

*Draft Rules laid before Parliament under section 373(3) of the Armed Forces Act 2006, for approval by resolution of each House of Parliament.*

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DRAFT STATUTORY INSTRUMENTS

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**2009 No. 000**

**DEFENCE**

**The Armed Forces (Court Martial) Rules 2009**

*Made* - - - -

*\*\*\* 2009*

*Coming into force* - -

*31st October 2009*

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The Secretary of State, in exercise of the powers conferred by section 19(5) of the Court Martial Appeals Act 1968(a), sections 111, 113, 132 and 135 of, paragraph 5 of Schedule 6 to, and paragraph 2(6) of Schedule 7 to, the Criminal Justice Act 2003(b), and sections 125(3), 155, 157(4), 158, 163, 165 and 286(4) of the Armed Forces Act 2006(c), makes the following Rules:

## PART 1 PRELIMINARY

### **Citation and commencement**

1. These Rules may be cited as the Armed Forces (Court Martial) Rules 2009 and shall come into force on 31st October 2009.

### **Interpretation: proceedings and parties**

2.—(1) Unless otherwise stated, any reference in these Rules to proceedings includes—

- (a) preliminary proceedings,
- (b) trial proceedings,
- (c) sentencing proceedings,
- (d) variation proceedings,
- (e) appellate proceedings,
- (f) activation proceedings, and
- (g) ancillary proceedings,

but does not include the exercise of any power of the court otherwise than at a hearing.

(2) In these Rules—

“activation order” means—

- 
- (a) 1968 c. 20. Section 19(5) of the Court Martial Appeals Act 1968 is inserted by paragraph 20 of Schedule 8 to the Armed Forces Act 2006 (c. 52).
  - (b) 2003 c. 44. By virtue of section 113 of, and paragraph 5 of Schedule 6 to, the Criminal Justice Act 2003 (“the 2003 Act”), section 111 has effect as if, in its subsection (7), the definition of “rules of court” included rules regulating the practice and procedure of service courts. By virtue of section 135 of, and paragraph 2(6) of Schedule 7 to, the 2003 Act, section 132 is modified so that, in its subsection (10), the definition of “rules of court” includes rules regulating the practice and procedure of service courts. By virtue of paragraph 6 of Schedule 6 and paragraph 8 of Schedule 7 (as amended by paragraph 234(4) and paragraph 235(6) of Schedule 16 to the Armed Forces Act 2006), “service court” includes the Court Martial.
  - (c) 2006 c. 52.

- (a) an order under paragraph 8(2)(a) or (b) of Schedule 12 to the 2003 Act (activation of suspended sentence of imprisonment);
- (b) an order under section 191(3) (activation of suspended sentence of service detention); or
- (c) an order under section 214(3) (reactivation of detention and training order);

“activation proceedings” means proceedings for the making of an activation order, but does not include sentencing proceedings in which the court has power to make such an order;

“ancillary proceedings” means—

- (a) a hearing under rule 127 of an application under section 285(4) for leave to appeal out of time from the Service Civilian Court; and
- (b) proceedings under any provision of Part 18;

“appellate proceedings” means proceedings of the court (other than sentencing proceedings) on appeal from the Service Civilian Court;

“community order proceedings” means any proceedings under Chapter 1 of Part 18;

“preliminary proceedings” means any proceedings of the court held for the purpose of arraigning a defendant on a charge or giving directions, orders or rulings for the purpose of trial proceedings;

“related proceedings”, in relation to preliminary proceedings, means—

- (a) trial proceedings in respect of any charge to which the preliminary proceedings relate;
- (b) any further preliminary proceedings in relation to such trial proceedings; and
- (c) any sentencing proceedings in respect of any offence found proved in such trial proceedings, or as respects which the offender pleads guilty in the preliminary proceedings or related proceedings;

“sentencing proceedings” means proceedings for the sentencing of—

- (a) a person convicted by the court on a plea of guilty or in trial or appellate proceedings, or
- (b) a person convicted by the Service Civilian Court who appeals against sentence, and does not include variation proceedings;

“trial proceedings” means proceedings for the trial of a charge by the court (including proceedings authorised by an order of the Appeal Court under section 19 of the 1968 Act), and does not include sentencing proceedings;

“variation proceedings” means proceedings under Part 15.

(3) References in these Rules to a party to any proceedings are to—

- (a) a person to whom the proceedings relate;
- (b) the Director; and
- (c) where the proceedings are for the hearing of an application (and the applicant is not a person to whom the proceedings relate), the applicant.

(4) References in these Rules to a person to whom proceedings relate are to—

- (a) in the case of preliminary or trial proceedings, a defendant;
- (b) in the case of sentencing proceedings, an offender who falls to be sentenced;
- (c) in the case of variation proceedings, an offender in respect of whom a sentence which falls to be varied has been passed;
- (d) in the case of appellate proceedings, an appellant;
- (e) in the case of activation proceedings, the offender in respect of whom the court has power to make an activation order;
- (f) in the case of community order proceedings, the offender in respect of whom the overseas community order was made;

- (g) in the case of a hearing of an application under section 232(1) for the variation or revocation of a service restraining order, the person in respect of whom the service restraining order was made;
- (h) in the case of a hearing of any other application (other than community order proceedings), the applicant;
- (i) in the case of proceedings under section 229 (service restraining orders) in respect of a case remitted to the court by the Appeal Court under section 230(3), the person whose appeal was allowed; and
- (j) in the case of a hearing under rule 151 (certification of contempt of court), the person whose offence the court is to consider certifying.

(5) In these Rules—

“the Director” means the Director of Service Prosecutions;

“defendant” means a person against whom a charge allocated for Court Martial trial has been brought.

**Interpretation: general**

3.—(1) Any reference in these Rules to a numbered section is to that section of the 2006 Act unless otherwise stated.

(2) In these Rules—

“the 2006 Act” means the Armed Forces Act 2006;

“the 1967 Act” means the Criminal Justice Act 1967(a);

“the 1968 Act” means the Court Martial Appeals Act 1968;

“the 1999 Act” means the Youth Justice and Criminal Evidence Act 1999(b);

“the 2003 Act” means the Criminal Justice Act 2003;

“the CPIA Order” means the Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009(c);

“advance information” has the meaning given by rule 43(2);

“allocated for Court Martial trial” means regarded for the purposes of Part 5 of the 2006 Act as allocated for Court Martial trial;

“the Appeal Court” means the Court Martial Appeal Court;

“bad character” has the meaning given by section 98 of the 2003 Act;

“civilian police force” means a UK police force or a British overseas territory police force;

“the court” means the Court Martial;

“DX” means document exchange;

“detention and training order” means an order under section 211;

“the judge advocate”, in relation to any proceedings, means the judge advocate specified for the proceedings under section 155(5);

“the lay members” has the same meaning as in section 155;

“legal representative” means a person appointed under rule 39;

“live link”, except in Part 15, has the meaning given by rule 18(3)(a);

“the minimum number” means—

(a) in the case of proceedings to which rule 29 applies, five;

(b) in the case of any other proceedings, three;

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(a) 1967 c. 80.  
 (b) 1999 c. 23.  
 (c) S.I. 2009/988.

“the original sentence”, in relation to activation proceedings, has the same meaning as in Part 17;

“pre-sentence report” has the meaning given by section 257;

“the president of the board” means the lay member (if any) who by virtue of rule 34 is the president of the board;

“proceedings with lay members” means any proceedings other than those listed in rule 27;

“qualified to be the president of the board” has the meaning given by rule 34(3);

“suspended sentence order” means an order under section 189(1) of the 2003 Act (suspended sentence of imprisonment) made by a relevant service court, as defined by section 196(2) of the 2006 Act;

“unit” means—

- (a) a naval ship or establishment;
- (b) any body of members of Her Majesty’s forces formed under the command of a person appointed to be the commanding officer of the body; or
- (c) an air force station.

(3) Any reference in these Rules to Schedule 8 to the 2003 Act is to that Schedule as modified by Schedule 5 to the 2006 Act.

## PART 2

### SERVICE OF DOCUMENTS

#### **Interpretation of Part 2**

4.—(1) References in this Part to service under these Rules include service under any enactment applied by these Rules.

(2) References in this Part to a requirement that a document be served on a person include any requirement that the document be supplied to the person, however expressed.

(3) References in this Part to a person’s agreement to the service of a document in a particular way include his agreement that any document of a description specified by him may be served in that way.

#### **Service on a person to whom proceedings relate**

5.—(1) Where under these Rules any document is to be served on a person to whom any proceedings relate, it may be served—

- (a) on him personally;
- (b) if he is subject to service law, by post in a letter addressed to him at his unit;
- (c) if he is not subject to service law—
  - (i) by leaving it at his usual or last known place of abode; or
  - (ii) by post in a letter addressed to his usual or last known place of abode;
- (d) by post in a letter addressed to his legal representative’s place of business; or
- (e) by DX, fax, electronic mail or other electronic means to his legal representative, where his legal representative—
  - (i) has given a DX box number, fax number or electronic mail or other electronic means address; and
  - (ii) has not refused to accept service by that means.

(2) In this rule references to the person’s legal representative are to any person of whose name and address the court administration officer has been notified under rule 39(4).

### **Service on the court administration officer**

6. Where under these Rules any document is to be served on the court administration officer, it may be served—

- (a) by post, DX, fax, electronic mail or other electronic means to any office of the Military Court Service; or
- (b) on a member of that Service personally, with his agreement.

### **Service on the Director**

7. Where under these Rules any document is to be served on the Director, it may be served—

- (a) by post, DX, fax, electronic mail or other electronic means to—
  - (i) the principal office of the Service Prosecuting Authority; or
  - (ii) with the agreement of a prosecuting officer, that Authority's main office in Germany; or
- (b) on a prosecuting officer personally, with his agreement.

### **Service on other individuals**

8. Where under these Rules any document is to be served on an individual other than a person to whom proceedings relate, the court administration officer or the Director, it may be served—

- (a) on the individual personally;
- (b) if he is subject to service law, by post in a letter addressed to him at his unit;
- (c) if he is not subject to service law—
  - (i) by leaving it at his usual or last known place of abode; or
  - (ii) by post in a letter addressed to his usual or last known place of abode.

### **Service on a corporation**

9. Where under these Rules any document is to be served on a corporation within the meaning of the Companies Act 2006<sup>(a)</sup>, it may be served—

- (a) by post to—
  - (i) the corporation's principal office in the United Kingdom;
  - (ii) if the corporation has no readily identifiable principal office in the United Kingdom, any place in the United Kingdom where it carries on its activities or business; or
  - (iii) if the corporation has no principal office in the United Kingdom and does not carry on its activities or business in the United Kingdom, its principal office; or
- (b) by DX, fax, electronic mail or other electronic means, where the corporation—
  - (i) has given a DX box number, fax number or electronic mail or other electronic means address; and
  - (ii) has not refused to accept service by that means.

### **Service by another method**

10.—(1) A judge advocate may direct that a document may be served by a method other than those mentioned in rules 5 to 9.

- (2) A direction under this rule—
  - (a) must specify—

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(a) 2006 c. 46.

- (i) the method to be used; and
  - (ii) the date by which the document must be served; and
- (b) may specify the time on that date by which the document must be served.

(3) The court may treat a document as served if the addressee responds to it, even if it was not served in accordance with these Rules.

#### **Service by commanding officer**

**11.** Where a document to be served on a person is sent or delivered to his commanding officer, his commanding officer must arrange for the document to be served on him personally as soon as is reasonably practicable.

#### **Service by fax or electronic means**

**12.** Where a document is served by fax, electronic mail or other electronic means, the person serving it need not provide a paper copy as well.

#### **Date of service**

**13.** Unless the contrary is shown, a document served on a person (otherwise than personally) shall be assumed to have been served—

- (a) in the case of a document sent by post from the United Kingdom to an address within the United Kingdom, on the fifth day after the day on which it was despatched;
- (b) in the case of a document sent by post—
  - (i) from the United Kingdom or Germany to an address within Germany, or
  - (ii) from Germany to an address within the United Kingdom, on the tenth day after the day on which it was despatched;
- (c) in the case of any other document sent by post, on the tenth day after the day on which it was despatched;
- (d) in the case of a document served by DX, on the fifth day after the day on which it was left at the addressee's DX box number or despatched;
- (e) in the case of a document served by fax, electronic mail or other electronic means, on the day after it was transmitted; and
- (f) in any case, on the day on which the addressee responds to it if that is earlier.

#### **Proof of service**

**14.—(1)** Where—

- (a) under any of rules 5 to 9 or a direction under rule 10, a document may be served by a particular method, and
- (b) a certificate is produced which—
  - (i) states that the document was so served, and
  - (ii) is signed by a person who purports to have so served the document,

the document shall be assumed to have been so served, unless the contrary is shown.

**(2)** Where a certificate is produced which—

- (a) states that a document was despatched, left at a DX box number or transmitted on a particular day, and
- (b) is signed by a person who purports to have despatched, left or transmitted the document, for the purposes of rule 13 the document shall be assumed to have been despatched, left or transmitted on that day, unless the contrary is shown.

(3) This rule is subject to any provision requiring proof on oath.

## PART 3

### PROCEEDINGS: GENERAL

#### **The court administration officer**

**15.**—(1) The court administration officer must exercise his functions (other than that of specifying the lay members for any proceedings) subject to any direction given by a judge advocate.

(2) The court administration officer may delegate any of his functions to a member of the Military Court Service.

#### **Listing of proceedings**

**16.**—(1) Proceedings shall commence at such time and place as may be appointed by the court administration officer; but this is subject to paragraph (2).

(2) Where an offender has been convicted in trial or appellate proceedings, the sentencing proceedings in respect of him shall commence immediately after the conclusion of the trial or appellate proceedings, unless the judge advocate for those proceedings appoints some later time.

(3) After the commencement of any proceedings, the court shall sit at such times and for such periods each day as the judge advocate may direct.

#### **Notification of proceedings**

**17.**—(1) The court administration officer must serve notice of any time and place appointed by him for the commencement or resumption of any proceedings on—

- (a) each person to whom the proceedings relate;
- (b) the legal representative (if any) of each such person;
- (c) the commanding officer of each such person;
- (d) the Director;
- (e) where the proceedings are for the hearing of an application, the applicant; and
- (f) any such other person as the Judge Advocate General may direct.

(2) At the same time as serving notice under paragraph (1) of the time and place appointed for the commencement of any proceedings with lay members, or as soon as is reasonably practicable after doing so, the court administration officer must serve on the persons mentioned in that paragraph a notice of the name and relevant particulars of—

- (a) each of the lay members; and
- (b) any person specified as a waiting member under rule 36.

(3) In paragraph (2), “relevant particulars” means—

- (a) in relation to a person subject to service law, his rank or rate and his unit;
- (b) in relation to any other person, any position held by him in the service of the Crown and any unit to which he is attached.

#### **Live links**

**18.**—(1) Any person may (and, if in service custody, must) attend any proceedings by live link, if a judge advocate so directs.

(2) A person who attends any proceedings by live link, and could give oral evidence in the proceedings if he were in the place where the proceedings are being held, may give evidence by live link.

(3) In these Rules (except Part 15)—

- (a) “live link” means an arrangement by which a person, when not in the place where proceedings are being held, is able to see and hear, and to be seen and heard by, the court during proceedings (and for this purpose any impairment of eyesight or hearing is to be disregarded); and
- (b) references to bringing a person before the court include bringing him to a place from which he can attend proceedings by live link.

(4) A direction under this rule may be given by—

- (a) the judge advocate for the proceedings; or
- (b) the judge advocate for any preliminary proceedings as respects which the proceedings are related proceedings.

(5) Rule 49(3) (effect of a direction given in preliminary proceedings) applies to a direction under this rule given in preliminary proceedings.

(6) Where a direction is given under this rule in relation to a witness, the witness may not give evidence otherwise than by live link without the leave of the judge advocate.

(7) A judge advocate may give a direction under this rule, or give permission for the purposes of paragraph (6)—

- (a) on an application by a party to the proceedings; or
- (b) of his own motion.

#### **Proceedings in absence of defendant etc**

**19.**—(1) Proceedings may be held in the absence of any person to whom they relate, if the judge advocate so directs.

(2) This rule does not permit a defendant to be arraigned in his absence.

#### **Deliberation in private**

**20.**—(1) While the court is deliberating on—

- (a) finding, or
- (b) any other matter as respects which the judge advocate directs that this paragraph is to apply,

no other person may be present.

(2) While the court is deliberating on—

- (a) sentence,
- (b) an issue of fact being tried under rule 112,
- (c) whether to make an activation order, or
- (d) any other matter as respects which the judge advocate directs that this paragraph is to apply,

no other person may be present except a person in attendance for instruction.

#### **Oaths and affirmations**

**21.**—(1) This rule applies where under these Rules an oath is required to be administered to a person.

(2) Sections 1 and 3 to 6 of the Oaths Act 1978<sup>(a)</sup> shall apply, as modified by paragraph (3), as they would apply if the person were required to take an oath in England and Wales.

(3) Where section 1 or 6 of that Act applies by virtue of this rule, the reference in that section to the words of the oath prescribed by law is to be read as a reference to the words prescribed by Schedule 1 for a person of the class to which the person belongs.

### **Interpreters**

**22.**—(1) The court administration officer may appoint a person to act as interpreter for the purposes of any proceedings.

(2) Before an interpreter begins to act, an oath must be administered to him.

(3) Before an interpreter is sworn, his name must be read out and any party to the proceedings may object to him on any reasonable ground, and, if the judge advocate upholds any such objection, the interpreter shall not be sworn.

### **Record of proceedings**

**23.**—(1) A record must be made of any proceedings.

(2) The record of proceedings must include—

- (a) a record of any plea offered, and whether any plea of guilty was accepted by the judge advocate;
- (b) a record of any finding;
- (c) a record of any sentence passed, order made or direction given by the court;
- (d) a record of any order made, and any direction or ruling given, by the judge advocate;
- (e) a sound recording of the proceedings, and any transcript of it (signed by the transcriber).

(3) The court administration officer shall send a copy of the record of any preliminary proceedings to—

- (a) the Judge Advocate General;
- (b) the Director; and
- (c) each defendant.

(4) Where a direction under rule 47 (preliminary proceedings in chambers) was given in relation to the proceedings, paragraph (3) shall have effect as if sub-paragraph (c) were omitted; and, where such a direction was given in relation to part of the proceedings, paragraph (3)(c) shall have effect in relation only to the record of the remainder.

(5) The record of proceedings shall be kept in the custody of the Judge Advocate General, together with any exhibits retained under rule 24 and any file of correspondence or other papers maintained by the court administration officer in connection with the proceedings, for at least six years from—

- (a) in the case of trial or appellate proceedings in which a defendant is convicted, the conclusion of the sentencing proceedings in relation to him;
- (b) in the case of preliminary proceedings where related trial or appellate proceedings take place but no defendant or appellant is convicted, the conclusion of the trial or appellate proceedings;
- (c) in any other case, the conclusion of the proceedings.

(6) A copy of the record of proceedings, or any part of it, shall be supplied on request—

- (a) to any party to the proceedings, without charge, and
- (b) to any other person, on payment of such charge as may be fixed by the Judge Advocate General,

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(a) 1978 c. 19.

but this is subject to paragraphs (7) and (8).

(7) Paragraph (6) does not require the supply of—

- (a) a copy of the record of any proceedings held in camera, or in relation to which a direction under rule 47 (preliminary proceedings in chambers) was given;
- (b) a copy of any part of a record of proceedings which relates to a part of the proceedings which was held in camera, or in relation to which such a direction was given.

(8) If, following a request for the supply of a copy of the record of proceedings or any part of it, the Secretary of State certifies that it is requisite for reasons of security that the record or part requested (or any part of it) should not be disclosed, paragraph (6) does not require the supply of the record or part requested (or the part of it to which the certificate relates).

### **Exhibits**

**24.**—(1) Any exhibit admitted in evidence must be marked sequentially with either a number or a letter.

(2) Each exhibit, or a label attached to it, must be signed by or on behalf of the judge advocate.

(3) Each exhibit must be retained with the record of proceedings, unless the judge advocate otherwise directs.

### **Termination of proceedings**

**25.**—(1) The judge advocate must terminate any proceedings to which rule 34 (president of the board) applies if—

- (a) the president of the board dies or is otherwise unable to continue to attend the proceedings; and
- (b) there is no other lay member of the court who is qualified to be the president of the board.

(2) The judge advocate must terminate any proceedings with lay members if—

- (a) a lay member dies or is otherwise unable to continue to attend the proceedings, or
- (b) the number of lay members discharged under rule 35(4) (objections to lay members) exceeds the number of waiting members,

and the number of lay members is in consequence reduced below the minimum number.

(3) The judge advocate may terminate any proceedings if he considers it in the interests of justice to do so.

(4) The Judge Advocate General shall terminate proceedings if the judge advocate dies or is otherwise unable to continue to attend the proceedings.

(5) Where proceedings with lay members are terminated under this rule, the lay members shall be discharged.

