PRACTICE IN THE COURT MARTIAL: COLLECTED MEMORANDA

Version 3 October 2009

CONTENTS

Section		Page
	Introduction	3
1	Conduct Prejudicial to Good order and Service Discipline: AFA06 s 19	4
2	Time Limits for Civilian Summary Offences	6
3	Plea and Case Management Hearings (PCMH) and Listing Practice	8
4	*Morris* Direction	14
5	Direction as to Unanimity	16
6	Credit for Time Spent in Pre-Trial Custody, Remission and Additional Detention	18
7	Notification under the Sexual Offences Act 2003 s 80 and the Vetting And Barring Scheme under the Safeguarding Vulnerable Groups Act 2006	20
8	Costs Orders under the Armed Forces (Proceedings) (Costs) Regulations 2009	24
9	Recommendations for Contributions Towards Legal Aid Costs : Convicted Defendants	27
10	Summary Dealings and Summary Appeal Court	29
11	Reporting Restrictions and Media Dealings in Court Martial Cases	31
	Annex: Summarised Description of Listing System	35

Introduction

This collection of Practice Memoranda is issued under the authority of the Judge Advocate General as an aid to those who practice in the Court Martial. It supersedes the previous version of the Practice Memoranda.

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 November 2009. 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

31 October 2009

PRACTICE MEMORANDUM: Section 1

CONDUCT PREJUDICIAL TO GOOD ORDER AND SERVICE DISCIPLINE: AFA06 s 19

1.1. AFA06 s 19 proscribes:

> "… an act that is prejudicial to good order and service discipline."

In some cases prosecutors have concentrated solely on proving the act or conduct without giving sufficient consideration to proving the prejudice to good order and service discipline caused by the act.

1.2 The law in relation to prejudicial conduct was helpfully set out in the case of *R v Dodman* [1998] 2 Cr App R 338. An act which amounts to an offence against any other section in the AFA06 (including s 42) should not normally be charged under s 19, unless the gravamen of the conduct is its prejudicial effect. Sometimes this principle has been ignored, for example 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. It is, however, perfectly proper to add a section 19 charge as an alternative to a substantive charge in appropriate circumstances.

1.3 The section is broadly worded and enables the Services to enforce the high standards of discipline and conduct necessary to support operational effectiveness. However, the section does not permit the criminalisation of any conduct and an accused person must have known or had reasonable cause to believe that the conduct was prejudicial when he did the act or made the omission.

1.4 It has been suggested by some commentators that s 19 may offend against Article 7 of the European Convention on Human Rights as it lacks certainty. This is clearly not the case (as it is part of an Act of Parliament certified as compliant by a Minister) and the section itself is not incompatible with the Convention. However, a specific charge drawn under s 19 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.

1.5 S 19 proscribes acts which are actually prejudicial, not *potentially* prejudicial or *likely* to prejudice good order and Service discipline. However it can be said that conduct which is "likely to be harmful" or "potentially harmful" can thereby 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.

1.6 *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 [the old Army Act 1955 equivalent section] 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."

1.7 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). The objective test is that a reasonable Service person would have contemplated that the conduct alleged was prejudicial when he did it.
- There may be an additional element of *mens rea* where the wording of the charge imports some additional mental element such as dishonesty.

PRACTICE MEMORANDUM: Section 2

TIME LIMITS FOR CIVILIAN SUMMARY OFFENCES

2.1 In the past some Service personnel have been prosecuted in the Court Martial 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 s 127 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 s 127 "simply does not apply to courts martial". The court did not have the benefit of full argument and only considered that very narrow point.

2.3 AFA06 s 42 specifies that every person subject to the Act shall be guilty of an offence if he does any act which is punishable by the law of England and Wales, or would be so punishable if done in England or Wales. In this context an "act" includes an omission, and "punishable" means punishable with a criminal penalty. 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 and Wales. In that case there would be no jurisdiction to try the matter in the Court Martial under s 42.

2.4 Nevertheless, the Magistrates Court Act s 127 does relate only to magistrates courts and it is, in any event, only a procedural section which does not apply to the Court Martial.

