



PRACTICE IN COURTS
MARTIAL:
COLLECTED MEMORANDA

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January Version 2

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Introduction

This collection of Practice Memoranda is issued under the authority of the Judge Advocate General as an aid to those who practice in Courts Martial. All previous Practice Memoranda issued by the Judge Advocate General or his predecessors are hereby withdrawn.

There is no statutory basis for these Practice Memoranda. They have been produced following extensive consultation and represent opinions or directions, including interpretations of the law, which provide persuasive guidance. Judge Advocates are encouraged to follow the guidance contained herein, but where they decide to depart from it they should explain their reasons for doing so on the record.

This document sets out the practice as at 1 January 2008. Further Practice Memoranda will be published in due course. It is proposed that each time a new or revised Practice Memorandum section is published, it will be consolidated into this document by issue of a new version.

His Honour Judge Jeff Blackett
Judge Advocate General

1 January 2008

PRACTICE MEMORANDUM: Section 1

CONDUCT TO THE PREJUDICE: NDA s39 and AA/AFA s69

- 1.1. NDA s39 and AA/AFA s69 offences proscribe
“... conduct to the prejudice of good order and naval/military/air force discipline.”
In some cases prosecutors have concentrated solely on proving the conduct without giving sufficient consideration to proving the prejudice to good order and service discipline caused by that conduct.
- 1.2. The law was helpfully set out in the case of *R v Dodman* [1998] 2 Cr App R 338 and the notes in the Manual of Military Law (p 350) refer to that judgment. Conduct which amounts to an offence against any other section in the Acts (including s42/s70) should not normally be charged under s39/s69, unless the gravamen of the conduct is its prejudicial effect. Sometimes this principle has been ignored where the prosecution is seeking stoppages of pay as compensation for damage caused by the conduct, but that is not a proper approach where the conduct constitutes a substantive disciplinary or criminal offence.
- 1.3. The sections proscribe conduct which is actually prejudicial not *potentially* prejudicial or *likely* to prejudice good order and Service discipline. In that respect note c(iii) in the Manual is misleading. A better formulation is that conduct which is “likely to be harmful” or “potentially harmful” can be said to be *actually* prejudicial. Normally this is likely to relate to the undermining of a senior person’s rank or status, or an indication that the defendant has flouted authority in front of others, or some other breakdown of good order or discipline. When a prosecutor opens the case he should describe how the conduct was prejudicial.
- 1.4. *Mens rea* for these offences was addressed in *Dodman*. Hobhouse LJ said (at page 346):

“it is the duty of a judge advocate to consider each charge laid under section 69 separately and consider what mental element is either expressly or by implication included in the conduct alleged and then to give the court-martial an appropriate direction as to what the prosecution have to prove regarding the state of mind of the accused in relation to that charge. Where the particulars do not involve any specific intent or specific state of mind then no further direction will be required than that which is appropriate to the basic *mens rea*. Indeed in very many cases there probably will be no dispute that the relevant act or omission, if it occurred, was or must have been deliberate. What summing-up is appropriate and necessary always depends upon the facts and issues in any given case and as regards any given charge involved in that case.”
- 1.5. It is a matter for the board to decide whether the conduct is objectively prejudicial, but the prosecution must satisfy the court that there was *mens rea* on the part of the defendant at the time he acted or omitted to act. The proper direction for the court is that the prosecution must prove:
 - The defendant did the act (or made the omission) complained of;
 - He did the act intentionally or recklessly; and
 - The conduct was *objectively* prejudicial to good order and Service discipline (the assessment being a matter of fact for the board).

- There may be an additional element of *mens rea* where the wording of the charge imports some additional mental element such as dishonesty.

1.6 It is necessary to consider whether there is any limit to the type of conduct caught by s39/s69, because if it is completely unfettered there is a risk that the sections would offend against Article 7 of the European Convention on Human Rights. The sections themselves are not incompatible with the Convention. However, a specific charge drawn under those sections which contained an allegation that was not objectively prejudicial to good order and service discipline (that is, where a reasonable Service person could not have contemplated that the conduct alleged was prejudicial when he did it) might fail either in the face of an abuse argument or on a submission of no case to answer.

PRACTICE MEMORANDUM: Section 2

TIME LIMITS FOR CIVILIAN SUMMARY OFFENCES

2.1 In the past some Service personnel have been prosecuted without having previously been charged, or informed that they will be charged, within six months of committing offences which would be summary only in the civilian courts.

2.2 The Magistrates Court Act 1980 s127 states:

‘A Magistrates Court shall not try on information or hear a complaint unless the information was laid, or the complaint made, within six months from the time when the offence was committed or the matter of the complaint arose’.

It was argued in *R v Buchan* [2007] EWCA Crim 76 that this section should apply *mutatis mutandis* to the court martial system, but the CMAC stated that s127 “simply does not apply to courts martial”. The court only considered that very narrow point.

2.3 NDA s42 and AA/AFA s70 specifies that every person subject to the relevant Act who commits any civil offence shall be guilty of an offence against one of those sections. The expression “civil offence” means any act or omission which is punishable by the law of England, or would be so punishable if committed in England. In relation to summary only offences it could be argued that if an information had not been laid within six months then it would not be punishable by the law of England. In that case there would be no jurisdiction to try the matter before a court martial under s42 or s70.

2.4 The counter to this is that the Magistrates Court Act s127 relates only to magistrates courts and it is, in any event, only a procedural section which does not apply to courts martial. Additionally, NDA s52(1) and AA/AFA s132(1) specify that time limits in respect to indictable civil offences must be observed. By implication it could thus be argued that Parliamentary draftsmen specified indictable offences because they envisaged that there would be no such limit on summary offences.

2.5 In *Secretary of State for Defence v Warn* [1968] 3 WLR 609 the respondent was convicted at a Naval court martial on charges of gross indecency with another man, contrary to the NDA s42 and the Sexual Offences Act 1956 s13. The Sexual Offences Act s8 required the consent of the DPP before proceedings were instituted, but no such consent had been obtained. The House of Lords held that the provisions of section 8 were procedural, but they were mandatory and applied equally to a court martial which was therefore incompetent to convict in the absence of the consent of the DPP. The proceedings were therefore a nullity and the convictions were quashed. Lord Hodson (at page 614) said:

‘Procedural sections are usually mandatory and there is nothing which points to the contrary in this case. Procedural provisions are, as here, often inserted for the protection of accused persons.’

2.6 As a matter of equity and fairness, it seems to be wrong to enable civilian charges to be tried by courts martial which would be procedurally time-barred from trial in the civilian courts. The CMAC in *Buchan* suggested that if the prosecution tried to bring such a case, abuse of process would be arguable if the delay caused prejudice (although it did not on the facts of that case). In such a case it would follow that a summary only matter should

not be tried by court martial if the accused has not been charged with the offence (or at least informed by the Service police or his commanding officer that he will be charged) within six months of the offence being committed or the complaint being made. If however there are elements of the offending which involve additional issues which are Service related, prosecutors would still be able to consider charging an accused with a relevant offence under the Service Discipline Acts which is not similarly time-barred in this way (but see also para 1.2 above).

- 2.7 In the civilian system an information is laid when it is received at the office of the clerk to the justices for the relevant area. Within the military system, a court martial should not try a civilian summary only matter unless a complaint has been made within six months from the time when the offence was committed or the matter of the complaint arose. The complaint is made when:
- (a) the service police (or MoD or Home Office police) report the accused to his Commanding Officer; or if that is not done:
 - (b) the Charge Report / Charge Sheet is brought into existence; or if that is not done:
 - (c) the Commanding Officer informs the accused that he is forwarding the matter to Higher Authority with a view to trial by court martial.
- 2.8 If the original charge under s42/ s70 was indictable or triable either way, and it is subsequently changed on review by the Prosecuting Authority to a summary-only charge but by now outside the 6 month time limit, it would be perfectly proper for the charge to be tried because the defendant would have suffered no prejudice by the Prosecuting Authority's actions.

