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STATUTORY INSTRUMENTS

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**2009 No. 1209**

**The Armed Forces (Service Civilian Court) Rules 2009**

**PART 12**

**EVIDENCE**

**CHAPTER 1**

**General**

**Application and interpretation of Part 12**

**57.**—(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**

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

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

(2) In this rule references to rules of evidence include rules conferring or restricting any discretion to exclude admissible evidence.

(3) No person may be required—

- (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 matters of which judicial notice could be taken in a trial on indictment in England and Wales.

**Oral testimony to be given on oath**

**59.**—(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**

**60.**—(1) Without prejudice to rule 58, section 9 of the 1967 Act (proof by written statement) shall apply, subject to 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; and
- (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; or
- (b) in trial proceedings.

(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**

**61.**—(1) Without prejudice to rule 58, section 10 of the 1967 Act (proof by formal admission) shall apply, subject to 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**

**62.**—(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**

**63.**—(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**

**64.**—(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 the court gives leave for the application to be made orally.

(2) If made in writing, the application—

- (a) must state whether a notice under rule 63 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 63, 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**

**65.**—(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 the court 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**

**66.**—(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 are 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 67 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**

- 67.**—(1) Where a party serves a notice under rule 66 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 66;
  - (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 66.

## **CHAPTER 4**

### **Evidence of service matters**

#### **Evidence of enlistment**

- 68.**—(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**

**69.** 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**

**70.—**(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**

**71.—**(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

72.—(1) 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 any—

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

shall be evidence of the matters stated in the certificate.

## CHAPTER 5

### Expert evidence

#### Expert evidence

73.—(1) Expert evidence shall not be adduced without the leave of the court 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 court 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 court's permission.

(5) Where more than one defendant wishes to introduce expert evidence on an issue, the court 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 court 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 court shall direct.

(7) Where the court 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 the 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 60) base an opinion or inference on the statement.

## CHAPTER 6

### Special measures directions

#### Interpretation of Chapter 6

74.—(1) In this Chapter—

“eligible witness” means a witness eligible for assistance by virtue of rule 75 or 76;

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

[<sup>F1</sup>“modern slavery 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 section 1 (slavery, servitude and forced or compulsory labour) or 2 (human trafficking) of the Modern Slavery Act 2015;
- (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 (encouraging and assisting crime) where the offence (or one of the offences) which the offender intended or believed would be committed is a modern slavery offence;]

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

- (a) [<sup>F2</sup>an offence which is—
  - (i) an offence under Part 1 of the Sexual Offences Act 2003, or
  - (ii) a relevant superseded offence as defined by section 62(1A) of the 1999 Act (meaning of “sexual offence” and other references to offences);
- (b) an offence of attempting or conspiring to commit, or of aiding, abetting, counselling or procuring or inciting the commission of, such an offence; or]
- (c) an offence under Part 2 of the Serious Crime Act 2007 <sup>M1</sup> (encouraging and assisting crime) committed in relation to such an offence;

“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 77.

#### Textual Amendments

**F1** Words in [rule 74\(1\)](#) inserted (31.7.2015) by [The Modern Slavery Act 2015 \(Consequential Amendments\) Regulations 2015 \(S.I. 2015/1472\)](#), regs. 1, **9(2)**

**F2** Words in [rule 74\(1\)](#) substituted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), rules 1(2), **17(a)**



### Marginal Citations

**M1** 2007 c. 27.

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

**75.**—(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 court 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 court 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 <sup>M2</sup>;
- (b) otherwise has a significant impairment of intelligence and social functioning; or
- (c) has a physical disability or is suffering from a physical disorder.

### Marginal Citations

**M2** 1983 c. 20.

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

**76.**—(1) A witness (other than a defendant) is eligible for assistance by virtue of this rule if the court 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—

- [<sup>F3</sup>(a) the proceedings are in respect of—
  - (i) a sexual offence,
  - (ii) a modern slavery offence, or
  - (iii) any other offence where it is alleged that the behaviour of the defendant amounted to domestic abuse;]
  - (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.