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 NDA57 s 42 and the Sexual Offences Act 1956 s 13. The Sexual Offences Act s 8 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 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 in the Court 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 cause prejudice on the facts of that case; see para 2.8 below). In such a case it would follow that a summary only matter should not be tried in the 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 AFA06 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, the Court Martial should expect, in a matter which would be summary-only in the civilian system, the complaint to have been made within six months from the time when the offence was committed or the matter of the complaint arose. If the complaint was made outside the six months, the court would be prepared to consider submissions from the defence as to prejudice to the defendant, comparing his position with that of a defendant in the civilian courts. The complaint is made:

(a) when the service police (or MoD or Home Office police) report the accused to his Commanding Officer or to the Director of Service Prosecutions;

or if that is not done:

(b) when the accused is charged by his Commanding Officer.

2.8 If the original charge under s 42 was indictable or triable either way, and it is subsequently reduced 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 (that was the position in the *Buchan* case, above). Additionally there may be circumstances where the six-month time limit has passed but it would be appropriate and proper to charge under AFA06 s 19 because the gravamen of the conduct was its prejudice to good order and Service discipline.

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 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 Armed Forces (Court Martial) Rules 2009 which came into force on 31 October 2009, as well as taking into account:

- the re-structuring of the Military Court Service estate, including the recent construction of four new two-court centres;
- the introduction of a single system of Services law under the Armed Forces Act 2006;
- the application of parts of the Criminal Procedure and Investigations Act 1996 (CPIA) to the Court Martial in April 2008; and
- the fully tri-service nature of the Military Court Service.

It reflects the need for preliminary proceedings and arraignment proceedings to take place in open court (with very few exceptions) so that appropriate preliminary matters may be resolved in a public forum. 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 Service 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. These comprise in the UK Court 1 at each of the centres at Bulford, Catterick and Colchester and in Germany Court 1 at Sennelager. These are the ‘primary’ courts, which expression simply means they sit continuously and take the bulk of the work. There are ‘secondary’ courts, which means they sit periodically but not continuously, at Aldergrove (Northern Ireland), Portsmouth and Episkopi in Cyprus; they are used for trials whenever they are the most appropriate venue but rarely otherwise, which is also true of the second courtrooms at each primary venue. The facility remains for ‘tertiary’ courts – that is, ad hoc premises made available elsewhere in the UK or 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, as soon as 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 Defendant's Assisting Officer action: It is not a legal requirement for the Commanding Officer to offer the assistance of a Defendant's Assisting Officer (DAO), but it is the invariable practice in all three Services to do so. The DAO 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, the defendant's legal adviser will have to produce and serve a defence statement in advance of or at 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 DAO 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 DAO 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 the JAG who may designate them as 'ticketed' cases, which means that a particular judge or category of judges is specified 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 Service Prosecuting Authority should issue papers to enable a sentencing hearing to be held **within two to three weeks** of an absentee's return to his unit or his detention 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 Service Prosecuting Authority can be given notice to prepare for a contested hearing; in that event the trial date will be used for the PCMH and arraignment. A Pre-Sentence Report is automatically ordered by MCS in all AWOL cases.

In custody hearings in AWOL cases, Service lawyers representing COs should ensure that where trial in the Court Martial is advised, (a) the CO is informed of the short time-frame for trial and (b) the Service Prosecuting Authority is sent a copy of the advice 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 arranged as Preliminary Proceedings and arraignment under the Armed Forces (Court Martial) Rules 2009 rr 45 and 56. MCS is to assume that the judge has given a direction of his own motion to that effect in each case. It is held in open court and robed unless the judge specifically directs otherwise. The letter notifying the parties of the PCMH normally specifies that the details of the board will be given later and the judge is to be specified 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 trial proceedings and sentencing proceedings is put into the MCS central system from a limited 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, Court Martial trial proceedings due to start or continue on Mondays are unlikely to start until 14.00, so that board members are often not required until that time.

3.5.3 PCMHs are held ordinarily at the four primary centres, Bulford, Colchester and Catterick in UK and BFG Sennelager in Germany. This may be varied only with the agreement of a judge on those occasions when a judge has other work at another centre, such as Portsmouth, and provided there are good and expedient reasons of economy and convenience for listing a PCMH on a Monday morning at that location. PCMHs are not to be delayed so that they can take place at a venue away from a primary centre.