PRACTICE MEMORANDUM: Section 3

PLEA AND CASE MANAGEMENT HEARINGS (PCMH) AND LISTING PRACTICE

3.1 Introduction.

The practice of holding automatically Plea and Case Management Hearings (formerly Directions Hearings) before a judge in most Court Martial cases was introduced to reduce and minimise delay and to afford prosecution and defence the time to prepare their cases. It also allows the trial judge to take into account the particular needs of victims and witnesses, and the operational commitments of the Armed Forces. This memorandum incorporates into the case management framework the Courts-Martial Rules (Royal Navy, Army and Royal Air Force) which came into force on 1 January 2008 and introduced arraignment and pleas at the preliminary stage, as well as taking into account:

- the recently-built two-court centres;
- the prospective transition to further new rules in 2009 under the Armed Forces Act 2006;
- the prospective introduction of parts of the Criminal Procedure and Investigations Act 1996 (CPIA) into the courts-martial system in April 2008; and
- the increasingly tri-service nature of the Military Court Service since the Director of the MCS took over responsibility for the NCAO.

It also reflects the need for such hearings to take place in open court so that any appropriate preliminary matters may be resolved. A description of the way the listing system works is given at Annex A, at the end of this document.

Ensuring the efficient dispatch of work is both a function and a duty reposed in the judiciary at all levels and in every jurisdiction. In the military jurisdiction this is always tempered by consideration of the essential operational needs of the Armed Forces. As a result cases are listed by the Military Court Service under judicial supervision and sanction.

3.2 The Framework.

In order to provide for effective case management, efficient listing of work, a permanent prosecution presence, and to deal with matters as they arise, there are four courts listed to sit every week for the 43 weeks which are currently available each year. In the UK these comprise one court each at the new centres at Bulford, Colchester and Catterick, and in Germany Osnabrück (moving to temporary accommodation at Sennelager and later to the new court centre at Sennelager). These are the 'primary' courts, which expression simply means they sit continuously, and since they ordinarily only hear work from their designated command areas, the provision of suitable boards becomes straightforward in Army cases as the boards will always come from another, specified, command area. There are 'secondary' courts, which means they sit regularly but not continuously, at Aldergrove, Hohne and Episkopi; they are used for trials whenever they are the most appropriate venue but rarely otherwise, which also applies to the second courtrooms at each primary venue. The court centre at Portsmouth is, in effect, the third courtroom for Bulford and Royal Navy cases after the Plea and Case Management Hearing are normally listed there, whether for sentencing or for trial, unless there is an operational need for a case to be listed at Plymouth or elsewhere. If in a given week there is no judge at Portsmouth, Royal Navy Plea and Case Management Hearings are heard at Bulford or at any other location

where a judge is available. The facility remains for 'tertiary' courts - that is, ad hoc premises made available anywhere in the world for a single trial where the interests of justice and operational commitments so require.

3.3 Plea and Case Management Hearings (PCMH).

Each new case, with the exception of Absence Without Leave (AWOL) cases, reaching the Military Court Service, whether UK or Germany based, is immediately considered for a PCMH. The process is as follows:

3.3.1 Military Court Service action: It is assumed the case is ready for PCMH, as far as the prosecution is concerned, once they have issued papers. Immediately following the issue of prosecution papers, MCS issues a letter to the defendant's Commanding Officer setting a date for a PCMH. A trial date may be included in this letter in simple cases and confirmed or re-set at or following the PCMH.

3.3.2 Commanding Officer action: The CO serves this letter on the defendant, at the same time as or very shortly after serving the prosecution papers. The letter advises the defendant that the purpose of the PCMH is to arraign him and set a timetable for trial or sentence as the case may be.

3.3.3 Unit Defending Officer / Defendant's Assisting Officer / Divisional Officer action: The defendant's UDO/DAO/DO must inform the defendant that if he is to obtain legal advice (which is highly advisable but not strictly obligatory), he is required to do so urgently, which means in good time before the PCMH. If the defendant is pleading not guilty, after the Criminal Procedure and Investigations Act begins to apply in April 2008, the defendant's legal adviser will have to produce and serve a defence statement in advance of the PCMH, and therefore will need time to take instructions and prepare the statement. If a particular lawyer is not available on the date fixed for the PCMH, the UDO/DAO/DO should advise and help the defendant to find an alternative lawyer in time. If the defendant does not obtain legal advice soon enough the PCMH and the remainder of the process may be delayed, and failure to give the defence statement may adversely affect the defendant's case, so UDO/DAO/DO support and encouragement is essential to both the efficiency and the fairness of the system.

3.3.4 Judge Advocate General action: In most cases, any judge who is sitting at the relevant court centre conducts the PCMH. However a small number of exceptionally serious cases will have been brought to the attention of JAG who may designate them as 'ticketed' cases, which means that a particular judge or category of judges is nominated to manage and preside over each case. Such ticketing designations are made before the PCMH.

3.4 Absence Without Leave (AWOL).

If the case involves only charges of AWOL, it is not listed for a PCMH. The Prosecuting Authority should issue papers to enable a trial to be held **within one month** of an absentee's return to his unit, or earlier if an absentee is kept in custody pending trial. The letter from MCS to the CO specifies the date in anticipation of a plea of guilty. The MCS letter also states that if the defendant intends to plead not guilty, he should immediately inform the MCS so that the Prosecuting Authority can be given notice to prepare for a contested hearing, but the trial date will remain the same. A Pre-Sentence Report is automatically ordered by MCS.

In custody hearings in AWOL cases, Service lawyers representing COs should ensure that where trial by Court Martial is advised, the CO is informed of the short time-frame for trial and the Prosecuting Authority is sent a copy of the advice so as to assist them in tracking cases.

3.5 Form of Plea and Case Management Hearing: dates and venues.

Every case (apart from AWOLs) is listed automatically for a PCMH. Every PCMH is required to be convened as a preliminary hearing and arraignment under Rules 36-40 of the Courts-Martial Rules 2007. MCS are to assume that the judge has given a direction of his own motion to that effect in each case. It is in open court and robed unless the judge specifically directs otherwise. A formal convening order is required, which will normally specify that the details of the board will be given later and the Judge Advocate is to be appointed by the Judge Advocate General.

Holding a PCMH enables binding pleas to be taken at the earliest practicable stage, enables substantive resolution of issues where necessary ahead of trial, emphasizes the public accountability of charge reductions or withdrawals by prosecutors, and enables orders to be made concerning matters such as reporting restrictions, and grant of permission for live link (video) evidence at trial.

3.5.1 The PCMH is about **four weeks** after the date of issue of prosecution papers. PCMHs are normally listed on Monday mornings commencing at 10.00am. The aim is that all information relevant to listing is put into the MCS central system from a fixed number of courts and at the same time each week. A PCMH may be held on a different day if all parties in the case agree and if a judge consents or so orders of his own motion. In this event the MCS confirms the details with as much advance notice as possible.

3.5.2 As a consequence, Courts Martial trials due to start or continue on Mondays are unlikely to start until 14.00, so that board members will not be required until that time.

3.5.3 PCMHs are held ordinarily at the four primary centres, Bulford, Colchester and Catterick in UK and Osnabrück (or its replacement as primary centre) in Germany, and at Portsmouth for RN trials (see para 3.2 above). This may be varied only on those occasions when a judge has other work at another centre and there are good and expedient reasons of economy and convenience for listing a PCMH on a Monday morning at that location.

3.5.4 Where there is an acceptable guilty plea, the sentencing date is about another three weeks after the PCMH, normally at the same court centre. Such sentencing fixtures are listed to last for a minimum of one and a half hours, thereby allowing four to be listed each day, although in some cases the judge may direct that more time be allowed.

3.5.5 Although sitting times are at the discretion of each individual judge, courts do not normally sit earlier than 10.00am (09.30 for custody hearings), nor on any applications over the short adjournment, nor late unless trial circumstances require it. Thus any proposed listing of more than four sentencing hearings in a day requires to be considered carefully by the judge.

3.6 Directions form.

The form **JAG DH1 – DIRECTIONS OF JUDGE ADVOCATE** is widely and freely distributed to all practitioners who represent prosecution or defendants and to all stakeholders in the military justice system. A blank copy is enclosed with the MCS letter informing the defendant of the PCMH. It is often referred to as the “pink form” (but it does not have to be on pink paper). The current (Jan 08) version of the DH1 form is labelled ver 4 and it can be completed on paper or electronically. If and when modifications are found necessary, ver 5 etc will be issued on the authority of JAG; otherwise the template wording is not to be changed by users.

