PRACTICE IN THE SERVICE COURTS
COLLECTED MEMORANDA

Version 5(1)

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Introduction

I am pleased to present this updated version of collected practice memoranda which has been completely reviewed and, in many places, fully rewritten to reflect current best practice in the Service Courts.

As stated in earlier versions there is no statutory basis for these practice memoranda. They have been produced following extensive consultation and simply represent opinions or directions, including interpretations of the law, which provide persuasive authority. 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.

As well as being generally refreshed there have been a number of more fundamental changes made to this revised version. The previous practice memorandum number 2, which dealt with time limits for civilian summary offences, has been deleted following the ruling of the Court Martial Appeal Court in *R v S* [2013] EWCA Crim 2579. Any application about abuse should henceforth be dealt with on its individual merits applying the test in *R v Maxwell* [2011] 2 Cr App R 31.

Annex A, which was a summarised description of the listing system, has also been deleted as it was judged to not add anything critical that was not covered by the third memorandum.

Two new memoranda have been added. In order to keep consecutive numbering a memorandum on the use of the SJAR and OJAR in trials has been added as memorandum 2. Another new memorandum, the Protection of Children of Service Families, Protection Orders and Assessment Orders, has been added at number 12.

All of these important changes had considerable input from Judges as well as from the staff of the Military Court Service and the Ministry of Defence and I am very grateful to all who contributed to this document.

His Honour Judge Jeff Blackett
Judge Advocate General

July 2014

MEMORANDUM 1

Conduct Prejudicial to Good Order and Service Discipline: AFA06 Section 19

1.1 AFA06 S.19 proscribes:

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

The section is broadly worded so as to enable the Services to enforce the high standards of discipline and conduct necessary to support operational effectiveness. However, the section is not intended to permit the criminalisation of **any** conduct without limit; 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.

1.2 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. It is, however, perfectly proper to add a section 19 charge as an alternative to a substantive charge in appropriate circumstances.

1.3 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.

1.4 It is not sufficient for the prosecution to concentrate 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. 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. In the Case Summary Sheet and when opening the case the prosecutor should describe how the conduct was prejudicial.

1.5 *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."

1.6 It is a matter for the board to decide whether the conduct was 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.

MEMORANDUM 2

Use of the OJAR / SJAR in Trials

2.1 Evidence of a defendant's good character can be used either during the trial proceedings as part of the defence case, or during sentencing proceedings as part of mitigation. Applications to adduce evidence of OJAR/SJAR during the trial will normally be made by the defence and will ordinarily only be excluded if they contain material which would mislead the Court. Data Protection Act (DPA) principles apply to the provision of these documents which are not routinely available to either the SPA or MCS.

2.2 However, some defence counsel who are new to proceedings in the Court Martial may not be aware that these documents exist or that they may be submitted to the court. At the PCMH judges should ensure that counsel are aware of the existence of OJAR/SJAR and the use that can be made of them.

Evidence of good character during the trial

2.3 Courts will generally give great latitude as to the type of material adduced to support submissions about the defendant's good character and there is only likely to be an objection where the material adduced may create a false impression. OJAR/SJAR contain much information about a service person's skills as well as his/her character. The latter is a relevant consideration for the Board when considering what weight should be given to good character; the former is not.

2.4 When the defence does provide copies of OJAR/SJAR to support assertions about the defendant's good character, the judge, when summing up, should remind the Board that statements about character in those reports are relevant but statements about the defendant's professional skill are not.

Use of OJAR/SJAR in mitigation

2.5 If the defence do not intend to adduce OJAR/SJAR as part of their plea in mitigation, the judge may ask defence counsel whether he or she is aware of the reports and whether he or she wishes to present them to the court. If they are not produced the court should be advised that defence counsel does not consider them to be particularly helpful or relevant.

2.6 The defendant has an automatic right to all his or her personal reports. In most cases the defendant should be able to print reports directly from the Joint Personnel Administration (JPA) system. Otherwise the reports must be provided through the Single Service personnel department. This approach can be made by MCS but time is needed for them to be provided. In certain

circumstances the court may wish to ask MCS to seek the OJAR/SJAR in advance whereupon two sets of the last 3 years worth of reports ought to be provided in sealed envelopes (one set for the judge and the other for the defendant) with the court's envelope to be opened only in the event that the defendant gives permission for his or her personal information to be shared or the court orders the use of the reports. Where the defendant's consent is not given, provided a judge orders their disclosure, the information becomes exempt from the non-disclosure provisions of the DPA by virtue of section 35(1) where disclosure is required by law or in connection with legal proceedings.

2.7 The judge should be mindful of the burden that such requests for OJAR/SJAR could have on the court administration and should only ask MCS to make the approach where the defence have not made the approach themselves and where the judge considers it in the interests of justice that the reports be made available. It is preferable for the defence to produce the documents themselves.

2.8 Following their use reports should, under the DPA, either be returned directly to the defendant or be destroyed securely by MCS and a record kept of such action by MCS.

MEMORANDUM 3

Plea and Case Management Hearings (PCMH) and Listing Practice

Introduction

3.1 The practice of automatically holding 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 a structured approach to prepare their cases under judicial supervision. This structure takes into account the particular needs of victims and witnesses, and the operational commitments of the Armed Forces. It acknowledges:

- the reducing Military Court Service (MCS) estate;
- the single system of Service 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
- MCS as an independent tri-Service organisation.

3.2 All preliminary proceedings and arraignment proceedings take place in open court (unless there are exceptional reasons for them to be held *in camera* or in chambers). 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 MCS under judicial supervision and sanction.

3.3 Holding a PCMH:

- enables binding pleas to be taken at the earliest practicable stage;
- enables substantive resolution of issues where necessary ahead of trial;
- emphasises 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.

Framework

3.4 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 five courts listed to sit on a regular basis. These comprise Court 1 at each of the Military Court Centres at Bulford, Catterick, Colchester and Sennelager (Germany), each sitting for 43 weeks of the year, and the Court at HMS Nelson, Portsmouth, sitting for 24 weeks of the year. These are the 'primary' courts, which expression simply means they take most of the work. Permanent court facilities are also available at Aldergrove (Northern Ireland)

and Episkopi (Cyprus). These together with the second courtrooms at Bulford, Catterick, Colchester and Sennelager form the 'secondary' courts, which means they sit periodically when they are the most appropriate venue but rarely otherwise. The facility remains for 'tertiary' courts; that is, ad hoc premises made available in the UK or anywhere in the world for a single trial where the interests of justice and/or operational commitments so require. Listing in the Military Court Centre at Sennelager will reduce in line with the drawdown from Germany with closure of the Court Centre expected in 2018. Further references to Sennelager in this memorandum should be read accordingly.

3.5 PCMHs are held ordinarily in the five primary courts. This may be varied only on the direction of the Judge Advocate General or the specified judge. PCMHs are not to be delayed so that they can take place at a venue other than a primary court.

Plea and Case Management Hearing (PCMH)

3.6 Each new case, with the exception of Absence Without Leave (AWOL) cases, reaching MCS is immediately considered for a PCMH. The process is as follows:

MCS action.

3.7 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 prosecution, defence and the defendant's Commanding Officer (CO) setting a date and venue for a PCMH. A provisional sentencing date and venue may be included in this letter in simple cases and confirmed or re-set by the judge at or following the PCMH if there is a guilty plea.

CO action.

3.8 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.

Defendant's Assisting Officer action.

3.9 It is not a legal requirement for the CO to offer the assistance of a Defendant's Assisting Officer (DAO), but it is the normal 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 as quickly as possible and in good time before the PCMH. If the defendant intends to plead not guilty, the defendant's legal adviser will have to produce and serve a defence case 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 case 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.

Judge Advocate General action.