3.5.4 Where there is an acceptable guilty plea, the date of the sentencing proceedings is about another three weeks after the PCMH, normally at the same primary court centre. Such sentencing fixtures are listed to last for a minimum of one and a half hours, thereby allowing up to 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 later than 16.30 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 **DH1 – DIRECTIONS OF JUDGE ADVOCATE** is widely and freely distributed to all practitioners who represent prosecution or defendants and to all stakeholders in the Service justice system. A blank copy is enclosed with the AFCLAA letter confirming legal aid to the defence representative. The current (October 2009) version of the DH1 form is labelled ver 5 and it can be completed on paper or electronically. If and when modifications are found necessary, ver 6 etc will be issued on the authority of the 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 thoroughly then PCMHs can sometimes be conducted largely by VTC, although if it is easy for the defence and prosecution representatives to appear in person then they should do so in any event. A judge 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) substantially 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 advocates **must** expect to attend in person unless the judge 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 giving of directions on disputed issues, 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 Service Prosecuting Authority. A prosecutor due to appear at the same court centre on other matters later that day (and since the primary court centres sit regularly, this is so every Monday) may be able to represent the Service Prosecuting Authority if necessary. If prosecutors appear at the PCMH who do not have conduct of the case, judges will readily 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.

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 proceedings 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 gives 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 deputy must be in court to provide listing options, and the listing parameters defined for a case at the 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 hearing 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 or sentencing proceedings at the appropriate venue on the next available date.

3.10.3 In the case of guilty pleas, this is in straightforward cases 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 guilty pleas for sentence are listed into the primary court centres. Only the first three pages of the DH1 form need to be completed.

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. The whole of the DH1 form needs to be completed. In most straightforward cases the default expectation is that six weeks or so will elapse between PCMH and trial. The listing parameters may be in terms of a bracket of dates, a "not before" date, or a specific date. If reporting restrictions are imposed at the PCMH, a further hearing may be timetabled to allow for any media applications to amend or rescind that order.

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 acceptable as the sole reason for an adjournment.

3.11.3 There may be occasions when for some reason one or both parties wishes to vacate or postpone the hearing date originally listed. 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, the 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 European Court of Human Rights 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 proceedings in the 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 all the following nine items in contested trial proceedings. Where there has been a guilty plea and the case is for sentencing proceedings only, a shortened direction should suffice. A suitably modified direction should be given before a Summary Appeal Court hearing, replacing "Court Martial" with "Summary Appeal Court".

4.1 The Court Martial and the Summary Appeal Court Guidance - Volume 2: Guide for Court Members.
You have all received and duly certified that you have read and understood the Guide for Court Members. You must remember your duties and obligations which are explained in it throughout the trial. I will summarise the more important points at this stage.

4.2 Differing functions *[not in the SAC]*.
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 in issue in the trial.

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.
You will not be reported on either formally or informally in respect of your performance in the 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 weight and importance when you discuss the case.

4.5 Other duties.
For the duration of these Court Martial proceedings your duty as a board member has absolute priority. When you are not sitting in court you may do other work and contact your parent unit [ship/station], but only if it does not interfere or conflict in any way with your primary duty to the 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. That includes any suggestion that you should rush your duties in the trial so as to hurry away to other tasks. 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. After the proceedings are over you may, of course, discuss matters which were mentioned in public during the trial.

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
- Communicating only via the Court Officer or the Court Usher

PRACTICE MEMORANDUM: Section 5

DIRECTION AS TO UNANIMITY

5.1 Since the coming into force of Juries Act 1974 s 17 (providing for majority verdicts), it has been the practice in the Crown Court to direct juries as to the requirement in the first place for a unanimous verdict, and eventually as to the acceptability of a majority 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."

5.2 Whilst s 17 does not apply directly to trials in the Court Martial, where majority verdicts have always been accepted, the spirit of the Practice Direction should be observed as far as possible. However the composition of the court and the provisions of the Armed Forces Act 2006 s 160 and the Armed Forces (Court Martial) Rules 2009 rr 109-110 governing trial in the Court Martial do not permit a refusal by the judge to accept a finding only on the grounds that it was not unanimous. A guilty finding or a special finding may be refused by the judge on the grounds that in the judgement of the judge it is contrary to the law. Accordingly the specimen direction as to unanimity provided by the Judicial Studies Board is not applicable to the Court Martial in its standard form.

5.3 As part of the continuing process of ensuring that practice and procedure at proceedings in the Court Martial reflect as far as possible trial in the Crown Court on indictment (per the Armed Forces (Court Martial) Rules 2009 r 26), judges should draw the attention of the board members to the great desirability of reaching a unanimous finding if possible.