### Textual Amendments

**F3** Rule 76(2)(a) substituted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), rules 1(2), **18**

### Special measures available

**77.**—(1) Where a witness (other than a defendant) is eligible for assistance by virtue of rule 75, the special measures available in relation to him are those for which provision is made by sections 23 [<sup>F4</sup>and 25 to 30] of the 1999 Act.

(2) Where a witness is eligible for assistance by virtue of rule 76, the special measures available in relation to him are those for which provision is made by sections 23 and [<sup>F5</sup>25 to 28] of that Act.

(3) Where a defendant is eligible for assistance by virtue of rule 75, the special measures available in relation to him are those for which provision is made by sections 29 and 30 of that Act.

[<sup>F6</sup>(4) In a domestic abuse case a special measure for which provision is made by any of sections 23 and 25 to 28 of the 1999 Act is only available under paragraph (2) if section 62 of the Domestic Abuse Act 2021 (special measures in criminal proceedings for offences involving domestic abuse) is in force for the purposes of that section of the 1999 Act.

(5) In this rule “domestic abuse case” means proceedings falling within rule 91(2)(a) by virtue only of paragraph (iii) of that sub-paragraph.]

#### Textual Amendments

- F4** Words in [rule 77\(1\)](#) substituted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), [rules 1\(2\)](#), [19\(a\)](#)
- F5** Words in [rule 77\(2\)](#) substituted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), [rules 1\(2\)](#), [19\(b\)](#)
- F6** [Rule 77\(4\)\(5\)](#) inserted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), [rules 1\(2\)](#), [19\(c\)](#)

#### Special measures direction relating to eligible witness

**78.**—(1) Subject to the special measures provisions and this Chapter, the court 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 court'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, the court 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 court 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) The court may give a special measures direction—
- (a) on an application made by a party to the proceedings; or
  - (b) of its 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 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.

**[F7] Special provisions relating to a child witness**

**78A.**—(1) Where the court is considering giving a special measures direction under rule 78(1) in relation to a child witness the court must—

- (a) first have regards to paragraphs (2) to (6) below; and
- (b) then have regard to rule 78(1);

and if the judge advocate is required by paragraphs (2) to (6) to give such a direction, any special measure which must be provided for in the direction under paragraph (2) or (4) is to be treated for the purposes of rule 78(1)(b), as it then applies to the witness, as one which is likely to improve the quality of evidence given by the witness (whether on its own or in combination with any other special measure).

(2) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which provides for any relevant recording to be admitted under section 27 of the 1999 Act (video recorded evidence in chief).

(3) The primary rule is subject to the following limitations—

- (a) the requirement contained in paragraph (2) has effect subject to rule 80(1);
- (b) if the witness informs the court of the witness’s wish that the primary rule should not apply or should apply only in part, the rule does not apply to the extent that the court is satisfied that not complying with the rule would not diminish the quality of the witness’s evidence; and
- (c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to improve the quality of the witness’s evidence (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(4) Where as a consequence of all or part of the primary rule being disapplied under paragraph (3) (b) a witness’s evidence or any part of it would fall to be given as testimony in court, the court must give a special measures direction making such provision as is described in section 23 of the 1999 Act (screening witness from accused) for the evidence or that part of it.

(5) The requirement in paragraph (5) is subject to the following limitations—

- (a) if the witness informs the court of the witness’s wish that the requirement in paragraph (4) should not apply, the requirement does not apply to the extent that the court is satisfied that not complying with it would not diminish the quality of the witness’s evidence; and
- (b) the requirement does not apply to the extent that the court is satisfied that making such a provision would not be likely to improve the quality of the witness’s evidence (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(6) In making a decision under paragraph (3)(b) or (5)(a), the court must take into account the following factors (and any others it considers relevant)—

- (a) the age and maturity of the witness;

- (b) the ability of the witness to understand the consequences of giving evidence otherwise than in accordance with the requirements in paragraph (2) or (as the case may be) in accordance with the requirements in paragraph (4);
- (c) the relationship (if any) between the witness and the defendant;
- (d) the witness's social and cultural background and ethnic origins;
- (e) the nature of the alleged circumstances of the offence to which the proceedings relate.