3.10 In most cases, the judge who is sitting at the relevant Court Centre is specified to conduct the PCMH. However a small number of exceptionally serious cases will have been brought to the attention of the Judge Advocate General 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.

AWOL cases

3.11 If the case involves only charges of AWOL, it is not listed for a PCMH. The Service Prosecuting Authority (SPA) aims to issue papers to enable a sentencing hearing to be held within three weeks of an absentee's return to his unit or his detention in custody pending trial. The letter from MCS to the prosecution, defence and CO specifies the date on the basis that the plea is likely to be guilty. The MCS letter also states that if the defendant intends to plead not guilty, he should immediately inform the MCS so that the SPA 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 not ordered by MCS in AWOL cases, unless directed by the judge or where the defendant is not represented by a lawyer. Any Court Martial case, which involves charges of AWOL only and of which MCS gets advance notice either from a custody hearing or from the CO or SPA, will automatically be given a provisional 'fast-track' listing by MCS. AWOL cases are listed by default at a rate of four per day maximum, unless the sitting judge directs otherwise.

3.12 In a custody hearing involving AWOL only, the Service lawyer advising the CO should ensure that where trial in the Court Martial is advised, (a) the CO is informed of the short time-frame for bringing the case to trial and (b) the SPA is sent a copy of the advice to assist them in tracking and preparing the case.

Form and listing of PCMH

3.13 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 Advocate General has given a direction of his own motion to that effect in each case. The letter notifying the parties of the PCMH normally states that the details of the Board will be given later and that the judge is to be specified by the Judge Advocate General. PCMHs are held in open court and robed unless the specified judge directs otherwise.

3.14 The MCS has the target of holding a PCMH about **six weeks** after the date of receipt of prosecution papers. The PCMH is listed into a 2 week warned list (assize) period and the Court Officer then confirms the exact date and time of the hearing having consulted the sitting judge.

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

3.16 Although sitting times are at the discretion of each individual judge, courts do not normally sit earlier than 10.00am (9.30am for custody hearings, arrest warrants and search warrants), nor on any applications over the short adjournment, nor later than 4.30pm 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. It is expected that a sitting week would normally be not less than 25 hours (i.e. 5 sitting hours per day).

Directions of the Judge Advocate (Form DH1)

3.17 The form **DH1 – DIRECTIONS OF JUDGE ADVOCATE** is widely available 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. Version 6 of May 2011 is the current version of the DH1 form and it can be completed on paper or electronically. If and when modifications are found necessary, version 7 etc will be issued on the authority of the Judge Advocate General; otherwise the template wording and layout of the form is not to be changed by users.

Attendance of defendant and prosecution and defence representatives by VTC

3.18 If the defendant is to be arraigned and required to plead, he must attend in person unless given leave by the judge to appear by VTC. He may also wish to instruct his defence advocate to attend at court 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 the PCMH can sometimes be conducted largely by VTC live link. However, 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 MCS and copied to the Court Centre in which the PCMH is listed. It should be sent by fax or email at least two working days in advance of the scheduled PCMH (see below). In certain circumstances the judge may direct arraignment by VTC live link (e.g. the defendant is being held in custody).

3.19 If, however, the DH1 form is **not** so completed and delivered to MCS and the Court Centre within the specified time, then the prosecution and defence advocates **must** expect to attend in person unless the judge directs 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 SPA. A prosecutor due to appear at the same Court Centre on other matters that day may be able to represent the SPA 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.

3.20 Where there is an application for use of a VTC live link at the PCMH which the judge is not minded to grant, there may be a short-notice 'For Mention' hearing (with both advocates attending by VTC in the absence of the defendant) to consider the application. The judge may direct that either or both parties may attend the subsequent PCMH by VTC and may impose certain conditions (e.g. if the DH1 is completed by a certain date; or there are no outstanding or contentious issues).

Duties of representatives

3.21 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:

- provided advice to the defendant, particularly about plea and related matters;
- completed the parts of the DH1 form that are relevant to his client;
- passed the form so completed to the prosecution in sufficient time for them to consider it and make any relevant comments; and
- complied with the requirements of CPIA to give a defence statement, if there is a plea of not guilty, subject to the applicable time limits.

Handling Form DH1

3.22 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 can be no doubt about directions given and the timetable for trial. Copies for those attending by VTC 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.

Action at PCMH

3.23 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.

3.24 The Court Officer, on behalf of the Court Administration Officer, may represent to the judge any service interests or special considerations affecting the listing arrangements of which he has been informed and which may need to be taken into account.

3.25 The point of having all parties, the judge and MCS together (in person or by VTC 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.

3.26 In the case of guilty pleas where provisional sentencing proceedings have already been listed at around four weeks ahead, the judge either confirms the listing or with the agreement of parties brings it forward to an earlier 'slot'.

3.27 If the defendant pleads guilty to one or more charges, the judge may direct 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. Production of a PSR is not automatic, and the direction depends on the circumstances of the case; the Armed Forces Act 2006 s 256(1) and (2) apply.

3.28 If the defendant pleads not guilty (or declines to plead), the judge gives further directions which may include the timetabling of a further preliminary hearing. The whole of the DH1 form needs to be completed. In most straightforward cases the default expectation is that eight 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. A 'For Mention' hearing should be timetabled around two weeks before the trial date, as a means of verifying compliance with directions to prepare the case for trial. If the judge does not

direct a 'For Mention' hearing, MCS will automatically list one at two weeks prior to trial. The judge may direct MCS to cancel the 'For Mention' hearing, if both prosecution and defence give 48 hours notice in writing to MCS that they are trial ready in all respects and if the judge is satisfied that they are so ready.

Listing, vacating and moving cases

3.29 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 (assize) period of up to two weeks. This allows the Court Officer more efficiently to arrange the work allocated to any given Board during the assize 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.

3.30 Save in complex or serious cases, the unavailability of counsel is not acceptable as the sole reason for an adjournment.

3.31 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 in writing, who canvass the view of the other party, also in writing, and then notify the trial judge or, if he is unavailable, the Judge Advocate General or Vice-Judge Advocate General. 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 either prosecution or defence a 'For Mention' hearing should be held. If that is done, then a new date if required may be fixed at that 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 is entitled to make representations about listing arrangements via the Court Officer, copied to the prosecution and the defence.

MEMORANDUM 4

Morris Direction

4.1 The Court Martial is an independent tribunal established by law. There have, in the past, been suggestions that Service Officer and Warrant Officers who serve as Board members may, or may be perceived to, lack independence from the chain of command. This issue was considered by the European Court of Human Rights (ECtHR) in Morris v United Kingdom (2002)34 ECHRR 1253. The ECtHR accepted that Service personnel are independent when sitting in Service Courts but certain safeguards are necessary to confirm and demonstrate that independence.

4.2 The ECtHR stated that the judge should give a direction to lay Board members after they are sworn to remind them of their duty to act independently and impartially. Such a direction is known as the "Morris Direction".

4.3 A full Morris Direction should be given at the start of each trial unless all parties indicate that they are content for it to be modified to reflect the fact that Board members have read the direction in advance (in the guide for court members) or that they will have received the full Direction at an earlier trial in the same assize period.

4.4 It is, of course, a matter for the individual judge to decide what is necessary. A shortened version is appropriate prior to a sentencing hearing. The direction is also appropriate for the Summary Appeal Court, where the members must also be reminded that the appeal is a rehearing and the appeal must be looked at entirely afresh, without being influenced by the fact that the Commanding Officer took a particular view.

4.5 The following topics should be included in the full Morris Direction:

i The Court Martial and the Summary Appeal Court Guidance - Volume 2: Guide for Court Members.

