sup>.

124. **Pre-sentence reports.** A pre-sentence report (PSR)<sup>202</sup> 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 must serve a copy on the prosecution, the offender and the judge advocate before the time

<sup>197</sup> 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).

<sup>198</sup> Armed Forces (Court Martial) Rules 2009 rule 114(7).

<sup>199</sup> Armed Forces (Court Martial) Rules 2009 rule 114(4).

<sup>200</sup> Armed Forces (Court Martial) Rules 2009 rule 114(5).

<sup>201</sup> Armed Forces (Court Martial) Rules 2009 rule 113(2).

<sup>202</sup> As defined by section 257 of the Act.

appointed for the sentencing hearing<sup>203</sup>. 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.<sup>204</sup>

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 directs<sup>205</sup> 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<sup>206</sup> to the record of proceedings.

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 sentence<sup>207</sup>. 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 court<sup>208</sup>, and in the event of an equality of votes on the sentence, the judge advocate has the casting vote<sup>209</sup>.

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 convicted<sup>210</sup>. The sentence must be recorded in writing, dated and signed by the president of the board and the judge advocate<sup>211</sup>, 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 advocate<sup>212</sup>, and the sentence must be formally announced in open court by the president of the board<sup>213</sup> unless the judge advocate is sentencing alone, in which case the judge advocate will announce the sentence. With leave of the judge advocate, the president of the board (if a Service person) may make additional remarks to the defendant about the

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<sup>203</sup> Armed Forces (Court Martial) Rules 2009 rule 113(1).

<sup>204</sup> Armed Forces (Court Martial) Rules 2009 rule 116.

<sup>205</sup> Armed Forces (Court Martial) Rules 2009 rule 115(1).

<sup>206</sup> Armed Forces (Court Martial) Rules 2009 rule 115(2).

<sup>207</sup> Armed Forces (Court Martial) Rules 2009 rule 20.

<sup>208</sup> Section 160(1) of the Act.

<sup>209</sup> Section 160(4) of the Act.

<sup>210</sup> Section 255 of the Act.

<sup>211</sup> Armed Forces (Court Martial) Rules 2009 rule 117(1).

<sup>212</sup> Armed Forces (Court Martial) Rules 2009 rule 117(2).

<sup>213</sup> Armed Forces (Court Martial) Rules 2009 rule 117(3).

effects of his offending on his Service to which he belongs and the likely effects of the sentence on his Service career<sup>214</sup>.

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

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<sup>214</sup> Armed Forces (Court Martial) Rules 2009 rule 117(4).



## 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 applied<sup>215</sup>. The procedure to be followed for the exercise of the power to vary is provided for by the Rules<sup>216</sup>.

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 court<sup>217</sup>

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 alone<sup>218</sup>. Lay members may attend the proceedings by live link<sup>219</sup>.

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,

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<sup>215</sup> Archbold Criminal Proceeding Evidence and Practice or other practitioners' texts and case law should be consulted.

<sup>216</sup> Armed Forces (Court Martial) Rules 2009 rule 118.

<sup>217</sup> See [Chapter 28](#) (Court Martial constitution and roles) for details of the constitution of the court for variation proceedings.

<sup>218</sup> 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.

<sup>219</sup> 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 defence<sup>220</sup>. In the latter case, the application must be in writing and set out the grounds for the application<sup>221</sup>, 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 decision<sup>222</sup>, 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 vote<sup>223</sup>. 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 129<sup>224</sup>.

## 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 subsequently<sup>225</sup>, but is not required to do so.

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<sup>220</sup> Armed Forces (Court Martial) Rules 2009 rule 119(3).

<sup>221</sup> 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.

<sup>222</sup> Armed Forces (Court Martial) Rules 2009 rule 119(5).

<sup>223</sup> Armed Forces (Court Martial) Rules 2009 rule 122.

<sup>224</sup> Armed Forces (Court Martial) Rules 2009 rule 123.

<sup>225</sup> 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 DSP<sup>226</sup>. 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 expires<sup>227</sup>.