(7) Where a special measures direction is given in relation to a child witness who is not also an eligible witness in accordance with rule 75(2), then—

- (a) subject to paragraph (8) below; and
- (b) except where the witness has already begun to give evidence in the proceedings,

the direction shall cease to have effect at the time when the witness attains the age of 18.

(8) Where a special measures direction is given in relation to a child witness who is not also an eligible witness in accordance with 75(2) and—

- (a) the direction provides—
  - (i) for any relevant recording to be admitted under section 27 of the 1999 Act as evidence in chief of the witness, or
  - (ii) for the special measure available under section 28 of the 1999 Act (video recorded cross-examination or re-examination) to apply in relation to the witness; and
- (b) if it provides for that special measure to so apply, the witness is still under the age of 18 when the video recording is made for the purposes of section 28;

then, so far as it provides as mentioned in sub-paragraph (a)(i) or (ii) above, the direction shall continue to have effect even though the witness subsequently attains that age.

(9) In this rule—

- (a) a witness is a “child witness” if the witness is an eligible witness by reason of rule 75(1) (whether or not the witness is an eligible witness by reason of any other provision of rule 75 or 76); and
- (b) a “relevant recording”, in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.]

#### **Textual Amendments**

**F7** Rules 78A, 78B inserted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), rules 1(2), **20**

#### **[<sup>F7</sup>Extension of provisions of rule 78A to certain witnesses over 18**

**78B.**—(1) Rule 78(1) and 78A(1) to (3) and (6), so far as relating to the giving of a direction complying with the requirement contained in rule 78A(2), apply to a qualifying witness in respect of a relevant recording made in relation to the witness, as they apply to a child witness (within the meaning of rule 78A).

(2) In this rule—

- (a) a witness (other than the defendant) is a “qualifying witness” if the witness—
  - (i) is not an eligible witness, but
  - (ii) was under the age of 18 when the relevant recording was made in relation to the witness; and

- (b) a “relevant recording”, in relation to a witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.]

**Textual Amendments**

**F7** Rules 78A, 78B inserted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), [rules 1\(2\)](#), **20**

**Evidence given in private**

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

- [<sup>F8</sup>(a) the proceedings relate to—
- (i) a sexual offence,
  - (ii) a modern slavery offence, or
  - (iii) any other offence where it is alleged that the behaviour of the defendant amounted to domestic abuse; or]
- (b) it appears to the court 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.

**Textual Amendments**

**F8** [Rule 79\(a\)](#) substituted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), [rules 1\(2\)](#), **21**

**Video recorded evidence in chief**

**80.—(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 court 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 court 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 court may nevertheless subsequently direct that it is not to be so admitted if—

- (a) it appears to the court 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 83 has not been complied with to the satisfaction of the court.

(4) Paragraph (3) is without prejudice to rule 84 (power to vary or discharge special measures direction).

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

- [<sup>F9</sup>(a) the witness must be called by the party tendering it in evidence, unless –
- (i) a special measures direction provides for the witness’s evidence on cross-examination to be given in any recording admissible under section 28 of the 1999 Act (video recorded cross-examination or re-examination), or
  - (ii) 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 court, has been dealt with adequately in the witness's recorded testimony; or
  - (ii) without the leave of the court, as to any other matter which, in the opinion of the court, 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 (5) 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 court 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.