(6) The termination of trial or appellate proceedings under this rule shall not bar further trial or appellate proceedings in relation to the same charge or charges.

(7) The termination of sentencing proceedings under this rule or rule 59(4) (change of plea) shall not bar further sentencing proceedings in relation to the same offence or offences.

(8) The termination of activation proceedings under this rule shall not bar further activation proceedings held by virtue of the same conviction.

### **Circumstances not provided for**

**26.** Subject to any other enactment (including any other provision of these Rules), the judge advocate shall ensure that proceedings are conducted—

- (a) in such a way as appears to him most closely to resemble the way in which comparable proceedings of the Crown Court would be conducted in comparable circumstances; and

- (b) if he is unable to determine how comparable proceedings of the Crown Court would be conducted in comparable circumstances, in such a way as appears to him to be in the interests of justice.

## PART 4

### MEMBERS OF THE COURT

#### **Proceedings without lay members**

- 27.**—(1) For proceedings to which this rule applies, there shall be no lay members.
- (2) This rule applies to preliminary proceedings.
  - (3) This rule applies to sentencing proceedings where every offender who falls to be sentenced is either—
    - (a) a civilian offender for the purposes of Part 1 of Schedule 3 to the 2006 Act; or
    - (b) an offender to whom Part 2 of that Schedule (ex-servicemen etc) applies, and who was convicted of every offence for which he falls to be sentenced either—
      - (i) in trial proceedings for which no lay member was subject to service law; or
      - (ii) on a guilty plea, where the court administration officer had previously notified him in writing that, if trial proceedings were required, none of the lay members would be subject to service law.
  - (4) This rule applies to variation proceedings if—
    - (a) it applied to the proceedings in which the sentence that falls to be varied was imposed; or
    - (b) a direction is given under rule 120.
  - (5) This rule applies to activation proceedings if—
    - (a) the original sentence was imposed by the court, and this rule applied to the proceedings in which it was imposed; or
    - (b) the original sentence was imposed by the Service Civilian Court.
  - (6) This rule applies to ancillary proceedings.

#### **Powers that may be exercised by a judge advocate**

- 28.** Any power of the court may be exercised by a judge advocate, except—
- (a) the power to try a defendant or appellant; and
  - (b) the power—
    - (i) to sentence an offender,
    - (ii) to vary a sentence, or
    - (iii) to make an activation order,otherwise than in proceedings to which rule 27 applies.

#### **Proceedings requiring at least five lay members**

- 29.**—(1) For proceedings to which this rule applies, the number of lay members shall be at least five.
- (2) This rule applies to trial proceedings if—
    - (a) any defendant is charged with an offence listed in Schedule 2 to the 2006 Act;
    - (b) any defendant is aged 18 or over at the commencement of the proceedings and is charged with an offence for which he could, if convicted, be sentenced to more than seven years' imprisonment; or

- (c) any defendant is aged under 18 at the commencement of the proceedings and is charged with an offence for which he could, if convicted while under the age of 18, be sentenced to more than seven years' detention under section 209.
- (3) This rule applies to sentencing proceedings if any offender falls to be sentenced for—
- (a) an offence listed in Schedule 2 to the 2006 Act; or
  - (b) an offence for which he could be sentenced to more than seven years' imprisonment or more than seven years' detention under section 209.
- (4) This rule applies to variation proceedings if it applied to the proceedings in which the sentence that falls to be varied was imposed.

### **Additional lay members**

**30.**—(1) Subject to the provisions of this rule, a judge advocate may direct—

- (a) that the number of lay members specified for any trial, sentencing or variation proceedings to which rule 29 (proceedings requiring at least five lay members) applies is to be either six or seven, as he may direct; or
- (b) that the number of lay members specified for—
  - (i) any other trial, sentencing or variation proceedings, or
  - (ii) any appellate proceedings,is to be either four or five, as he may direct.

(2) A judge advocate may not give a direction under this rule in relation to trial or appellate proceedings unless he considers it necessary to do so, having regard to the expected length and location of the proceedings.

(3) Without prejudice to paragraph (2), a judge advocate may not give a direction under this rule in relation to trial or appellate proceedings unless—

- (a) in his opinion the proceedings are likely to last more than ten court days; or
- (b) the proceedings are to be held outside the United Kingdom and Germany and in his opinion are likely to last more than five court days.

(4) A direction under this rule may not be given after the commencement of the proceedings to which it relates unless—

- (a) such a direction was given before the commencement of the proceedings;
- (b) one or more lay members have been discharged under rule 35(4) (objections); and
- (c) the number of lay members remaining (including any waiting members) is equal to the minimum number.

(5) A judge advocate may rescind a direction given under this rule at any time before the commencement of the proceedings to which it relates.

### **Warrant officers**

**31.**—(1) For any proceedings with lay members where every person to whom the proceedings relate is of or below the rank or rate of warrant officer, the number prescribed for the purposes of section 155(3) (that is to say, the number of lay members who may be warrant officers rather than officers) is two.

(2) For any proceedings with lay members where any person to whom the proceedings relate is an officer subject to service law, every lay member must be an officer qualified for membership under section 156 and not ineligible by virtue of section 157 or rule 32; and section 155(3) shall not apply in relation to any such proceedings.

### **Persons ineligible for membership in particular circumstances**

32.—(1) A person is ineligible for membership of the court for any trial proceedings if, at any time since the date of the commission of any offence charged, he and any defendant were serving in the same unit.

(2) A person is ineligible for membership of the court for any sentencing proceedings if, at any time since the date of the commission of any offence for which an offender falls to be sentenced, he and the offender were serving in the same unit.

(3) A person is ineligible for membership of the court for any variation proceedings if he was not a member of the court for the proceedings in which the sentence that falls to be varied was imposed.

(4) A person is ineligible for membership of the court for any appellate proceedings if at any time since the date of the commission of any offence to which the proceedings relate he and any appellant were serving in the same unit.

(5) A person is ineligible for membership of the court for any activation proceedings if at any time since the date of the commission of the offence for which the original sentence was passed he and the offender were serving in the same unit.

(6) A person is ineligible for membership of the court for any proceedings if he was a member of the court for any previous proceedings to which any person to whom the proceedings relate was a party; but this is subject to paragraphs (7) to (9).

(7) A person is not ineligible for membership of the court for sentencing proceedings by virtue of having been a member of the court for any trial or appellate proceedings in which any offender was convicted of any offence for which he falls to be sentenced.

(8) A person is not ineligible for membership of the court for variation proceedings by virtue of having been a member of the court for—

- (a) any trial or appellate proceedings in which the offender was convicted of any offence for which the sentence that falls to be varied was imposed; or
- (b) the proceedings in which that sentence was imposed.

(9) For the purposes of paragraph (6) a person is not to be regarded as having been a member of the court for any previous proceedings if those proceedings were terminated under rule 25(2) by virtue of sub-paragraph (b) of that paragraph (successful objections exceeding the number of waiting members).

(10) In relation to a person who at any time was not subject to service law, references in this rule to a unit in which the person was at that time serving are to be read as references to a unit to which he was at that time attached.

(11) This rule does not apply to the judge advocate.

### **Civilians**

33.—(1) For proceedings to which this rule applies, each of the lay members must be either—

- (a) a person not subject to service law who is qualified for membership under paragraph (2) and not ineligible by virtue of rule 32; or
- (b) an officer or warrant officer who would be qualified for membership under section 156, and not ineligible by virtue of section 157 or rule 32, if this rule did not apply;

and section 155(3) shall not apply in relation to the proceedings.

(2) For proceedings to which this rule applies, a person not subject to service law is qualified for membership of the court unless—

- (a) he is aged under 18, or has reached the age of 70, at the commencement of the proceedings;
- (b) he is not a United Kingdom national;
- (c) he is a mentally disordered person;

- (d) he is disqualified for jury service;
- (e) he is a member of the Military Court Service; or
- (f) he is on the staff of the Service Prosecuting Authority.

(3) In paragraph (2), “United Kingdom national” has the same meaning as in paragraph 11 of Schedule 15 to the 2006 Act.

(4) For the purposes of paragraph (2)—

- (a) a person is a mentally disordered person if he is one of those listed in Part 1 of Schedule 1 to the Juries Act 1974(a); and
- (b) a person is disqualified for jury service if he is one of those listed in Part 2 of that Schedule.

(5) This rule applies to—

- (a) trial proceedings, if any defendant is not subject to service law at the commencement of the proceedings;
- (b) sentencing proceedings with lay members, if any offender who falls to be sentenced was not subject to service law when convicted;
- (c) variation proceedings with lay members, if this rule applied to the sentencing proceedings in which the sentence that falls to be varied was imposed;
- (d) appellate proceedings; and
- (e) activation proceedings with lay members, if the offender is not subject to service law at the commencement of the proceedings.

(6) Where this rule applies to any proceedings and any person to whom the proceedings relate is an officer not subject to service law, paragraph (1) has effect as if the words “or warrant officer” in sub-paragraph (b) were omitted.

### **The president of the board**

**34.**—(1) For proceedings to which this rule applies, at least one lay member must be an officer who is qualified to be the president of the board.

(2) This rule applies to any proceedings with lay members, except proceedings for which (by virtue of rule 33) no lay member is subject to service law.

(3) An officer is qualified to be the president of the board if—

- (a) he is of or above the rank of lieutenant commander, major or squadron leader;
- (b) he is subject to service law; and
- (c) where any person to whom the proceedings relate is subject to service law, he is of superior rank to every such person.

(4) For the purposes of paragraph (3)(c) an officer is of superior rank to a person to whom the proceedings relate if—

- (a) that person is of or above the rank of commodore, brigadier or air commodore; and
- (b) the officer holds the same rank as that person, or an equal rank, but is senior to him within that rank.

(5) In paragraphs (3) and (4), “rank” means substantive rank.

(6) Where one lay member is qualified to be the president of the board, he shall be the president of the board.

(7) Where two or more lay members are so qualified, the most senior of them shall be the president of the board.

(8) Paragraph (9) applies where—

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(a) 1974 c. 23. Schedule 1 to the Juries Act 1974 is substituted by section 321 of, and paragraphs 1 and 15 of Schedule 33 to, the Criminal Justice Act 2003.

- (a) the president of the board is discharged under rule 35(4) (objections);
- (b) the proceedings are not terminated under rule 25(2) (lay members reduced below minimum number);
- (c) no other lay member is qualified to be the president of the board; and
- (d) no waiting member is so qualified.

(9) Where this paragraph applies—

- (a) the proceedings shall be adjourned;
- (b) the court administration officer shall specify as a lay member another officer who is qualified to be the president of the board;
- (c) that officer shall be the president of the board; and
- (d) rule 35 (objections) shall apply on the resumption of the proceedings as it applies on the commencement of the proceedings.

(10) Notwithstanding anything in this rule, in any proceedings with lay members the judge advocate shall preside over the court.

### **Objections to lay members**

**35.—**(1) At the commencement of any proceedings to which this rule applies, the names of the lay members and waiting members shall be read out.

(2) Any party to the proceedings may object to any lay member, on any reasonable ground.

(3) The judge advocate shall rule on any objection to a lay member before the lay member is sworn.

(4) If an objection to a lay member is upheld, the judge advocate shall discharge him.

(5) This rule applies to any proceedings with lay members except—

- (a) sentencing proceedings, where every offender who falls to be sentenced was convicted in trial or appellate proceedings of at least one offence for which he falls to be sentenced; and
- (b) variation proceedings.

### **Waiting members**

**36.—**(1) When the court administration officer specifies the lay members for any proceedings to which rule 35 applies, he shall at the same time specify a person (referred to in these Rules as a “waiting member”) to take the place of any lay member who may be discharged under rule 35(4).

(2) Where a lay member is discharged under rule 35(4), and rule 34(9) (no member qualified to be president of the board) does not apply, the waiting member shall become a lay member.

(3) Where the court administration officer specifies a waiting member, he shall specify a second waiting member if a judge advocate so directs.

(4) A second waiting member may be specified at any time before the commencement of the proceedings.

(5) Where two waiting members have been specified and paragraph (2) applies, the reference in that paragraph to the waiting member is to the senior waiting member.

(6) Where—

- (a) two waiting members have been specified,
- (b) two lay members are discharged under rule 35(4), and
- (c) rule 34(9) does not apply,

both the waiting members shall become lay members.

(7) Rule 35(2) to (4) (objections) apply in relation to a waiting member who becomes a lay member by virtue of this rule.

### **Swearing of lay members**

37. At the commencement of any proceedings to which rule 35 applies, an oath shall be administered—

- (a) subject to that rule, to each of the lay members; and
- (b) to any person in attendance for instruction.

### **Judge advocate's power to direct lay members to withdraw**

38. In any proceedings with lay members, the judge advocate may direct the lay members to withdraw while he hears submissions or gives a ruling on any question of law, practice or procedure.

## **PART 5**

### **ASSISTANCE AND REPRESENTATION**

#### **Legal representatives**

39.—(1) A party to proceedings may appoint a legal representative to act for him in relation to the proceedings.

(2) A person may not be appointed as a legal representative unless—

- (a) he has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990(a);
- (b) he is an advocate or a solicitor in Scotland;
- (c) he is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland; or
- (d) he is a person having in any of the Channel Islands, the Isle of Man, a Commonwealth country or a British overseas territory rights and duties similar to those of a barrister or solicitor in England and Wales, and subject to punishment or disability for breach of professional rules.

(3) Any right conferred on a party to proceedings by these Rules may be exercised, and any duty imposed on him by these Rules (except pleading to a charge) discharged, by his legal representative on his behalf.

(4) A party who appoints a legal representative shall notify the court administration officer of the legal representative's name and address.

#### **Parent or guardian of young civilian**

40.—(1) This rule applies where a person to whom proceedings relate ("the young person")—

- (a) is under the age of 18 years at the commencement of the proceedings; and
- (b) is not subject to service law.

(2) Where a party to the proceedings or the court administration officer is required to serve any document on the young person under these Rules, he must also serve it on the young person's parent or guardian.

(3) Where the young person has not appointed a legal representative—

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(a) 1990 c. 41. Subsection (6) of section 71 of the Courts and Legal Services Act 1990 was substituted by the Access to Justice Act 1999 (c. 22), section 43, Schedule 6, paragraphs 4 and 9. Subsections (7) and (8) of section 71 of the 1990 Act were repealed by section 106, Schedule 15, Part 2 of the 1999 Act. Prospective amendments to section 71 of the 1990 Act are made to subsections (1) and (3) by the Constitutional Reform Act 2005 (c. 4), section 59(5), Schedule 11, Part 2, paragraph 4(1), (3). Prospective amendments are made to subsections (4) and (6) and a new subsection (6A) is inserted into section 71 of the 1990 Act by the Legal Services Act 2007 (c. 29), section 208(1), Schedule 21, paragraphs 83 and 94(a), (b) and (c).

- (a) any right conferred on a party to proceedings by these Rules may be exercised, and any duty imposed on him by these Rules (except pleading to a charge) discharged, by his parent or guardian on his behalf; and
- (b) the judge advocate may give leave for his parent or guardian to represent him in any proceedings.

## PART 6

### ARREST OF DEFENDANT

#### **Arrest by service police etc before arraignment**

41. Where—

- (a) a charge is allocated for Court Martial trial, and
- (b) the defendant has not been arraigned before the court,

section 111 shall apply as if the defendant had been so arraigned and proceedings before the court had not concluded.

#### **Warrant for arrest by civilian police**

42.—(1) Where a judge advocate has power to direct the arrest of a defendant under section 111 (including that section as applied by rule 41), he also has power to issue a warrant for the defendant's arrest.

(2) A warrant issued under this rule—

- (a) must be addressed to one or more officers of a civilian police force;
- (b) must state the offence with which the defendant is charged; and
- (c) must state that he must be transferred to service custody as soon as is practicable after his arrest.

(3) Where a defendant is arrested under a warrant issued under this rule and is transferred to service custody, subsection (4) of section 111 shall apply as if he had been arrested under that section.

## PART 7

### ADVANCE INFORMATION

#### **Service of advance information**

43.—(1) Where a charge is allocated for Court Martial trial, the Director must, as soon as is practicable—

- (a) serve advance information in relation to all defendants on the court administration officer; and
- (b) serve advance information in relation to each defendant on—
  - (i) that defendant; and
  - (ii) that defendant's legal representative (if any).

(2) "Advance information", in relation to any defendant, means—

- (a) copies of the statements of those witnesses on whom the Director intends to rely against the defendant;
- (b) a list of all exhibits which the Director intends to adduce in evidence against the defendant, and a statement of where any non-documentary exhibits are held; and

(c) a transcript of any sound recording of an interview with the defendant.

(3) Where, after the Director has served advance information on a defendant, he intends to adduce against the defendant any evidence not included in the advance information, he must as soon as is practicable serve on the defendant and the court administration officer such documents as he would have been required to include in the advance information if he had had that intention at the time when he served advance information.

(4) Where paragraph (3) applies in the course of trial proceedings, the reference in that paragraph to the court administration officer is to be read as a reference to the judge advocate.

(5) Where the Director no longer intends to call a witness whose statement he has served under this rule, he must as soon as is practicable give notice of that fact to every defendant.

#### **Information as to possibility of activation order etc**

**44.**—(1) Where a charge is such that, if a defendant to the charge were convicted of it by the court, the court would have power to make an activation order, the advance information in relation to the defendant must include a notice that the court would have that power if he were convicted.

(2) Where a defendant—

(a) has been conditionally discharged by virtue of Schedule 3 to the 2006 Act, and

(b) is charged with an offence committed during the period of conditional discharge,

the advance information in relation to him must include a notice that, if he were convicted of the offence, the court would have power to deal with him under section 186(2) for the offence for which he was conditionally discharged.

(3) Where an overseas community order is in force in respect of a defendant, the advance information in relation to him must include a notice that, if he were convicted of the offence while the overseas community order is in force, the court would have the powers conferred by paragraph 23 of Schedule 8 to the 2003 Act.

## **PART 8**

### **PRELIMINARY PROCEEDINGS**

#### **Listing of initial preliminary proceedings**

**45.** On receipt of the advance information in relation to a charge, the court administration officer must—

(a) forward it to the Judge Advocate General and request him to specify a judge advocate for preliminary proceedings in relation to the charge; and

(b) appoint a time and place for the commencement of the preliminary proceedings.

#### **Listing of further preliminary proceedings**

**46.**—(1) The court administration officer must appoint a time and place for further preliminary proceedings if so directed by—

(a) the judge advocate for any preliminary proceedings; or

(b) the Judge Advocate General.

(2) The judge advocate for any preliminary proceedings may give a direction under this rule—

(a) on the oral application of the Director or a defendant; or

(b) of his own motion.

(3) The Judge Advocate General may give a direction under this rule on the written application of the Director or a defendant.

(4) A written application for a direction under this rule—

- (a) must be made to the court administration officer;
- (b) must specify the reason for which further preliminary proceedings are required;
- (c) must include an estimate of the likely length of the further preliminary proceedings; and
- (d) subject to rule 47 (preliminary proceedings in chambers without notice), must be served on every other party to the proposed trial proceedings.

### **Preliminary proceedings in chambers without notice to defendant**

47. On application by the Director, the judge advocate for any preliminary proceedings may direct that the proceedings are, or that any part of the proceedings is—

- (a) where there is one defendant, to be held in his absence and without notice to him;
- (b) where there are two or more defendants, to be held in the absence of both or all of them and without notice to any of them.

### **Outline of prosecution case**

48. A judge advocate may direct the Director to serve on each defendant and the court administration officer, before any preliminary proceedings, an outline of the prosecution case.

### **Powers of judge advocate**

49.—(1) In preliminary proceedings the judge advocate may give such directions as appear to him to be necessary to secure the proper and efficient management of the case.

(2) Without prejudice to paragraph (1), the judge advocate may make an order or ruling on—

- (a) any question as to the admissibility of evidence;
- (b) any question as to the joinder or severance of charges; or
- (c) any other question of law, practice or procedure relating to the case.

(3) Any direction given in preliminary proceedings shall have effect throughout any related proceedings unless varied or discharged by—

- (a) the judge advocate who gave it; or
- (b) the judge advocate for any related proceedings.

(4) Any order or ruling made in preliminary proceedings shall have effect throughout any related proceedings unless varied or discharged—

- (a) by the judge advocate who made it;
- (b) by the judge advocate for any related proceedings; or
- (c) on appeal.

(5) Section 166 (fitness to stand trial) applies in preliminary proceedings as it applies on a trial by the court.

### **Appeals**

50.—(1) The Appeal Court shall have jurisdiction to hear an appeal against any order or ruling made in preliminary proceedings.

(2) An appeal under this rule may be brought only with leave of the Appeal Court.

(3) A judge advocate may continue preliminary proceedings notwithstanding that leave to appeal has been granted under paragraph (2), but related proceedings (other than further preliminary proceedings) may not commence until the appeal has been determined or abandoned.