5.4 The following form of words (or something similar) should therefore be adopted at the end of the summing-up of a case:

> "You must remember that each of you has an equal vote and voice when you as a board decide the correct finding in this case. You must each exercise your unfettered duty to act in accordance with your conscience and the oath you have taken. You must consider 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 board expressed during your discussions.
>
> "It is obviously preferable that you should come to a unanimous decision on your findings. However in the Court Martial the law permits you to decide whether the defendant is guilty or not guilty by a simple majority.
> [*Even numbers only:* If you are split equally then the defendant must be acquitted – there is no casting vote where findings are concerned.]
>
> "Having said that, I cannot emphasise too strongly that you should strive hard to reach a unanimous decision. By way of analogy in the Crown Court a jury must have deliberated for over two hours and ten minutes before a judge can even direct them that a majority verdict may be acceptable. Therefore, it is only if, after thorough discussion and full consideration of the evidence, you find yourselves unable to reach a unanimous decision in respect of the defendant, that you should consider returning a majority finding."

5.5 When the board indicates in a note it is ready to return a finding and the proceedings resume, the following is an appropriate way to proceed, in respect of each charge:

- The judge first asks the President of the Board on each charge to answer **yes** or **no** to the question:
  "Have you reached a finding upon which you are all agreed?"

- If the response is **yes**, the judge asks the President of the Board to state Guilty or Not Guilty as provided by the AF(CM)R09 r 110(1).

- If the response is **no**, the judge then asks the President of the Board to answer **yes** or **no** to the question:
  "Have you reached a finding upon which a majority of you are agreed?"

- If the response is **yes** the judge asks the President of the Board to state Guilty or Not Guilty as provided by the AF(CM)R09 r 110(1).

5.6 The effect of this procedure is that in the case of a conviction following trial in the Court Martial, the defendant and his advisers (and if applicable the appeal court) would be in a position to know whether the finding was unanimous or by majority. This resembles as closely as possible within the Act and Rules the position following a conviction in the Crown Court, and thereby meets the purposes of AF(CM)R09 r 26.

PRACTICE MEMORANDUM: Section 6

CREDIT FOR TIME SPENT IN PRE-TRIAL CUSTODY, REMISSION and ADDITIONAL DETENTION

6.1 Like any other criminal court, the Court Martial is required to take into account pre-trial custody when sentencing and set out the specific arithmetical calculation in the Reasons for Sentence[1]. 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 the Military Corrective Training Centre, Colchester (MCTC) is governed by **The Service Custody and Service of Relevant Sentences Rules 2009** (SI 2009/1096). Rule 8(1) to (3) provides for automatic remission as follows:

> **8.**— (1) A detainee who has been sentenced to twenty-five or more days of service detention shall be entitled to a period of remission in accordance with this rule according to the following provisions.
>
> (2) If his sentence does not exceed twenty-eight days he shall be entitled to a period of remission equal to the number of days by which the sentence exceeds twenty-four days.
>
> (3) If his sentence exceeds twenty-eight days, he shall be entitled to a period of remission equal to one third of the period of his sentence, except that, if this would result in the detainee serving fewer than twenty-four days the period of remission shall be such as to require the detainee to serve twenty-four days.
>
> ...

6.3 In addition to the above, rule 70(1) provides for detainees to earn additional days of remission, as awarded by the commandant.

> **70.**—(1) The commandant may for good conduct award a detainee serving a sentence of more than ninety days of service detention remission of his sentence (additional to remission under rule 8) to a maximum of one-sixth of the period of his sentence in excess of ninety days.
>
> ...

6.4 Remission of a sentence of detention at MCTC under rule 8 is as of right, just as it is during imprisonment. The formerly common wording about earning "time off for good behaviour" is appropriate only to additional earned remission under rule 70.

6.5 Following 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 was suspended and later abolished. The Armed Forces Act 2006 s 300 enables rules to be made about service custody, and s 300(4) and (5) provide that:

> (4) The rules may contain provision in respect of the award of additional days to a person guilty of a disciplinary offence created by the rules.

[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

(5) The rules may provide for the determination of any matter by a judge advocate, and may contain provision for and in connection with appeals against such determinations.

6.6 The Service Custody and Service of Relevant Sentences Rules 2009 r 51 provides for a Judge Advocate (referred to as an adjudicator) to impose additional days of detention at a compliant hearing. The additional days are not strictly forfeiture of remission, although the effect is similar.

51.—(1) If he finds a charge under rule 45 proved, the adjudicator may, subject to paragraph (2), impose one or more of the following punishments—

(a) ...

(b) an award of additional days of service detention not exceeding twenty-eight days.

(2) If more than one charge is found to be proved at the same hearing, punishments under this rule may be ordered to run consecutively but, the total period of additional days of service detention awarded shall not exceed twenty-eight days and the total period of cellular confinement shall not exceed ten days.