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**Textual Amendments**

**F9** [Rule 80\(5\)\(a\)](#) substituted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), [rules 1\(2\)](#), [22](#)

**[<sup>F10</sup>Video recorded cross-examination or re-examination**

**80A.**—(1) Where a special measures direction provides for a video recording to be admitted under section 28 of the 1999 Act (video recorded cross-examination or re-examination), such a recording must be made in the presence of such persons as the direction may provide and in the absence of the defendant, but in circumstances in which—

- (a) 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 persons in whose presence the recording is being made; and
  - (b) the defendant is able to see and hear any such examination and to communicate with any legal representative acting for the defendant (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)(a) and (b) are to be regarded as satisfied in relation to those representatives if at all material times they are satisfied in relation to at least one of them.
- (3) Where a special measures direction provides for a recording to be admitted under section 28 of the 1999 Act, the court may nevertheless subsequently direct that it is not to be so admitted if any requirement of paragraph (1), these Rules or the direction has not been complied with to the satisfaction of the court.
- (4) Where in pursuance of section 28(1) of the 1999 Act a recording has been made of any examination of the witness, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceedings (whether in any recording admissible under section 27 (video recorded examination in chief) or 28 of the 1999 Act or otherwise than in

such a recording) unless the court gives a further special measures direction making such provision as is mentioned in section 28(1)(a) and (b) of the 1999 Act in relation to any subsequent cross-examination, and re-examination, of the witness.

- (5) The court may only give such a further direction if it appears to the court—
- (a) that the proposed cross-examination is sought by a party to the proceedings as a result of that party having become aware, since the time when the original recording was made in pursuance of section 28(1) of the 1999 Act, of a matter which that party could not with reasonable diligence have ascertained by then; or
  - (b) that for any other reason it is in the interests of justice to give further direction.

(6) Nothing in this rule shall be read as applying in relation to any cross-examination of the witness by the defendant in person (in a case where the defendant is to be able to conduct any such cross-examination).]

#### Textual Amendments

**F10** Rule 80A inserted (4.7.2022) by [The Armed Forces \(Service Court Rules\) \(Amendment\) Rules 2022 \(S.I. 2022/605\)](#), rules 1(2), 23

#### Examination of witness through intermediary

**81.**—(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 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

**82.**—(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 83(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;
  - (e) the views of the witness as to the matters specified in accordance with sub-paragraph (d);
  - (f) where a previous application for a special measures direction has been refused, any material change of circumstances relied upon in support of the application.
- (3) In paragraph (2)(a) “evidence in support of an alibi” has the same meaning as in article 7(5) 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 court, adduce evidence (including expert evidence) at the hearing.

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

**83.**—(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, in so far as not contained in the recording itself—

- (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, at 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**

**84.**—(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 82(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.

## [F11] CHAPTER 7

### Use of specimens in proceedings for offences relating to alcohol and drugs

#### Textual Amendments

**F11** Ch. 7 inserted (1.11.2013) by [The Armed Forces \(Interpretation, Translation and Alcohol and Drug Tests\) Rules 2013 \(S.I. 2013/2527\)](#), arts. 1(2), **22**

#### Application and interpretation

**84A.**—(1) This Chapter applies to proceedings for an offence under section 42 of the Act (criminal conduct) as respects which the corresponding offence under the law of England and Wales is an offence under section 78, 79, 92 or 93 of the Railways and Transport Safety Act 2003 (shipping and aviation staff: offences relating to alcohol and drugs).

(2) In this Chapter “drug”, “medical establishment”, “service police establishment” and “service policeman” have the meanings given by section 93I of the Act.

#### Use of specimens

**84B.**—(1) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by or taken from the defendant shall, in all cases (including cases where the specimen was not provided or taken in connection with the alleged offence), be taken into account and, subject to paragraph (2), it shall be assumed that the proportion of alcohol in the defendant’s breath, blood or urine at the time of the alleged offence was not less than in the specimen.