**PART 9**  
**JOINDER, SEVERANCE AND AMENDMENT**

**Joinder of charges**

**51.**—(1) The court may try two or more charges together, if they are included in the same charge sheet.

(2) Where in accordance with regulations made under section 128 the charges in two or more charge sheets could have been included in the same charge sheet, the Director may consolidate both or all the charge sheets into one.

(3) Where the Director consolidates two or more charge sheets into one, he must immediately serve the new charge sheet on the court administration officer and each defendant.

**Severance of charges**

**52.** Where a defendant is charged with more than one offence in the same charge sheet, a judge advocate may direct, before the commencement of trial proceedings in relation to the charge sheet, that the charges be divided between two or more charge sheets.

**Severance of defendants**

**53.** Where two or more defendants are charged in a single charge, a judge advocate may direct, before the commencement of trial proceedings in relation to the charge, that the charge be replaced with charges against the defendants separately and in separate charge sheets.

**Amendment of charges**

**54.**—(1) Where in preliminary proceedings (whether before or after arraignment) or trial proceedings it appears to the judge advocate that the charge sheet or any charge is defective, he shall make such order for the amendment of the charge sheet or charge (as the case may be) as appears necessary to meet the circumstances of the case.

(2) But the judge advocate may not make an order under this rule if, in all the circumstances, the required amendments cannot be made without injustice.

(3) Without prejudice to the generality of paragraph (2), in relation to a proposed amendment in preliminary proceedings the circumstances relevant for the purposes of that paragraph include (in particular) whether the defendant has been arraigned.

(4) Where an order is made under this rule, the Director shall serve the amended charge sheet on every defendant in the way that would be required by regulations made under section 128—

- (a) if the amendment had been made otherwise than in accordance with an order made under this rule; and
- (b) where the amendment is made after arraignment, if it had been made before arraignment.

**Consequences of exercise of powers under this Part**

**55.**—(1) Where in preliminary proceedings the judge advocate is of opinion that, in consequence of the exercise of any power of the court under this Part, it is in the interests of justice—

- (a) that the commencement of the trial proceedings be postponed, or
- (b) that a defendant be arraigned or re-arraigned on any charge,

the judge advocate shall make such order or give such direction as appears necessary.

(2) Where in trial proceedings the judge advocate is of opinion that in consequence of the exercise of any power of the court under this Part it is in the interests of justice—

- (a) that the proceedings be adjourned,
  - (b) that the lay members be discharged, or
  - (c) that a defendant be arraigned or re-arraigned on any charge,
- the judge advocate shall make such order or give such direction as appears necessary.

## PART 10

### ARRAIGNMENT

#### **Arraignment**

**56.**—(1) A defendant shall be arraigned in preliminary proceedings on each charge brought against him, but need not be arraigned on every charge at the same time.

(2) A defendant shall be required to plead separately to each charge on which he is arraigned.

(3) Where a defendant pleads guilty to a charge, the judge advocate may accept the plea if satisfied that the defendant understands—

- (a) the nature of the charge;
- (b) the general effect of the plea; and
- (c) the difference in procedure following pleas of guilty and not guilty.

(4) Where the judge advocate accepts a plea of a guilty to a charge—

- (a) the defendant shall stand convicted of the charge; and
- (b) unless there is a further charge against him to which he has not pleaded guilty (or as respects which a plea of guilty has not been accepted by the judge advocate), the court administration officer shall appoint a time and place for sentencing proceedings.

(5) Where—

- (a) a plea of guilty is not accepted by the judge advocate, or
- (b) the defendant does not plead (or does not plead intelligibly) to the charge,

the judge advocate shall record a plea of not guilty.

#### **Order that charge lie on the file**

**57.** Where the judge advocate accepts a plea of guilty to any charge, the judge advocate may (with the Director's consent) order that any other charge—

- (a) to which the defendant has not pleaded,
- (b) to which the defendant has pleaded not guilty, or
- (c) as respects which the judge advocate has recorded a plea of not guilty under rule 56(5),

is to lie on the file, not to be proceeded with without the leave of the court or the Appeal Court.

#### **Offer of no evidence**

**58.**—(1) Where—

- (a) a defendant has pleaded not guilty to a charge, or the judge advocate has recorded a plea of not guilty to the charge under rule 56(5), and
- (b) the Director indicates that he intends to offer no evidence on the charge,

the judge advocate shall record a finding of not guilty in respect of the charge.

(2) A finding of not guilty recorded under this rule shall have effect for all purposes as an acquittal by the court.

### **Change of plea**

**59.**—(1) At any time before the lay members withdraw to deliberate on their finding on a charge, a defendant who has pleaded not guilty to the charge may withdraw his plea and substitute a plea of guilty.

(2) But a judge advocate may not accept a plea of guilty substituted under paragraph (1) unless satisfied that the defendant understands the matters mentioned in rule 56(3).

(3) At any time before the court begins to deliberate on its sentence for an offence, a defendant who has pleaded guilty to the charge of the offence may, with the leave of a judge advocate, withdraw his plea and substitute a plea of not guilty.

(4) Where a defendant changes his plea under paragraph (3)—

(a) in the course of sentencing proceedings in relation to the offence, or

(b) in the course of trial proceedings in relation to another charge,

the judge advocate shall terminate the proceedings.

### **Powers of Director after arraignment**

**60.**—(1) After a defendant has been arraigned on a charge, the Director may not exercise any of the powers under section 125(2) in relation to him without the leave of the court.

(2) Where—

(a) section 130(2) prohibits the Director from referring a charge to the defendant's commanding officer without the written consent of the defendant, and

(b) the defendant gives his written consent to such a referral,

this rule does not require leave for the referral.

(3) Where a defendant has been arraigned and the Director (with leave) exercises any of the powers under section 125(2)(a) to (c) in relation to him, the Director shall serve the amended charge sheet on every defendant in the way that would be required by regulations made under section 128 if the power had been exercised before arraignment.

### **Retrial authorised by Appeal Court**

**61.**—(1) This rule applies where the Appeal Court quashes a conviction and makes an order under section 19 of the 1968 Act authorising the appellant to be retried.

(2) Rule 56 (arraignment) applies, but rule 60 applies whether or not the defendant has been re-arraigned.

(3) Rule 60(1) does not require leave of the court for anything authorised by the order of the Appeal Court (including any direction by that court under section 19(4) of the 1968 Act).

(4) The Director may not refer any charge to the defendant's commanding officer, or allocate it for trial by the Service Civilian Court.

(5) The Director may not discontinue proceedings on any charge, unless at the same time he makes a direction under section 127(2) (direction barring further service or civilian proceedings) in relation to the charge.

## **PART 11**

### **ATTENDANCE OF WITNESSES**

#### **Notification of witnesses**

**62.**—(1) Where any person is required to give evidence in any proceedings, the court administration officer shall notify him of the time and place at which he is required to attend.

(2) When the court administration officer gives notice of any proceedings to a party to the proceedings other than the Director, he shall offer to notify any person whom the party may require to give evidence.

(3) Where a witness summons is issued under rule 63 or 65, the court administration officer shall serve it on the person to whom it is directed.

(4) If, in the opinion of the court administration officer, it is not reasonably practicable to notify a person under this rule or to serve a witness summons on a person, he shall give notice of that fact to the judge advocate and the party who wishes the person to attend.

### **Issue of witness summons on application to a judge advocate**

**63.**—(1) This rule applies where a judge advocate is satisfied that—

- (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any proceedings before the Court Martial; and
- (b) it is in the interests of justice to issue a witness summons under this rule to secure the attendance of that person to give evidence or to produce the document or thing.

(2) In such a case, the judge advocate shall, subject to the following provisions of this rule, issue a witness summons directed to the person concerned and requiring him to—

- (a) attend before the court at the time and place stated in the witness summons; and
- (b) give the evidence or produce the document or thing.

(3) A witness summons may be issued under this rule only on an application; and the judge advocate may refuse to issue the witness summons if any requirement relating to the application is not fulfilled.

(4) An application for a witness summons must be made as soon as is practicable after the applicant becomes aware of the grounds for making it.

(5) The application must—

- (a) identify the proposed witness;
- (b) explain—
  - (i) what evidence the proposed witness can give or produce;
  - (ii) why it is likely to be material evidence; and
  - (iii) why it would be in the interests of justice to issue a witness summons.

(6) The application may be made orally unless the judge advocate otherwise directs.

(7) An application in writing must contain a declaration that the facts stated in it are true to the best of the applicant's knowledge and belief.

(8) An application in writing must be served on the court administration officer and as directed by the judge advocate.

(9) A witness summons issued under this rule which requires a person to attend before the court and produce a document or thing may also require him to produce the document or thing—

- (a) at a place stated in the witness summons, and
- (b) at a time so stated, before the time at which the summons requires him to attend before the court,

for inspection by the applicant.

(10) A witness summons issued under this rule must state that failure to comply with the summons may result in the issue of a warrant for the arrest of the person to whom the summons is addressed.

### **Application for witness summons to produce a document, etc: judge advocate's assessment of relevance and confidentiality**

**64.**—(1) This rule applies where a person served with an application for a witness summons requiring the proposed witness to produce in evidence a document or thing objects to its production on the grounds that—

- (a) it is not likely to be material evidence; or
- (b) even if it is likely to be material evidence, the duties or rights (including rights of confidentiality) of the proposed witness or of any person to whom the document or thing relates outweigh the reasons for issuing a witness summons.

(2) A judge advocate may require the proposed witness to make the document or thing available for the objection to be assessed.

(3) The judge advocate may invite—

- (a) the proposed witness or any representative of the proposed witness, or
- (b) a person to whom the document or thing relates or any representative of such a person,

to help the judge advocate assess the objection.

### **Issue of witness summons of judge advocate's own motion**

**65.**—(1) For the purpose of any proceedings, a judge advocate may of his own motion issue a witness summons directed to a person and requiring him to—

- (a) attend before the court at the time and place stated in the witness summons; and
- (b) give evidence, or produce any document or thing specified in the witness summons.

(2) A witness summons issued under this rule must state that failure to comply with the summons may result in the issue of a warrant for the arrest of the person to whom the summons is addressed.

(3) A judge advocate may withdraw a witness summons issued under this rule if he no longer considers it necessary or if one of the following applies for it to be withdrawn—

- (a) the witness, on the grounds that—
  - (i) he cannot give or produce evidence likely to be material evidence; or
  - (ii) even if he can, his duties or rights (including rights of confidentiality) or those of any person to whom the evidence relates outweigh the reasons for the issue of the witness summons; or
- (b) any person to whom the proposed evidence relates, on the grounds that—
  - (i) that evidence is not likely to be material evidence; or
  - (ii) even if it is, his duties or rights (including rights of confidentiality) or those of the witness outweigh the reasons for the issue of the witness summons.

### **Application to withdraw a witness summons**

**66.**—(1) A judge advocate may withdraw a witness summons if an application is made under this rule.

(2) An application under this rule may be made by the party who applied for the witness summons, on the ground that it is no longer needed.

(3) An application under this rule may also be made by the witness, on the grounds that—

- (a) he was not aware of any application for it; and
- (b) either—
  - (i) he cannot give or produce evidence likely to be material evidence; or

- (ii) even if he can, his duties or rights (including rights of confidentiality) or those of any person to whom the evidence relates outweigh the reasons for the issue of the witness summons.

(4) An application under this rule may also be made by any person to whom the proposed evidence relates, on the grounds that—

- (a) he was not aware of any application for it; and
- (b) either—
  - (i) that evidence is not likely to be material evidence; or
  - (ii) even if it is, his duties or rights (including rights of confidentiality) or those of the witness outweigh the reasons for the issue of the witness summons.

(5) An application under this rule—

- (a) must be made in writing to the court administration officer;
- (b) must be made as soon as is practicable after the applicant becomes aware of the grounds for making it; and
- (c) must state the grounds on which it is made.

(6) An application under this rule must be served on—

- (a) the witness (where he is not the applicant);
- (b) the party who applied for the witness summons (where he is not the applicant); and
- (c) any other person who, to the applicant's knowledge, has been served with the application for the witness summons.

(7) Where—

- (a) a witness summons requires the proposed witness to produce in evidence a document or other thing, and
- (b) a person other than the party who applied for the witness summons makes an application under this rule,

rule 64(2) and (3) apply, with references to “the objection” read as references to the matters mentioned in paragraph (3)(b) or (4)(b) (as the case may be).

### **Oral applications**

**67.**—(1) Where a rule or direction requires an application under this Part to be in writing, the application may be made orally with the leave of the judge advocate.

(2) A party who seeks leave to make such an application orally must—

- (a) give as much notice as the urgency of his application permits to those on whom he would otherwise have served an application in writing; and
- (b) in doing so, explain the reasons for—
  - (i) the application; and
  - (ii) seeking leave to make the application orally.

### **Further process to secure attendance of witness**

**68.**—(1) If the judge advocate is satisfied by evidence on oath that—

- (a) a person is likely to be able to give material evidence or produce any document or other thing likely to be material evidence in the proceedings,
- (b) that it is in the interests of justice that the person should attend to give evidence or to produce the document or thing, and
- (c) it is probable that a witness summons issued under rule 63 or 65 would not procure his attendance,

the judge advocate may, instead of issuing a witness summons, issue a warrant to arrest that person and bring him before the court.

(2) Where—

- (a) any person has failed to attend before the court in answer to a witness summons issued under rule 63 or 65,
- (b) the judge advocate is satisfied by evidence on oath that—
  - (i) the person is likely to be able to give evidence likely to be material evidence or produce any document or other thing likely to be material evidence in the proceedings, and
  - (ii) the person has been duly served with the witness summons and that a reasonable sum has been paid or tendered to him for costs and expenses, and
- (c) it appears to the judge advocate that there is no just excuse for the person's failure to attend,

the judge advocate may issue a warrant to arrest the person and bring him before the court.

(3) Subject to paragraph (4), a warrant issued under this rule shall be addressed to—

- (a) one or more service policemen; or
- (b) one or more officers of a civilian police force.

(4) A warrant issued under this rule may not be addressed to a service policeman unless it appears to the judge advocate that the person for whose arrest it is issued is subject to service law or is a civilian subject to service discipline.

(5) Where a person has been arrested by an officer of a civilian police force under a warrant issued under this rule, he must be transferred to service custody as soon as is practicable.

(6) Where a person has been arrested under a warrant issued under this rule and is in service custody—

- (a) he must as soon as is practicable be brought before a judge advocate for a review of whether he should continue to be kept in service custody until he can be brought before the court; and
- (b) if he has not been brought before a judge advocate for such a review within 48 hours of the arrest he must be released.

### **Review of custody of witness**

**69.**—(1) Paragraphs (2) to (5) apply where—

- (a) a person is brought before a judge advocate under rule 68(6); or
- (b) the keeping of a person in service custody has been authorised by an order under paragraph (2) and he is brought before a judge advocate before the expiry of the period for which it was so authorised.

(2) The judge advocate may by order authorise the keeping (or further keeping) of the person in service custody if he is satisfied that there are substantial grounds for believing that, if released from service custody, the person would fail to attend the court as required.

(3) The period for which the judge advocate may, by an order under paragraph (2), authorise the keeping of the person in service custody is such period, ending not later than 8 days after the day on which the order is made, as he considers appropriate in all the circumstances.

(4) If the judge advocate makes no order under paragraph (2), the person must be released from service custody without delay; but this is subject to paragraph (5).

(5) The judge advocate may require the person to comply, before release or later, with such requirements as appear necessary to secure his attendance before the court.

(6) Where the keeping of the person in service custody is authorised by an order under paragraph (2), he must be released on the expiry of the period for which it was so authorised unless a judge advocate has made a further order under that paragraph.

(7) Any requirement imposed by virtue of paragraph (5) may be varied or discharged by a judge advocate on application by the person or the Director.

(8) Section 107(5) shall apply in relation to a requirement imposed by virtue of paragraph (5) as it applies in relation to a requirement imposed by virtue of section 107(3)(a).

(9) A person guilty of an offence under section 107(5) by virtue of paragraph (8) shall be liable to a fine not exceeding level 4 on the standard scale.

### **Entitlement to witness expenses**

**70.**—(1) Where any person is—

- (a) notified under rule 62 of the requirement to give evidence in any proceedings, or
- (b) served with a witness summons issued under rule 63 or 65,

there shall be paid or tendered to him at that time any expenses in respect of his attendance.

(2) For the purpose of this rule—

- (a) the tender of a warrant or voucher entitling a person to travel free of charge shall constitute tender of his expenses in respect of any travelling required; and
- (b) the tender of a written undertaking by the court administration officer to defray any other expenses payable under these Rules shall constitute tender in respect of those expenses.

### **Order for inspection of banker’s books**

**71.** The powers conferred by section 7 of the Bankers’ Books Evidence Act 1879(a) (orders for the inspection of bankers’ books) may be exercised by a judge advocate, in relation to any proceedings of the court, on the application of any party to the proceedings.

## PART 12

### EVIDENCE

#### CHAPTER 1

#### General

### **Application and interpretation of Part 12**

**72.**—(1) The provisions of this Part apply in relation to any proceedings in which an issue of fact falls to be determined, unless otherwise stated.

(2) In relation to any proceedings other than trial proceedings, references in this Part to a defendant are to be read as references to a person to whom the proceedings relate.

### **Rules of evidence**

**73.**—(1) The rules of evidence applicable in a trial on indictment in England and Wales shall apply, to the extent that they—

- (a) are capable of applying; and
- (b) are not applied, with or without modifications, by any other enactment or subordinate legislation (whenever passed or made).

(2) In this rule, “rules of evidence” includes rules conferring or restricting any discretion to exclude admissible evidence.

(3) No person may be required—

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(a) 1879 c. 11.

- (a) to answer any question which he could not be required to answer in a trial on indictment in England and Wales; or
  - (b) to produce any document which he could not be required to produce in such a trial.
- (4) The court may take judicial notice of—
- (a) matters of which judicial notice could be taken in a trial on indictment in England and Wales; and
  - (b) matters within the general service knowledge of the court.

**Oral testimony to be given on oath**

**74.**—(1) Oral testimony shall be given on oath.

(2) This rule is subject to—

- (a) section 5 of the Oaths Act 1978 (affirmation);
- (b) section 31 of the 1999 Act (evidence admitted under a special measures direction); and
- (c) section 56 of that Act (reception of unsworn evidence by witness who is not permitted to be sworn).

**Proof by written statement**

**75.**—(1) Without prejudice to rule 73, section 9 of the 1967 Act (proof by written statement) shall apply, as modified by paragraph (2), in relation to a statement made—

- (a) in the United Kingdom by any person, or
- (b) outside the United Kingdom by a person subject to service law or a civilian subject to service discipline,

as it applies in criminal proceedings in relation to a statement made in the United Kingdom.

(2) In its application by virtue of this rule, section 9 of the 1967 Act shall have effect as if—

- (a) subsection (2)(c) required service of the statement on the court administration officer (as well as each of the other parties to the proceedings);
- (b) in subsection (2)(d), the reference to the parties' solicitors were to their legal representatives;
- (c) subsections (5) and (8) were omitted; and
- (d) in subsection (6), the references to the court were to the judge advocate.

(3) An application to the court under section 9(4)(b) of the 1967 Act—

- (a) may be made in preliminary proceedings; and
- (b) if made in trial proceedings, shall be determined by the judge advocate.

(4) Section 89 of the 1967 Act (offence of making a false statement tendered in evidence) shall apply in relation to a statement tendered in evidence in proceedings of the court by virtue of section 9 of that Act, wherever made, as it applies in relation to a statement tendered in evidence in criminal proceedings by virtue of that section.

**Proof by formal admission**

**76.**—(1) Without prejudice to rule 73, section 10 of the 1967 Act (proof by formal admission) shall apply, as modified by paragraph (2), as it applies in relation to criminal proceedings.

(2) In its application by virtue of this rule, section 10 of the 1967 Act shall have effect as if—

- (a) in subsection (1), the reference to the prosecutor were to the Director; and
- (b) in subsection (2), references to a defendant's counsel or solicitor were to his legal representative.

### **Use of documents to refresh memory**

77.—(1) A person giving oral evidence about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if—

- (a) he states in his oral evidence that the document records his recollection of that matter at that earlier time; and
- (b) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence.

(2) Where—

- (a) a person giving oral evidence about any matter has previously given an oral account, of which a sound recording was made, and he states in that evidence that the account represented his recollection of the matter at that time,
- (b) his recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of his oral evidence, and
- (c) a transcript has been made of the sound recording,

he may, at any stage in the course of giving his evidence, refresh his memory of the matter from that transcript.

## CHAPTER 2

### Evidence of bad character

#### **Notice of intention to adduce evidence of a defendant's bad character**

78.—(1) Where, in trial proceedings—

- (a) the Director intends to adduce evidence of a defendant's bad character, or
- (b) a defendant intends to adduce evidence of another defendant's bad character, or to cross-examine a witness with a view to eliciting such evidence,

he must serve on the court administration officer and all other parties to the proceedings a notice of that intention.