3.7 Attendance of defendant and prosecution and defence representatives.

If the defendant is to be arraigned and required to plead, he must attend in person. He may wish to instruct his defence advocate also to attend in person to advise him. The purpose of the PCMH will be frustrated if representatives do not prepare in advance. If they do so then PCMHs can sometimes be conducted largely by VTC, although if it is easy for the defence and prosecution representative to appear in person then they should do so in any event. A Judge Advocate may not require personal attendance of advocates (unless he decides that the issues in the case require it) provided that the DH1 form has been (a) agreed between prosecution and defence advocates, and (b) delivered to OJAG and copied to the court centre in which the PCMH is listed. It should be sent by fax or electronically at least three working days in advance of the scheduled PCMH (see paragraph 3.8 below).

If, however, the DH1 form is **not** so completed and delivered to OJAG and court centre within the specified time, then the prosecution and defence representatives **must** attend in person unless the Judge Advocate orders otherwise in response to a written application. The rationale for this requirement is that both prosecution and defence counsel must be at court so that they can deal effectively with the completion of the DH1 form and any other matters which may arise, including the pleas. Ideally the prosecutor with conduct of the case should appear, but if that is not possible another prosecutor can represent the Prosecuting Authority. A prosecutor due to appear at the same court centre on other matters that day (and since the primary court centres sit regularly, this is so every Monday) should be able to represent the Prosecuting Authority if necessary. If prosecutors appear at the PCMH who do not have conduct of the case, judges will allow short adjournments to enable them to take further instructions by phone during the hearing.

3.8 Duties of representatives.

Prosecutors and defence advocates must communicate before the PCMH in order to complete as much of the DH1 form as possible jointly in advance of the date of that hearing. The defence representative is required to prepare a draft DH1 form to identify areas of potential dispute which need to be resolved by the judge. At a PCMH, the judge will expect, at the very least, that the defence representative will have:

- (a) provided advice to the defendant, particularly about plea and related matters,
- (b) completed the parts of the DH1 form that are relevant to his client, and
- (c) passed the form so completed to the prosecution in sufficient time for them to consider it and make any relevant comments.

- (d) complied with the requirements of CPIA to give a defence statement, if there is a plea of not guilty (from April 2008 on).

3.9 Handling the form.

At the PCMH a copy of the draft DH1 form is handed up to the judge, who completes it giving any relevant directions including setting the case management timetable and parameters for listing so the trial can be prepared and the date set.

If the cases of two or more defendants are linked, the judge may use separate DH1s for each defendant, if the directions vary, or may combine them into one form. If lengthy directions are required, continuation sheets may be used.

At the end of the hearing the definitive DH1 form is signed by the judge and stamped by the Court Officer, who will give photocopies to all participants to ensure there is no doubt about directions given and the timetable for trial. Copies for those attending by video live link are faxed. The directions given are valid and binding only if the form is signed and stamped; unsigned copies are considered merely drafts.

3.10 Action at Plea and Case Management Hearing.

3.10.1 The Court Officer or his assistant must be in court to provide listing options, and the listing parameters defined for a case at PCMH are to be adhered to. Accordingly the location and availability of witnesses should be ascertained as far as possible either prior to or during the PCMH, as witness requirements become known. Some enquiries will take time, but it is preferable to have short adjournments throughout the PCMH rather than fixing a case for a time and place which is later discovered to be unsuitable or impossible.

3.10.2 The point of having all parties, the judge and MCS together (in person or via video live link) is to achieve agreement on case management where possible, for timetables to be set for disclosure, etc. and for the future shape of the case to be determined. Regardless of plea, the judge, in conjunction with the Court Officer, identifies the relevant parameters for listing the trial at the appropriate venue on the next available date. In the case of guilty pleas, this will in straightforward cases be the next 1½ hour 'slot' around three weeks ahead in the list of the court at which the PCMH takes place, although in some cases the judge may direct that more time be allowed. Most or all guilty pleas for sentence will be listed into the primary court centres or Portsmouth.

3.10.4 If there is a guilty plea to one or more charges, the judge often directs that a Pre-Sentence Report (PSR) be written, if appropriate, after giving a broad indication of sentencing options for the guidance of the report writer. The MCS makes the arrangements for the PSR to be produced.

3.10.5 If the defendant pleads not guilty (or declines to plead) the judge gives further directions which may include the timetabling of a further PCMH. If reporting restrictions are imposed at the PCMH, a further hearing may be timetabled to allow for any media applications to amend or set aside that order. In most straightforward cases the default expectation is that six weeks or so will elapse between PCMH and trial.

3.11 Listing, vacating and moving cases.

- 3.11.1 Guilty pleas for sentencing are more easily moved than contested trials. The Court Officer and judge usually agree to remind the parties at PCMH that the sentencing hearing may be brought forward from the date listed, with suitable notice (no less than 24 hours, and possibly a minimum of 48 hours in Germany), within a “Warned List Period” of up to two weeks. This allows the Court Officer more efficiently to arrange the work allocated to any given board during its two-week “Warned List Period”. It is not practicable in this jurisdiction to compel the bringing forward of trials, and accordingly they may be brought forward only with the consent of all involved, as often happens.
- 3.11.2 Save in complex or serious cases, the unavailability of counsel is not an acceptable reason for adjournment.
- 3.11.3 There may be occasions when one or both parties wishes to postpone the hearing date originally listed for some reason. In all cases the proper approach is for the party concerned to communicate this to MCS, who notify the trial judge or, if he is unavailable, JAG or VJAG. The judge will have regard to the reason put forward for vacating, and whether the application is by consent. Ordinarily where the application is opposed by prosecution or defence a ‘mention’ hearing should be held. If that is done, then a new date if required will ordinarily be fixed at that mention hearing. If the application is by consent, and the judge decides that the reason is good enough not to require further investigation, it may well be appropriate without a hearing to postpone to a new date. The chain of command has no formal standing as a party to the case, but may make representations about listing arrangements via the Court Officer, copied to the prosecution and the defence.

PRACTICE MEMORANDUM: Section 4

MORRIS DIRECTION

Following the case of *Morris v United Kingdom* (2002) 34 EHRR 1253, the practice has grown for judges to give a warning (known as a “Morris Direction”) at the beginning of every court martial after the board members have been sworn. The precise formulation of this direction is a matter for the trial judge, but it should include the following topics in a contested trial, and those marked * in a guilty plea. A suitably modified direction incorporating topics marked # should also be given before a Summary Appeal Court hearing.

4.1 The Military Court Guide *#.

You have all received and duly certified that you have read and understood the Military Court Guide. You must remember your duties and obligations which are explained therein throughout the trial and I will summarise some of the more important points at this stage.

4.2 Differing functions.

Our functions in this trial are very different. The law is my area of responsibility and you must accept the directions I give. On the other hand the facts are entirely a matter for you and although I will remind you of the evidence when I sum up at the end of the trial I play no part in deciding any matters of fact.

4.3 Evidence and no contact *#.

You must decide this case only on the evidence presented to you in court. You and you alone must decide and you must not be influenced by anybody else. You must not, therefore, discuss the case with anyone outside your number, and you should only discuss the case when you are all present together. You must have no contact with members of the prosecution or defence teams nor any contact with actual or potential witnesses. You are, in the main, staying in non-service accommodation to ensure that there is no inadvertent contact.

4.4 No reports *#.

Queen’s Regulation specifies that you will not be reported on either formally or informally in respect of your performance at this court martial. This ensures that you may express any opinion and cast any vote you feel is appropriate without any pressure from your superior. Each of your opinions is of equal importance when you discuss the case.

4.5 Other duties *#.

For the duration of this court martial your duty as a panel member has absolute priority. When you are not sitting in court you may do other work and contact your parent unit, but only if it does not interfere or conflict in any way with your primary duty to this court martial. You should not undertake any additional task which might affect your ability to sit in this trial, and if you do contact your parent or any other unit you must not discuss this case.

4.6 Undue influence *#.

If anyone has attempted to influence you in the performance of your duties in this trial you must report that to me now. If there is any such attempt during this trial it must be

reported to me immediately. Any such act by any person will be investigated and may lead to criminal or disciplinary proceedings against that person.

4.7 Questions.

If you have any questions about law, procedure or evidence they must be addressed to me in open court and in the presence of all parties. No advice should be sought elsewhere. If you do wish to ask a question it should be written down and passed through the President to me and I will answer it in open court.