Remind lay members of the Members Guide, which each member must certify that he has read. It gives useful guidance as to how they should approach your task.

ii Differing functions *[not in the SAC or Newton hearings]*.

The judge will give binding directions on the law which Board members must follow, but they are the sole judges of fact. It is the Board members task to decide which evidence is truthful and reliable and it is their collective view of the evidence which will determine their verdict. They must only discuss the evidence when they are in their retiring room and all of them are present.

iii Evidence and no contact.

Board members should be advised in the following terms:

You must not discuss the case with anyone outside your number either face to face on the telephone or on any internet chat site, such as Facebook. It is your view of the evidence that matters and any discussion would risk, consciously or not, your being influenced by the opinion of others. If anyone tries to talk to you about the case, cut them off straight away and please send me a note through the court usher explaining what has happened. If anyone suggests that you should rush your duties to get away to other tasks please report that. You must have no contact with the prosecution or defence or any witness or potential witness. I must have no out of court contact with you until you deliver your verdict. We have a system of open justice where the prosecution and defence decide what evidence they wish to rely on. You should not seek any information about any aspect of the case on the internet or elsewhere. To do so would be contrary to your oath and be a potential offence. It would be unfair to seek evidence because the prosecution and defence would not be able to deal with it. You should not visit the scene except on a view arranged by the court. The danger of doing that is that the lighting and lay out at the scene may be different now and the parties would not be able to explain this.

iv No reports.

Board members' independence is guaranteed, in part, by the fact that the Queen's Regulations specify that they cannot be reported on formally or informally for any decision they take on sentence or finding. QR 75, 6.111 states "The performance of a court member shall not be considered or evaluated in the preparation of any personal report, assessment or other document used in whole or in part for the purpose of determining whether a member is qualified to be promoted, or is qualified or suited for particular appointments or training."

v Other duties.

Board members may undertake other work outside court hours, but their main duty is trying the case and that takes priority. Until they retire to consider their verdict they can speak with their units, but not about the case. When they retire to consider their verdict they should not use the telephone and must stay together and separate from anyone else until they reach a verdict or the judge otherwise directs.

vi Undue influence.

Board members should be reminded to report to the judge immediately if anyone has attempted or attempts to influence them in the performance of their duties in the trial. That includes any suggestion that they should rush their 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.

vii Questions.

If Board members have any questions about law, procedure or evidence they must be addressed by the judge in open court and in the presence of all parties. No advice should be sought elsewhere and they should not speak to the Court Staff about the case. If they do wish to ask a question it should be written down and passed through the court officer or court usher to the judge who will answer it in open court.

viii Secrecy.

Board members swear not to disclose their deliberations. After all the cases are over they can talk about what happened in open court but they cannot disclose anything about their deliberations in reaching their verdict or discussions on sentence if the defendant is convicted, unless required to do so in due course of law.

ix Other matters.

- Making notes - suggest that they are only brief reminders as the judge takes a full note and reminds them of it during his summing up. It is more important for Board members to watch the witnesses when they give their evidence so that they can assess whether or not they are telling 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
- Judges will incorporate remarks from the Crown Court Bench Book

MEMORANDUM 5

Direction as to Unanimity

5.1 Since the coming into force of the 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.

5.2 The Juries Act 1974 does not apply to trials in the Court Martial, where simple majority verdicts have always been accepted. Accordingly the specimen direction as to unanimity provided by the Judicial College is not applicable to the Court Martial in its standard form.

5.3 However, 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 judge first asks the President of the Board on each charge to answer "**Yes"** or "**No"** to the question:

"Have you reached a finding?"

If the response is "**Yes"**, the judge asks the President of the Board to state "**Guilty**" or "**Not Guilty**" as provided by The Armed Forces (Court Martial) Rules 2009 r 110(1). In the light of the judgment of the Court Martial Appeal Court in the case of R v Twaite [1], no enquiry should be made as to whether the finding was unanimous or by a majority.

[1] *R v Twaite* [2010] EWCA Crim 2973 and confirmed in R v Blackman [2014] EWCA Crim 1029

MEMORANDUM 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 refer to it in the Reasons for Sentence[2]. 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 advantage), then that must be set out in the Reasons for Sentence (Armed Forces Act 2006 ss 246, 252 & 253). Pre-trial custody however does not include any time spent in custody prior to being charged. Only time spent in Service custody after charge counts.

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.
>
> ...

---

[2] *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

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* [3] — which established that disciplinary hearings in civilian prisons resulting in forfeiture of remission engage Article 6 — the Commandant MCTC's power to order forfeiture of 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.
>
> (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, the length of sentence pronounced in that court 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 number of days need not be specified as these are calculated and applied administratively. The Commandant MCTC or the Governor of the

[3] *Ezeh and Connors v. UK* 39665/98; 40086/98 [2002] ECHR 595

relevant civilian custodial establishment calculates the exact release date and informs the offender.

6.8 It is thus made clear to the offender by the court 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.
> (*If the sentence is over 90 days*): You may be released earlier if the commandant awards extra remission for good behaviour."
>
> **Imprisonment:** "You will serve ½ of the sentence we are about to pass, less time you spent in custody after charge. You will then be released on licence….etc."

6.9 In both cases specify that those days will be calculated administratively and the defendant will be informed of his release date by the Governor or Commandant.

6.10 When deciding and announcing the length of a custodial sentence it is important to avoid confusion or ambiguity. 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.

MEMORANDUM 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 This Memorandum covers two distinct consequences of a conviction for sexual offences of all types and offences committed against children and adults in prescribed circumstances.

Notification under the Sexual Offences Act 2003 s 80

7.2 This only arises if the offender is convicted of an offence in SOA 2003 Schedule 3 which is set out at Archbold 2014 §20-278 *et seq*. Virtually all common sexual offences are covered – whether under the SOA 2003 or other legislation whether passed before or after that Act. Care is required where an offence was committed against an adult because in respect of some offences the notification requirement depends on the sentence imposed. The most common examples are Indecent Assaults under SOA 1956 and Sexual Assaults under SOA 2003. Equally care is required with offences concerned with indecent images of children where both the age of the child and the offender are relevant.

7.3 There is no substitute for checking the Schedule in respect of the offence to which the conviction relates. In particular note the variations with regard to Community penalties and their equivalents in service law which are contained in SOA 2003 Sched 3 §§93 (SDA offences) and 93A (AFA 2006 offences). In essence a community sentence of at least 12 months is to be read as being a service community order or overseas community order of at least 12 months; or being sentenced to a term of service detention of at least 112 days.

7.4 The court has no discretion over the question of notification – it is a mandatory consequence of conviction – and therefore no power to make any order in respect of notification. On plea of guilty or conviction, the judge should do the following:

I. Certify under SOA 2003 s 92 that the offences are ones to which the notification requirements of SOA 2003 Part II apply or may apply because of any sentence which may be imposed, and

II. In cases where notification is automatic, issue the form prescribed and get the offender to sign the acknowledgement part <u>before</u> he leaves the court building.

7.5 The form permits completion as to length of notification where that is known – i.e. when sentence is passed – and where it is not – i.e. where it depends on the type of sentence to be imposed. If it is completed electronically at the date of certification it saves time issuing the final version on sentence. The period during which notification is required is prescribed by reference to the sentence imposed and the relevant law is to be found at SOA 2003 s 82.

7.6 Failure to certify at the relevant time does not invalidate the notification requirement. The purpose is to avoid any dispute at a later date and so should always be done. If a certificate is not issued then those responsible for the incarceration of the offender are responsible for issuing him with the appropriate notification on release. Good practice dictates that certification should be done at the date of conviction.