(2) A notice under this rule—

- (a) must describe the misconduct to which the evidence relates;
- (b) must state what evidence of the misconduct the party serving the notice intends to adduce or elicit;
- (c) if served by the Director, must identify any witness whom he intends to call about the misconduct; and
- (d) identify the paragraph or paragraphs of section 101(1) of the 2003 Act which the party serving the notice asserts to be applicable to the evidence.

(3) If served by the Director, a notice under this rule must be served not more than 14 days after the Director serves advance information in respect of the charge to which the evidence relates.

(4) If served by a defendant, a notice under this rule must be served not more than 14 days after—

- (a) the date on which the Director complies or purports to comply with article 4 of the CPIA Order; or,
- (b) if later, the date on which the Director discloses to the defendant the previous convictions of the co-defendant to whose misconduct the notice relates.

(5) If it is not reasonably practicable to serve a notice under this rule within the time prescribed by paragraph (3) or (4) (as the case may be), the notice must be served as soon as it is reasonably practicable to do so.

(6) The court may dispense with the requirement to serve a notice under this rule if satisfied that no injustice would result.

### **Application to exclude evidence of a defendant's bad character**

**79.**—(1) An application under section 101(3) of the 2003 Act to exclude evidence of a defendant's bad character in trial proceedings must be made in writing to the court administration officer and served on all other parties to the proceedings, unless a judge advocate gives leave for the application to be made orally.

(2) If made in writing, the application—

- (a) must state whether a notice under rule 78 has been served on the applicant in relation to the evidence, and if so on what date; and
- (b) must be made and served not more than 14 days after that date (if any), unless paragraph (3) applies.

(3) Where—

- (a) the court dispenses with the requirement to serve a notice under rule 78, or
- (b) such a notice is served but it is not reasonably practicable to make the application within 14 days of the service of the notice,

the application must be made as soon as is reasonably practicable.

### **Application for leave to adduce evidence of the bad character of a non-defendant**

**80.**—(1) An application for leave to give evidence in trial proceedings of the bad character of a person other than a defendant must be made in writing to the court administration officer and served on all other parties to the proceedings, unless a judge advocate gives leave for the application to be made orally.

(2) If made in writing, such an application—

- (a) must describe the misconduct to which the evidence relates;
- (b) must state what evidence of the misconduct the applicant seeks to adduce or elicit;
- (c) if made by the Director, must identify any witness whom he intends to call about the misconduct; and
- (d) must state the grounds on which the applicant asserts that the evidence is admissible.

(3) If made by the Director, an application under this rule must be made not more than 14 days after the Director serves advance information in respect of the charge to which the evidence relates.

(4) If made by a defendant, an application under this rule must be made not more than 14 days after—

- (a) the date on which the Director complies or purports to comply with article 4 of the CPIA Order; or,
- (b) if later, the date on which the Director discloses to the defendant the previous convictions of the person to whose misconduct the application relates.

(5) If it is not reasonably practicable to make an application under this rule within the time prescribed by paragraph (3) or (4) (as the case may be), the application must be made as soon as it is reasonably practicable to do so.

## **CHAPTER 3**

### **Hearsay evidence**

#### **Notice of intention to adduce hearsay evidence**

**81.**—(1) Where a party to trial proceedings proposes to adduce a hearsay statement, or (in the case of a defendant) to cross-examine a witness with a view to eliciting evidence of such a statement, on the basis that the statement is admissible by virtue of—

- (a) section 114(1)(d) of the 2003 Act (interests of justice),

- (b) section 116 of that Act (maker of statement unavailable to give oral evidence), or
- (c) section 117 of that Act (statement contained in a document),

he must serve on the court administration officer and all other parties to the proceedings a notice to that effect.

(2) A notice under this rule—

- (a) must give details of the statement that the party serving the notice proposes to tender in evidence;
- (b) where the statement is contained in a document which has not already been served on all the other parties, must include a copy of the document;
- (c) where the notice is served by the Director and oral evidence of the statement is to be given, must identify any witness who is to give it;
- (d) must specify whether the party serving the notice proposes to tender the statement by virtue of section 114(1)(d), 116 or 117 of the 2003 Act;
- (e) where he proposes to tender the statement by virtue of section 114(1)(d) of that Act, must specify which of the factors mentioned in section 114(2) of that Act he considers to be relevant, and how they are relevant; and
- (f) where the statement is evidence that an earlier hearsay statement was made, must specify whether he proposes to tender it by virtue of section 121(1)(a), (b) or (c) of that Act.

(3) Where a notice under this rule is served by the Director, it must be served not more than 14 days after the Director serves advance information in respect of the charge to which the evidence relates.

(4) Where a notice under this rule is served by a defendant, it must be served not more than 14 days after the Director complies or purports to comply with article 4 of the CPIA Order.

(5) Where—

- (a) a notice has been served under this rule in relation to a hearsay statement, and
- (b) no counter-notice has been served in accordance with rule 82 in relation to the statement,

the statement is to be treated as admissible by agreement of the parties.

(6) In this rule “hearsay statement” means a statement which—

- (a) is not made in oral evidence in the proceedings; and
- (b) is relied on as evidence of a matter stated in it.

### **Counter-notice objecting to the admission of hearsay evidence**

**82.—**(1) Where a party serves a notice under rule 81 in relation to a statement, any other party may serve a counter-notice objecting to the admission of the statement.

(2) A counter-notice served under this rule must state—

- (a) the date on which the party serving it was served with the notice under rule 81;
- (b) whether he objects to the admission of the whole or only part of the statement, and if only part which part; and
- (c) the grounds on which he so objects.

(3) A counter-notice served under this rule must be served on the court administration officer and all other parties to the proceedings not more than 14 days after service of the notice under rule 81.

## CHAPTER 4

### Evidence of service matters

#### **Evidence of enlistment**

**83.**—(1) A document purporting to be an enlistment paper used to enlist a person in accordance with regulations made under section 328 shall be evidence that—

- (a) that person was enlisted, on the date on which the declaration in the enlistment paper purports to have been signed by him, and on the terms set out in the document; and
- (b) anything recorded in the document as the answer given by him to a question in the document was given by him in answer to that question when it was put to him by or on the direction of the recruiting officer who enlisted him.

(2) A document purporting to be a copy of such a document as is mentioned in paragraph (1) and purporting to be certified to be a true copy by a person stated in the certificate to have custody of the document shall be evidence of the matters mentioned in sub-paragraphs (a) and (b) of that paragraph.

#### **Evidence as to service etc**

**84.** A document stating that a person—

- (a) was or was not serving at any specified time or during any specified period in any part of Her Majesty's forces,
- (b) was discharged from any of Her Majesty's forces at or before any specified time,
- (c) held or did not hold at any specified time any specified rank, rate or appointment in any of Her Majesty's forces,
- (d) had at or before any specified time been attached, posted or transferred to any part of Her Majesty's forces,
- (e) at any specified time or during any specified period was or was not serving or held or did not hold any rank, rate or appointment in any particular country or place, or
- (f) was or was not at any specified time authorised to use or wear any decoration, badge or emblem,

shall, if it purports to be issued by or on behalf of the Defence Council or by a person authorised by them, be evidence of the matters stated in the document.

#### **Service records**

**85.**—(1) A record purporting to be—

- (a) made in any service record in pursuance of any Act or of Queen's Regulations, or otherwise in pursuance of naval, military, or air force duty, and
- (b) signed by the commanding officer of the person to whom the record relates or by a person whose duty it was to make or keep the record,

shall be evidence of the matters stated in the record.

(2) A document purporting to be a copy of such a record (including the signature) as is mentioned in paragraph (1) and purporting to be certified to be a true copy by a person stated in the certificate to have custody of the record shall be evidence of the matters stated in the document.

#### **Defence Council instructions, regulations and certificates**

**86.**—(1) A document purporting to be issued by order of the Defence Council and to contain instructions or regulations given or made by the Defence Council shall be evidence of the giving of the instructions or the making of the regulations and their contents.

(2) A certificate purporting to be issued by or on behalf of the Defence Council or by a person authorised by them and stating—

- (a) that a decoration of a description specified in, or as annexed to, the certificate is or is not a naval, military or air force decoration, or
- (b) that a badge or emblem of a description specified in, or as annexed to, the certificate is or is not one supplied or authorised by the Defence Council,

shall be evidence of the matters stated in the certificate.

### **Standing or routine orders**

**87.** A certificate purporting to be signed by a person's commanding officer or an officer authorised by the commanding officer to give the certificate, and stating the contents of, or of any part of, standing orders, or other routine orders of a continuing nature, of any of Her Majesty's forces, made for—

- (a) any part of Her Majesty's forces,
- (b) any area or place, or
- (c) any ship, train or aircraft,

shall be evidence of the matters stated in the certificate.

## **CHAPTER 5**

### **Expert evidence**

#### **Expert evidence**

**88.**—(1) Expert evidence shall not be adduced without the leave of the judge advocate unless the party proposing to rely on it has served on every other party and the court administration officer, not less than 14 days before the date appointed for the commencement of the proceedings, a statement of the substance of the expert evidence.

(2) The statement referred to in paragraph (1) must be in writing unless every other party consents to its being made orally.

(3) Where more than one party wishes to introduce expert evidence, the judge advocate may direct the experts to—

- (a) discuss the expert issues in the proceedings; and
- (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(4) Except for the statement prepared under paragraph (3)(b), the content of the discussion under paragraph (3)(a) may not be referred to without the judge advocate's permission.

(5) Where more than one defendant wishes to introduce expert evidence on an issue, the judge advocate may direct that the evidence on that issue is to be given by one expert only.

(6) Where the defendants cannot agree who should be the expert to give evidence under paragraph (5), the judge advocate may—

- (a) select the expert from a list prepared or identified by them; or
- (b) direct that the expert be selected in such other manner as the judge advocate shall direct.

(7) Where the judge advocate gives a direction under paragraph (5) for a single joint expert to be used, each of the defendants may give instructions to the expert.

(8) When a defendant gives instructions to an expert under paragraph (7) he must, at the same time, send a copy of the instructions to every other defendant.

(9) Where—

- (a) a statement has been prepared for the purposes of proceedings, and

(b) the person who prepared the statement had, or may reasonably be supposed to have had, personal knowledge of the matters stated,  
a statement served under paragraph (1) may be accompanied by a notice, given for the purposes of section 127 of the 2003 Act (expert evidence: preparatory work), that another person will in evidence given in the proceedings (whether orally or under section 9 of the 1967 Act, as applied by rule 75) base an opinion or inference on the statement.

## CHAPTER 6

### Special measures directions

#### Interpretation of Chapter 6

**89.**—(1) In this Chapter—

“eligible witness” means a witness eligible for assistance by virtue of rule 90 or 91;

“intermediary” has the same meaning as in section 29 of the 1999 Act;

“sexual offence” means an offence under section 42 as respects which the corresponding offence under the law of England and Wales is—

- (a) an offence under Part 1 of the Sexual Offences Act 2003(a);
- (b) an offence of attempting or conspiring to commit such an offence; or
- (c) an offence under Part 2 of the Serious Crime Act 2007(b) (encouraging and assisting crime) where the offence (or one of the offences) which the offender intended or believed would be committed is an offence under Part 1 of the Sexual Offences Act 2003;

“special measures direction” means a direction providing for one or more of the special measures available in relation to a witness to apply to evidence given by the witness;

“the special measures provisions” means the provisions of Chapter 1 of Part 2 of the 1999 Act applied by an order under section 61(1) of that Act.

(2) In this Chapter—

- (a) references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy (and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively); and
- (b) references to the special measures available in relation to a witness are to be construed in accordance with rule 92.

#### Witnesses eligible for assistance on grounds of age or incapacity

**90.**—(1) A witness is eligible for assistance by virtue of this rule if the witness is under the age of 18 at the time when it falls to the judge advocate to consider whether to give a special measures direction in relation to the witness.

(2) A witness is also eligible for assistance by virtue of this rule if the judge advocate considers that the quality of evidence given by the witness is likely to be diminished because the witness—

- (a) suffers from mental disorder within the meaning of the Mental Health Act 1983(c);
- (b) otherwise has a significant impairment of intelligence and social functioning; or
- (c) has a physical disability or is suffering from a physical disorder.

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(a) 2003 c. 42.  
(b) 2007 c. 27.  
(c) 1983 c. 20.

### **Witnesses eligible for assistance on grounds of fear or distress about testifying**

**91.**—(1) A witness (other than a defendant) is eligible for assistance by virtue of this rule if the judge advocate is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) A witness is also eligible for assistance by virtue of this rule if—

- (a) the proceedings are in respect of a sexual offence;
- (b) the witness is a complainant in respect of that offence; and
- (c) the witness has not informed the court of the witness's wish not to be so eligible.

### **Special measures available**

**92.**—(1) Where a witness (other than a defendant) is eligible for assistance by virtue of rule 90, the special measures available in relation to him are those for which provision is made by sections 23, 25 to 27, 29 and 30 of the 1999 Act.

(2) Where a witness is eligible for assistance by virtue of rule 91, the special measures available in relation to him are those for which provision is made by sections 23 and 25 to 27 of that Act.

(3) Where a defendant is eligible for assistance by virtue of rule 90, the special measures available in relation to him are those for which provision is made by sections 29 and 30 of that Act.

### **Special measures direction relating to eligible witness**

**93.**—(1) Subject to the special measures provisions and this Chapter, a judge advocate may give a special measures direction in relation to a witness if—

- (a) the witness is an eligible witness; and
- (b) any of the special measures available in relation to the witness (or any combination of them) would, in the judge advocate's opinion, be likely to improve the quality of evidence given by the witness.

(2) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.

(3) In determining whether any special measure or measures would be likely to improve the quality of evidence given by the witness, and if so whether to give a direction providing for the measure or measures to apply, a judge advocate must consider all the circumstances of the case, including in particular—

- (a) any views expressed by the witness; and
- (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

(4) Where there are two or more defendants—

- (a) any reference to the defendant in the special measures provisions may be taken, in connection with the giving of a special measures direction, as a reference to all or any of the defendants, as the judge advocate may determine; and
- (b) any such direction may be given on the basis of any such determination.

(5) A special measures direction may provide for one or more special measures to apply in combination with a direction under rule 18 (live links), and for the purposes of this Chapter a measure would be likely to improve the quality of the witness's evidence if, were it combined with such a direction, it would be likely to do so.

(6) A judge advocate may give a special measures direction—

- (a) on an application made by a party to the proceedings; or
- (b) of the judge advocate's own motion.

(7) A judge advocate who gives, or refuses an application for, a special measures direction must state in open court his reasons for doing so.

(8) Nothing in this Chapter is to be regarded as affecting any power of the court or a judge advocate to make an order or give leave of any description—

- (a) in relation to a witness who is not an eligible witness; or
- (b) in relation to an eligible witness, where the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

### **Evidence given in private**

**94.** A special measures direction may not provide for the exclusion of persons under section 25 of the 1999 Act unless—

- (a) the proceedings relate to a sexual offence; or
- (b) it appears to the judge advocate that there are reasonable grounds for believing that any person other than a defendant has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

### **Video recorded evidence in chief**

**95.—(1)** A special measures direction may not provide for a video recording, or a part of such a recording, to be admitted under section 27 of the 1999 Act if the judge advocate is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted.

(2) In considering for the purposes of paragraph (1) whether any part of a recording should not be so admitted, the judge advocate must consider whether any prejudice to a defendant which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(3) Where a special measures direction provides for a recording to be admitted under section 27 of the 1999 Act, the judge advocate may nevertheless subsequently direct that it is not to be so admitted if—

- (a) it appears to the judge advocate that—
  - (i) the witness will not be available for cross-examination (whether conducted in the ordinary way or in accordance with any such direction), and
  - (ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available; or
- (b) rule 98 has not been complied with to the satisfaction of the judge advocate.

(4) Paragraph (3) is without prejudice to rule 99 (power to vary or discharge special measures direction).

(5) Where a recording is admitted under section 27 of the 1999 Act—

- (a) the witness must be called by the party tendering it in evidence, unless the parties to the proceedings have agreed that there is no need for the witness to be called; and
- (b) the witness may not give evidence in chief otherwise than by means of the recording—
  - (i) as to any matter which, in the opinion of the judge advocate, has been dealt with adequately in the witness's recorded testimony; or
  - (ii) without the leave of the judge advocate, as to any other matter which, in the opinion of the judge advocate, is dealt with in that testimony.

(6) Where a special measures direction provides for part only of a recording to be admitted under section 27 of the 1999 Act, references in paragraphs (3) and (4) to the recording or to the witness's recorded testimony are references to the part of the recording or testimony which is to be so admitted.

(7) The judge advocate may give leave for the purposes of paragraph (5)(b)(ii) if it appears to him to be in the interests of justice to do so, and may do so either—

- (a) on an application by a party to the proceedings; or
- (b) of his own motion.

#### **Examination of witness through intermediary**

**96.**—(1) Any examination of a witness conducted in pursuance of a provision included in a special measures direction by virtue of section 29(1) of the 1999 Act (examination of witness through intermediary) must take place—

- (a) in the presence of such persons as the direction may provide; and
- (b) in circumstances in which the members of the court, and legal representatives acting in the proceedings, are able to see and hear the examination of the witness and to communicate with the intermediary (and for this purpose any impairment of eyesight or hearing is to be disregarded).

(2) Where two or more legal representatives are acting for a party to the proceedings, paragraph (1)(b) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(3) Before an intermediary begins to act, he shall make a declaration in the following form:

“I solemnly, sincerely and truly declare that I will well and faithfully communicate the questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding.”

(4) In this rule “the intermediary” has the same meaning as in section 29 of the 1999 Act.

#### **Application for special measures direction: general**

**97.**—(1) An application for a special measures direction must be made in writing to the court administration officer, unless a judge advocate gives leave for it to be made orally.

(2) A written application must specify—

- (a) unless the application is made by a defendant and does not relate to evidence in support of an alibi, the name and date of birth of the witness in relation to whom it is made;
- (b) the special measure or measures sought;
- (c) where the application is for a direction including provision by virtue of section 27 of the 1999 Act (video recorded evidence in chief), the information mentioned in rule 98(4);
- (d) the grounds on which the applicant asserts—
  - (i) that the witness is an eligible witness; and
  - (ii) that the measure or measures will improve the quality of the witness’s evidence; and
- (e) the views of the witness as to the matters specified in accordance with sub-paragraph (d).

(3) In paragraph (2)(a) “evidence in support of an alibi” has the same meaning as in article 7 of the CPIA Order.

(4) A written application must be made, and a copy served on all other parties to the proceedings—

- (a) where the application is made by the Director, not more than 14 days after the Director serves advance information in respect of the charge to which the proposed evidence relates;
- (b) where the application is made by a defendant, not more than 14 days after the Director complies or purports to comply with article 4 of the CPIA Order.

(5) Notwithstanding paragraph (4), a judge advocate may at his discretion consider a written application made outside the period of 14 days there mentioned.

(6) Where a written application has been made, a judge advocate may—

- (a) grant the application without a hearing; or
  - (b) direct a hearing.
- (7) But the application may not be granted without a hearing unless—
- (a) at least 14 days have elapsed since the application was served on each other party to the proceedings, and
  - (b) no other party has served notice on the court administration officer that he opposes the application.
- (8) Any party to the proceedings—
- (a) may attend a hearing of the application, and be heard;
  - (b) may, with leave of the judge advocate, adduce evidence (including expert evidence) at the hearing.

**Application for special measures direction permitting admission of video recorded evidence in chief**

**98.**—(1) This rule applies where an application is made for a special measures direction including provision by virtue of section 27 of the 1999 Act.

(2) The application must be accompanied by a copy of the video recording which (or part of which) it is proposed to tender in evidence.

(3) Where the application is made by the Director, he must at the same time serve on each defendant a copy of that recording.

(4) The application must include the following information—

- (a) the date on which the recording was made;
- (b) the times at which the recording commenced and finished, including details of any interruptions;
- (c) the address of the premises where the recording was made, and the usual function of those premises;
- (d) in relation to each person present at any point during, or immediately before, the recording—
  - (i) the name, age and occupation of the person;
  - (ii) the time for which he was present; and
  - (iii) his relationship (if any) to the witness;
- (e) in relation to the equipment used for the recording—
  - (i) a description of the equipment;
  - (ii) the number of cameras used;
  - (iii) whether the cameras were fixed or mobile;
  - (iv) the number and location of the microphones;
  - (v) the video format used; and
  - (vi) whether it offered single or multiple recording facilities and, if so, which were used; and
- (f) if the recording is a copy—
  - (i) the location of the master recording; and
  - (ii) details of when and by whom the copy was made.

(5) Where the applicant is a defendant and the application is granted, the applicant must, not later than the close of the case for the prosecution, serve on each other party to the proceedings a copy of the video recording which (or part of which) it is proposed to tender in evidence under the direction.

### **Variation or discharge of special measures direction**

**99.**—(1) A judge advocate may vary or discharge a special measures direction if it appears to him to be in the interests of justice to do so.

(2) A judge advocate may exercise the power conferred by paragraph (1)—

- (a) on an application made by a party to the proceedings; or
- (b) of the judge advocate's own motion.