4.8 Secrecy *#.

You have all taken an oath or made an affirmation and that is a serious matter. It means that you must not disclose the vote or opinion of anyone during your deliberations unless required in due course of law. You may, of course, discuss matters which were mentioned in public during the trial after it is over.

4.9 Other matters.

- You may make notes but I suggest that they are only brief reminders. I will take a full note of the evidence and remind you of it when I sum up. It is more important for you to watch the witnesses when they give their evidence so that you can assess whether or not they are telling you the truth
- Specific matters such as video equipment, special measures etc
- Times of sitting, breaks etc

PRACTICE MEMORANDUM: Section 5

DIRECTION AS TO UNANIMITY

- 5.1** Since the coming into force of Juries Act 1974 s17, it has been the practice in the civilian courts to direct juries as to the requirement in the first place at least for a unanimous verdict. Indeed the first Practice Direction on the topic contained the following observation:

“It is important that all those trying indictable offences should so far as possible adopt a uniform practice both in directing the jury in summing-up and also in receiving the verdict or giving further directions after retirement.”

Whilst s17 does not apply directly to trial at court martial, the spirit of the Practice Direction should if at all possible be observed. However the composition of the court and the provisions of the rules governing trial by court martial do not permit a refusal by the judge to accept a finding, unless it is a guilty finding or a special finding which in the judgement of the judge is contrary to the law. Accordingly the specimen direction provided by the Judicial Studies Board is not appropriate at Courts-Martial.

- 5.2** As is well known the finding of a court martial – the equivalent of a verdict – can be by a simple majority. This provision is to be found in the Service Discipline Acts and is retained in the Armed Forces Act 2006 s160(1).

As part of the continuing process of ensuring that practice and procedure at trial by court martial reflect as far as possible trial on indictment, judges should draw the attention of the board members to the desirability of reaching if at all possible a unanimous finding.

- 5.3** The following form of words should therefore be adopted when summing-up a case:

“You must remember that each of you has an equal vote when it comes to your decision as to the correct finding in this case. You must each exercise your unfettered duty to act in accordance with your conscience in accordance with the oaths you have taken after considering the evidence in the case, the directions as to the law that I have given you, the arguments in the speeches you have heard, and of course the views of the other members of the court expressed during your discussions.

“It is obviously preferable that you should all be agreed on your findings but any decision as to whether you are satisfied so that you are sure of the defendant’s guilt does not have to be unanimous – it can be by a simple majority. Just as importantly any decision that he should be acquitted can also be by a simple majority – it does not have to be a unanimous decision. [If you are split equally then the defendant must be acquitted – there is no casting vote where findings are concerned.]

“However having said that, I cannot emphasise too strongly that it is far more satisfactory if your decision is unanimous. You should strive long and hard to come to a unanimous decision. By way of analogy in the Crown Court a jury must have retired for over two hours before a judge can even direct them that a majority verdict may be acceptable. It is only if, after lengthy discussion and examination of the evidence, you find yourselves unable to reach a unanimous decision in respect of the defendant, that you should depart from that ideal.”

PRACTICE MEMORANDUM: Section 6

CREDIT FOR TIME SPENT IN PRE-TRIAL CUSTODY and REMISSION

6.1 Like any other criminal court, a court martial is required to take into account pre-trial custody when sentencing and set out the specific arithmetical calculation in their Reasons for Sentence¹. If the court specifically decides that the offender is not to benefit from his pre-trial custody (for example, because he has drawn out his period of custody for his own clear advantage), then that must be set out clearly in the Reasons for Sentence.

6.2 Remission of sentences ordered to be served at MCTC is governed by Rules 28-32 of The Imprisonment and Detention (Army) Rules 1979. Rule 28(1) provides as follows:

Subject to any of these Rules which provide for or authorise forfeiture of remission, a soldier under sentence in a military establishment or an overseas establishment shall be entitled to have part of his sentence remitted according to the following provisions:

(a) if his sentence does not exceed twenty-four days – no remission;

(b) if his sentence exceeds twenty-four days but does not exceed twenty-eight days – a period equal to the number of days by which the sentence exceeds twenty-four days;

(c) if his sentence exceeds twenty-eight days – one-third of the period of his sentence, except where this would result in a soldier under sentence serving less than twenty-four days when the period of remission will be such as to require him to serve twenty-four days.

6.3 Rule 30 provides for automatic forfeiture of remission as follows:

One day's remission of the sentence of a soldier under sentence in a military or overseas establishment shall be forfeited for each period of two days and every odd day on which the soldier is unable to do the work or training he would normally be required to do because -

(a) his sickness was caused by his own misconduct; or

(b) he was undergoing a sentence of a civil court; or

(c) he was in the lawful custody of any civil authority

6.4 Remission of a sentence of detention at MCTC is as of right, just as it is for imprisonment, and the formerly common wording about earning "time off for good behaviour" is not appropriate. Since the ECtHR case of *Ezeh and Connors v. UK* - 39665/98; 40086/98 [2002] ECHR 595 - which established that disciplinary hearings in civilian prisons resulting in forfeiture of remission engage Article 6 - the Commandant MCTC's power to forfeit remission has been suspended. The intention is to amend the Imprisonment and Detention Rules after implementation of the Armed Forces Act 2006 to provide for a Judge Advocate to adjudicate on such awards at a compliant hearing.

6.5 Detention.

¹ R v General Officer Commanding, Second Division, The Army and Another, Ex parte Buchanan (Chris Lee); Regina v Same, Ex parte Falls (Raymond Carbery) reported in The Times 20 October 1998

As a sentence of 36 days or more military detention attracts a full $\frac{1}{3}$ remission, the appropriate credit for pre-trial custody is calculated by multiplying the number of days in pre-trial custody by $\frac{3}{2}$, and deducting the result from the sentence that would otherwise have been imposed. However, care has to be taken in relation to sentences of between 24 and 35 days detention as remission cannot take a sentence below 24 days, and there is no remission for sentences below 24 days. In this case courts need only reduce any sentence by the number of days in pre-trial custody without any grossing-up.

6.6 Imprisonment.

A determinate sentence of imprisonment attracts remission of $\frac{1}{2}$ after which the offender is released on licence¹. The military system must comply with the civilian practice to ensure that an offender sentenced by a court martial does not serve longer in a civilian prison than a civilian would if he had received the same sentence from a civilian court. To calculate the appropriate credit for pre-trial custody when imposing a sentence of imprisonment (or YOI) the number of days in pre-trial custody should be multiplied by 2.

6.7 It is essential that it is made clear to the offender how the final sentence is reached. After setting out the aggravating and mitigating features of the case, the judge will use the following or a similar following form of words:

“We consider that the appropriate sentence in your case is X months [detention] / [imprisonment]. However, because you have already spent Y days in pre-trial custody for which we have made the appropriate deduction, and for which you receive [Y times $\frac{3}{2}$] or [Y times 2] days credit, you will be sentenced to Z months and days [detention] / [imprisonment].”

¹ Criminal Justice Act 2003 s244

PRACTICE MEMORANDUM: Section 7

NOTIFICATION UNDER SEXUAL OFFENCES ACT 2003 s80

7.1 The notification requirements under Part 2 SOA 2003 are not straightforward when considering cases tried by court martial and this PM sets out the statutory framework in some detail as an aide memoire. The most important issue for judges is the importance of checking in every case whether the notification requirements are triggered. Normally this will present no problem, but in cases where shorter sentences of detention are imposed extra care is required. Likewise, if the offence is within SOA 2003 Schedule 3 it is best practice to make the necessary statement in open court and issue the relevant certificate at the conclusion of the hearing. If for any reason either of those things are not done, then the OJAG staff should be alerted in the Record of Proceedings and arrangements can be made for either the MCTC or relevant prison authorities to ensure the offender is reminded on release of the requirement to register.

7.2 Statutory Framework

SOA 2003 Section 80 states:

Persons becoming subject to notification requirements

(1) A person is subject to the notification requirements of this Part for the period set out in section 82 ("the notification period") if –

- (a) he is convicted of an offence listed in Schedule 3;
- (b) he is found not guilty of such an offence by reason of insanity;
- (c) he is found to be under a disability and to have done the act charged against him in respect of such an offence; or
- (d) in England and Wales or Northern Ireland, he is cautioned in respect of such an offence.