The Barring Scheme under the Safeguarding Vulnerable Groups Act 2006

7.7 *The current law is set out at s§5-1119 Archbold 2014*

7.8 The Independent Safeguarding Authority (ISA) has replaced earlier similar bodies by virtue of the Protection of Freedoms Act 2012, s.88 and has a duty to establish and maintain the "children's barred list" and the "adults' barred list" by virtue of the Safeguarding Vulnerable Groups Act 2006 (SVGA06) s.2. SVGA06 s 2 also gave effect to Parts 1 and 2 of Schedule 3 which apply for the purpose of determining whether an individual is included in the children's barred list or the adults' barred list respectively. Neither the Court Martial nor any other court has the power to disqualify persons under the now repealed provisions of Criminal Justice and Court Services Act 2000 (CJCSA 2000) Part II.

7.9 Where the offender is convicted of an offence specified for the purposes of SVGA06 Sched 4 §24(1)(a) or where an order of a description specified under §24(1)(b) is made against him, the duty of the Court is to inform the defendant that the ISA will or (as the case may be) may include him in the list concerned and thus bar him from a wide range of work with children and/ or vulnerable adults.

7.10 The specified offences are listed in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009/37) (as amended). Inclusion in the lists is automatic – the only variations permitted are if the lists are expressed to be ones where there is a right to make representations. The four paragraphs in the schedule list the offences which will result in automatic inclusion in one of four lists. The lists are as follows:

List 1 The children's list with no right to make representations
List 2 The children’s list with the right to make representations
List 3 The adults’ with no right to make representations
List 4 The adults' list with a right to make representations.

7.11 A helpful version of the lists can be found at Archbold 2014 §5-1126. They are extremely long and bear careful consideration It is important to note that in addition to the offences actually listed all offences contrary to the Army and Air Force Acts 1955 ss 70, and the NDA 1957 s 42 as well as AFA 2006 s 42 which correspond with the listed offences are included. As Archbold points out, there are considerable anomalies in the lists particularly with regard to offences of violence against children – for instance under the CJCSA 2000 disqualification for such offences would have been automatic if the sentence was of a certain length.

7.12 It is the duty of the Secretary of State to inform the ISA once he is satisfied that the necessary criteria are satisfied. Once that has occurred the individual concerned may make representations to the ISA as to his removal from the list. No sentencing court has any part in this process. The ISA informs the offender of the barring action shortly after it receives confirmation of the conviction from the Police National Computer.

7.13 The role of the criminal courts is extremely limited as inclusion in one or other of the lists of barred persons will be automatic in certain circumstances and in no circumstances will inclusion on a list depend on an order of a court. A failure by the court to inform the offender of the likelihood of inclusion in either list does not appear to be fatal to such inclusion.

7.14 This Memorandum covers two distinct consequences of a conviction for sexual offences of all types and offences committed against children and adults in prescribed circumstances.

MEMORANDUM 8

Costs Orders under the Armed Forces (Proceedings) (Costs) Regulations 2009

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 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.

8.3 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.

8.4 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 penalised by a costs order but also the conduct which may justify such an order.

8.5 Guidance on the procedure in respect of both types of order is given in *Criminal Procedure Rules 2013 (SI 2013/1554)* rr 76.8 (unnecessary or improper act etc) and 76.9 (costs against a legal representative) (see *Archbold 2014 at* 6-116 and 117). That guidance may be adopted under *Armed Forces (Court Martial) Rules 2009 r26.* When an order is made under either of these Regulations, the amount must be specified. The following points should be noted:

a) 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.

(ii) 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.

b) Wasted 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:

- Has there been an improper, unreasonable or negligent act or omission?
- As a result, have any costs been incurred by a party?
- If the answers to both (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. A mere mistake is not sufficient to justify an order – there must be a more serious error. 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.

c) Costs incurred by the Military Court Service (MCS) on behalf of the Director of Service Prosecutions

In the Service Justice System bringing witnesses to court is arranged and paid for by the Military Court Service, rather than by the parties. Such costs represent a significant part of the MCS budget and are easily quantifiable. Orders made under AF(P)(C)R09 rr 3 and 4 may include any costs incurred in securing the attendance of witnesses at court. 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."

This means that a wasted costs order on these grounds could not be made against the prosecution. 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

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

e) 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:

(i) in the case of an order made by the Court Martial, to the Court Martial Appeal Court; and

(ii) 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.

MEMORANDUM 9

Legal Aid for Defendants

Introduction

9.1 The Armed Forces Legal Aid Scheme 2011 (AFLAS 11) is now the only legal aid scheme available within the Service Justice System. The contributory element of the scheme is summarised briefly at paragraphs 9.4 to 9.14. Full details and forms are available from AFCLAA. The scheme is non-statutory, and is funded by the Ministry of Defence. Costs of acquitted non-legally aided defendants are dealt with at paragraphs 9.20 to 9.21.

Operation of the AFLAS 11

Trials: Court Martial (including Referral Stage) and Service Civilian Courts (see also 9.18)

9.2 Every defendant who appears for trial in the Court Martial (including the initial referral to DSP stage) or Service Civilian Court is entitled to be granted legal aid for those proceedings, provided they have submitted a completed application form, and have not exceeded the financial eligibility threshold (see 9.6 to 9.8). However, they may have to pay contributions towards their defence costs; subject to the outcome of the Means Test, this could be from income, from capital or both. Ultimately, the amount paid by a convicted offender will never exceed legal aid costs actually incurred (see 9.11 to 9.12 for details).

Information

9.3 Applicants are required to provide information about their income, capital assets and financial commitments so that an accurate Means Test can be carried out to determine what, if any, contribution will be required from their income and/or capital.

Contribution Order

9.4 A Contribution Order confirming an offer of legal aid is issued to each applicant who submits a completed legal aid application form. It gives details of the contribution required (if any) and the payment options available. Applicants are required to sign the Contribution Order thereby accepting liability for the payment of contributions, and return it to AFCLAA, with proof of first payment (if appropriate), to complete the process.

Means Test

9.5 The means test assesses the applicant's ability to pay. The applicant's "disposable income" is calculated by subtracting various allowances from gross income. Annual disposable income above a threshold of £3,398, or capital and/or equity above a threshold of £30,000, implies contributions will be payable. Those below both income and capital thresholds pay nothing.

Financial Eligibility Threshold

9.6 With effect from 27 January 2014, any applicant with disposable income in excess of £37,500 per annum will not receive an automatic offer of legal aid. Instead, they will be required to provide further details, primarily a written estimate from their legal representative, detailing the likely private costs of their case, to support a review of their application.

9.7 The estimated costs provided, and any additional relevant financial details (Hardship Review), are subtracted from the disposable income determined by the original means test, to provide a revised disposable income figure. If the revised disposable income is below the £37,500 threshold, a Contribution Order will be issued in accordance with paragraph 9.9 below; the estimate of private legal costs will not be included when determining monthly contributions as, once the applicant has been granted legal aid, they will not be required to pay privately from their income.

9.8 Applicants, whose disposable income still exceeds the financial eligibility threshold after further review, will not be eligible to receive legal aid; there is scope for acquitted applicants to recover some or all of their private costs from Central Funds.

Contributions

9.9 For applicants with annual disposable income above the threshold, income contributions are set at 90% of the monthly disposable income x 5 months. To ensure no-one pays significantly more in contributions than their maximum likely legally aided costs, monthly contributions are capped according to the Class (type) of offence (as defined in The Criminal Legal Aid (Remuneration) Regulations 2013. Capital contributions, if required are payable after the case is concluded.

Minimum Drawing Rate (MDR)

9.10 Contributions paid directly from salary via JPA may be subject to the MDR regulations, which prevent compulsory deductions exceeding 50% of the monthly nett salary (after deducting PAYE and NI contributions). Where applicable, the amount of monthly contributions payable is reduced, but the number of contributions payable increased. A revised Contribution Order is issued, for the minimum number of monthly payments necessary to satisfy both the MDR regulations and the maximum contribution.