(3) An application under this rule must be made in writing to the court administration officer, unless—

- (a) a judge advocate gives leave for it to be made orally; or
- (b) paragraph (8) applies.

(4) A copy of a written application under this rule must be served on each other party to the proceedings.

(5) Where a written application has been made under this rule, a judge advocate may—

- (a) grant the application without a hearing; or
- (b) direct a hearing.

(6) But the application may not be granted without a hearing unless—

- (a) at least 14 days have elapsed since the application was served on each other party to the proceedings; and
- (b) no other party has served notice on the court administration officer that he opposes the application.

(7) Rule 97(8) applies in relation to a hearing of the application as it applies in relation to a hearing of an application for a special measures direction.

(8) Where the direction was made on the application of a defendant and includes provision for the admission of a video recording which had not been served on the Director, the Director may make an oral application without leave.

(9) A judge advocate who varies or discharges, or refuses an application for the variation or discharge of, a special measures direction must state in open court his reasons for doing so.

(10) In this rule, references to the variation of a special measures direction include the further variation of a direction previously varied.

### **Warning to lay members**

**100.** Where in proceedings with lay members evidence has been given in accordance with a special measures direction, the judge advocate must give the lay members such warning (if any) as he considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice any defendant.

## **PART 13**

### **TRIAL PROCEDURE**

### **Opening addresses**

**101.** Before the Director adduces any evidence in trial proceedings—

- (a) the Director, and
- (b) with leave of the judge advocate, any defendant,

may make an opening address.

### **Examination of witnesses**

**102.**—(1) The judge advocate may question any witness, or put to the witness a question from a lay member.

- (2) If it appears to the judge advocate to be in the interests of justice, the court may—
- (a) allow the cross-examination or re-examination of a witness to be postponed;
  - (b) call any witness whom it has not already heard;
  - (c) recall a witness;
  - (d) permit any party to recall a witness;
  - (e) permit the Director to call a witness after the close of the case for the prosecution; or
  - (f) permit a defendant to give evidence after calling another witness.

### **Presence of witnesses**

**103.**—(1) Except for a defendant and any expert or character witness, a witness as to fact shall not, except by leave of the judge advocate, be in court while not under examination.

(2) If while a witness is under examination a question arises as to the admissibility of a question or otherwise with regard to the evidence, the judge advocate may direct the witness to withdraw until the question is determined.

(3) The judge advocate may direct any expert or character witness present in court to withdraw if the judge advocate considers his presence undesirable.

(4) For the purposes of this rule a witness is in court if he is able to see and hear the court through a live link.

### **Submission of no case to answer**

**104.**—(1) At the close of the case for the prosecution a defendant may submit, in respect of any charge, that the Director has failed to establish a case for him to answer.

(2) Without prejudice to the generality of rule 38, the judge advocate shall hear and rule on such a submission in the absence of the lay members.

(3) If such a submission is allowed, the judge advocate shall direct the lay members to find the defendant not guilty of the charge.

(4) This rule is subject to section 6 of the Domestic Violence, Crime and Victims Act 2004(a).

### **The case for the defence**

**105.**—(1) Where a defendant intends to adduce evidence as to fact (other than by giving evidence himself), he may make an opening address before adducing or giving evidence; but this is subject to paragraph (2).

(2) Where a defendant made an opening address under rule 101, he may not make another address under this rule without the leave of the judge advocate.

(3) Where a defendant gives evidence, he must do so before calling any other witness.

(4) Paragraph (3) is subject to rule 102(2).

### **Finding of not guilty before conclusion of the defence**

**106.**—(1) At any time after the close of the case for the prosecution, the lay members may find a defendant not guilty on a charge.

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(a) 2004 c. 28; section 6 of the Domestic Violence, Crime and Victims Act 2004 is applied to the Court Martial by section 8 of that Act (as amended by paragraph 238 of Schedule 16 to the Armed Forces Act 2006).

(2) The lay members may not make a finding under this rule before the summing-up unless the judge advocate has—

- (a) invited the Director to address the court as to whether such a finding should be made; and
- (b) invited the lay members to consider making such a finding.

### **Closing addresses**

**107.**—(1) This rule applies at the close of the case for all defendants.

(2) If any defendant has adduced evidence as to fact, or given evidence himself, the Director may make a closing address.

(3) Each defendant may then make a closing address; but a legal representative who represents more than one defendant may make only one closing address.

### **Summing up**

**108.**—(1) After any closing addresses, the judge advocate shall direct the lay members on the relevant law; and sum up the evidence.

(2) The judge advocate may direct the lay members that if they record a finding of guilty on one charge they need not record a finding on another charge.

### **Deliberation on findings**

**109.**—(1) If after they have withdrawn to deliberate on their finding the lay members require further direction on the law, they shall seek and be given further direction by the judge advocate in open court (subject to rule 152).

(2) The lay members may not separate, without the leave of the judge advocate, before all their findings have been announced.

(3) Where two or more of the lay members are subject to service law, the votes of those members on the finding on each charge shall be given in ascending order of rank or rate and seniority.

### **Announcement of findings**

**110.**—(1) The finding of the lay members on each charge shall be announced by the president of the board.

(2) Paragraph (1) is subject to any direction given under rule 108(2).

(3) If the judge advocate is satisfied that the findings announced are acceptable in law, the judge advocate and the president of the board shall sign a record of the findings.

(4) If the judge advocate is not so satisfied, he shall direct the lay members to withdraw and reconsider their findings.

(5) Where, in accordance with a direction given under rule 108(2), no finding is recorded on a charge, the judge advocate may direct that the charge is to lie on the file, not to be proceeded with without the leave of the court or the Appeal Court.

(6) Where no lay member is subject to service law, references in this rule to the president of the board are to be read as references to a lay member chosen by the lay members from among their number.

## PART 14

### SENTENCING PROCEEDINGS

#### **Application and interpretation of Part 14**

**111.**—(1) This Part applies in relation to any sentencing proceedings.

(2) In this Part—

“the offender” means any offender who falls to be sentenced in the proceedings; and

“the offence” means any offence for which the offender falls to be so sentenced.

#### **Dispute on facts after plea of guilty**

**112.**—(1) Where, after the judge advocate has recorded a plea of guilty in respect of any charge, there are disputed facts in the case, the judge advocate may direct that any issue of fact be tried by the court.

(2) The finding of the court on any such issue shall be determined by a majority of the votes of the members of the court.

(3) In the case of an equality of votes, the court must find for the offender.

(4) The finding of the court shall be announced by the judge advocate.

#### **Pre-sentence report and previous convictions**

**113.**—(1) Where the court administration officer has arranged for a pre-sentence report to be prepared in advance of the proceedings, he shall serve a copy on the Director and the offender before the time appointed for the proceedings.

(2) Where the Director has obtained a record of the offender’s previous convictions in advance of the proceedings, he shall serve a copy on the offender and the court administration officer before the time appointed for the proceedings.

#### **Information before sentencing**

**114.**—(1) Where—

(a) the offender was convicted on a plea of guilty (other than a plea offered in the course of a trial),

(b) the proceedings are on an appeal against a sentence imposed by the Service Civilian Court (other than an appeal against both conviction and sentence), or

(c) the offender was convicted in trial proceedings but previous sentencing proceedings in respect of him were terminated,

the Director shall address the court on the facts of the case.

(2) Where practicable, the Director shall inform the court of—

(a) the offender’s age and rank or rate;

(b) the offender’s service record;

(c) any recognised acts of gallantry or distinguished conduct on the part of the offender, and any decoration to which he is entitled;

(d) any previous convictions of the offender for—

(i) service offences,

(ii) offences under the law of any part of the United Kingdom, or

(iii) relevant offences under the law of another member State,

any sentence awarded in respect of any such offence, and whether any such conviction is spent for the purposes of the Rehabilitation of Offenders Act 1974(a);

- (e) any formal police caution administered to the offender by a constable in England and Wales or Northern Ireland;
- (f) any period for which the offender has been in custody awaiting trial; and
- (g) the offender's pay, terminal benefits and future pension entitlements.

(3) For the purposes of paragraph (2)(d) an offence is "relevant" if the act that constituted the offence would have constituted an offence under the law of any part of the United Kingdom if it had been done in that part at the time when the Director presents information to the court under this rule.

(4) The Director shall inform the court whether the offence is a relevant offence for the purposes of section 165 (sentencing powers following election for trial by the court).

(5) Where the court has power—

- (a) to make an activation order in respect of the offender, or
- (b) to deal with him under section 186(2) (offence during period of conditional discharge) or paragraph 23 of Schedule 8 to the 2003 Act (overseas community order in force),

the Director shall inform the court of that fact, of the previous offence by virtue of which the court has that power, and of the sentence passed for that offence.

(6) Where the offender is not subject to service law but has formerly been so subject, paragraph (2) has effect as if—

- (a) for the words "and rank or rate" in sub-paragraph (a) there were substituted "and his rank or rate when he last ceased to be subject to service law"; and
- (b) before the word "pay" in sub-paragraph (g) there were inserted "employment,".

(7) Where the offender is a civilian subject to service discipline and has not formerly been subject to service law, paragraph (2) has effect as if—

- (a) in sub-paragraph (a) the words "and rank or rate" were omitted;
- (b) sub-paragraphs (b) and (c) were omitted;
- (c) for sub-paragraph (g) there were substituted—  
" (g) details of the offender's employment (if any);" and
- (d) after sub-paragraph (g) there were inserted—  
" (h) if the offender was under 18 years of age when convicted, whether he has a service parent or service guardian (within the meaning of section 233).".

### **Offences taken into consideration**

**115.**—(1) The court may take into consideration any other service offence committed by the offender, of a similar nature to that for which he falls to be sentenced, if he so requests and the judge advocate so directs.

(2) A list of offences taken into consideration shall be signed by the offender and attached to the record of proceedings.

### **Mitigation of sentence**

**116.** The offender may—

- (a) call witnesses in mitigation of sentence or as to his character;
- (b) produce to the court any document; and

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(a) 1974 c. 53. Sections 2 and 6 of the Rehabilitation of Offenders Act 1974 were amended, and the Schedule inserted, by the Armed Forces Act 1996 (c. 46), section 13 and Schedule 4. Sections 1, 2 and 5, and the Schedule, were further amended by paragraphs 63 to 66 of Schedule 16 to the 2006 Act.

- (c) address the court in mitigation of sentence.

### **Pronouncement of sentence**

**117.**—(1) The sentence shall be recorded in writing, dated and signed by the judge advocate and the president of the board.

(2) The judge advocate shall make the statement of reasons, and give the explanation, required by section 252(1).

(3) The president of the board shall pronounce sentence.

(4) With leave of the judge advocate, the president of the board may make additional remarks to the offender about—

- (a) the effects of his offence on the service to which he belongs; and
- (b) the likely effects of the sentence on his service career.

(5) Where there are no lay members, or none of the lay members is subject to service law—

- (a) paragraph (1) shall have effect as if the words “and the president of the board” were omitted;
- (b) in paragraph (3), the reference to the president of the board shall be read as a reference to the judge advocate; and
- (c) paragraph (4) shall not apply.

(6) In this rule, “sentence” has the same meaning as in section 252.

## **PART 15**

### **VARIATION PROCEEDINGS**

#### **Power to vary sentence**

**118.**—(1) In proceedings under this Part (“variation proceedings”), the court may vary a sentence imposed by it within the period of 56 days beginning with the day on which the sentence was imposed.

(2) The power conferred by this rule may not be exercised in relation to any sentence if an appeal, or an application for leave to appeal, against the sentence has been determined.

(3) A sentence varied under this rule shall take effect, as so varied, from the beginning of the day on which it was originally imposed, unless the court otherwise directs.

(4) In this rule—

- (a) references to a sentence include any order made, or direction given, by the court when dealing with an offender; and
- (b) references to the variation of a sentence include the variation or rescission of such an order or direction.

#### **Direction that variation proceedings be held**

**119.**—(1) Variation proceedings may be held only in accordance with a direction given under this rule.

(2) After the conclusion of any proceedings in which a sentence was imposed, the judge advocate for those proceedings may direct the court administration officer to appoint a time and place for variation proceedings in respect of the sentence.

(3) The judge advocate may give a direction under this rule—

- (a) on the application of the Director or the offender; or
- (b) of his own motion.

(4) An application for a direction under this rule—

- (a) must be made in writing to the court administration officer, stating the grounds on which it is made;
- (b) if made by the Director, must be served on the offender; and
- (c) if made by the offender, must be served on the Director.

(5) Where the judge advocate dismisses an application for a direction under this rule, the court administration officer shall notify the Director and the offender of that fact.

#### **Direction that variation proceedings be held without lay members**

**120.**—(1) Where a judge advocate directs under rule 119 that variation proceedings are to be held, he may direct that there are to be no lay members.

(2) A judge advocate may not give a direction under this rule unless satisfied that conditions A and B are met.

(3) Condition A is that one or more of the original lay members could not, without substantial inconvenience, attend the proceedings at the time and place appointed.

(4) Condition B is that, if—

- (a) the proceedings were postponed until the earliest time at which the judge advocate, the original lay members and the offender could, without substantial inconvenience, attend the proceedings (whether at the place originally appointed or any other place), and
- (b) the sentence were then varied in the way in which it would be most likely to be varied if no direction were given under this rule and the original lay members were specified for the proceedings and could attend,

the offender would be unfairly prejudiced by the postponement.

(5) In this rule—

- (a) any reference to the attendance of the original lay members includes their attendance by live link, as defined by rule 121(2) (and for this purpose it is to be assumed that they have been or would be specified as lay members for the variation proceedings); and
- (b) any reference to the attendance of the offender includes his attendance by live link, as defined by rule 18(3).

(6) Where a direction (“the original direction”) was given under rule 30 (additional lay members) in relation to the sentencing proceedings, it is to be assumed for the purposes of paragraph (4)(b) that—

- (a) a direction would also be given under rule 30 in relation to the variation proceedings; and
- (b) the number of lay members specified in that direction would be the same as that specified in the original direction.

(7) In this rule—

“inconvenience” includes expense, and adverse effect on the operational effectiveness of any of Her Majesty’s forces;

“the original lay members” means the persons who, at the time when the sentence that falls to be varied was imposed, were lay members for the sentencing proceedings;

“the sentencing proceedings” means the proceedings in which the sentence that falls to be varied was imposed.

#### **Attendance of lay members by live link**

**121.**—(1) A lay member may attend variation proceedings by live link.

(2) In this rule, “live link” means an arrangement by which a lay member, when not in the place where proceedings are being held, is able to see and hear, and to be seen and heard by, the other

members of the court during the proceedings (and for this purpose any impairment of eyesight or hearing is to be disregarded).

#### **Decision on variation of sentence**

**122.** In the case of an equality of votes on whether the sentence should be varied, and if so how, the judge advocate has a casting vote.

#### **Announcement of sentence as varied**

**123.** Where the court varies the sentence, sections 252 and 253(2) (duty to give reasons and explain sentence) and rule 117 (announcement of sentence) shall apply as they apply to the passing of a sentence.

#### **Power to order offender's release from custody**

**124.**—(1) This rule applies where an offender is in custody by virtue of a custodial sentence or a sentence of service detention imposed by the court.

(2) If it appears to the judge advocate, within the period of 56 days beginning with the day on which the sentence was imposed—

- (a) that the court had no power to impose such a sentence, or
- (b) that the maximum term for which the court had power to impose such a sentence has expired,

the judge advocate may order that the offender be immediately released.

(3) The power conferred by this rule may not be exercised in relation to any sentence if an appeal, or an application for leave to appeal, against the sentence has been determined.

(4) This rule is without prejudice to any other provision of this Part.

## **PART 16**

### **APPELLATE PROCEEDINGS**

#### **Notice of appeal**

**125.**—(1) An appeal under section 285 (appeals from the SCC) shall be brought by serving a written notice of appeal on the court administration officer.

(2) The court administration officer shall serve the notice on the Director.

#### **Extension of initial period**

**126.**—(1) An application under section 285(3)(b) (extension of initial period for appeal) shall be made in writing to the court administration officer.

(2) The court administration officer shall forward the application to the Judge Advocate General and the Director.

#### **Leave to appeal out of time**

**127.**—(1) An application for leave under section 285(4) (leave to appeal out of time) shall be made in writing to the court administration officer.

(2) Such an application must—

- (a) state why the applicant did not appeal within the initial period (within the meaning of section 285); and
- (b) be accompanied by the proposed notice of appeal.

(3) The court administration officer shall forward the application to the Judge Advocate General and the Director.

(4) The Judge Advocate General may—

- (a) grant the application;
- (b) inform the court administration officer that he is minded to dismiss the application without a hearing; or
- (c) direct a hearing of the application.

(5) Where the Judge Advocate General is minded to dismiss the application without a hearing, the court administration officer shall notify the applicant in writing of that fact.

(6) Where the applicant is given notice under paragraph (5), the application shall be treated as dismissed unless the applicant gives notice in writing to the court administration officer, before the end of the period of 14 days beginning with the date of the notice under paragraph (5), that he requires a hearing of the application.

(7) There shall be a hearing of the application if—

- (a) the Judge Advocate General directs a hearing; or
- (b) the applicant requires a hearing under paragraph (6).

(8) A hearing of the application shall be before a judge advocate specified by the Judge Advocate General.

(9) At a hearing of the application—

- (a) the applicant may address the judge advocate; and
- (b) the Director may, with leave, address the judge advocate.

(10) Where, if the application were granted, section 286(5) would prohibit the Judge Advocate General from being a member of the court hearing the appeal, references to the Judge Advocate General in paragraphs (4) to (8) are to be read as references to the Vice Judge Advocate General.

### **Application of Act and Rules to appellate proceedings**

**128.**—(1) In relation to appellate proceedings, references in Part 7 of the 2006 Act to a defendant are to be read as references to an appellant.

(2) In relation to an appeal against conviction, Part 8 (preliminary proceedings) shall apply as it applies in relation to a charge allocated for Court Martial trial, with the following modifications—

- (a) rule 45 (listing of initial preliminary proceedings) shall not apply, and the appellant shall not be re-arraigned on the charge on which he was convicted;
- (b) rule 46 (listing of further preliminary proceedings) shall apply as if the word “further” were omitted wherever it appears; and
- (c) any reference to the trial proceedings is to be read as a reference to the appellate proceedings.

(3) In relation to appellate proceedings on an appeal against conviction, Parts 11 to 13 shall apply as they apply in relation to trial proceedings.

(4) In Parts 8 and 11 to 13 as they apply by virtue of this rule—

- (a) references to a defendant are to be read as references to an appellant;
- (b) references to the date on which a charge was brought are to be read as references to the date on which notice of appeal was given.

(5) Where two or more defendants were convicted in the same proceedings by the Service Civilian Court and both or all of them appeal against conviction, their appeals shall be heard together.

### **Abandonment of appeal**

**129.** Where—

- (a) an appellant fails to appear before the court at the time appointed for the commencement or resumption of the appellate proceedings, and
- (b) the judge advocate considers that there is no reasonable explanation for the failure to appear,

the judge advocate may direct that the appeal be treated as abandoned.

## PART 17

### ACTIVATION PROCEEDINGS

#### **Interpretation of Part 17**

**130.** In this Part—

“the relevant facts”, “the original sentence”, “the relevant period”, “the new offence”, “summons”, “warrant” and “relevant order” have the meanings given by—

- (a) rule 131(2), where rule 131 applies;
- (b) rule 132(2), where rule 132 applies;
- (c) rule 133(2), where rule 133 applies;

“the offender” means the person convicted of the new offence.

#### **Offence committed during operational period of suspended sentence of imprisonment**

**131.**—(1) This rule applies where the court administration officer is notified of the facts mentioned in paragraph 12(2A)(a) and (b) of Schedule 12 to the 2003 Act, as substituted by paragraph 8(1) of Schedule 7 to the 2006 Act.

(2) Where this rule applies, in this Part—

“the relevant facts” means the facts mentioned in those paragraphs, as so substituted;

“the original sentence” means the suspended sentence mentioned in paragraph 12(2A) of Schedule 12 to the 2003 Act, as substituted by paragraph 8(1) of Schedule 7 to the 2006 Act;

“the relevant period” means the operational period of that sentence;

“the new offence” means the offence mentioned in that sub-paragraph, as so substituted;

“summons” means a summons under that sub-paragraph, as so substituted;

“warrant” means a warrant under that sub-paragraph, as so substituted;

“relevant order” means an order under paragraph 8(2) of Schedule 12 to the 2003 Act in respect of the original sentence.

#### **Offence committed during operational period of suspended sentence of service detention**

**132.**—(1) This rule applies where the court administration officer is notified of the facts mentioned in section 191(2)(a) and (b) and (6)(b).

(2) Where this rule applies, in this Part—

“the relevant facts” means the facts mentioned in those paragraphs;

“the original sentence” means the suspended sentence of service detention mentioned in section 191(2)(a);

“the relevant period” means the operational period of that sentence;

“the new offence” means the offence mentioned in section 191(2)(b);

“summons” means a summons under section 191(6);

“warrant” means a warrant under that subsection;

“relevant order” means an order under section 191(3) in respect of the original sentence.