(2) A person for the time being subject to the notification requirements of this Part is referred to in this Part as a "relevant offender".

The terms of that section are mandatory and impose an obligation on the individual to register. There is no power to **order** registration – the Editors of Archbold rightly make the point at 20-264 that people regularly talk in terms of “making orders” under these provisions, but there are no such orders (See *R v Longworth* [2006] 1 WLR 313).

7.3 SOA 2003 Schedule 3 lists sexual offences for the purposes of Part 2 of the Act (notification and orders). Paragraph 18 states that:

An offence under section 3 of this Act (sexual assault) *{is subject to the notification requirements}* if -

- (a) where the offender was under 18, he is or has been sentenced, in respect of the offence, to imprisonment for a term of at least 12 months;
- (b) in any other case -
 - (i) the victim was under 18, or
 - (ii) the offender, in respect of the offence or finding, is or has

been -

- (a) sentenced to a term of imprisonment,
- (b) detained in a hospital, or
- (c) made the subject of a community sentence of at least 12 months.

7.4 In the Court Martial system, sentences of detention of at least 112 days are treated the same for notification purposes as a community sentence of at least 12 months. This is because of paragraph 93 of Schedule 3 which reads as follows:

- (1) An offence under –
 - (a) section 70 of the Army Act 1955,
 - (b) section 70 of the Air Force Act 1955, or
 - (c) section 42 of the Naval Discipline Act 1957

of which the corresponding civil offence (within the meaning of that Act) is an offence listed in any of paragraphs 1 to 35.

- (2) A reference in any of those paragraphs to being made the subject of a community sentence of at least 12 months is to be read, in relation to an offence under an enactment referred to in sub-paragraph (1) as a reference to being sentenced to a term of service detention of at least 112 days.

7.5 Certification

Once a court martial has decided to pass a sentence which triggers the notification requirement, the judge must state the requirement in open court so that a certificate may be raised under SOA 2003 s92.

7.6 Section 92 reads as follows:

Certificates for purposes of Part 2

- (1) Subsection (2) applies where on any date a person is -
 - (a) convicted of an offence listed in Schedule 3;
 - (b) found not guilty of such an offence by reason of insanity; or
 - (c) found to be under a disability and to have done the act charged against him in respect of such an offence.
- (2) If the court by or before which the person is so convicted or found -
 - (a) states in open court -
 - (i) that on that date he has been convicted, found not guilty by reason of insanity or found to be under a disability and to have done the act charged against him, and
 - (ii) that the offence in question is an offence listed in Schedule 3, and
 - (b) certifies those facts, whether at the time or subsequently,

the certificate is, for the purposes of this Part, evidence (or, in Scotland, sufficient evidence) of those facts.

PRACTICE MEMORANDUM : Section 8

COSTS ORDERS UNDER THE ARMED FORCES PROCEEDINGS (COSTS) REGULATIONS 2005

8.1 The Armed Forces Act (AFA) 2001 ss26 – 28 and the Armed Forces Proceedings (Costs) Regulations (AFP(C)R) 2005 make provision for two entirely separate forms of orders:

- (i) AFA s26 and AFP(C)R 3 govern orders between Parties, and
- (ii) AFA s27 and AFP(C)R 4 govern orders against legal or other representatives.

8.2 S26 and AFP(C)R 3 are concerned with costs incurred as a result of unnecessary or improper acts or omissions by, or on behalf of, a party to the proceedings.

S27 and AFP(C) R 4 are concerned with costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative whether the act or omission occurred before or after those costs were incurred.

It is only the latter which are called “**Wasted Costs Orders**” in the legislation and it is important to distinguish between the two types of orders when considering what conduct may give rise to the making of an order: there is not just a distinction as to the person who may be the subject of an adverse costs order under the AFP(C)R 2005 but also the conduct which may give rise to such an order.

8.3 Guidance on the procedure in respect of both types of order is given in *Practice Direction (Costs in Criminal Proceedings)* [2004] 2 All ER 1070. When an order is made under either of these Regulations, the amount must be specified. The following points should be noted:

8.3.1 Costs Orders between Parties- AFP(C)R 3

- (i) There has to be a causal relationship between the “unnecessary or improper act or omission” and the incurring of costs.
- (iii) The word ‘improper’ in the context of Regulation 3 “does not necessarily connote some grave impropriety”. Used, as it is, in conjunction with the word ‘unnecessary’, it is “...intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly.”
- (iii) The very institution of proceedings is capable of being the subject of an order of this nature.

8.3.2 Costs Orders against Legal or other Representatives – AFP(C)R 4

- (i) The primary responsibility for the consideration of a Wasted Costs order lies with the judge. It is his responsibility to keep the question of costs in the forefront of his mind at every stage of the case and he ought to be prepared to take the initiative himself without any prompting from the parties.

- (ii) There is a clear need for any judge intending to exercise the wasted costs jurisdiction to formulate carefully and concisely the complaint and grounds upon which such an order may be sought. These measures are draconian and, as in contempt proceedings, the grounds must be clear and particular.
- (iii) Judges contemplating making a Wasted Costs order should bear in mind the guidance given by the Court of Appeal in *Re A Barrister (Wasted Costs Order) (No.1 of 1991)* [1993] QB 293. In particular a three stage test or approach is recommended when a Wasted Costs order is contemplated:
 - (a). Has there been an improper, unreasonable or negligent act or omission?
 - (b). As a result have any costs been incurred by a party?
 - (c). If the answers to (a) and (b) are “yes”, should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved?
- (iv) Further guidance is given by the Court of Appeal in *Re P.* [2002] 1 Cr App R 19, CA. That emphasised that whilst the primary object of Wasted Costs orders is not to punish but to compensate, they do nonetheless carry a penal element. Accordingly a mere mistake is not sufficient to justify an order - there must be a more serious error. Furthermore the representative who is the subject of a complaint which might lead to the making of an order against him, must have a proper opportunity to respond to it.

8.4 Costs incurred by the Military Court Service (MCS).

Orders made under AFP(C)R 3 and 4 may include any costs incurred in securing the attendance of witnesses at court. This is particularly important as such costs represent a significant part of the MCS budget and are easily quantifiable. The authority for this statement comes from AFP(C)R 7 which provides:

“Where any of Her Majesty’s forces incurs costs of any of the descriptions in the Schedule to these Regulations in respect of the exercise by the prosecuting authority of its functions as a party to proceedings under the services Acts such costs shall be taken for the purposes of any order under Regulation 3 or 4 to have been incurred by that authority.”

The Schedule includes:

- Costs incurred in relation to the recovery and disclosure of information in the course of proceedings
- Costs incurred in the preparation of case papers and reports
- Travelling and subsistence expenses of witnesses
- Travelling and subsistence expenses of prosecuting authority staff
- Fees and expenses of a prosecuting authority advocate
- Any other costs properly incurred in preparing for a trial or an appeal

8.5 One particular area of concern is to be found in the notification of witness requirements at Directions Hearings. Not only is time and money wasted in bringing witnesses to court unnecessarily, but in the military justice system, lives can be put in danger. Judges will be particularly alert to costs thrown away by bringing about the attendance of witnesses whose attendance was never actually needed.

PRACTICE MEMORANDUM: Section 9

RECOMMENDATIONS FOR CONTRIBUTIONS TOWARDS LEGAL AID COSTS : CONVICTED DEFENDANTS IN ARMY & RAF TRIALS

9.1 The provisions as to legal aid at courts martial administered by the Army and the Royal Air Force are to all intents and purposes identical. In the Army they are to be found at Annex D to Chapter 6 of the Queen's Regulations for the Army. The scheme is administered by ACLAA, and for the RAF by the RAFLAA.

9.2 Paragraph 4 of Annex D to QR (Army) Chapter 6 provides as follows:

“The grant of Legal Aid is subject to the individual's agreement to pay such contribution towards his defence as may be determined by ACLAA after taking into account any recommendation of the Judge Advocate. At the conclusion of the proceedings, in which the accused has been found guilty, the JA will consider whether it is reasonable, taking into account all the circumstances of the case including the means of the accused and any punishment, to recommend recovery of a financial contribution towards defence costs.”