Acquittal

9.11 If an applicant is acquitted, or the case is discontinued at any stage, contributions payments are refunded in full with interest.

Excess Contributions (following conviction)

9.12 Where income contributions paid exceed the actual costs incurred, the overpayment is refunded without interest.

Documentary Evidence

9.13 Applicants are required to supply documentary evidence to substantiate the financial information provided on their application form.

Hardship Review

9.14 Applicants may ask for the assessment to be reviewed on grounds of hardship, by providing further information and evidence in support. They must give their reasons for requesting a review and full details of relevant extra expenditure. For example, an applicant may have received a Contribution Order for an income contribution, but have far higher than usual household expenditure which the living allowance element of the means test does not truly reflect[4]. Such applications are reviewed by AFCLAA staff, but in some cases, AFCLAA may seek the opinion of the Judge Advocate General before making a final decision. There is no further right of appeal.

Exceptional Applicants

9.15 Applicants aged 17 or under make no contributions. Applicants in receipt of benefits (Income Support, Income Based Job Seekers Allowance, Guaranteed State Pension Credit; or Income-Related Employment & Support Allowance) make no contributions.

Overseas Travel Costs

9.16 Where the applicant was stationed overseas as part of their duty, or Court Martial proceedings are held outside the UK, the additional costs of overseas travel and accommodation are not counted as the applicant's liability.

Judicial Apportionment

9.17 A convicted offender may, through their legal representative, apply to the Court Martial for an order that they should pay only a proportion of the costs, on the grounds that it would be manifestly unreasonable to pay the whole amount. This provision applies to those who have been convicted on one or

[4] E.g. applicants with significantly high levels of personal debt, especially where formal repayment programs have been established to resolve these (i.e. IVA), or where a dependant has special needs, with additional costs relating to specialised care, diet or education; costs of private education and/or private healthcare are not included.

more, but not all, of the offences for which they were charged. Applications must include the grounds and the proportion (as a percentage) of the costs which it is said would be reasonable. The trial judge (or a judge specified by the JAG) considers the application and may seek further information from AFCLAA before making a final decision. Where an application is granted, the judge states the percentage of costs payable. If there was a co-accused who was convicted, they pay only their own share of the total costs (not the outstanding balance of the applicant's costs). There is no right of appeal against a refusal.

Service Civilian Courts (SCC)

9.18 For SCC cases (unlike the Court Martial) it is not assumed that the Interests of Justice (IOJ) test is automatically met. Applications which meet the IOJ test are then processed throughout (including means testing), just as for Court Martial cases.

Summary Appeals (SAC) and Elections

9.19 Applications for legal aid in respect of summary appeals or CM by election are treated differently in that:

- the income-based Means Test includes an additional £500 allowance[5], increasing the threshold,
- there is no capital or equity contribution liability,
- contributions are payable only after the case in concluded, not in advance, and
- the amount of the contribution is fixed as follows: SAC appeal against finding dismissed - £500; SAC appeal against finding dismissed but sentence reduced - £250; SAC appeal against sentence dismissed - £250; SAC appeal lodged by Reviewing Authority – NIL; CM election for trial results in conviction - £1,000.

Non-Legally Aided Defendants

9.20 If a defendant in the Court Martial who has instructed a legal representative privately (that is, without legal aid) is acquitted of all charges, they may no longer apply to the judge for a recommendation that their costs be reimbursed. This applies to all cases where the defendant either declined to properly apply for legal aid, or refused an offer of legal aid from AFCLAA, choosing to instruct a legal representative privately instead.

9.21 Applicants who were refused legal aid because they exceeded the financial eligibility threshold but who were later acquitted or their case discontinued,

[5] To cover any costs incurred if/when applicant obtains privately funded independent legal advice before deciding to elect or appeal.

should apply to AFCLAA to reclaim their privately incurred legal costs from Central Funds. The maximum that can be reclaimed is limited to that which would have been paid under legal aid. Applicants are only able to reclaim these costs where AFCLAA have provided a Refusal Certificate to show the applicant's annual disposable income exceeded the financial eligibility threshold.

MEMORANDUM 10

Summary Hearings and Summary Appeal Court (SAC)

Technical errors in Summary Hearings- Status of a Commanding Officer

10.1 A Commanding Officer has continuing jurisdiction over those under his command. At the conclusion of a summary hearing the Commanding Officer effectively becomes *functus officio*. and it would be wrong for him to revisit and alter a punishment he has awarded. 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. 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;

i. he did so within a reasonable time.
ii. he did not increase the severity of the sentence, and
iii the accused concerned indicated he was content that the error be rectified in the way proposed by the Commanding Officer.

Otherwise technical errors fall to be corrected by the Summary Appeal Court.

10.2 When the Reviewing Authority identifies a technical error in the sentence awarded summarily, it will seek leave to appeal from the Judge Advocate General. If the Judge Advocate General considers that the technical error can be rectified without affecting the substance of the overall sentence, or where the error is *de minimis*, he may, with the consent of the parties, convene himself as a SAC and rectify the error.

Credit for admission of guilt at summary hearing

10.3 At a summary hearing the accused is asked whether he admits or denies the charge and where he admits the charge his Commanding Officer is required to give credit for this. The SAC is always informed whether an appellant was given credit for admitting the charge at the summary hearing.

10.4 If the sentence by the Commanding Officer is the maximum permissible (28 days, or 90 days with extended powers: AFA06 s133) in the absence of any information to the contrary 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 punishment if it is satisfied that the Commanding Officer did not give due credit.

SAC Sentencing Powers: Restrictions

10.5 The 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 hearings 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. The system of unrestricted appeal to a compliant SAC would fail to ensure that the summary system is compliant if the appellant placed himself in jeopardy of, or was deterred by the risk of, a more severe punishment by appealing. Thus it is important for this interlocking system not to be compromised.

10.6 Although hearings before the SAC are *de novo* if the appeal is against finding, the court's sentencing powers are therefore restricted. The SAC may substitute only a sentence which would have been within the powers of the Commanding Officer (or within the limited delegated powers of the subordinate commander) imposing it and which in the opinion of the court is no more severe than the punishment originally awarded at the summary hearing.(AFA06 s147(3))

10.7 Punishments available at summary hearing (AFA06 s132) are not strictly listed in order of severity, although the list appears to be approximately 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 down the 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 in effect than one day's detention, even though a fine is lower on the list than detention. If the 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))

Appellant's Failure to Attend the SAC

10.8 Where notice of the time and place of appeal hearing has been served on an appellant who 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, provided he is satisfied that proper notice of time and place of the appeal was served on the appellant, the judge may direct proceedings to be held in his absence. Otherwise the case may be adjourned until the appellant has a reasonable opportunity to attend a further hearing.

MEMORANDUM 11

Reporting Restrictions and Media Dealings in Court Martial Cases

General Principles

11.1 In June 2014 the Judicial College issued the third version of guidance on reporting restrictions in the criminal courts. Although the document was drafted for the civilian courts the guidance ought to be considered by those operating in the Courts Martial. The guidance can be found on the judiciary.gov.uk website.

11.2 The principle of open justice as expressed in *Scott v Scott* [6] in 1913 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). The open justice principle is expressed in the Judicial College guidance as follows:

- The general rule is that the administration of justice must be done in public. The public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously.

- Any restriction on these usual rules will be exceptional. It must be based on necessity.

- The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence.

- The terms of any order must be proportionate – going no further than is necessary to meet the relevant objective

11.3 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.

[6] *Scott v Scott* [1913] A.C. 417, HL

A more comprehensive list appears in the Judicial College guidance. 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

11.4 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.