### **Offence committed during release period of detention and training order**

**133.**—(1) This rule applies where the court administration officer is notified of the facts mentioned in section 214(7)(a) to (c).

(2) Where this rule applies, in this Part—

“the relevant facts” means the facts mentioned in those paragraphs;

“the original sentence” means the order under section 211 mentioned in section 214(1); and

“the relevant period” means the period between the offender’s release from custody under that order and the date on which the term of the order ends;

“the new offence” has the same meaning as in section 214;

“summons” means a summons under section 214(7);

“warrant” means a warrant under that subsection;

“relevant order” means an order under section 214(3) in respect of the original sentence.

### **Application for activation proceedings**

**134.**—(1) This rule applies where any of rules 131 to 133 applies.

(2) The court administration officer shall notify the Director that this rule applies, and forward to the Director such of the following as is not already in the Director’s possession—

(a) the record of the proceedings in which the original sentence was passed;

(b) information concerning—

(i) the new offence, and any other offence proved to have been committed by the offender during the relevant period; and

(ii) the sentence passed for each such offence; and

(c) the record of any proceedings in which a court made, or gave reasons for not making—

(i) a relevant order in respect of the original sentence; or

(ii) where rule 133 applies, an order under section 105(2) of the Powers of Criminal Courts (Sentencing) Act 2000(a) in respect of the original sentence.

(3) The Director may give written notice to the court administration officer and the offender that he requires activation proceedings to be held.

(4) A notice under paragraph (3) must be given within 28 days of the court administration officer’s compliance with paragraph (2).

(5) Where the Director gives notice under paragraph (3), the court administration officer shall forward to the Judge Advocate General the documents and information mentioned in paragraph (2)(a) to (c).

(6) The Judge Advocate General shall—

(a) issue a summons requiring the offender to appear before the court for activation proceedings; or

(b) issue a warrant for the offender’s arrest.

(7) The Judge Advocate General may delegate his functions under this rule to any judge advocate.

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(a) 2000 c. 6.

### **Warrant for offender's arrest**

**135.**—(1) This rule applies where the Judge Advocate General issues a warrant for the offender's arrest.

(2) The warrant shall be addressed to—

- (a) one or more service policemen; or
- (b) one or more officers of a civilian police force.

(3) The warrant may not be addressed to a service policeman unless the offender is subject to service law or is a civilian subject to service discipline.

(4) The warrant shall state the relevant facts.

(5) Where the warrant is addressed to an officer of a civilian police force, it shall state that the offender must be transferred to service custody as soon as is practicable after arrest.

(6) Where the offender is arrested under the warrant, or, if arrested by an officer of a civilian police force, is transferred to service custody—

- (a) he must as soon as is practicable be brought before a judge advocate for a review of whether he should continue to be kept in service custody until he can be brought before the court;
- (b) if he has not been brought before a judge advocate for such a review within 48 hours of the arrest he must be released;
- (c) the court administration officer shall appoint a time and place for activation proceedings; and
- (d) the offender shall be brought before the court at that time and place, unless he has been released from custody under rule 136(4).

### **Review of custody**

**136.**—(1) Paragraphs (2) to (5) apply where—

- (a) the offender is brought before a judge advocate under rule 135(6); or
- (b) the keeping of the offender in service custody has been authorised by an order under paragraph (2) and he is brought before a judge advocate before the expiry of the period for which it was so authorised.

(2) The judge advocate may by order authorise the keeping (or further keeping) of the offender in service custody if satisfied that there are substantial grounds for believing that, if released from service custody, the person would fail to attend the court as required.

(3) The period for which the judge advocate may, by an order under paragraph (2), authorise the keeping of the offender in service custody is such period, ending not later than 8 days after the day on which the order is made, as the judge advocate considers appropriate in all the circumstances.

(4) If the judge advocate makes no order under paragraph (2), the offender must be released from service custody without delay; but this is subject to paragraph (5).

(5) The judge advocate may require the offender to comply, before release or later, with such requirements as appear necessary to secure his attendance before the court.

(6) Where the keeping of the offender in service custody is authorised by an order under paragraph (2), he must be released on the expiry of the period for which it was so authorised unless a judge advocate has made a further order under that paragraph.

(7) Any requirement imposed by virtue of paragraph (5) may be varied or discharged by a judge advocate on application by the offender or the Director.

(8) Section 107(5) and (6) shall apply in relation to a requirement imposed by virtue of paragraph (5) as they apply in relation to a requirement imposed by virtue of section 107(3)(a).

### **Disclosure by Director**

137.—(1) This rule applies where activation proceedings are to be held.

(2) As soon as is reasonably practicable, and in any event not less than 7 days before the time appointed for the commencement of the proceedings, the Director shall serve on the offender such of the information and documents mentioned in rule 134(2) as are in his possession.

### **Procedure in activation proceedings**

138.—(1) This rule applies where the offender appears or is brought before the court for activation proceedings.

(2) The judge advocate shall ask the offender whether he admits the relevant facts.

(3) If the offender does not admit the relevant facts—

(a) the Director may adduce evidence of them;

(b) the offender may cross-examine any witness called by the Director, and may give evidence or call witnesses; and

(c) the judge advocate shall determine whether the relevant facts are proved.

(4) Paragraphs (5) to (9) apply where—

(a) the offender admits the relevant facts, or

(b) the judge advocate determines that the relevant facts are proved.

(5) The Director shall address the court on the circumstances of the offence for which the original sentence was passed, and the new offence.

(6) The offender may adduce evidence as to his character, and such evidence may be given orally or in writing.

(7) The offender may address the court as to—

(a) whether the court should make a relevant order; and

(b) the terms in which any such order should be made.

(8) The court's decision as to whether to make a relevant order, and if so in what terms, shall be determined by a majority of the votes of the members of the court.

(9) In the case of an equality of votes, the judge advocate has a casting vote.

(10) Where the court makes a relevant order, rule 117 shall apply in relation to the making of the order as it applies in relation to the passing of a sentence, with the omission of paragraph (2).

## **PART 18**

### **ANCILLARY PROCEEDINGS**

#### **CHAPTER 1**

##### **Community order proceedings**

### **Application and interpretation of Chapter 1**

139.—(1) This Chapter applies where an overseas community order made by the court is in force.

(2) In this Chapter—

“the order” means the overseas community order;

“the offender” means the person in respect of whom the order was made.

### **Breach of requirements: application for summons or warrant**

**140.**—(1) An application by the responsible officer for a summons or a warrant under paragraph 8 of Schedule 8 to the 2003 Act shall be made in writing to the court administration officer, specifying—

- (a) the requirement of the order with which the offender is alleged to have failed to comply;
- (b) the respect in which, and the date on which (or the dates between which) he is alleged to have failed to comply with that requirement;
- (c) whether he has within the previous twelve months been given a warning under paragraph 5 of Schedule 8 to the 2003 Act in respect of the order, and if so when and in what terms; and
- (d) any grounds on which, to the responsible officer's knowledge, the offender is likely to rely as constituting a reasonable excuse for the alleged failure to comply.

(2) The court administration officer shall forward the application to the Judge Advocate General.

(3) The Judge Advocate General may—

- (a) issue a summons under paragraph 8 of Schedule 8 to the 2003 Act requiring the offender to appear before the court for proceedings under paragraph 10 of that Schedule;
- (b) issue a warrant under paragraph 8 of that Schedule for the offender's arrest;
- (c) dismiss the application without a hearing; or
- (d) direct a hearing of the application.

(4) If the Judge Advocate General directs a hearing of the application, the court administration officer shall notify the responsible officer of the time and place appointed for the hearing.

### **Breach of requirements: arrest under warrant**

**141.**—(1) This rule applies where the Judge Advocate General issues a warrant under paragraph 8 of Schedule 8 to the 2003 Act for the offender's arrest.

(2) The warrant shall be addressed to—

- (a) one or more service policemen; or
- (b) one or more officers of a civilian police force.

(3) The warrant may not be addressed to a service policeman unless the offender is a civilian subject to service discipline.

(4) The warrant shall state the matters mentioned in rule 140(1)(a) and (b).

(5) Where the warrant is addressed to an officer of a civilian police force, it shall state that the offender must be transferred to service custody as soon as practicable after arrest.

(6) Where the offender is arrested under the warrant, or, if arrested by an officer of a civilian police force, is transferred to service custody—

- (a) he must as soon as is practicable be brought before a judge advocate for a review of whether he should continue to be kept in service custody until he can be brought before the court; and
- (b) if he has not been brought before a judge advocate for such a review within 48 hours of the arrest he must be released.

(7) Rule 136 (review of custody) applies in relation to an offender brought before a judge advocate under paragraph (6) as it applies in relation to an offender brought before a judge advocate under rule 135(6).

(8) Where the offender has been arrested under a warrant—

- (a) the court administration officer shall appoint a time and place for proceedings under paragraph 10 of Schedule 8 to the 2003 Act; and

- (b) the offender shall be brought before the court at that time and place, unless he has been released from custody under rule 136(4).

**Revocation of order with or without re-sentencing**

**142.**—(1) An application under paragraph 14 of Schedule 8 to the 2003 Act must be made in writing to the court administration officer, specifying—

- (a) whether the applicant wants the court—
  - (i) to revoke the order; or
  - (ii) both to revoke the order and to deal with the offender for the offence in respect of which the order was made; and
- (b) the grounds on which the application is made.

(2) The court administration officer shall forward the application to the Judge Advocate General.

(3) If the application is made by the offender, the Judge Advocate General may—

- (a) revoke the order;
- (b) dismiss the application; or
- (c) direct a hearing of the application.

(4) If the application is made by the responsible officer, the Judge Advocate General may—

- (a) dismiss the application; or
- (b) direct a hearing of the application, and issue a summons under paragraph 14(5) of Schedule 8 to the 2003 Act requiring the offender to appear at the hearing.

(5) If the Judge Advocate General directs a hearing of the application, the court administration officer shall notify the responsible officer (and, if he is the applicant, the offender) of the time and place appointed for the hearing.

(6) A warrant for the offender's arrest, issued under paragraph 14(5) of Schedule 8 to the 2003 Act—

- (a) shall be addressed to—
  - (i) one or more service policemen; or
  - (ii) one or more officers of a civilian police force;
- (b) shall state that the offender has failed to appear in answer to a summons issued under paragraph 14(5) of Schedule 8 to the 2003 Act; and
- (c) if addressed to an officer of a civilian police force, shall state that the offender must be transferred to service custody as soon as is practicable after arrest.

(7) The warrant may not be addressed to a service policeman unless the offender is a civilian subject to service discipline.

(8) Where the offender is arrested under such a warrant, or, if arrested by an officer of a civilian police force, is transferred to service custody—

- (a) he must as soon as is practicable be brought before a judge advocate for a review of whether he should continue to be kept in service custody until he can be brought before the court; and
- (b) if he has not been brought before a judge advocate for such a review within 48 hours of the arrest he must be released.

(9) Rule 136 (review of custody) applies in relation to an offender brought before a judge advocate under paragraph (8) as it applies in relation to an offender brought before a judge advocate under rule 135(6).

(10) Where the offender has been arrested under a warrant—

- (a) the court administration officer shall appoint a time and place for the hearing of the application; and

- (b) the offender shall be brought before the court at that time and place, unless he has been released from custody under rule 136(4).

#### **Amendment of requirements**

**143.**—(1) An application under paragraph 17 of Schedule 8 to the 2003 Act must be made in writing to the court administration officer, specifying—

- (a) the amendment of the order that the applicant wants the court to make; and
- (b) the grounds on which the application is made.

(2) The court administration officer shall forward the application to the Judge Advocate General.

(3) The Judge Advocate General may—

- (a) make the proposed amendment (subject to paragraph 17(2) of Schedule 8 to the 2003 Act);
- (b) dismiss the application; or
- (c) direct a hearing of the application.

(4) If the Judge Advocate General directs a hearing of the application, the court administration officer shall notify the responsible officer and the offender of the time and place appointed for the hearing.

#### **Extension of unpaid work requirement**

**144.**—(1) An application under paragraph 20 of Schedule 8 to the 2003 Act must be made in writing to the court administration officer, specifying—

- (a) the period for which the applicant wants the court to extend the period of twelve months specified in section 200(2) of that Act; and
- (b) the grounds on which the application is made.

(2) The court administration officer shall forward the application to the Judge Advocate General.

(3) The Judge Advocate General may—

- (a) grant the application;
- (b) extend the period specified in section 200(2) of the 2003 Act by a period shorter than that proposed in the application;
- (c) dismiss the application; or
- (d) direct a hearing of the application.

(4) If the Judge Advocate General directs a hearing of the application, the court administration officer shall notify the responsible officer and the offender of the time and place appointed for the hearing.

## **CHAPTER 2**

### **Other ancillary proceedings**

#### **Review of service compensation order**

**145.**—(1) An application to the court under section 177 (application for discharge of service compensation order or reduction of amount payable)—

- (a) shall be made in writing to the court administration officer;
- (b) shall be served on the person in whose favour the order was made;
- (c) shall state whether the applicant wishes the court—
  - (i) to discharge the order; or

- (ii) to reduce the amount which remains to be paid, and if so by how much;
- (d) shall specify which of the grounds mentioned in section 177(3) applies; and
- (e) shall state that the application may be granted without a hearing if the person in whose favour the order was made does not serve notice on the court administration officer, within 14 days of being served with the application, that he opposes it.

(2) The court administration officer shall forward the application to the Judge Advocate General.

(3) The Judge Advocate General may—

- (a) grant the application;
- (b) exercise the court's powers under section 177 in a way other than that proposed in the application;
- (c) dismiss the application; or
- (d) direct a hearing of the application.

(4) The Judge Advocate General may not (without a hearing) grant the application or otherwise exercise the court's powers under section 177 unless—

- (a) at least 14 days have elapsed since the application was served on the person in whose favour the order was made; and
- (b) that person has not served notice on the court administration officer that he opposes the application.

(5) Where the Judge Advocate General (without a hearing) grants the application, otherwise exercises the court's powers under section 177 or dismisses the application, the court administration officer shall give notice in writing of that decision to the applicant and the person in whose favour the order was made.

(6) Where the Judge Advocate General directs a hearing of the application, the court administration officer shall notify the applicant, and the person in whose favour the order was made, of the time and place appointed for the hearing.

### **Application for time to pay financial penalty**

**146.**—(1) An application to the court under section 251(3) (application for order allowing time for payment of amount due in respect of fine or service compensation order, or directing payment by instalments)—

- (a) shall be made in writing to the court administration officer;
- (b) shall state whether the applicant wishes the court—
  - (i) to allow time for payment of the amount due in respect of the fine or service compensation order, and if so how much time; or
  - (ii) to direct payment of that amount by instalments, and if so by instalments of what amounts and payable on what dates;
- (c) shall specify the grounds on which the application is made;
- (d) if made in respect of a service compensation order—
  - (i) shall be served on the person in whose favour that order was made; and
  - (ii) shall state that it may be granted without a hearing if that person does not serve notice on the court administration officer, within 14 days of being served with the application, that he opposes it.

(2) The court administration officer shall forward the application to the Judge Advocate General.

(3) The Judge Advocate General may—

- (a) make the proposed, or any other, order under section 251;
- (b) dismiss the application; or

(c) direct a hearing of the application.

(4) But the Judge Advocate General may not (without a hearing) make an order under section 251 in respect of a service compensation order unless—

(a) at least 14 days have elapsed since the application for the order was served on the person in whose favour the service compensation order was made; and

(b) that person has not served notice on the court administration officer that he opposes the application.

(5) Where the Judge Advocate General (without a hearing) makes an order under section 251 or dismisses the application, the court administration officer shall give notice in writing of that decision to—

(a) the applicant; and

(b) where the application is in respect of a service compensation order, the person in whose favour that order was made.

(6) Where the Judge Advocate General directs a hearing of the application, the court administration officer shall notify—

(a) the applicant, and

(b) where the application is in respect of a service compensation order, the person in whose favour that order was made,

of the time and place appointed for the hearing.

(7) This rule shall apply in relation to an application to the court under section 251(4) (application for variation of order under section 251) as if for paragraph (1)(b) there were substituted—

“(b) shall state the respects in which the applicant wishes the court to vary the order under section 251;”.

### **Remission of fine**

**147.**—(1) The court’s power to remit the whole or part of a fine under section 267 may be exercised—

(a) on an application to the court under section 251(3) or (4) (whether at a hearing under rule 146 or otherwise); or

(b) on an application under this rule.

(2) An application under this rule—

(a) shall be made in writing to the court administration officer;

(b) shall specify those financial circumstances of the applicant of which the court was unaware when it fixed the amount of the fine; and

(c) shall include an explanation for the applicant’s failure to co-operate with the court in its inquiry under section 249.

(3) The court administration officer shall forward the application to the judge advocate for the proceedings in which the fine was imposed.

(4) The judge advocate may—

(a) exercise any of the court’s powers under section 267;

(b) dismiss the application; or

(c) direct a hearing of the application.

(5) Where, without a hearing, the judge advocate exercises any of the court’s powers under section 267 or dismisses the application, the court administration officer shall notify the applicant in writing of the judge advocate’s decision.

(6) Where the judge advocate directs a hearing of the application, the court administration officer shall notify the applicant of the time and place appointed for the hearing.

### **Remission of case by Appeal Court for consideration of service restraining order**

**148.**—(1) This rule applies where the Appeal Court allows an appeal against conviction but remits the case under section 230(3) for the court to consider whether to proceed under section 229 (service restraining orders).

(2) The court administration officer shall appoint a time and place for proceedings under section 229.

(3) Any person to whom notice of the proceedings is given is entitled to be heard at the proceedings.

(4) The person whose appeal was allowed need not attend the proceedings, but the court may make an order under section 229 in his absence.

### **Variation or revocation of service restraining order**

**149.**—(1) An application under section 232(1) for the variation or revocation of a service restraining order—

(a) shall be made in writing to the court administration officer;

(b) shall specify whether the applicant wishes the court—

(i) to revoke the order; or

(ii) to vary the order, and if so how; and

(c) shall specify the grounds on which it is made.

(2) The court administration officer shall forward the application to the judge advocate for the proceedings in which the order was made.

(3) The judge advocate may—

(a) dismiss the application; or

(b) direct a hearing of the application.

(4) Where the judge advocate dismisses the application without a hearing, the court administration officer shall notify the applicant in writing of the judge advocate's decision.

(5) Where the judge advocate directs a hearing of the application, the court administration officer shall notify—

(a) the applicant, and

(b) every other person mentioned in the order,

of the time and place appointed for the hearing.

(6) In this rule “the order” means the order under section 229 as respects which the application is made.

### **Variation or revocation of order for recognizance**

**150.**—(1) An application to the court under section 235(4) for the variation or revocation of an order for a service parent or guardian to enter into a recognizance—

(a) shall be made in writing to the court administration officer;

(b) shall specify whether the applicant wishes the court—

(i) to revoke the order; or

(ii) to vary the order, and if so how; and

(c) shall specify the grounds on which it is made.

(2) The court administration officer shall forward the application to the judge advocate for the proceedings in which the order was made.

(3) The judge advocate may—

(a) vary or revoke the order;

- (b) dismiss the application; or
- (c) direct a hearing of the application.

(4) Where, without a hearing, the judge advocate varies or revokes the order or dismisses the application, the court administration officer shall notify the applicant in writing of the judge advocate's decision.

(5) Where the judge advocate directs a hearing of the application, the court administration officer shall notify the applicant of the time and place appointed for the hearing.

(6) In this rule "the order" means the order under section 233 as respects which the application is made.

### **Certification of contempt of court**

**151.**—(1) The court's powers under section 311(2) (certification of contempt of court) may be exercised only at a hearing under this rule.

(2) If so directed by a judge advocate, the court administration officer shall—

- (a) appoint a time and place for a hearing under this rule; and
- (b) notify the contemnor and the Director of the time and place so appointed.

(3) The contemnor and the Director are entitled to be heard at the hearing.

(4) The contemnor need not attend the hearing, but the court may exercise its powers under section 311(2) in his absence.

(5) In this rule—

- "the contemnor" means the person whose offence the court is to consider certifying; and
- "offence" has the same meaning as in section 311.

## **PART 19**

### **RESTRICTIONS ON PUBLIC ACCESS AND REPORTING**

#### **Proceedings in camera**

**152.**—(1) A judge advocate may order that any proceedings, or any part of any proceedings, be held in camera, if satisfied that the order is necessary or expedient in the interests of the administration of justice.

(2) Without prejudice to the generality of paragraph (1), a judge advocate may conclude that it is necessary or expedient in the interests of the administration of justice to make an order under this rule on the ground that, if no order were made, the Director would be—

- (a) likely to abandon the proceedings, or
- (b) unlikely to bring comparable proceedings in future,

lest information useful to an enemy be disclosed, or national security endangered.