That power to make a recommendation is however subject to the following limitation:

“The contribution which an accused may be called upon to make is assessed as follows;

- (a) Those, whose gross annual income taking into account any spouse's income, falls at or below the fixed threshold promulgated by the Ministry of Defence (PS2A(A)), will have their defence fully funded by the Army / Royal Air Force Legal Aid Scheme.
- (b) For those whose income, including any spouse's income, exceeds this threshold, then,
 - (1) The maximum contribution will be no greater than the amount of disposable income, as calculated on the basis of the AF A6199A during a 26 week period or the full costs of the defence, whichever is lower,
 - (2) Capital and equity taking any joint or spouse's assets, in excess of fixed limits, as promulgated by Ministry of Defence (PS2A(A)) will also be taken into consideration in determining the contribution to be paid.”

9.3 In each case the relevant legal aid authority will produce a means assessment which will be placed before the judge at trial. On the basis of that document he will assess the amount if any that he deems it appropriate for the convicted defendant to pay towards his legal costs.

The current (February 2007) threshold for income is £25,520. Capital below £3,000 is to be disregarded – it would seem that in theory any capital over that figure (including equity) may be brought into account.

9.4 In the Royal Navy the administration of legal aid is differently managed and governed by rules analogous to those which apply in the Crown Court whose thresholds are the same as those in paragraph 9.3 above. Reference should be made to Chapter 28 of the Manual of Naval Law for further guidance.

- 9.5** Whilst there is no statutory or even extra-statutory provision which exempts a convicted defendant from being ordered to bear part or all of his costs if the thresholds are not exceeded, it could be considered unjust to make a recommendation that he should. Whatever decision is reached by a judge when considering whether or not to order costs, it is helpful to ACLAA when completing the pro-forma to include reasons for reaching whatever decision has been taken.
- 9.6** Judges should bear in mind the ever-increasing burden on public funds occasioned by legal representation and the fact that almost uniquely, convicted service personnel often remain in reasonably secure employment even if they are convicted of criminal offences. Whilst remembering the necessity to avoid undue financial burdens, there is often unused scope for recommending the payment of legal costs in full or in part.

PRACTICE MEMORANDUM: Section 10

SUMMARY DEALINGS AND SUMMARY APPEAL COURT

10.1 Status of a Commanding Officer

A Commanding Officer has continuing jurisdiction over those under his command. He can hold a summary dealing where and when he chooses – he does not have to convene and dissolve himself – and in that respect he is like a judge in a standing court. Clearly it would be wrong in principle for him to revisit punishments for no good reason, and the commanding officer effectively becomes *functus officio* as soon as he has properly completed each summary hearing. However, if the commanding officer makes a technical mistake when sentencing one of his subordinates he does not become *functus officio* because he has not properly completed the process (or dissolved himself). It would, therefore, be perfectly proper for him to revisit the decision to rectify that mistake even though there is no specific statutory basis for this provided he did so within a reasonable time. Otherwise technical errors will be corrected by the summary reviewing authority or the Summary Appeal Court.

10.2 Credit for guilty plea at summary hearing

At a summary trial in the Royal Navy the accused is asked to plead, and where he pleads guilty his commanding officer is required to give credit for it. The punishment warrant letter that accompanies the warrant seeking authorisation to impose a custodial sentence contains precise information about the amount of credit given. An SAC is always informed whether an appellant was given credit for a plea of guilty at the summary trial.

10.3 In the Army and RAF, however, a plea is not taken from an accused at summary dealing and there is often no way of telling whether the commanding officer has given credit for an admission of guilt, if there was one. Clearly if the sentence by the commanding officer is the maximum permissible (28 days, or 60 days with extended powers) it is safe to assume that credit was not given to reflect any admission of guilt. There is no statutory requirement for an Army or RAF commanding officer to give credit for an admission of guilt (Criminal Justice Act 2003 s144 does not apply to summary dealings) but this can lead to the strange outcome whereby an accused who elects for trial by court martial and then pleads guilty receives a lesser sentence than if he had not so elected. Thus, if an Army or RAF offender appeals solely on the basis that a sentence of detention did not take account of an admission of guilt, the SAC is entitled to reduce the sentence if it is satisfied that the appellant did indicate guilt at the summary dealing but the commanding officer did not give credit for that admission.

10.4 The Summary Appeal Court (SAC) is compliant with Article 6 of the European Convention on Human Rights. Service personnel have an unfettered right of appeal from Service summary dealings / trial and this, combined with their right to elect trial by court martial before those summary proceedings begin, ensures that the summary system as a whole is compliant with the ECHR.

10.5 SAC Sentencing Powers

Although hearings before the SAC are *de novo* if the appeal is against finding, the court's sentencing powers are restricted. It may only substitute a sentence which would have

been within the powers of the commanding officer (or ASA) and in the opinion of the court is no more severe than the punishment originally awarded at summary dealing / trial.¹

10.6 Punishments available at summary dealing / trial are nominally listed in order of severity² but when the SAC decides to substitute an alternative sentence it is not a matter of simply reducing the original sentence or substituting an alternative one lower on the relevant statutory list. The SAC must consider the practical effect of the individual sentence in the circumstances of the case. For example, a large fine may be more severe than one day's detention even though a fine is lower on the list than detention. If a SAC does substitute a sentence which is higher up the statutory list than the sentence originally passed it must explain why the court is of the opinion that the actual sentence is no more severe than the original punishment.

10.7 Where an appeal is against a punishment awarded by a subordinate commander with limited delegated powers at summary dealing / trial, the SAC may only award a punishment which is within those delegated powers. Although on the face of the legislation it may appear that the SAC could award a sentence which falls within the commanding officer's powers even though outside the powers delegated to the subordinate commander, such an effect would breach the appellant's ECHR Article 6 rights. The system of appeal to a compliant SAC ensures that the whole summary system is compliant, but only if the appellant does not place himself in jeopardy of, or is deterred by the risk of, a more severe punishment by appealing.

10.8 Appellant's Failure to Attend an SAC

Where an appellant does not appear he is not deemed to have abandoned his appeal as there is a specific means of doing so by completing the relevant form. The SAC was intended to reflect the proceedings in the Crown Court where a judge and two lay magistrates hear appeals from the Magistrates' Court. In that jurisdiction even repeated failure by the appellant to appear does not amount to abandonment.³ In the SAC where the appellant is represented there is a positive duty to hear the case, but even if he is not represented the SAC should proceed to hear the case in the appellant's absence provided it is satisfied that a proper notice of time and place of the appeal has been served on the appellant.

¹ Naval Discipline Act 1957 s52FM; Army and Air Force Acts 1955 s83ZG

² Naval Discipline Act 1957 s43 and s52D(8); Army and Air Force Acts 1955 ss76C(2)

³ *Hayes v Chelmsford Crown Court* [2003] 167JP65

PRACTICE MEMORANDUM: Section 11

REPORTING RESTRICTIONS AND MEDIA DEALINGS IN COURT MARTIAL CASES

General Principles

- 11.1 The principle of open justice as expressed in *Scott v Scott* [1913] A.C. 417, HL applies to Courts Martial just as it does in any other criminal court, and the presumption is that all criminal court proceedings are open and accessible to the public. There is a statutory requirement that a Court Martial sit in open court unless there is a compelling reason for the judge to direct otherwise: for instance cases involving matters which could lead to the disclosure of security classified information may be held *in camera* (Naval Discipline Act 1957 s61, Army Act 1955 s94, and Air Force Act 1955 s94).
- 11.2. In Courts Martial just as in other criminal courts, automatic reporting restrictions apply under certain circumstances which may render discretionary restrictions unnecessary, such as:
- restrictions on publishing information identifying of victims or alleged victims in sexual offence cases
 - rulings made at preliminary hearings.

The judge may provide guidance to the media as to the applicability of automatic reporting restrictions in a specific case. The media remain responsible for ensuring they comply with the law.

Legal Considerations

- 11.3 Discretionary reporting restrictions can be imposed by a judge under the Contempt of Court Act 1981. Section 4(1) of the Act provides that publication of a fair, accurate and contemporaneous report of proceedings held in public is lawful, and s4(2) provides:

In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

The Contempt of Court Act 1981 s11 provides:

In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

S11 anonymity orders may be made in relation to the defendant or a witness, or any other “matter” relevant to proceedings (for instance, evidence which is sensitive for security reasons). Under s11, prior to the making of such a direction the court must first have exercised its discretion to withhold the name or other matter from the public.