11.5 The AF(CM)R09 r 153 enables the Court Martial to give leave for any name or other matter given in evidence in proceedings to be withheld from the public. The Coroners and Justice Act 2009 s 86 provides for witness anonymity orders (s 94 makes it clear this provision applies to Service courts). A witness anonymity order requires specified measures to be taken in relation to a witness to ensure that the identity of the witness is not disclosed in or in connection with the proceedings. The kinds of measures to be taken include measures for securing that the witness's name and other identifying details may be withheld or removed from materials disclosed to any party; that the witness may use a pseudonym; that the witness is not asked questions that might lead to his or her identification; that the witness is screened; and that the witness's voice is subjected to modulation.

11.6 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.

11.7 S 11 directions 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 or the Coroners and Justice Act 2009 s 86.

11.8 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 for example 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.

11.9 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**.**

11.10 Judges should consider each 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 contains general provisions enabling the judge to conduct the proceedings:

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

11.11 Guidance on the exercise of judicial discretion was provided in the case of *Re Times Newspapers Ltd* [2009] 1 WLR 1015. There is a two fold test for deciding whether to withhold the name of the defendant: either that 'the administration of justice would be seriously affected were it not to grant anonymity' (from *Scott v Scott*) or that 'there is a real and immediate risk to life' (a more modern limb arising from ECHR Article 2 as recognised in *Re Officer* [2007] 1 WLR 2135).

Practical Considerations

11.12 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.

11.13 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

11.14 Whenever an order imposing reporting restrictions is made, in all cases (including UK and overseas, Royal Navy, Army & RAF) the 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 Judge Advocate General (JAG), 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 the JAG 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.

11.15 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. The Court Officer arranges for journalists and their vehicles to be accommodated suitably inside and outside the Court Centre. 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, or the SPA nor comment on legal judgments, rulings, or orders except on behalf of those it represents. Such matters are referred to the Judicial Communications Office.

11.16 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 Court Officer ensures advance notification is sent to an agreed list of representative media bodies.

Documents and Exhibits

11.17 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 may assist with the practical arrangements.

11.18 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) document "Publicity and the Criminal Justice System – Protocol for working together" (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 by 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.

11.19 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

11.20 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. The administration of this function is carried out by the

Military Court Service. 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 s 32 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.

Use of electronic items

11.21 With the exception of text-based devices, the use of electronic items in the courtroom by members of the media and the public is forbidden. Members of the media and legal commentators do not need to make any application to use text-based devices from court. However, any member of the public, who wishes to use a text-based device from court, must make an application either verbally or in writing through the Court Officer. The Judge Advocate will then rule on the application. Any use of a text-based device in court must not cause a disturbance or distraction. The Judge Advocate may withdraw permission for the use of text-based devices in court at any time.

11.22 Anyone using electronic text is strictly bound by the existing restrictions on reporting court proceedings, under the Contempt of Court Act 1981. The Lord Chief Justice's full guidance on the use of text-based devices is at the following link:
http://www.judiciary.gov.uk/2011-2/judicial-office-news-release-live-text-based-communication-guidance-14122011/

MEMORANDUM 12

Protection of Children of Service Families, Protection Orders and Assessment Orders

Introduction

12.1 This Memorandum sets out the legal and practical steps necessary for seeking and obtaining a Protection Order (PO) and provides some guidance on Assessment Orders (AOs). It is designed as a guide to practice and procedure for all parties likely to be involved in such proceedings; the relevant statutes and case law should also be consulted.

Part 1 – Legislation, statutory and judicial guidance

Armed Forces Act 1991 and the Children Act 1989

12.2 The Armed Forces Act 1991 (the 1991 Act) Part III Sections 17-23 as amended by the Armed Forces Act 2006 Schedule 13 makes provision for orders for the assessment and emergency protection of children forming part of or staying with the family of a person subject to service law or a civilian subject to service discipline. The powers to make an order under the 1991 Act apply even if the child is only staying with the family for a short period of time.

12.3 The power to make orders for the protection of children under the 1991 Act is vested in the Judge Advocate and that power does not apply in the United Kingdom, although a Judge Advocate sitting in the United Kingdom may deal with an application for an AO or PO.

12.4 The Armed Forces (Protection of Children of Service Families) Regulations 2009 (the 2009 Regulations) are also relevant.

12.5 The Children Act 1989 does not apply outside the UK. However, the language used in Part III of the Armed Forces Act 1991 and in Part V of the 1989 Act in relation to AOs and POs is similar so the guidance and case law relating to Part V is likely to be relevant to an application under the Armed Forces Act 1991. Nevertheless, the guidance will need to be applied with care bearing in mind the context of life in an overseas military environment.

12.6 The fundamental rights in the European Convention on Human Rights also needs to be borne in mind when applying the Armed Forces Act 1991, and particularly the right to a fair trial (Article 6) and the right to respect for

private and family life (Article 8). Article 6 is particularly relevant to the question of giving adequate notice of a hearing.

Assessment Orders

12.7 AOs are dealt with in sections 17 and 18 of the 1991 Act. An AO enables an assessment of the state of the child's health or development, or of the way in which he or she has been treated, to be undertaken, if it is unlikely that such an assessment will be made or be satisfactory in the absence of an assessment order, for example, if the parent or carer of the child is being uncooperative and significant harm is suspected.

12.8 A Judge Advocate[7] may consider an application for an AO if it is made by one of the following:

a. A registered medical practitioner; or

b. A registered social worker qualified to practise in child protection.

12.9 An AO will only be granted by the Judge Advocate where he/she is satisfied that:

a. The applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm.

b. An assessment of the state of the child's health or development or of the way in which the child has been treated is required to enable the applicant to determine whether or not the child is suffering or is likely to suffer significant harm.

c. Is it unlikely that such an assessment will be made, or be satisfactory, in the absence of an AO.

12.10 It is an offence for anyone subject to service law (or civilians subject to service discipline) to intentionally obstruct any person exercising a power conferred on him by an AO or court.

Protections Orders

12.11 Protection Orders (PO) are dealt with in sections 19 to 22 of the 1991 Act. A PO provides for immediate short-term protection of children, and a Judge Advocate will consider a request for the granting of a PO from anyone.

12.12 A PO application made by somebody other than a registered social worker or medical practitioner (for example, a policeman) will only be granted where the Judge Advocate is satisfied that:

[7] A Judge Advocate means a Judge Advocate appointed under the Armed Forces Act 2006.

a. there is reasonable cause to believe that the child is likely to suffer significant harm if that child is not removed to alternative accommodation (which is to be provided by the applicant or someone on the applicant's behalf);

b. there is reasonable cause to believe that the child is likely to suffer significant harm if that child does not remain in the place in which he is being accommodated.

12.13 Certain persons designated under the 1991 Act are additionally entitled to apply for a PO in order to make enquiries with respect to a child's welfare where access to the child is being unreasonably refused or where the designated person has reasonable cause to believe that access to the child is required as a matter of urgency. Designated persons are the same as those empowered to apply for a CAO, namely:

a. A registered social worker qualified to practise in child protection;

b. A registered medical practitioner.

12.14 In accordance with Section 19(4) of the 1991 Act, the Judge Advocate must ensure that a PO is not made unless the child (age dependent but see earlier comments), the child's parents, any other person with parental responsibility and any other person the child was residing with immediately prior the application for an PO being made, has had opportunity to make representations, unless, in the interests of the child it would be undesirable to do so.