(3) An order under this rule may be made only on oral application by a party to the proceedings, and such an application shall be made in camera unless the judge advocate otherwise directs.

(4) Where an order is made under this rule—

- (a) the court administration officer shall immediately cause a copy of the order to be prominently displayed at the place appointed for the proceedings; and
- (b) the proceedings (or the part of the proceedings as respects which the order is made) shall not commence until—
  - (i) at least 24 hours after the making of the order; and

- (ii) if an application for leave to appeal against the order has been made, the dismissal of the application or the determination or abandonment of the appeal (as the case may be).
- (5) Section 158 (open court) shall not apply in relation to—
- (a) any proceedings, or any part of any proceedings, as respects which an order under this rule has been made; or
  - (b) unless the judge advocate hearing the application otherwise directs, the hearing of an application for such an order.

#### **Withholding of matter from the public in proceedings before the court**

**153.** The court may give leave for any name or other matter given in evidence in proceedings to be withheld from the public.

#### **Appeals**

- 154.** A person aggrieved may appeal to the Appeal Court, with the leave of that court, against—
- (a) any order or direction restricting the access of the public to the whole or any part of any proceedings; and
  - (b) any order or direction restricting the publication of any report of the whole or any part of a trial or any such ancillary proceedings.

## **PART 20**

### **CONSEQUENCES OF ELECTION FOR COURT MARTIAL TRIAL**

#### **Interpretation**

**155.** In this Part—

“election charge” means a charge as regards which an election for Court Martial trial is made under section 129 (including a charge as regards which an election in respect of another charge takes effect by virtue of section 129(3));

“relevant”, in relation to an offence, means relevant for the purposes of section 165 (sentencing powers of Court Martial where election for trial by that court).

#### **Charge referred to Director following election on another charge**

**156.—(1)** Where—

- (a) a person makes an election under section 129,
- (b) another charge brought against the person is, at the time of the election, regarded for the purposes of Part 5 of the 2006 Act as allocated for summary hearing,
- (c) the other charge is not an election charge,
- (d) the person’s commanding officer refers the other charge to the Director under section 123(2)(e) without giving the person the opportunity to make an election under section 129 in respect of it, and
- (e) the court convicts or acquits the person of the offence to which the other charge relates,

that offence is relevant.

(2) Where—

- (a) a charge is in respect of an offence which, if the defendant were convicted or acquitted of it, would be relevant by virtue of this rule,

- (b) another charge (“the new charge”) is brought under section 125 in addition to the charge, or substituted for it, and
- (c) the court convicts or acquits the defendant of the offence to which the new charge relates, that offence is relevant.

### **Powers of the Director**

**157.**—(1) This rule applies where a relevant charge is allocated for Court Martial trial.

(2) In this rule, “relevant charge” means a charge in respect of an offence which would be a relevant offence if the defendant were convicted or acquitted of it.

(3) The Director may not, without the written consent of the defendant, substitute under section 125(2)(b)—

- (a) a charge in respect of an offence other than one that may be dealt with at a summary hearing (within the meaning of section 53); or
- (b) a charge which section 54 would have prevented the defendant’s commanding officer from hearing summarily (if no election under section 129 had been made, and the officer had made the substitution but had not obtained the permission of higher authority to hear the charge).

(4) The Director may not, without the written consent of the defendant, bring under section 125(2)(c) a charge in addition to the relevant charge.

### **Sentence where charge added to, or substituted for, election charge**

**158.** Where—

- (a) the court convicts a person of an offence which is relevant by virtue of section 165(1)(b) (charges brought in addition to, or substituted for, an election charge), and
- (b) section 165(4) does not apply,

the sentence passed in respect of the offence must be such that the person’s commanding officer could have awarded the punishments awarded by that sentence if he had heard the election charge summarily and had recorded a finding that it had been proved.

### **Sentence where charge referred following election on another charge**

**159.**—(1) Where—

- (a) the court convicts a person of an offence which is relevant by virtue of rule 156, and
- (b) section 165(4) does not apply,

the sentence passed in respect of the offence must be such that the person’s commanding officer could have awarded the punishments awarded by that sentence if he had heard the non-election charge summarily and had recorded a finding that it had been proved.

(2) In this rule “the non-election charge” means the charge referred as mentioned in rule 156(1)(d).

### **Multiple relevant offences: application of section 165(4)**

**160.**—(1) This rule applies where the court convicts a person of two or more relevant offences.

(2) Where any of the offences is relevant by virtue of section 165(1)(b), the charge in respect of it is to be treated for the purposes of section 165(4) as if, had no election under section 129 been made, the charge would have been heard summarily at the hearing at which the election charge would have been heard if no such election had been made.

(3) Where—

- (a) the offences are relevant by virtue of rule 156(1), and

- (b) the charges in respect of them would have been heard summarily together if they had not been referred as mentioned in rule 156(1)(d),

those charges are to be treated for the purposes of section 165(4) as if they would have been heard summarily together if no election under section 129 had been made.

(4) Where any of the offences is relevant by virtue of rule 156(2)—

- (a) paragraph (3) applies as if the offence were relevant by virtue of rule 156(1); and
- (b) for the purposes of paragraph (3)(b) the charge in respect of the offence is to be treated as a charge which, had it not been referred as mentioned in rule 156(1)(d), would have been heard summarily at the hearing at which the non-election charge would have been heard if it had not been so referred.

(5) In paragraph (4) “the non-election charge” means the charge referred as mentioned in rule 156(1)(d).

### **Sentence for multiple relevant offences**

**161.**—(1) This rule applies where section 165(4) applies.

(2) The relevant offences mentioned in section 165(4) (“the joined offences”) shall for the purposes of section 255 (individual sentence for each offence) be regarded as a single offence, and the court shall accordingly pass a single sentence in respect of them.

(3) Paragraphs (4) and (5) apply where the joined offences are relevant by virtue of section 165(1)(a) or (b).

(4) If there was one election charge, the sentence must be such that the offender’s commanding officer could have awarded the punishments awarded by the sentence if he had heard the election charge summarily and had recorded a finding that it had been proved.

(5) If there were two or more election charges, the sentence must be such that the offender’s commanding officer could have awarded the punishments awarded by the sentence if he had heard the election charges summarily, together, and had recorded findings that they had been proved.

(6) Paragraphs (7) and (8) apply where the joined offences are relevant by virtue of rule 156.

(7) If there was one non-election charge, the sentence must be such that the offender’s commanding officer could have awarded the punishments awarded by the sentence if he had heard the non-election charge summarily and had recorded a finding that it had been proved.

(8) If there were two or more non-election charges, the sentence must be such that the offender’s commanding officer could have awarded the punishments awarded by the sentence if he had heard the non-election charges summarily, together, and had recorded findings that they had been proved.

(9) In relation to the sentence, sections 242 (service detention: general restriction), 243 (length of term of service of service detention) and 248 (forfeiture of seniority and reduction in rank or disrating) shall apply as if the sentence were being passed by an officer at a summary hearing.

(10) In this rule—

“non-election charge” means a charge referred to the Director in such circumstances that the offence to which it relates would be a relevant offence by virtue of rule 156(1) if the defendant were convicted or acquitted of it;

“the sentence” means the sentence passed in respect of the joined offences.

### **Multiple relevant offences: powers of Appeal Court**

**162.**—(1) In a case in which the court passed a single sentence in respect of two or more offences by virtue of rule 161, the 1968 Act is modified as follows.

(2) Where section 13(a) (power to re-sentence when some but not all convictions successfully appealed) applies but the appellant remains convicted of two or more of the joined offences, those joined offences of which he remains convicted are to be treated for the purposes of section 13(2) as a single offence.

(3) Where section 14 or 14A(b) (substitution of conviction on different charge) applies in relation to a conviction of any of the joined offences, subsection (2) of that section has effect as if the reference in paragraph (b) to a sentence that the Court Martial would have had power to pass in respect of the offence mentioned in subsection (1)(b) (“the other offence”) were to a sentence which that court would have had power to pass, in respect of the other offence and those of the joined offences of which the appellant remains convicted, if—

- (a) it had convicted him of the other offence; and
- (b) the other offence were one of the joined offences.

(4) Section 16A(2)(c) (powers of Appeal Court on appeal against sentence) has effect as if the reference in paragraph (b) to the offence were to the joined offences.

(5) In this rule “the joined offences” has the same meaning as in rule 161.

### **Offences associated with a relevant offence**

**163.** Where the court sentences an offender for—

- (a) a relevant offence with which another offence (whether or not a relevant offence) is associated, or
- (b) an offence with which a relevant offence is associated,

for the purposes of Part 9 of the 2006 Act the offences shall be regarded as not being associated with one another.

### **Activation of suspended sentence of detention**

**164.—**(1) This rule applies where—

- (a) the court makes an order under section 191(3) (activation of suspended sentence of service detention) by virtue of having convicted a person of a relevant offence; and
- (b) the sentence in respect of which the order is made was passed by an officer or the Summary Appeal Court.

(2) The term of the suspended sentence as it takes effect by virtue of the order must not exceed 28 days unless the offender’s commanding officer would have had extended powers for the purposes of section 194 if no election under section 129 had been made.

(3) Paragraph (4) applies where—

- (a) the court awards a term of service detention in respect of the relevant offence, or (by virtue of rule 161) in respect of the relevant offence and one or more other offences; and
- (b) the order provides for the suspended sentence to take effect from the end of the term so awarded.

(4) The aggregate of the terms of the two sentences—

- (a) must not exceed 28 days unless the offender’s commanding officer would have had extended powers for the purposes of section 194 if no election under section 129 had been made; and
- (b) must not exceed 90 days in any event.

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(a) Section 13 of the 1968 Act is substituted by paragraph 11 of Schedule 8 to the 2006 Act.  
(b) Sections 14 and 14A of the 1968 Act are amended by paragraphs 12 and 13 (respectively) of Schedule 8 to the 2006 Act.  
(c) Section 16A of the 1968 Act is substituted by paragraph 16 of Schedule 8 to the 2006 Act.

### **Service restraining orders**

**165.** The court may not make a service restraining order in relation to a person by virtue of having convicted or acquitted him of a relevant offence.

### **Review of unduly lenient sentence**

**166.** In section 273(1)(a) (review of unduly lenient sentence by Appeal Court) the reference to an offence under section 42 does not include a relevant offence.

## **PART 21**

### **TRANSITORY AND TRANSITIONAL PROVISIONS**

#### **Supreme Court of Northern Ireland**

**167.** Until paragraph 5 of Schedule 11 to the Constitutional Reform Act 2005(a) comes into force, the reference in rule 39(2)(c) to the Court of Judicature of Northern Ireland is to be read as a reference to the Supreme Court of Northern Ireland.

#### **Transitional**

**168.** Schedule 2 shall have effect.

Date

Parliamentary Under Secretary of State  
Ministry of Defence

## **SCHEDULE 1**

Rule 21(3)

### **OATHS AND AFFIRMATIONS**

**169.** The words prescribed are—

- (a) for lay members in trial proceedings, “...I will well and truly try the defendant before the court according to the evidence; I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law”;
- (b) for lay members in appellate proceedings, “...I will well and truly try the appellant before the court according to the evidence; I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law”;
- (c) for lay members in other proceedings, “...I will duly administer justice according to law and without partiality, favour or affection; and I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law”;
- (d) for persons in attendance for instruction, “...I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial, unless required to do so in due course of law”;

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(a) 2005 c. 4.

- (e) for witnesses, "... the evidence I shall give shall be the truth, the whole truth, and nothing but the truth"; and
- (f) for interpreters, "... I will well and faithfully interpret and make true explanation of all such matters and things as shall be required of me according to the best of my skill and understanding".

## SCHEDULE 2

Rule 168

### TRANSITIONAL PROVISIONS

#### PART 1

#### GENERAL

##### **Interpretation**

**170.**—(1) In this Schedule—

“AA 1955” means the Army Act 1955(a);

“AFA 1955” means the Air Force Act 1955(b);

“the Army Rules” means the Courts-Martial (Army) Rules 2007(c);

“commencement” means the time at which these Rules come into force;

“court-martial rules” means the RN Rules, the Army Rules and the RAF Rules (or any of them);

“NDA 1957” means the Naval Discipline Act 1957(d);

“preliminary hearing” means a preliminary hearing held under court-martial rules;

“the RAF Rules” means the Courts-Martial (Royal Air Force) Rules 2007(e);

“the RN Rules” means the Courts-Martial (Royal Navy) Rules 2007(f);

“the SDAs” means AA 1955, AFA 1955 and NDA 1957;

“SDA compensation order” means a compensation order under paragraph 11(1) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957;

“SDA offence” means any of the following—

- (a) any offence under Part 2 of AA 1955 or AFA 1955;
- (b) any offence under Part 1 of NDA 1957;
- (c) an offence under section 47K of that Act;
- (d) an offence under section 18 or 20 of the Armed Forces Act 1991(g) committed before commencement;
- (e) an offence under any of sections 95 to 97 of the Reserve Forces Act 1996(h) committed before commencement;
- (f) an offence under paragraph 5(1) of Schedule 1 to that Act committed before commencement by a person within sub-paragraph (2) below;

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- (a) 1955 c. 18.
  - (b) 1955 c. 19.
  - (c) S.I. 2007/3442.
  - (d) 1957 c. 53.
  - (e) S.I. 2007/3444.
  - (f) S.I. 2007/3443.
  - (g) 1991 c. 62.
  - (h) 1996 c. 14.

“stoppages” has the same meaning as in AA 1955, AFA 1955 or NDA 1957 (as the case may be).

(2) A person is within this sub-paragraph if—

- (a) after committing the offence and before commencement, he became a member of a reserve force and—
  - (i) he remained such a member until commencement; or
  - (ii) immediately before commencement, he was subject to military law, air-force law or NDA 1957; or
- (b) after commencement, he becomes a member of the reserve forces.

### **Record of court-martial proceedings**

**171.**—(1) Rule 23(5) to (8) shall apply in relation to the record of—

- (a) the proceedings of a court-martial, and
- (b) a preliminary hearing,

with the following modifications.

(2) In paragraph (5)—

- (a) the reference to exhibits retained under rule 24 is to be read as a reference to exhibits retained under rule 62(3) of the RN Rules or rule 65(3) of the Army Rules or the RAF Rules; and
- (b) the reference to the court administration officer is to be read as a reference to the court administration officer within the meaning of AA 1955, AFA 1955 or NDA 1957 (as the case may be).

(3) Paragraph (5) shall have effect as if for sub-paragraphs (a) to (c) there were substituted “the conclusion of the proceedings of the court-martial (or, in relation to the record of a preliminary hearing which was not followed by proceedings of a court-martial, the conclusion of the last preliminary hearing in the case)”.

(4) In paragraph (7)—

- (a) references to proceedings (or part of proceedings) held in camera include a preliminary hearing (or part of such a hearing) in relation to which the judge advocate gave a direction under rule 34(1) of the RN Rules or rule 37(1) of the Army Rules or the RAF Rules; and
- (b) the reference to proceedings in relation to which a direction under rule 47 was given is to be read as a reference to a preliminary hearing held under rule 35 of the RN Rules or rule 38 of the Army Rules or the RAF Rules.

### **Persons ineligible for membership in particular circumstances**

**172.**—(1) In rule 32(6), the reference to any previous proceedings includes proceedings under any of the SDAs.

(2) In rule 32(10), the reference to a person who at any time was not subject to service law applies only in relation to a time after commencement.

(3) In relation to a person who at any time before commencement was not subject to military law, air-force law or NDA 1957, references in rule 32 to a unit in which the person was at that time serving are to be read as references to a unit to which he was at that time attached.

## PART 2

### STEPS TAKEN BEFORE COMMENCEMENT

#### **Service of documents**

173. Any document served on a person before commencement, which would have been served on him in accordance with any provision of these Rules if that provision had then been in force, is to be treated as having been served on him in accordance with that provision.

#### **Court administration officers**

174. Anything done before commencement by a court administration officer within the meaning of any of the SDAs, which would have been done in accordance with any provision of these Rules if it had been done by the court administration officer within the meaning of the 2006 Act and that provision had then been in force, is to be treated as having been done by the court administration officer in accordance with that provision.

#### **Prosecuting officers**

175. Anything done before commencement by—

- (a) the prosecuting authority for the Royal Navy, the Army or the Royal Air Force, or
- (b) a prosecuting officer (within the meaning of any of the SDAs),

which would have been done in accordance with any provision of these Rules if it had been done by the Director and that provision had then been in force, is to be treated for the purpose of these Rules as having been done by the Director in accordance with that provision.

#### **Legal representatives**

176.—(1) Anything done before commencement by a person's legal representative within the meaning of court-martial rules, which would have been done in accordance with any provision of these Rules if it had been done by the person's legal representative within the meaning of these Rules and that provision had then been in force, is to be treated for the purpose of these Rules as having been done by the person's legal representative in accordance with that provision.

(2) A person who, immediately before commencement, was a person's legal representative (within the meaning of court-martial rules) is to be treated as having been appointed under rule 39.

#### **Arraignment**

177. Where—

- (a) a defendant was arraigned on a charge under section 91A(2) of AA 1955 or AFA 1955, or section 58A(2) of NDA 1957, and
- (b) the charge is allocated for Court Martial trial,

the defendant is to be regarded for the purposes of these Rules as having been arraigned, and as having pleaded not guilty to the charge, in preliminary proceedings.

#### **Directions etc**

178.—(1) A direction, order or ruling given or made in a preliminary hearing by the judge advocate (within the meaning of court-martial rules) has effect in related proceedings as if made in preliminary proceedings by the judge advocate for those proceedings.

(2) Proceedings are “related proceedings” in relation to a preliminary hearing if, had the hearing been preliminary proceedings, they would have been related proceedings in relation to those proceedings.

(3) A summons issued under court-martial rules shall have effect as if issued under these Rules.

(4) A direction given before commencement which, had it been given after commencement, would have been a direction under rule 30 (additional lay members), has effect as if given under that rule.

(5) In rule 50(1) (appeals from preliminary proceedings) the reference to preliminary proceedings includes a preliminary hearing.

(6) In rule 154 (appeals from orders restricting public access etc.) references to an order or direction include an order made, or a direction given, by—

- (a) a court-martial; or
- (b) a judge advocate in a preliminary hearing.

## PART 3

### EVIDENCE

#### **Proof by written statement**

**179.** The reference in rule 75(1)(b) to a person subject to service law or a civilian subject to service discipline is to be read, in relation to a statement made before commencement, as a reference to a person who at the time of making the statement was a person mentioned in section 99A(2)(b) of AA 1955.

#### **Evidence of enlistment or entry for service**

**180.**—(1) In rule 83, references to an enlistment paper used to enlist a person in accordance with regulations made under section 328 include—

- (a) an attestation paper within the meaning of AA 1955 or AFA 1955; and
- (b) a copy of Royal Navy Form S3049 (Notice Form for Entry/Re-Entry into Naval Service) signed by a person on being entered for service in the Royal Navy.

(2) In relation to a document purporting to be a copy of Royal Navy Form S3049, rule 83(1)(a) has effect as if for the word “enlisted” there were substituted “entered for service”.

(3) In rule 83(1)(b) the reference to a recruiting officer includes a recruiting officer within the meaning of Part 1 of AA 1955 or AFA 1955.

#### **Documents signed by or on behalf of a person’s commanding officer**

**181.** In relation to a record or certificate purporting to have been signed before commencement, references in rules 85 and 87 to a person’s commanding officer are to be read as references to his commanding officer within the meaning of Part 2 of the Armed Forces Act 2001(a).

#### **Special measures**

**182.**—(1) In Chapter 6 of Part 12, “sexual offence” includes an SDA civil offence as respects which the corresponding civil offence is—

- (a) an offence under Part 1 of the Sexual Offences Act 2003;
- (b) a relevant superseded offence, within the meaning of section 62 of the 1999 Act;

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(a) 2001 c. 19.

- (c) an offence of attempting or conspiring to commit, or inciting the commission of, an offence within paragraph (a) or (b) above; or
- (d) an offence under Part 2 of the Serious Crime Act 2007 where the offence (or one of the offences) which the offender intended or believed would be committed is an offence under Part 1 of the Sexual Offences Act 2003.

(2) In this paragraph—

“SDA civil offence” means an offence under section 70 of AA 1955 or AFA 1955 or section 42 of NDA 1957;

“the corresponding civil offence”, in relation to an SDA civil offence—, means—

- (a) the act or omission constituting the SDA civil offence; or
- (b) if that act or omission is not punishable by the law of England and Wales, the equivalent act done or omission made in England or Wales.

## PART 4

### SENTENCING

#### **SDA offences**

**183.** In rules 114(2)(d) and 115, references to service offences include SDA offences.

#### **Activation of suspended sentence of imprisonment**

**184.**—(1) In these Rules, “activation order” includes an order made by the court determining the suspension of an SDA suspended sentence of imprisonment and committing the offender to imprisonment.