- 11.4 Prosecution or defence counsel may apply for orders imposing reporting restrictions so as to withhold from the public the identity of defendants or witnesses only if such an order is

necessary for avoiding a risk of impediment to or frustration of the administration of justice. This may be in the instant proceedings or in future proceedings. For the protection of a particular witness, directions may be given permitting the witness to give evidence from behind a screen or under a pseudonym (“X”) rather than their real name. It is not sufficient that the reporting of the name, etc would cause the defendant or witness embarrassment, or even financial loss; those applying for such a restriction must show by way of evidence that failure to exercise the discretion to withhold the name would risk frustrating or impeding the administration of justice, for example because there are reasonable grounds for fearing that the operational or personal safety of these individuals is threatened.

11.5 The Youth Justice and Criminal Evidence Act 1999 s46 contains detailed guidance as to when a court can make a “reporting direction” restricting disclosure of the identity of a witness. The court must consider the personal characteristics of the witness as set out in s46(4). The grounds which the court must consider before granting a “reporting direction” to the effect that no matter relating to a witness shall be included in any publication are set out in s46(6) & (8), including considering:

- (a) whether it would be in the interests of justice to do so, and
- (b) the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings.

11.6 Judge Advocates will consider each such application on its merits, giving due weight to the public interest in the principle of open justice and to the qualified right to freedom of expression (the right both to impart and receive information) under Article 10 of the European Convention on Human Rights (ECHR). It is noted that the Human Rights Act 1998 s12 does not apply to relief sought in criminal proceedings. Personal safety considerations may, where there is cogent evidence in support, justify non-disclosure of identity on the grounds that disclosure would contravene the rights of the individual under ECHR Articles 2 & 8. The Courts-Martial (Royal Navy), (Army) & (Air Force) Rules 2007 r.89 contain general provisions enabling

“...such course to be adopted as appears ...best calculated to do justice.”

Practical Considerations

11.7 If reporting restrictions have been applied for or are to be considered, the hearing considering them should be either a full Court Martial or a preliminary hearing open to the public under the Courts-Martial Rules 2007 rr.36-37 unless there are exceptional circumstances. Where practicable the media must be notified in advance about any applications for reporting restrictions and have the opportunity to make submissions in relation to the application. Failing that, in an exceptional case, an order should be expressed to be interim and be followed up by a further hearing open to the public and notified to the media at which the judge reconsiders the reporting restrictions already made, after giving the media an opportunity to be heard or represented.

11.8 The latter is important as at present, unlike in the Crown Court, there is apparently no avenue open to the media for appealing against or judicially reviewing reporting restrictions imposed in a Court Martial, until the Armed Forces Act 2006 s163(3)(i) and the rules made under it come into force. Media representatives are thus especially troubled if they also appear to be given no avenue for making representations at the time when the restrictions are originally imposed.

Administrative Action

- 11.9 Whenever an order imposing reporting restrictions is made, in all cases (including UK and overseas, Royal Navy, Army & RAF) the Military Court Service Court Officer at that court the same day faxes the signed copy and emails the text of the order(s) to the Judicial Communications Office (JCO), with side copies to the Director of the Military Court Service, the Office of the Judge Advocate General (OJAG), and Ministry of Defence (MoD) Media Ops. The Judicial Communications Office circulates the order to a wide circle of media contacts, and deals with phone calls or queries from the media about actual or possible reporting restrictions. The Court Officer hands out hard copies of the order imposing reporting restrictions locally to any media representatives present at court on the day. Simple queries received locally may be dealt with locally, if the answer is sufficiently obvious, but otherwise are referred to JCO. JCO may seek advice or information from OJAG if necessary, before responding to media queries. It is primarily the responsibility of the media to make checks about the existence of reporting restrictions if in doubt, whether these are automatic or discretionary.
- 11.10** It has been agreed that whenever there is significant media interest in a forthcoming trial, with the likelihood of many press and broadcast media personnel attending, MoD Media Ops make arrangements for management, accreditation, etc of the journalists and if required for a pre-trial briefing. MoD Media Ops may arrange a photo-opportunity for the defendants, if they agree. Nothing prevents the media from taking any other photographs or videos outside of the court precincts in the normal way. MCS Court Officer arranges for journalists and their vehicles to be accommodated suitably inside and outside the court centre. OJAG may arrange a photo-opportunity for the judge, if he agrees. MoD Media Ops deals with queries from journalists about military operations, uniforms, ranks, vehicles, weapons, and the like, and represents the position of the Ministry of Defence and MoD Ministers, but does not represent the court or the judge, nor comment on legal judgments, rulings, or orders. Such matters are referred to the Judicial Communications Office and OJAG.
- 11.11 If a hearing is convened to consider whether reporting restrictions should be imposed, confirmed, rescinded or varied, at which the media may wish to be represented, the MCS Court Officer ensures advance notification is sent to an agreed list of representative media bodies.

Documents and Exhibits

- 11.12** In some cases there is prosecution evidence in the form of documents or images, such as photographs or video recordings, which the media desire to (a) see and (b) describe for publication and (c) have copies for publication by print or broadcast. It has been agreed that media representatives address requests for access to material to the prosecutor in the first instance, and the prosecutor takes the initial decision to permit or deny access. If a media representative makes application to the trial judge, without having first contacted the prosecutor, the judge may defer the matter to the prosecutor. If the images are to be shown, or supplied, to the media, MoD Media Ops make the practical arrangements.
- 11.13 In considering any such application, it has been agreed that the prosecutor will have regard to the Crown Prosecution Service / Association of Chief Police Officers (CPS/ACPO) **Protocol on Publicity and the Criminal Justice System** (October 2005),

insofar as it is relevant. The overriding objective is to provide an open and accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity. It should however be noted that requests for Crown evidence are subject to the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA) and the Human Rights Act 1998. Although the ECHR Article 10 guarantees the right to impart and receive information, this must be balanced against the other rights guaranteed, notably in Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life). Additional considerations for a military prosecutor would be whether material should not be disclosed for operational reasons or for reasons relating to the personal safety of military personnel. However, prosecutors will always strive to interpret these provisions as positively as possible in accordance with the overriding objective outlined above.

- 11.14 If media representatives are not satisfied with the decision of the trial prosecutor, they may apply in writing to the head of the prosecuting authority (that is, the Naval Prosecuting Authority, the Army Prosecuting Authority, or the Royal Air Force Prosecuting Authority as the case may be). The prosecuting authority will also have regard to the CPS/ACPO Protocol insofar as it is relevant.

Access to Archives

- 11.15 The rules provide that after the conclusion of a Court Martial the record of the proceedings is kept in the custody of the Judge Advocate General for six years, and that exhibits are retained with the record of proceedings, unless otherwise ordered. Note that any application for disclosure of records of proceedings and related archive material including evidential images may be regarded as falling within the Freedom of Information Act 2000 s32 which absolutely exempts court records from disclosure. If the Judge Advocate General receives any requests, including from the media, for such disclosure notwithstanding the exemption he will consider them on a case-by-case basis after considering representations from interested parties.

Practice Memoranda:**ANNEX A****SUMMARISED DESCRIPTION OF LISTING SYSTEM****A.1 Courtroom Locations and Status****A.1.1 Four Primary Permanent Courts comprising:**

Bulford Court 1
 Catterick Court 1
 Colchester Court 1
 Osnabrück*

(*will become Sennelager Court 1)

- (a). Sit full-time on a continuous basis (i.e. 43 weeks per year omitting Summer, Christmas and Easter closures, plus a vacation list in August for custody cases)
- (b). Lists packed full to maximise utilisation of court-time and judge-time
- (c). Large majority of all cases are dealt with at primary centres
- (d). OJAG provides a judge automatically on 43 week basis, either the home judge or a replacement
- (e). Hold Plea and Case Management Hearings every working Monday or as directed. Defendants, prosecution and defence representatives or agents will attend in person or (if DH1 previously completed and submitted) representatives may appear by video live link
- (f). Case files & papers pending trial at all venues are normally kept at primary centres

A.1.2 Eight Secondary Permanent Courts comprising:

Aldergrove Courts 1 & 2
 Bulford Court 2
 Catterick Court 2
 Colchester Court 2
 Cyprus (Episkopi)
 Hohne
 Portsmouth*

- (a). Do not sit continuously but only when appointed to hear trials, because:
 - it is an exceptionally long trial, or
 - as overflow because the primary courts are fully listed, or
 - it is the most appropriate venue geographically, or
 - * Royal Navy trials are normally listed at Portsmouth (but see para 3.2 above)
- (b). OJAG provides a judge by arrangement whenever requested for trial dates (but not for theoretical dates lacking a trial in prospect)
- (c). Do not automatically hold Plea and Case Management Hearings, but may do so by arrangement on Mondays (i) only if a sitting is being held at the secondary court, and (ii) only if the location is convenient for that case
- (d). Case files & papers pending trial are not normally kept at Aldergrove, Hohne, Episkopi or Portsmouth – files are taken there for trial and returned post-trial
- (e). Aldergrove, Hohne, Episkopi and Portsmouth may or may not be permanently staffed, at discretion of MCS

A.1.3 Tertiary Ad Hoc Courts

Courts martial are fully portable so venues may be anywhere in the world, in UK, Germany or elsewhere, wherever operational needs require.