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 time<sup>228</sup>. 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)<sup>229</sup>, 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 together<sup>230</sup>.

143. **Abandonment of appeal.** An appellant will be treated as having abandoned his appeal if he fails without reasonable excuse to appear for the appeal<sup>231</sup>, or if he withdraws his appeal in writing.

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<sup>226</sup> Armed Forces (Court Martial) Rules 2009 rule 125(1) and (2).

<sup>227</sup> Section 285(3)(b) of the Act and Armed Forces (Court Martial) Rules 2009 rule 127.

<sup>228</sup> Armed Forces (Court Martial) Rules 2009 rule 127(1).

<sup>229</sup> Armed Forces (Court Martial) Rules 2009 rules 128(1)(b) and 46.

<sup>230</sup> Armed Forces (Court Martial) Rules 2009 rule 128(4).

<sup>231</sup> 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 SAC<sup>232</sup>. 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 148<sup>233</sup>.

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<sup>232</sup> 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.

<sup>233</sup> 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 CM<sup>234</sup> 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 sentence<sup>235</sup>. 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 imprisonment<sup>236</sup>.

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

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<sup>234</sup> CM for this purpose includes the Appeal Court and the Supreme Court (House of Lords), see section 191(7) of the Act.

<sup>235</sup> Section 191(2) of the Act and Armed Forces (Court Martial) Rules 2009 rule 132.

<sup>236</sup> 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.<sup>237</sup>

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 148<sup>238</sup>. 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 arrest<sup>239</sup>.

### **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 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

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<sup>237</sup> Armed Forces (Court Martial) Rules 2009 rule 134(2).

<sup>238</sup> Armed Forces (Court Martial) Rules 2009 rule 134(4).

<sup>239</sup> Armed Forces (Court Martial) Rules 2009 rule 134(6).

taken place within 48 hours of arrest the offender must be released<sup>240</sup>. 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 required<sup>241</sup>. Any such requirements may be varied or discharged by the judge advocate on application by the offender<sup>242</sup>. 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 possession<sup>243</sup>.

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 proceedings<sup>244</sup> - 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 proven<sup>245</sup>.

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;
- (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;

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<sup>240</sup> Armed Forces (Court Martial) Rules 2009 rule 136.

<sup>241</sup> 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.

<sup>242</sup> Armed Forces (Court Martial) Rules 2009 rule 136(7).

<sup>243</sup> Armed Forces (Court Martial) Rules 2009 rule 137.

<sup>244</sup> Armed Forces (Court Martial) Rules 2009 rule 32(6).

<sup>245</sup> Armed Forces (Court Martial) Rules 2009 rules 138(3) and (4).

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 proceedings<sup>246</sup>, 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.

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<sup>246</sup> 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 hearing<sup>247</sup>.

159. In addition, a judge advocate may on an application for amendment, amend the requirements of an overseas community order, with or without a hearing<sup>248</sup>. He may also, on application, extend an unpaid work requirement, with or without a hearing<sup>249</sup>.

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 required<sup>250</sup>. Any such requirements may be varied or discharged by the judge advocate on application of the offender<sup>251</sup>. 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 possible<sup>252</sup>.

### 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 commitment<sup>253</sup>. 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;

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<sup>247</sup> Armed Forces (Court Martial) Rules 2009 rules 140 and 142.

<sup>248</sup> Armed Forces (Court Martial) Rules 2009 rule 143.

<sup>249</sup> Armed Forces (Court Martial) Rules 2009 rule 144.

<sup>250</sup> 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.

<sup>251</sup> Armed Forces (Court Martial) Rules 2009 rules 141(7), 142(9).

<sup>252</sup> Armed Forces (Court Martial) Rules 2009 rule 141(8) and 142(10).