Statutory guidance

12.15 Statutory Guidance as to the application of s.44 of the Children Act 1989 Act is contained in the revised Children Act 1989 Guidance and Regulations Volume 1 – Court Orders and in the revised version of Working Together to Safeguard Children which are readily available on the internet. Although this guidance is not strictly speaking applicable to applications for a PO or an AO under the 1991 Act, it may be of assistance. Care should be taken when applying the statutory guidance to service families outside the UK. In relation to the circumstances justifying an application for an emergency protection order, the statutory guidance provides as follows:

a. Where there is a risk to the life of a child or a likelihood of serious immediate harm, an agency with statutory child protection powers should act quickly to secure the immediate safety of the child. Decisive action is essential once it appears that circumstances fall within one of the grounds in s.44(1) of the Children Act 1989 (which is similar to section 19 of the 1991 Act).

b. A PO should not be regarded as a routine response to allegations of child abuse or a routine step in the instigation of care proceedings.

c. Where possible, protection measures should only be taken where a comprehensive inter-agency discussion demonstrates that such measures are justified and planning has been undertaken to minimise their impact.

d. In some cases, it may be sufficient to secure a child's safety by a parent taking action to remove an alleged perpetrator, or by the alleged perpetrator agreeing to leave the home.

Judicial Guidance - Relevant case law

12.16 Under the Human Rights Act 1998 domestic courts (and this includes the Judge Advocate) are required to have regard to the European Convention on Human Rights and Fundamental Freedoms. In a series of cases in the UK involving the Children Act 1989 the courts have expressed concerns about the circumstances in which POs under the Children Act 1989 have been made by magistrates. Judicial guidance about the circumstances and issues to be considered on an application for a protection orders were set out in two leading cases. This guidance is binding on the lower courts of England and Wales and has a significant impact on the practice and procedure of PO applications in England and Wales. POs have become much rarer and are now considered much more carefully. Although the cases are not, strictly speaking, binding on the Judge Advocate in considering an application under the 1991 Act, in practice they are likely to be very relevant.

12.17 The key cases are *X Council v B (emergency protection orders)* [2005] 1FLR 341 and *Re X: Emergency Protection Orders* [2006] EWHC 510.

12.18 Subject to what was said in the preceding paragraphs, the guidance sets out a useful guide to what the Judge Advocate expects from lawyers and social workers considering making an application for a PO.

12.19 In the *X Council* case Mr. Justice Munby set out 14 guidance points which were then supplemented by Mr. Justice MacFarlane in the second case. They are set out below—

i An EPO summarily removing a child from his parents is a "draconian" and "extremely harsh" measure, requiring "exceptional justification" and "extraordinarily compelling reasons". Such an order should not be made unless the court is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety "imminent danger" must be "actually established".

ii Both the local authority, which seeks, and the court, which makes an EPO, assumes a heavy burden of responsibility. It is important that both the local authority and the court approach every application for an EPO with an anxious awareness of the extreme gravity of the relief

being sought and a scrupulous regard for the European Convention rights of both the child and the parents.

iii Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.

iv If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a child assessment order under section 43 of the Children Act 1989.

v No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte (without notice) application, very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safely.

vi The evidence in support of the application for an EPO must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The source of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.

vii Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by the local authority for an EPO. They must also be given proper notice of the evidence the local authority is relying upon.

viii Where an application for an EPO is made Ex parte (without notice) the local authority must make out a compelling case for applying without first giving the parents notice. An ex parte (without notice) application will normally be appropriate only if the case is genuinely one of emergency or other urgency – and even then it should normally be possible to give some kind of albeit informal notice to the parents – or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.

ix The evidential burden on the local authority is even heavier if the application is made ex parte (without notice). Those who seek relief ex parte (without notice) are under a duty to make the fullest and the most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law.

12.20 These points were added to in the further case as follows—

x Section 45(7)(b) of the Children Act 1989 permits the court to hear oral evidence. It is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the court. It is, therefore, particularly important that the court complies meticulously with the mandatory requirements of the Family Proceedings Rules. The court must "keep a note of the substance of the oral evidence" and must also record in writing not merely its reasons but also any findings of fact.

xi The mere fact that the court is under the obligations imposed by rules (to keep a record of evidence) is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence. Parents against whom an EPO is made ex parte (without notice) are entitled to be given, if they ask: (i) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing, and (ii) what legal authorities were cited to the court. The local authority's legal representatives should respond forthwith to any reasonable request from the parents or their legal representatives either for copies of the materials read by the court or for information about what took place at the hearing. It will, therefore, be prudent for those acting for the local authority in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

xii Section 44(5)(b) of the Children Act 1989 provides that the local authority may exercise its parental responsibility only in such manner "as is reasonably required to safeguard or promote the welfare of the child". Section 44(5)(a) provides that the local authority shall exercise its power of removal under Section 44(4)(b)(i) "only… in order to safeguard the welfare of the child". The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not itself enough. The court decides whether to make an EPO. But the local authority decides whether to remove. The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision making actually takes place and that it is appropriately documented.

xiii Consistent with the local authority's positive obligation under Article 8 to take appropriate action to reunite parent and child, sections 44(10)(a) and 44(11)(a) impose on the local authority a mandatory obligation to return a child who it has removed under section 44(4)(b)(1) to the parent from whom the child was removed if "it appears to (the local authority) that it is safe for the child to be

returned". This imposes on the local authority a continuing duty to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. In this, as in other respects, the local authority is under a duty to exercise exceptional diligence.

xiv Section 44(13) of the Children Act 1989 requires the local authority subject only to any direction given to the court under section 44(6), to allow a child who is subject to an EPO "reasonable contact" with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources.

xv The 14 key points made by Munby J in X Council v B should be copied and made available to the justices hearing an EPO on each and every occasion such an application is made.

xvi It is the duty of the applicant for an EPO to ensure that the X Council v B guidance is brought to the court's attention.

xvii Mere lack of information or need for assessment can never of themselves establish the existence of a genuine emergency sufficient to justify an EPO. The proper course in such a case is to consider application for a child assessment order or issuing section 31 proceedings and seeking the court's direction under section 38(6) for assessment.

xviii Evidence given to the justices should come from the best available source. In most cases this will be from the social worker with direct knowledge of the case.

xix Where there has been a case conference with respect to the child, the most recent case conference minutes should be produced to the court.

xx Where the application is made without notice, if possible the applicant should be represented by a lawyer, whose duties will include ensuring that the court understands the legal criteria required both for an EPO and for the application without notice.

xxi The applicant must ensure that as full a note as possible of the hearing is prepared and given to the child's parents at the earliest possible opportunity.

xxii Unless it is impossible to do so, every without notice hearing should either be tape recorded or be recorded in writing by a full note being taken by a dedicated note taker who has no other role to play in the hearing.

xxiii When the matter is before the court on the first "on notice" hearing, the court should ensure that the parents have received a copy of the clerk's

notes of the EPO hearing together with a copy of any material submitted to the court and a copy of the justices reasons.

xxiv Cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice.

xxv Cases of sexual abuse where the allegations are inchoate and non-specific, and where there is no evidence of immediate risk of harm to the child, will rarely warrant an EPO.

xxvi Cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct harm to the child, will rarely warrant an EPO.

xxvii Justices faced with an EPO application in a case of emotional abuse, non-specific allegations of sexual abuse and/or fabricated or induced illness, should actively consider refusing the EPO application on the basis that the local authority should then issue an interim care order. Once an application for an interim care order has been issued in such a case, it is likely that the justices will consider that it should immediately be transferred up for determination by the county court or high court.

xxviii The requirement that justices give detailed findings and reasons applies as much to an EPO application as it does to any other application. In a case of urgency, the decision may be announced and the order made with the detailed reasons prepared thereafter.

xxix Where an application is made without notice, there is no need for the court to determine whether or not the hearing should proceed on a without notice basis (and give reasons for that decision) independently of any subsequent decision upon the substantive EPO application.