(2) That assumption shall not be made if the defendant proves—

- (a) that he consumed alcohol before he provided the specimen or had it taken from him, and after the time of the alleged offence; and
- (b) that had he not done so the proportion of alcohol in his breath, blood or urine—
  - (i) where the corresponding offence under the law of England and Wales is an offence under section 78(2) of the Railways and Transport Safety Act 2003, would not have been such as to impair his ability to carry out his duties;
  - (ii) where that corresponding offence is an offence under subsection (2) of section 79 of that Act, would not have been such as to impair his ability to take the action mentioned in subsection (1)(b) of that section;
  - (iii) where that corresponding offence is an offence under section 92 of that Act, would not have been such as to impair his ability to perform the function mentioned in subsection (1)(a) or (b) (as the case may be) of that section;
  - (iv) where that corresponding offence is an offence under section 78(3), 79(3) or 93 of that Act, would not have exceeded the prescribed limit.

(3) A specimen of blood shall be disregarded unless—

- (a) it was taken from the defendant under section 93E of the 2006 Act; or
  - (b) it was taken from the defendant under section 93G of that Act and the defendant subsequently gave his permission for a laboratory test of the specimen.
- (4) Where, at the time a specimen of blood or urine was provided by the defendant, he asked to be provided with such a specimen, evidence of the proportion of alcohol or any drug found in the specimen is not admissible on behalf of the Director unless—
- (a) the specimen in which the alcohol or drug was found is one of two parts into which the specimen provided by the defendant was divided at the time it was provided; and
  - (b) the other part was supplied to the defendant.
- (5) Where a specimen of blood was taken from the defendant under section 93G of the 2006 Act, evidence of the proportion of alcohol or any drug found in the specimen is not admissible on behalf of the Director unless—
- (a) the specimen in which the alcohol or drug was found is one of two parts into which the specimen taken from the defendant was divided at the time it was taken; and
  - (b) any request to be supplied with the other part which was made by the defendant at the time when he gave his permission for a laboratory test of the specimen was complied with.

#### **Documentary evidence as to specimens**

**84C.**—(1) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine may, subject to paragraphs (3) and (4) and to rule 84B(4) and (5), be given by the production of a document or documents purporting to be whichever of the following is appropriate, that is to say—

- (a) a statement automatically produced by the device by which the proportion of alcohol in a specimen of breath was measured and a certificate signed by a service policeman (which may but need not be contained in the same document as the statement) that the statement relates to a specimen provided by the defendant at the date and time shown in the statement; and
  - (b) a certificate signed by an authorised analyst as to the proportion of alcohol or any drug found in a specimen of blood or urine identified in the certificate.
- (2) Subject to paragraphs (3) and (4), evidence that a specimen of blood was taken from the defendant with his consent by a registered medical practitioner or a registered nurse may be given by the production of a document purporting to certify that fact and to be signed by a registered medical practitioner or registered nurse.
- (3) Subject to paragraph (4)—
- (a) a document purporting to be such a statement or such a certificate (or both such a statement and such a certificate) as is mentioned in paragraph (1)(a) is admissible in evidence on behalf of the Director in pursuance of this rule only if a copy of it either has been handed to the defendant when the document was produced or has been served on him not later than seven days before the hearing; and
  - (b) any other document is so admissible only if a copy of it has been served on the defendant not later than seven days before the hearing.
- (4) A document purporting to be a certificate (or so much of a document as purports to be a certificate) is not so admissible if the defendant, not later than three days before the hearing or within such further time as the court may in special circumstances allow, has served notice on the Director requiring the attendance at the hearing of the person by whom the document purports to be signed.
- (5) In this rule “authorised analyst” means—

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**Changes to legislation:** *There are currently no known outstanding effects for the The Armed Forces (Service Civilian Court) Rules 2009, PART 12. (See end of Document for details)*

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- (a) any person possessing the qualifications prescribed by regulations made under section 27 of the Food Safety Act 1990 as qualifying persons for appointment as public analysts under that Act; and
- (b) any other person authorised by the Secretary of State to make analyses for the purposes of section 16 of the Road Traffic Offenders Act 1988 or this rule.]

**Changes to legislation:**

There are currently no known outstanding effects for the The Armed Forces (Service Civilian Court) Rules 2009, PART 12.