6.7 Under the pre-AFA06 law, where a person was sentenced to imprisonment or detention by the court-martial, in that court the length of sentence was already reduced to take account of time spent in post-charge custody. That is not now the case. Under the current law the Court Martial decides the appropriate sentence for the offence, passes it in full, and explains for the benefit of the offender that he will be required to serve only $^{2}/_{3}$ (detention) or ½ (imprisonment) of the sentence, less any time already spent in post-charge custody. The Commandant MCTC or the Governor of the relevant civilian custodial establishment calculates the exact release date.

6.8 It is thus made clear to the offender what the sentence is, and how it will be calculated how long he will actually spend in custody before release. After setting out the aggravating and mitigating features of the case, the judge uses the following or a similar following form of words:

Service Detention: "You will serve $^{2}/_{3}$ of the sentence we are about to pass, less time you spent in custody after charge which on the information before us was X days."

Imprisonment: "You will serve ½ of the sentence we are about to pass, less time you spent in custody after charge which on the information before us was X days. You will then be released on licence….etc."

6.9 When deciding and announcing the length of a custodial sentence it is important to avoid confusion. Thus any sentence under 6 months is expressed in days (each month being calculated as 30 days). Sentences of 6 months or over are expressed in months, or calendar years and months. Since the Court Martial is no longer required to deduct time spent in custody before determining the length of the sentence, sentences above 6 months rarely need to refer to days.

PRACTICE MEMORANDUM: Section 7

NOTIFICATION under the SEXUAL OFFENCES ACT 2003 s 80 and the VETTING AND BARRING SCHEME under the SAFEGUARDING VULNERABLE GROUPS ACT 2006

7.1 The notification requirements under SOA 2003 Part 2 are not straightforward when considering cases tried in the Court Martial and this memorandum sets out the statutory framework. The most important issue for judges is the need to check in every case whether the notification requirements are triggered and if so to inform the offender. Normally this presents 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 certificate under s 92 at the conclusion of the hearing. If for any reason either of those things is not done, then the OJAG staff are alerted by the TRN1 Record of Proceedings, and arrangements are made for either the MCTC or the prison authorities to remind the offender on release of the requirement to register.

7.2 Statutory Framework

SOA 2003 Section 80 states:

80.— 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(A) of Schedule 3 which reads as follows:

(1) An offence under section 42 of the Armed Forces Act 2006 as respects which the corresponding offence under the law of England and Wales (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 that section, as a reference to –

a. being made the subject of a service community order or overseas community order under the Armed Forces Act 2006 of at least 12 months; or
b. being sentenced to a term of service detention of at least 112 days.

7.5 Certification

Once the 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 s 92.

7.6 Section 92 reads as follows:

92.— 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.

7.7 Disqualification from Working with Children Orders under the Criminal Justice and Court Services Act 2000 in the Court Martial (and other courts)

Since 2001, a defendant convicted of an 'offence against a child' (as defined in of the Criminal Justice and Court Services Act 2000 s 26) must be disqualified from working with children if: (a) the defendant was aged 18 or over at the time of the offence; and (b) a 'qualifying sentence' (as defined in Section 30 of the Act) has been imposed in respect of the conviction. The requirement to disqualify also applies where the court has imposed a hospital order or a guardianship order.

7.8 Independent Safeguarding Authority

From 20 January 2009, a Court must in certain circumstances inform a defendant that the Independent Safeguarding Authority will bar him from a wide range of work with children and/ or vulnerable adults. This new requirement partly relates to two existing requirements on different categories of Courts:

- Disqualification from Working with Children Orders; and
- Risk of Sexual Harm Orders.

7.9 Vetting and Barring Scheme under the Safeguarding Vulnerable Groups Act 2006

After the full implementation of the Vetting and Barring Scheme (VBS) in October 2009, in accordance with Schedule 10 to the Safeguarding Vulnerable Groups Act 2006 (SVGA06), the powers previously held by Courts (including the Court Martial) to disqualify defendants from working with children were superseded (although the powers still subsist for an overlap period). The equivalent function lies with the Independent Safeguarding Authority (ISA); although the SVGA06 referred to the 'Independent Barring Board' the title has become the ISA.