Contact with the child

12.21 Section 20(4) of the 1991 Act provides that the Judge Advocate may give such directions as he considers appropriate with respect to contact which is or is not to be allowed between the child and any named person. Subject to such directions, the person who made the application (the responsible person) must allow the child reasonable contact, during the period of an order, with his parents, any other person with parental responsibility, any person with whom he was living immediately before the making of the application for the order, any person in whose favour there is a contact order in relation to him and any person acting on behalf of those persons. The direction can be varied at any time. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources.

12.22 The statutory guidance states that:

'*It is anticipated that where the applicant is the local authority the court will leave contact to the discretion of the authority or order that reasonable contact be negotiated between the parties, unless the issue is disputed*'

12.23 The same approach and principles should inform decision making in relation to care planning for PO applications. Efforts should be made to arrange contact that meets the interests of the child and the issues of concern that have led to the urgent application to court.

Who has Parental Responsibility?

12.24 Parental Responsibility is defined by Section 3 of the Children Act 1989 as "*all the rights, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property*". Parental responsibility is therefore the legal definition of being a parent. The expression has the same meaning in the 1991 Act. Parental responsibility is relevant because those with parental responsibility must normally be served with notice of a hearing and also because of the requirements for contact referred to above.

12.25 If parents are not married at the date of the child's birth, only the mother automatically has parental responsibility. However, by virtue of section 1 of the Family Law Reform Act 1987 parents who, although not married to each other at the time of the child's birth, subsequently marry each other and therefore legitimise the child, will both be deemed to have parental responsibility for that child.

12.26 Care must be taken to ensure that all parties within the legal definition of parental responsibility are informed of the proceedings.

Part 2 - Application for Order under the Armed Forces Act 1991

Preparation checklist (non-exhaustive)

12.27 When making an application, the following steps must be taken to bring the matter before the Judge Advocate:

- The applicant must liaise with the Military Court Service (MCS) to arrange the hearing. The MCS should be contacted as soon as it is likely that an application may be made. If, in the event, the application is unnecessary then the MCS should be notified. However, it is better to give early warning of an application so that contingency arrangements can be made.

- The MCS must be informed if video tele-conference facilities are needed.

- The applicant must ensure that arrangements are in place so that when the sealed application is issued it will be served on the parents.

- The following forms and documents must be submitted:

- a completed application;
- notice of hearing; and
- consent forms as appropriate.

12.28 Appropriate forms are available from the MCS and in due course will be available in the Manual of Service Law (MSL).

12.29 The applicant should ensure that sufficient forms are lodged so that there is :

- one for the solicitor instructed by the applicant;
- one for the Judge Advocate;
- one for each person to be served or given notice e.g. the natural parents of the child; and
- one for the child's representative.

12.30 The following documentary evidence (so far as it is relevant) should be provided:

- Chronology
- Previous core assessments
- Previous case conference minutes and in particular the most recent
- Education records
- Medical records/reports
- Heath visitor or school nurse records
- Police disclosure or relevant documents
- Social work statement setting out the reason for the application and setting out the nature of the imminent danger to the child, and why the application is necessary and proportionate including, if appropriate, the reasons for an exclusion requirement. Some background information as to social work involvement with the family and as to the family circumstances is needed to give some context to the application but the statement should primarily focus on the emergency issues.

Serving notice of the hearing

12.31 If the hearing is not on notice, notice of the hearing is not to be served.

12.32 If the hearing is on notice, the application and notice of hearing and all evidence filed in support and a list of solicitors for parents must be served on:

- the mother;
- the father if married or with parental responsibility;
- anyone else with parental responsibility for the child;
- the child's guardian and solicitor;
- notice of hearing only should be served on;
- unmarried father without parental responsibility;
- any other person caring for the child at the time of the application but who does not have parental responsibility e.g., step parent

- parents should be informed that they are able to instruct a solicitor of their own choice
- parents should be given the applicant's solicitors' details so they can give that information to their solicitors.

Guide to procedure for preparing the application

12.33 All applications should be made to the Judge Advocate through the MCS, which will deal with the practical arrangements.

12.34 The applicant's solicitors should contact the MCS to fix a time for hearing in consultation with the Judge Advocate. The applicant's solicitors should email all papers to the MCS.

12.35 The MCS must be informed as soon as possible if an interpreter is needed for the hearing or for documents to be translated.

12.36 The MCS must be informed as soon as possible if a video link is required.

12.37 The MCS will book a verbatim court recorder.

12.38 A request for a without notice hearing should be made very clear and the Judge Advocate will then decide whether or not to permit such a hearing. The Judge Advocate may wish to hear from the advocate acting for the applicant in order to decide whether or not to allow a without notice hearing.

12.39 The MCS will provide issued papers to the applicant and will confirm the date, time and venue for the hearing.

12.40 The applicant's solicitors must contact solicitors for the child and will ensure the issued papers and supporting statement and documents are made available to child's solicitors.

12.41 If possible, a guardian will be appointed for the child. At present there are no formal arrangements are in place for the appointment of a guardian.

12.42 The applicant must serve the parents with notice of the application and notify them of their entitlement to seek legal advice. The applicant will be expected to assist with travel arrangements for parents. Legal aid funding is available from the Armed Forces Criminal Legal Aid Authority (AFCLAA) (see https://www.gov.uk/armed-forces-criminal-legal-aid-authority-afclaa)

12.43 The applicant must ensure notice has been given to any other person entitled to know of the hearing.

12.44 When seeking an exclusion requirement the applicant must ensure that before applying for the PO it has:

- Obtained the written consent to the making of the exclusion requirement from the person who is to remain living in the house with the children.

- Prepared a statement of evidence in support of the application for an exclusion requirement

12.45 If a PO is made containing an exclusion requirement the order must be served on the relevant person and he must be informed that he is entitled to apply to vary or discharge the exclusion requirement. The order is not effective until it has been served.

Guide to procedure before the Judge Advocate

Without notice applications

12.46 For without notice applications the procedure will, subject to the discretion of the Judge Advocate, normally be as follows:

- the application, including the background, and reasons for applying and the plans if the order was made must be put to the Judge Advocate;
- the guidance in Re X must be brought to the attention of the Judge Advocate;
- The application hearing should be recorded, preferably on tape, but if not a full note must be taken;
- the Judge Advocate may ask further questions; and
- The Judge Advocate will announce the decision on the application and give reasons.

On notice applications

12.47 For on notice applications the procedure will, subject to the discretion of the Judge Advocate, normally be as follows:

- Any preliminary issues, e.g. joining another person as a party will be dealt with;
- the applicant puts its case first, and calls its evidence;
- the witnesses in support will be questioned by the applicant's solicitor to bring out the key issues;

- the witnesses may be asked questions by the parents and other parties' representatives, or the parties themselves if they are unrepresented;

- the Judge Advocate may then ask any questions;

- the other parties then in turn call their evidence; each witness gives their primary evidence and may then be cross-examined by each of the other parties; the Judge Advocate may also ask questions;

- the Guardian appointed to represent the interests of the child may be called to give evidence, or the solicitor representing the child may seek only to test the evidence;

- the Judge Advocate may then retire to consider his/her decision, before giving the decision and reasons for it; and

- the Judge Advocate will draw up and sign the order.

The order must then be served. This should be done in person or at the last known address.

12.48 If an exclusion order was made this must be served on the person to be excluded, together with the statement setting out the reasons why the order is needed and notice of the right to apply to vary.

Application to extend the order

12.49 The MCS should be notified that a further application is to be made and a hearing needs to be fixed.

12.50 An updating statement must be served and filed, updating the Judge Advocate and the parties on what steps have been taken since the order was granted and setting out the plans for the child now. It should make clear why a further order is needed.

Part 3 – Directory

MCS:

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Trenchard Lines
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SN9 6BE

Telephone: 01980 618058

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