- (a). Sit only when appointed to hear cases by arrangement, and only because the judge directs there are legal, practical or operational reasons why that is the most appropriate venue
- (b). Facilities meet basic standards of suitability, not necessarily the high standard facilities required for permanent courts
- (c). Do not hold Plea and Case Management Hearings except if directed by the judge
- (d). Staff and papers travel to venue for trial and return post-trial

A.2. Listing Principles

A.2.1 AWOLs

Cases based on charges exclusively of AWOL are listed for a hearing date 21-28 days after receipt by MCS of the prosecution papers (or earlier if possible) on the working assumption of a guilty plea, with no Plea and Case Management Hearing. MCS order the preparation of a Pre-Sentence Report on receipt of papers, on the permanently delegated authority of the judge. If the defendant is detained in custody at MCTC Colchester the case is listed at Colchester MCC. AWOLs are listed for a provisional date, but prosecution and defence are warned that each case can be brought forward to an earlier date in the same week (with not less than 24 hours notice) if the exigencies of the lists make this desirable. AWOL cases are by default listed at the rate of four per day, unless the judge directs otherwise locally.

A.2.2 Plea and Case Management Hearings

For every case other than AWOLs, a PCMH is held in accordance with sections 3.5 to 3.10. Accordingly the judge may make an order or ruling on any of the matters contained in the rules or any other question of law, practice or procedure relating to the case (r.40). A hearing date is not fixed before the PCMH takes place, but MCS may have set a provisional hearing date to be confirmed or re-set at the PCMH, when the parameters within which a hearing date is to be fixed are considered along with other directions, and are specified in the DH1 form.

A.2.3 Guilty Pleas and Sentencing

Where a case is to be listed only for sentencing following a guilty plea, the listing parameters normally are for a date no more than 14 to 21 days after the PCMH, near the end of the next fortnightly "Warned List Period". Availability of witnesses and advocates is not normally an issue and length may be 1½ hours, unless the judge indicates otherwise. Trial venue is normally obvious or inconsequential, but the judge may indicate otherwise if appropriate. The judge orders a Pre-Sentence Report to be prepared if necessary. The Court Officer or Court Administration Officer then appoints the case to be convened under rule 20, within the defined listing parameters. The sentencing may take place on the date appointed or it may be brought forward (with not less than 24 hours notice, or 48 hours outside Great Britain) from the end of that "Warned List Period" to an earlier day in the same "Warned List Period" if other listed cases go short and provided the Pre-Sentence Report is ready and the parties consent.

A.2.4 Contested Trials: Information Relevant to Dates & Venue

At the PCMH, if there is a Not Guilty plea to one or more charges, possible listing parameters are considered by the judge in the light of all options, issues and representations. The time needed for the steps the prosecution and defence are required to take in preparation for trial naturally define the earliest possible trial date. The Court Officer provides to the judge all information which is available at that time relevant to the listing parameters (such as the location of witnesses, expected dates of deployments, leave, etc., and availability of experts) and any provisional date he may suggest. Factors connected with the urgency of the case, and reasons why the trial should or should not be held at particular venues, are also considered. The parties make any representations about advocate availability - the defendant and a prosecutor are assumed to be available in any working week, and availability of a specific defence advocate is accorded appropriate importance depending upon the weight of the case. The listing parameters are given in the DH1 form signed off after the PCMH. For Royal Navy cases originating other than in Portsmouth, the prosecution, the defence and the clerk provide information relevant to trial venue and the judge sets the parameters appropriately, which may provide for hearing at a Secondary or Tertiary venue if necessary. Any matters not specifically mentioned are assumed to be at the discretion of the Court Administration Officer.

A.2.5 Contested Trials: Listing Process

The Court Administration Officer lists each Primary court continuously, with the diary divided into two-week "Warned List Periods" to match the warned availability dates of Board members. Secondary courts are listed intermittently on a stand alone trial-by-trial basis. As each case completes its initial PCMH, under rule 20 the CAO appoints a date and venue for trial, which is always at the earliest possible date which is consistent with the defined listing parameters for that case and takes into account the pattern of other listed cases and courtroom availability. Contested trials start at least 28 days after the PCMH and normally 42 days or more.

A.2.6 Organisation of Lists

As each case arises for listing, whether following a Guilty or Not Guilty plea, the Court Administration Officer:

- (a). puts the case into the diary for a start date in the next available vacant slot with a sufficient number of days or hours for the expected length of trial
- (b). lists into the primary court most conveniently located, if available, or a secondary if so directed
- (c). if the primary court is full on the ideal dates, considers the options of another primary court, a secondary court, or a delayed hearing date depending on the listing parameters for that case in the DH1
- (d). takes into account the listing parameters for that case. If additional information (such as the location of witnesses, expected dates of deployments, leave, availability of experts, etc) becomes available, takes it into account in appointing a hearing date
- (e). lists cases normally on the basis of a fixed date. If the trial is short (one day or less) and there are no witnesses or witnesses are known to be available on a contingency basis, lists it into a Warned List Period on the basis that it may be brought forward (with not less than 24 hours notice) from the end of that Warned

List Period to an earlier day in the same Warned List Period if necessary with the consent of the parties

- (f). lists RN and RAF trials in the same way as Army trials, except that (i) in a given week all RN trials or separately all RAF trials are consolidated into a single location in UK; and (ii) RN trials will normally be held at Portsmouth, unless the listing parameters specify otherwise (see para 3.2 and A.2.4 above)
- (g). if there are special reasons why booking an ad hoc tertiary venue is needed, explores options and provides relevant information to the judge at or after the PCMH so he can give further directions
- (h). if listing within the parameters proves impossible, seeks direction from the judge

The Court Administration Officer may delegate some or all of the tasks to a Court Officer or other staff at his discretion (r.18).

A.3. Applications to Change Dates

After listing arrangements have been made by the Court Administration Officer in accordance with the parameters settled by a judge at a PCMH, if the prosecution, the defence or the Court Officer desire to change them in the light of further information, the agreement of a judge (preferably the intended trial judge) or JAG or VJAG must be obtained. If agreement to a written application is not obtained, the matter must be brought before a judge in court and the reasons for the desired change explained fully. The reasons are based on considerations such as the location of witnesses, expected dates of deployments, leave, availability of experts, developments in other listed cases, courtroom availability, and advocate availability.

A.4 Board Member Availability

A.4.1 The requirements for supply of Army board members, defined one year at a time in advance, are for such numbers and such ranks to be readied that, as a starting point, there are always enough members in a working week for up to seven Army courts of which up to three can be five-man boards, distributed between the Divisions. In addition there are enough RN and RAF board members available for one RN court and/or one RAF court in each working week. Each member is warned to be available for up to a two-week period (the "Warned List Period"), which time can stretch beyond the second week only if a trial overruns or if they have to return for sentencing. The Warned List Period is the same across the three Services.

A.4.2 Surplus board members are generally cancelled as soon as it becomes clear they will not be needed, to minimise disruption to their normal duties. However, whenever an RN or RAF court is sitting, three booked Army board members for that week are not cancelled unless and until it becomes clear the RN/RAF list will go ahead. Thus if it becomes known far enough in advance that an RN/RAF list is collapsing or going short, the possibility of utilising that court for Army work is preserved.