7.10 Duty of Court – January 2009

In January 2009 SVGA06 Sch 3 para 25 was commenced (by The Safeguarding Vulnerable Groups Act 2006 (Commencement No.3) Order 2009 SI 2009/39), thereby imposing a duty on a Court to inform a defendant that the ISA will bar him from working with children and/or vulnerable adults when the Court:

(a) disqualifies the defendant under the Criminal Justice and Court Services Act 2000
(b) imposes a Risk of Sexual Harm Order under the Sexual Offences Act 2003; or
(c) convicts the defendant of an offence involving harm or a risk of harm to children or vulnerable adults, as listed in SI 2009/37.

The reason for the requirement on the Courts to inform the defendant is to pre-empt a later defence, by a person accused of committing the offence of applying for work from which he is barred, that he did not know he was barred.

7.11 Duty of Court – October 2009

After the Vetting & Barring Scheme go-live date in October 2009 (when the requirements commenced for a new employee to register with the ISA before starting work with children or vulnerable adults, and for an employer to check that a new employee has registered with the ISA), the duty of the Court became:

(a) where it previously had power to make a disqualification order, now only to inform the defendant that the ISA will bar him;

(b) when it makes a Risk of Sexual Harm Order, also to inform the defendant that the ISA will bar him;

(c) when it convicts a defendant of an offence involving harm or a risk of harm to children or vulnerable adults, to inform the defendant that the ISA will bar him.

7.12 Duty of ISA

The ISA informs the defendant of the barring action shortly after it receives confirmation of the conviction from the Police National Computer.

PRACTICE MEMORANDUM : Section 8

COSTS ORDERS UNDER THE ARMED FORCES (PROCEEDINGS) (COSTS) REGULATIONS 2009 (SI 2009/993)

8.1 The Armed Forces Act 2001(AFA01) ss 26 – 28 and the Armed Forces (Proceedings) (Costs) Regulations 2009 (AF(P)(C)R09)make provision for two entirely separate forms of orders:

(i) AFA01 s 26 and AF(P)(C)R09 r 3 govern orders between parties, and
(ii) AFA01 s 27 and AF(P)(C)R09 r 4 govern orders against legal or other representatives (wasted costs).

8.2 S 26 and AF(P)(C)R09 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.

S 27 and AF(P)(C)R09 r4 are concerned with costs incurred by a party as a result of an unnecessary or improper 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 a distinction not only as to the person who may be the subject of a costs order 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- AF(P)(C)R09 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 r 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 – AF(P)(C)R09 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 in this instance he ought to be prepared to take the initiative even without any prompting from a party.

(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) The judge 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) on behalf of the Director of Service Prosecutions

Orders made under AF(P)(C)R09 rr 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 AF(P)(C)R09 r6 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 Director [of Service Prosecutions] of his functions as a party to proceedings before a court mentioned in section 27(1), such costs shall be taken for the purposes of any order under regulation 3 or 4 to have been incurred by the Director."

MCS/DSP costs include:

- 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.

8.6 Before making an order under AC(P)(C)R09 rr 3 or 4 the judge must allow representations from legal or other representatives. Any person against whom the court makes an order under rr 3 or 4 may appeal:

a. in the case of an order made by the Court Martial, to the Court Martial Appeal Court; and
b. in the case of an order made by the Summary Appeal Court or the Service Civilian Court, to the High Court in England and Wales.

PRACTICE MEMORANDUM: Section 9

RECOMMENDATIONS FOR CONTRIBUTIONS TOWARDS LEGAL AID COSTS : CONVICTED DEFENDANTS

9.1 After the completion of any trial or sentencing proceedings in the Service courts where the defendant has pleaded guilty or been convicted and has been sentenced, the judge must consider whether the defendant should pay a contribution towards his costs where he has been granted legal aid. The judge has no power to make an order in relation to any contribution, but he may make a recommendation. If he makes no recommendation there will be no contribution payable. In all cases the judge should state in open court whether or not he is making a recommendation, together with his reasons, having previously considered oral representations from the defence.

9.2 The provisions as to legal aid in the Court Martial are administered by the Armed Forces Criminal Legal Aid Authority (AFCLAA), which is a non-statutory body. Although legal aid for defendants is not a statutory entitlement, in practice it is essential for defendants to be provided with the financial means to mount a defence and for them not to be penalised financially if acquitted.

9.3 Defendants applying to AFCLAA for legal aid are required sign a declaration acknowledging that they may be obliged to contribute towards their defence costs, and that after trial the judge may make a recommendation as to the amount (if any) deemed appropriate for convicted defendants to pay towards their own legal costs. This is a pre-condition of the grant of legal aid.