(2) In this paragraph, “SDA suspended sentence of imprisonment” means a sentence of imprisonment—

- (a) passed by—
  - (i) a court-martial;
  - (ii) the Courts-Martial Appeal Court on an appeal brought from a court-martial; or
  - (iii) the House of Lords or the Supreme Court on an appeal brought from a decision of the Courts-Martial Appeal Court; and
- (b) suspended under section 120 of AA 1955 or AFA 1955 or section 90 of NDA 1957.

#### **SDA conditional discharge orders**

**185.**—(1) Where—

- (a) an SDA conditional discharge order has been made in respect of an offender, and
- (b) he is charged with an offence committed during the period of conditional discharge,

the advance information in relation to him must include a notice that, if he were convicted of the offence, the court would have power to deal with him for the offence for which he was conditionally discharged.

(2) In rule 114(5) the reference to power to deal with the offender under section 186(2) includes power to deal with him for an offence as respects which an SDA conditional discharge order was made.

(3) In this paragraph, “SDA conditional discharge order” means an order for a person’s conditional discharge under paragraph 3(1) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

## **Community supervision orders**

**186.**—(1) Where—

- (a) a community supervision order has been made in respect of an offender, and
- (b) he is charged with an offence committed during the period specified in the order,

the advance information in relation to him must include a notice that, if he were convicted of the offence, the court would have power to deal with him for the offence for which the order was made.

(2) In rule 114(5) the reference to power to deal with the offender under paragraph 23 of Schedule 8 to the 2003 Act includes power to deal with him for an offence as respects which a community supervision order was made.

(3) In this paragraph, “community supervision order” means an order under paragraph 4(1) of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

## **Variation proceedings**

**187.**—(1) In rule 118(1), the reference to a sentence imposed by the court includes a sentence imposed by a court-martial.

(2) In rule 119(2), the reference to proceedings in which a sentence was imposed includes proceedings of a court-martial in which a sentence was imposed.

(3) In relation to variation proceedings held by virtue of this paragraph—

- (a) rule 29 applies if, at the time when the sentence was imposed, the lay members of the court-martial were more than four in number;
- (b) the reference in rule 32(3) to a member of the court for the proceedings in which the sentence that falls to be varied was imposed is to be read as a reference to a member of the court-martial;
- (c) a person is not ineligible for membership of the court for the variation proceedings by virtue of having been a member of the court-martial;
- (d) rule 32(6) is subject to paragraph (c) above;
- (e) rule 33 applies to the proceedings if any of the lay members of the court-martial was not subject to military or air-force law or to NDA 1957;
- (f) the reference in rule 118(4) to the court is to be read as a reference to the court-martial; and
- (g) references in rule 120 to the original lay members are to be read as references to the lay members of the court-martial.

(4) In this paragraph, references to the lay members of the court-martial are to the members of that court other than the judge advocate.

## **Power to order offender’s release from custody**

**188.** In rule 124—

- (a) references to the court include a court-martial;
- (b) the reference to a custodial sentence includes—
  - (i) a sentence of imprisonment passed by a court-martial;
  - (ii) a sentence of custody for life under section 71A(1A) or (1B) of AA 1955 or AFA 1955 or section 43A(1A) or (1B) of NDA 1957;
  - (iii) a sentence of detention during Her Majesty’s pleasure under section 71A(3) of AA 1955 or AFA 1955 or section 43A(3) of NDA 1957;
  - (iv) a sentence of detention under section 71A(4) of AA 1955 or AFA 1955 or section 43A(4) of NDA 1957 (detention for serious offence committed by young person);

- (v) a custodial order under section 71AA of, or paragraph 10 of Schedule 5A to, AA 1955 or AFA 1955, or section 43AA of, or paragraph 10 of Schedule 4A to, NDA 1957; and
- (c) the reference to a sentence of service detention includes a sentence of detention under section 71(1)(e) of AA 1955 or AFA 1955 or section 43(1)(e) of NDA 1957.

## PART 5

### APPELLATE PROCEEDINGS

#### **Appeal from a Standing Civilian Court**

**189.** In these Rules—

“appellate proceedings” includes proceedings of the court (other than sentencing proceedings) on appeal from a Standing Civilian Court;

“sentencing proceedings” includes proceedings for the sentencing of a person convicted by a Standing Civilian Court who appeals against sentence.

## PART 6

### ACTIVATION PROCEEDINGS

#### **Activation proceedings in respect of a suspended sentence of detention under NDA 1957**

**190.**—(1) This paragraph applies where the court administration officer is notified—

- (a) that a sentence of detention passed on an offender by a court-martial under NDA 1957 is suspended under section 90 of that Act;
- (b) that—
  - (i) the offender’s commanding officer has recorded a finding under the 2006 Act that a charge against the offender in respect of an SDA offence committed since the sentence was suspended, or a service offence, is proved; or
  - (ii) the offender has been convicted (before or after commencement) of an offence in the British Islands committed since the sentence was suspended; and
- (c) the offender has not been dealt with in respect of the suspended sentence.

(2) Where this paragraph applies, in Part 17 and this paragraph—

“the relevant facts” means the facts mentioned in sub-paragraph (1);

“the original sentence” means the sentence mentioned in sub-paragraph (1)(a);

“the relevant period” means the period since the original sentence was suspended (or last suspended);

“the new offence” means the offence mentioned in sub-paragraph (1)(b)(i) or (ii), as the case may be;

“summons” and “warrant” mean a summons or warrant (as the case may be) issued on the basis of the facts mentioned in sub-paragraph (1);

“relevant order” means an order under section 191(3) in respect of the original sentence.

(3) Where this paragraph applies—

- (a) references in Part 17 to the proceedings in which the original sentence was passed are to be read as references to the proceedings under NDA 1957 in which that sentence was passed; and

- (b) rule 134(2)(c) includes the record of any proceedings in which a court or an officer made, or gave reasons for not making, an order under section 91(1) or 91B(1) of NDA 1957(a) in respect of the original sentence.

## PART 7

### ANCILLARY PROCEEDINGS

#### **Review of stoppages or SDA compensation order**

**191.**—(1) Rule 145 applies in relation to an application to the court under section 177 in respect of—

- (a) an award of stoppages; or
- (b) an SDA compensation order.

(2) In rule 145 as applied by this paragraph, references to the order are to be read as references to the award of stoppages or the SDA compensation order, as the case may be.

(3) In relation to an award of stoppages, rule 145 has effect as if the following were omitted—

- (a) paragraph (1)(b);
- (b) paragraph (1)(e), and the word “and” preceding it;
- (c) paragraph (4);
- (d) in paragraph (5), the words “and the person in whose favour the order was made”; and
- (e) in paragraph (6), the words “, and the person in whose favour the order was made,”.

#### **Application for time to pay financial penalty**

**192.**—(1) Rule 146 applies in relation to an application to the court under section 251(3) in respect of—

- (a) a fine awarded under any of the SDAs;
- (b) an award of stoppages; or
- (c) an SDA compensation order.

(2) References in rule 146 to an application made in respect of a service compensation order include an application made in respect of an SDA compensation order.

#### **Variation or revocation of order for recognizance**

**193.**—(1) Rule 150 applies in relation to an application to the court under section 235(4) in respect of an order under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

(2) In rule 150 as applied by this paragraph, “the order” means the order under paragraph 14 of Schedule 5A to AA 1955 or AFA 1955 or of Schedule 4A to NDA 1957.

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(a) Sections 91 to 91D of NDA 1957 were substituted for section 91 of that Act by article 31 of the Armed Forces (Alignment of Service Discipline Acts) Order 2008, S.I. 2008/1694.

## PART 8

### CONSEQUENCES OF ELECTION FOR COURT-MARTIAL TRIAL

#### Interpretation

**194.**—(1) In this Part—

“SDA election” means an election for court-martial trial under section 76AA(1) of AA 1955 or AFA 1955 or section 52D(2) of NDA 1957;

“SDA election offence” means an offence which is relevant for the purposes of section 165 by virtue of an SDA election;

“SDA non-election charge” means a charge referred to higher authority in such circumstances that the offence to which it relates would be a relevant offence by virtue of rule 156(1), as modified by paragraph 196, if the defendant were convicted or acquitted of it.

(2) References in this Part to a person’s commanding officer, in relation to any time before commencement, include an appropriate superior authority.

(3) References in this Part to a hearing at which a charge would have been heard if an election had not been made, or a charge referred, are to be read, in relation to an election or referral made before commencement, as references to a hearing at which the charge would in those circumstances have been dealt with summarily under section 76B of AA 1955 or AFA 1955 or tried summarily under section 52D of NDA 1957.

#### Application of Part 20 to SDA elections

**195.**—(1) In Part 20 and this Part, “election charge” includes—

- (a) a charge as regards which an SDA election was made (including a charge to which an election on another charge relates by virtue of section 76AA(2) of AA 1955 or AFA 1955 or section 52D(2A) of NDA 1957); and
- (b) a charge preferred by a prosecuting authority under section 83B(4) of AA 1955 or AFA 1955 or section 52I(4) of NDA 1957 in respect of the offence alleged in a charge within paragraph (a).

(2) In Part 20, references to the making of an election under section 129 include the making of an SDA election.

#### Charge referred to higher authority following election for court-martial trial on another charge

**196.**—(1) In relation to a person who made an SDA election, rule 156 is modified as follows.

(2) In paragraph (1)(b) the reference to a charge which at the time of the election is regarded for the purposes of Part 5 of the 2006 Act as allocated for summary hearing is to be read as a reference to a charge which, at the time of the election, could have been dealt with or tried by the person’s commanding officer.

(3) In paragraph (1)(d) the reference to a referral of a charge to the Director under section 123(2)(e) is to be read as a reference to the referral of the charge to higher authority under section 76(5)(b) of AA 1955 or AFA 1955 or section 52B(5)(b) of NDA 1957.

(4) In paragraph (2)(b)—

- (a) the reference to a charge brought under section 125 in addition to a charge includes an additional charge preferred under section 83B(8)(b) of AA 1955 or AFA 1955 or section 52I(7)(b) of NDA 1957; and
- (b) the reference to a charge substituted for a charge includes—
  - (i) a charge preferred by a prosecuting authority under section 83B(4) of AA 1955 or AFA 1955 or section 52I(4) of NDA 1957 in respect of an offence other than the offence alleged in the charge as regards which the election was made; and

- (ii) a charge substituted under section 83B(8)(a) of AA 1955 or AFA 1955 or section 52I(7)(a) of NDA 1957.

### **Powers of the Director**

**197.**—(1) This paragraph applies, and rule 157(3) does not apply, where a charge is allocated for Court Martial trial and is a relevant charge (within the meaning of rule 157) by virtue of an SDA election.

(2) Where the election charge was brought under AA 1955 or AFA 1955, the Director may not, without the written consent of the defendant, substitute under section 125(2)(b) a charge of an offence if, at the time of the election, a charge of that offence would not have been capable of being dealt with summarily (within the meaning of section 76(6)(b) of AA 1955 or AFA 1955, as the case may be).

(3) Where the election charge was brought under NDA 1957, the Director may not, without the written consent of the defendant, substitute under section 125(2)(b) a charge of an offence if, at the time of the election, a charge of that offence would not have been capable of being tried summarily (within the meaning of NDA 1957).

### **Sentence for an SDA election offence relevant by virtue of section 165(1)(a) or (b)**

**198.**—(1) This paragraph applies, and section 165(2) and rule 158 do not apply, where—

- (a) the court convicts a person of an SDA election offence which is relevant by virtue of section 165(1)(a) or (b); and
- (b) section 165(4) does not apply.

(2) If there was one election charge, the sentence passed in respect of the offence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the election charge summarily and found it proved.

(3) If there were two or more election charges, the sentence passed in respect of the offence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the election charges summarily, together, and found them proved.

### **Sentence where charge referred following SDA election on another charge**

**199.**—(1) This paragraph applies, and rule 159 does not apply, where—

- (a) the court convicts a person of an SDA election offence which is relevant by virtue of rule 156 as modified by paragraph 196; and
- (b) section 165(4) does not apply.

(2) If there was one SDA non-election charge, the sentence passed in respect of the offence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the non-election charge summarily and found it proved.

(3) If there were two or more SDA non-election charges, the sentence passed in respect of the offence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the non-election charges summarily, together, and found them proved.

### **Multiple relevant offences where election under AA 1955**

**200.**—(1) Where the court convicts a person of two or more offences which are relevant by virtue of an election under section 76AA(1) of AA 1955, section 165(4) does not apply.

(2) Where—

- (a) by virtue of sub-paragraph (1), section 165(4) does not apply, and
- (b) by reason of that fact, paragraph 198 or 199 applies,

references in paragraph 198 or 199 (as the case may be) to the sentence passed in respect of the offence are to be read as references to the combination of the sentences passed in respect of the offences.

### **Sentence for multiple relevant offences**

**201.**—(1) This paragraph applies where—

- (a) the court convicts a person of two or more SDA election offences; and
- (b) section 165(4) applies.

(2) Sub-paragraphs (3) and (4) apply, and rule 161(4) and (5) do not apply, where the joined offences are relevant by virtue of section 165(1)(a) or (b).

(3) If there was one election charge, the sentence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the election charge summarily and found it proved.

(4) If there were two or more election charges, the sentence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the election charges summarily, together, and found them proved.

(5) Sub-paragraphs (6) and (7) apply, and rule 161(7) and (8) do not apply, where the joined offences are relevant by virtue of rule 156 (as modified by paragraph 196).

(6) If there was one SDA non-election charge, the sentence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the non-election charge summarily and found it proved.

(7) If there were two or more SDA non-election charges, the sentence may not be more severe than the most severe punishment that the person's commanding officer could have awarded if he had dealt with or tried the non-election charges summarily, together, and found them proved.

(8) In this paragraph, "the joined offences" and "the sentence" have the same meaning as in rule 161.

### **Activation of suspended SDA sentence of detention**

**202.**—(1) The court may not, by virtue of having convicted a person of an SDA election offence, make an order under section 191(3) in respect of a sentence passed under AA 1955 or AFA 1955.

(2) Sub-paragraph (3) applies where, by virtue of having convicted a person of an SDA election offence, the court makes an order under section 191(3) in respect of a sentence of detention passed under NDA 1957 for a term of more than 90 days.

(3) The order must provide—

- (a) that the suspended sentence shall take effect with the substitution of a term of 90 days or less for the original term; or
- (b) that the suspended sentence—
  - (i) shall take effect for 90 days; and
  - (ii) shall then have effect as if it were a suspended sentence of service detention for a term of not more than that part of the original term which exceeds 90 days.

## EXPLANATORY NOTE

*(This note is not part of the Rules)*

The Armed Forces Act 2006 (c. 52) (“the Act”) creates a standing Court Martial. These Rules provide for the constitution and procedure of the court, including rules of evidence and powers to bring persons before the court. Additionally the Rules modify the powers of the Director of Service Prosecutions, the Court Martial and the Court Martial Appeal Court in a case in which a defendant elected Court Martial trial (or a court-martial if the election occurred before commencement).

Part 2 of these Rules makes provision with regard to the service of documents on different people and sets out when service is deemed to have occurred depending upon the method of service.

Part 3 deals with administrative matters including listing and notification of proceedings (rules 16 and 17), providing that a judge advocate may direct attendance at court by live link (rule 18) and the making and retention of records of proceedings (rule 23). Rule 21 provides that oaths taken at the Court Martial are to be the same as those in sections 1 to 3 and 6 of the Oaths Act 1978 (c. 19) as modified by Schedule 1 to these Rules. Rule 25 sets out the circumstances in which a judge advocate must terminate proceedings including: when the president of the board for any proceedings dies or is unable to continue to attend the proceedings and no other lay member is qualified to take his place; or if the number of lay members at any proceedings falls below the required minimum for those proceedings.

Part 4 deals with court membership including: when a judge advocate is to sit alone, such as when the offender who is to be sentenced is a civilian who will be awarded a sentence under Part 1 of Schedule 3 to the Act or is an ex-serviceman who either was tried by a court where all of the lay members were civilians, or who would have been tried by all civilian lay members had he not pleaded guilty (rule 27); the proceedings when the court must comprise a judge advocate and lay members, such as for a trial of a defendant (rule 28); that the minimum number of lay members must be five when the defendant is charged with an offence set out in Schedule 2 to the Act or an offence that can attract more than 7 years’ imprisonment or detention (depending upon the age of the defendant) (rule 29); those circumstances in which the judge advocate may direct that up to two additional lay members are added to the court (rule 30); when the lay members are to be civilians (rule 33); and who may be the president of the board (rule 34).

Part 5 sets out who may be a legal representative at court (rule 39) and provides, when a defendant who is a young person has not appointed a legal representative, which rights of the defendant may be exercised by the parent or guardian of that defendant (rule 40).

Part 6 applies section 111 of the Act (power to arrest a defendant during proceedings of the court) to pre-arraignment where a defendant is to be tried by the court. A judge advocate may either direct his arrest or issue a warrant for his arrest under this part.

Part 7 provides for service of advance information and when that information must include notice that a defendant could become subject to an activation order (rule 44).

Part 8 makes provision with regard to preliminary hearings including the power of a judge advocate to make orders or rulings on matters such as the admissibility of evidence, joinder or severance of charges and other questions of law, practice or procedure (rule 49). Rule 50 provides for appeals from such orders or rulings to the Court Martial Appeal Court.

Part 9 provides for the joinder or severance of charges and the amendment of charges.

Part 10 deals with arraignment of defendants and the ability of defendants to change their pleas.

Part 11 is concerned with the attendance of witnesses at court and provides for matters such as the notification of witnesses (rule 62), summoning of witnesses (rules 63 to 67) and the powers of a judge advocate to issue warrants for the arrest of witnesses in order to secure their attendance at court (rule 68).

Part 12 deals with evidence and applies provisions that operate in the civilian courts. This part is divided into chapters that in their turn deal with: general evidential matters (chapter 1) (applying provisions of the Criminal Justice Act 1967 (c. 80) to the Court Martial); evidence of bad character (chapter 2) (procedural provision in respect of provisions of the Criminal Justice Act 2003 (c. 44) which apply to the Court Martial); hearsay evidence (chapter 3) (procedural provision in respect of further provisions of the 2003 Act which apply to the court); evidence of service matters (chapter 4) (which is equivalent to provisions made under section 372 of the Act for civilian courts); expert evidence (chapter 5); and special measures directions (chapter 6) (applying provisions of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to the Court Martial).

Part 13 sets out the procedure to be followed at trial and follows procedures in the Crown Court.

Part 14 is concerned with sentencing matters and procedure. Ordinarily sentencing is an exercise conducted jointly by the judge advocate and lay members at the Court Martial and rule 117 provides that the reasons for a sentence are explained to the offender by the judge advocate but that pronouncement of sentence is by the president of the board. The president of the board may also, with the leave of the judge advocate, make a statement that explains to the offender the effects of his offending on his service and the likely effects it will have on his own service career.

Part 15 provides for the variation of a sentence including when the judge advocate can hold variation proceedings in the absence of the lay members (rule 120) and that lay members may attend variation proceedings by live link (rule 121).

Appeals from the Service Civilian Court are heard by the Court Martial. Part 16 provides for procedural matters in relation to appeals including: seeking leave to appeal out of time (rule 127); when the court may treat an appeal as abandoned (rule 129); and how the Rules are to apply to appellate proceedings (rule 128) (for example, references in the Rules to “trial proceedings” should be read as “appellate proceedings”).

Part 17 deals with activation proceedings of suspended sentences passed in relation to an earlier offence when a new offence has been committed during the operational period of that suspended sentence.

Part 18 is concerned with ancillary proceedings. Chapter 1 applies when an overseas community order made by the court is in force and the offender has breached the terms of that order. Chapter 2 deals with other ancillary proceedings such as reviewing a service compensation order (rule 145), applying for time to pay a financial penalty (rule 146), remitting a fine (rule 147), etc. It also provides for the procedure to be followed when the court decides to exercise its powers under section 311(2) of the Act and certify a person for contempt of court (rule 151).

Part 19 sets out the power of a judge advocate to order that proceedings are held in camera, including on the basis that the proceedings might otherwise be abandoned lest information useful to an enemy may be disclosed or national security endangered (rule 152). Rule 154 provides for appeals to the Court Martial Appeal Court against such an order.

Part 20 provides that where a person elects for trial by the Court Martial the powers of sentencing of the court are capped at those that would have been available to the defendant’s commanding officer had the commanding officer found the charge proved at a summary hearing. The detail of Part 20 is concerned with establishing when a charge is relevant for the purposes of imposing such a cap, the way in which the court is to pass sentence for multiple relevant offences where the commanding officer would have passed a single sentence, and the powers of the Court Martial Appeal Court in such a case. This part supplements section 165 of the Act.

Part 21 makes transitory and transitional provisions. Rule 167 provides that until paragraph 5 of Schedule 11 to the Constitutional Reform Act 2005 (c. 4) is in force all references in the Rules to the Court of Judicature of Northern Ireland are to be read as references to the Supreme Court of Northern Ireland. Rule 168 introduces Schedule 2 which sets out transitional provisions.