<sup>253</sup> 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 alone<sup>254</sup>. 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 power<sup>255</sup> 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 alone<sup>256</sup>. 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 circumstances<sup>257</sup>. Such action can be taken either on an application for such remission<sup>258</sup>, or as a result of an application under paragraph 163. Where the application is for remission of the fine, the

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<sup>254</sup> Armed Forces (Court Martial) Rules 2009 rule 145.

<sup>255</sup> Section 251 of the Act.

<sup>256</sup> Armed Forces (Court Martial) Rules 2009 rule 146.

<sup>257</sup> Sections 267 and 249 of the Act.

<sup>258</sup> Armed Forces (Court Martial) Rules 2009 rule 147.

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 alone<sup>259</sup>. 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 1997<sup>260</sup>. 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 order<sup>261</sup>. 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 him<sup>262</sup> may apply for the variation or revocation of the order<sup>263</sup>. 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**

168. The CM has the power to deal quickly and effectively with a person who commits contempt of court<sup>264</sup>. This includes the power to keep the person in custody until the end of

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<sup>259</sup> Armed Forces (Court Martial) Rules 2009 rule 148.

<sup>260</sup> Section 229 of the Act.

<sup>261</sup> Section 232 of the Act.

<sup>262</sup> Section 233 of the Act.

<sup>263</sup> Section 235(4) of the Act and Armed Forces (Court Martial) Rules 2009 rule 150.

<sup>264</sup> Section 309 of the Act.

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 civilian<sup>265</sup>. The powers may be used in relation to anyone who commits an offence by<sup>266</sup>:

- 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 court<sup>267</sup>.

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 4<sup>268</sup> on the standard scale, or do both<sup>269</sup>. 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 scale<sup>270</sup>.

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 hearing<sup>271</sup>. 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).

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<sup>265</sup> 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.

<sup>266</sup> Section 309(6) of the Act.

<sup>267</sup> Section 309(1) of the Act.

<sup>268</sup> Level 4 is the scale set in civilian courts.

<sup>269</sup> Section 309(2) of the Act.

<sup>270</sup> Section 309(3) of the Act.

<sup>271</sup> 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;
- j. 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 he accepts or declines an offer of legal aid to fund legal representation, 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 (MOD F2263). 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. Complete your contact details at the relevant section and ensure the completed form is passed to the Div Offr/SSA/P1 Hr Disc personnel for onward transmission to AFCLAA as soon as possible: see paragraph 24 for further detail.

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. If the defendant does not already know which legal representative he wishes to represent him, he can ask AFCLAA to nominate one on his behalf; AFCLAA are not able to recommend legal representatives or otherwise provide details of independent legal representatives in advance. 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. An assessment of the defendant's means, taking into account their personal and financial circumstances, will determine whether they will be eligible to receive free legal aid, or will be required to make a contribution; income contributions are required in advance of trial, but will be refunded in full where the case is discontinued or the defendant is otherwise acquitted. See JSP 838 – The Armed Forces Legal Aid Scheme for further advice. 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 branch<sup>272</sup> 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: see paragraph 25 for further advice. 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

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<sup>272</sup> For Army defendants this must be an RAF legal branch and vice versa.

interests to apply for legal aid, as the fees for legal representation are governed by the legal aid regulations and are therefore usually less than the private rates charged by legal representatives. 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 MOD F2263; the defendant should be encouraged to submit a completed MOD F2263C – Hardship Review, if applicable, as this may reduce or remove any contribution required. For details of the procedure see JSP 838 (The Armed Forces Legal Aid Scheme).

25. Upon receipt of a completed application, and any Hardship Review, AFCLAA will make a formal offer of legal aid, using a MOD F2263A – Contribution Order, detailing what financial contribution the defendant is required 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 form<sup>273</sup>. 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 rapidly<sup>274</sup>. 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 relevant Court Centre) but the legal representative is responsible for his own travel arrangements; he remains personally liable for all accommodation and subsistence costs, and travel costs other than local travel to/from

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<sup>273</sup> 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.

<sup>274</sup> It is usual for the first hearing to take place within 4 weeks of service of the prosecution papers.

the airport and the Court when overseas. 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:

- 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.