9.4 The power to make a costs recommendation has no statutory basis, but derives from the contract entered into with AFCLAA by the defendant. In practice in each case AFCLAA produces:

- an assessment of the defendant's means; and
- an estimate of the defendant's costs (subject to later detailed assessment)

to inform consideration of a possible contribution towards the costs of the defence. This is placed before the judge after conviction, at the sentencing hearing.

9.5 The Ministry of Defence have promulgated threshold levels which provide a useful guide to judges when they consider whether a contribution is appropriate (Nov 2009). The thresholds are those used in the civilian statutory criminal legal aid scheme, and are applied by analogy in the Service courts. Defendants whose gross annual income (including any spouse's income) is at or below £22,235, whose capital assets are below £3,000, and whose equity in their main residence is below £100,000 can expect to make NIL contribution to their defence. If the defendant is aged 17 or below at the time of the application, there will be NIL contribution. These thresholds are binding in that they form part of the contract agreed between AFCLAA and the defendant.

9.6 Convicted service personnel often remain in secure paid employment even after conviction of criminal offences, which is very different from the situation in the civilian world. Where the financial resources of the defendant are very small, or he is to lose most or all of them as a result of the sentence (e.g. custody without pay, dismissal, large fine or service compensation order), there may be very limited scope for any contribution. If the defendant has significant resources which he will keep after the sentence (e.g. small fine,

suspended sentence, loss of seniority, reprimand), a contribution is more likely to be recommended. A token contribution (such as £100) may also be considered in cases where the judge thinks it appropriate.

9.7 Where the judge is minded to recommend a contribution and the defendant's resources exceed the income threshold, there are provisions in the JSP to the effect that the amount payable from income will be limited to a sum no greater than the defendant's disposable income during a 26 week period. This ceiling is binding in that it forms part of the contract agreed between AFCLAA and the defendant, and therefore judges should have regard to this when making any recommendation for contributions from income. In addition the judge may recommend a contribution if the defendant has capital assets above the threshold. The total contribution required by AFCLAA following the assessment of the defendant's means is thus 26 times weekly disposable income (or some lesser sum) plus amounts of capital assets and equity (if any) above the thresholds, or the full costs of the defence, whichever is less.

9.8 In the Royal Navy legal representation for defendants is often provided by uniformed RN barristers instead of by civilian lawyers. Sometimes RAF lawyers provide representation, usually for Army defendants. In these cases if there has been no application to AFCLAA for legal aid, no agreement to pay any contribution, and no figure for the costs of the defence, then there is no scope for a recommendation by the judge.

9.9 Where the case is in the Court Martial by election or in the SAC, the defendant/appellant is still liable to pay a contribution towards his costs if the judge so recommends. Caution is needed because there is a risk that such a recommendation could be represented as a disincentive to elect/appeal, and thus undermine the summary hearing system in ECHR terms. In these circumstances any recommendation is likely to be justified only where the defendant has caused unreasonable delay or made frivolous applications which have caused additional costs to AFCLAA.

9.10 Service courts differ from the Crown Court in that a convicted defendant cannot be ordered to pay prosecution costs, except where they have been incurred as a result of unnecessary or improper acts or omissions; see Section 8 above. In practice, the effects on the defendant of the sentence plus the recommendation to contribute to defence costs are likely to soak up whatever amounts the defendant can reasonably be expected to pay in total. Occasionally there is scope to consider prosecution costs as well, when the circumstances mentioned in Section 8 are met.

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 Appeal Court.

10.2 Credit for guilty plea at summary hearing

At a summary hearing the accused is asked to plead, and where he pleads guilty his commanding officer is required to give credit for it. An SAC is always informed whether an appellant was given credit for a plea of guilty at the summary trial.

10.3 Clearly if the sentence by the commanding officer is the maximum permissible (28 days, or 90 days with extended powers: AFA06 s133) it is safe to assume that credit was not given to reflect any admission of guilt. If an 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 plead guilty at the summary dealing but the commanding officer did not give credit for that plea.

10.4 The Summary Appeal Court (SAC) is compliant with Article 6 of the European Convention on Human Rights (right to a fair trial). Service personnel have an unfettered right of appeal from Service summary hearing and this, combined with their right to elect trial in the 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 substitute only a sentence which would have been within the powers of the commanding officer and in the opinion of the court is no more severe than the punishment originally awarded at the summary hearing.[2]

10.6 Punishments available at summary hearing (AFA06 s132) are not strictly listed in order of severity, although the list appears to be in descending order of severity. 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 statutory list. The SAC

[2] Armed Forces Act 2003 s 147(3)

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 it must explain why the court is of the opinion that the actual sentence is no more severe than the original punishment. (AFA06 s147(3))

10.7 Where an appeal is against a punishment awarded by a subordinate commander with limited delegated powers at a summary hearing, the SAC may only award a punishment which is within those delegated powers. The system of unrestricted 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, the judge should consider whether there is a reasonable explanation for the failure to appear. If there is no reasonable explanation, the judge may direct the appeal to be treated as abandoned. Alternatively, the judge may direct proceedings to be held in the absence of the appellant provided he is satisfied that a proper notice of time and place of the appeal was served on him, or otherwise adjourn until the appellant can attend.

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 the Court 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 the 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* (Armed Forces Act 2006 s 158; Armed Forces (Court Martial) Rules 2009 r 152 & 153).

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 s 4(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 s 11 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.

S 11 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 s 11, 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 under r 153.

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 s 46 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 s 46(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 s 46(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 Judges 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 s 12 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 Armed Forces (Court Martial) Rules 2009 r 26 contain general provisions enabling the judge to conduct the proceedings:

"…in such a way as appears to him to be in the interests of justice."

Practical Considerations

11.7 If reporting restrictions have been applied for or are to be considered, the hearing considering them should be either trial proceedings of the Court Martial or preliminary proceedings open to the public 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 Media representatives prefer to and are entitled to expect to be given an avenue for making representations at the time when the restrictions are originally imposed. The media may appeal against reporting restrictions imposed in the Court Martial to the Court Martial Appeal Court, under the Armed Forces Act 2006 s 163(3)(i) and the Court Martial Appeal Court Rules 2009.

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 same way as for a Crown Court. 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 Director of Service Prosecutions. The Service 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:

BFG (Sennelager) Court 1
Bulford Court 1
Catterick Court 1
Colchester Court 1

(a). Sit full-time on a continuous basis (i.e. 43 weeks per year omitting Summer, Christmas and Easter closures, plus a limited 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
(g). Facilities are modern, fully equipped and to the highest standards

A.1.2 Eight Secondary Permanent Courts comprising:

Aldergrove Courts 1 and 2
BFG (Sennelager) Court 2
Bulford Court 2
Catterick Court 2
Colchester Court 2
Cyprus (Episkopi/Troodos)
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

(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, Cyprus or Portsmouth – files are taken there for trial and returned post-trial

A.1.3 Tertiary Ad Hoc Courts

The Court Martial is 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 only basic standards of suitability, not necessarily the high standards of the primary 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 around 14 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 orders 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 Court Centre. AWOLs are listed within a "Warned List Period", but prosecution and defence advocates are warned that each case can be brought forward to an earlier date in that period (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. A hearing date is not fixed before the PCMH takes place, but MCS may have prepared a provisional hearing date to be confirmed or varied at the PCMH. The parameters within which a hearing date is to be fixed are considered along with other issues, and are directed in the DH1 form.

A.2.3 Guilty Pleas and Sentencing Proceedings

Where a case is to be listed only for sentencing proceedings following a guilty plea, the listing parameters normally are for a date no more than 14 to 21 days after the PCMH, within 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. Venue is normally obvious or inconsequential, but the judge may indicate otherwise if appropriate, or if a secondary or tertiary venue is an option. The judge orders a Pre-Sentence Report to be prepared if necessary. The Court Administration Officer then notifies the hearing date to those concerned, 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 the UK) within that

"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 for the trial 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 defines 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 is assumed to be available in any working week, and availability of a specific prosecution advocate or 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. 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, the Court Administration Officer appoints a date and venue for the 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. 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) within that "Warned List Period" if necessary with the consent of the parties

(f). lists proceedings with RN and RAF defendants in the same way as Army defendants , except that in a given week all RN defendants or separately all RAF defendants are consolidated into a single location in UK;

(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 further directions can be given

(h). if listing within the parameters proves impossible, seeks direction from the judge.

The Court Administration Officer may delegate his functions to other members of the Military Court Service.

A.3. Applications to Change Dates

After listing arrangements have been made by the Court Administration Officer in accordance with the parameters directed 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 the 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 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 six courts to sit to try Army defendants. RN and RAF board members are specified to be available for alternate "Warned List Periods" or as required.

A.4.2 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 dates of the "Warned List Periods" are the same across the three Services. Surplus board members are generally cancelled as soon as it becomes clear they will not be needed, to minimise disruption to their normal duties.

Ends