

ARMED FORCES ACT 2006

EXPLANATORY NOTES

COMMENTARY

First Group of Parts – Discipline

Part 7- Trial by Court Martial

Chapter 1 – The Court Martial

Section 154: The Court Martial

318. This section establishes the Court Martial as a standing court which may sit anywhere within or outside the UK. This is a departure from the present situation where courts-martial are convened on an ad hoc basis.

Section 155: Constitution of the Court Martial

319. This section provides for the membership of the court for Court Martial proceedings. In proceedings before the Court Martial there is to be a judge advocate, who shall be specified by or on behalf of the Judge Advocate General, and lay members who will be specified by or on behalf of the court administration officer. In most proceedings the required minimum number of lay members will be three. This is in recognition of the fact that the majority of cases that are dealt with by the Court Martial equate to those heard in the magistrates' courts in England and Wales where the Bench is comprised of three lay members. However, for more serious cases the minimum required will be five. When the minimum is to increase to five will be set down in rules made under section 163. This section also provides for rules to be made that will set out when a judge advocate may direct the court administration officer to specify up to two additional members of the court. This will help to avoid trials collapsing if a lay member dropped out for some reason. Finally the rules will also be able to set down when a judge advocate may sit alone, for example, when arraigning a person or hearing arguments on the law.

Section 156: Officers and warrant officers qualified for membership of the Court Martial

320. This section provides for the general principle that officers and warrant officers may be members of the Court Martial. Officers must have held their commission for at least three years (or periods totalling 3 years), or have been warrant officers immediately prior to their commission. Only substantive, not acting, warrant officers are qualified to be members of the Court Martial. There are exceptions to these general qualifications for membership, and these are listed in the section. The purpose of these exceptions is to avoid the potential of any real or perceived bias through, for example, the involvement of persons connected to the service disciplinary system in a trial.

Section 157: Officers and warrant officers ineligible for membership in particular circumstances

321. This section provides for the circumstances in which officers and warrant officers who are otherwise qualified are nevertheless ineligible for membership of the Court Martial for a particular trial because of their involvement in investigating the charge or a command relationship with the accused.

Chapter 2 – Court Martial Proceedings

Section 160: Decisions of Court Martial: finding and sentence

322. This section provides that the finding of the Court Martial on a charge and any sentence passed by it must be determined by a majority of the members of the court. However, the judge advocate is not entitled to vote on the finding but if there is an equality of votes on sentence, he has a casting vote. This provision ensures that (as in the Crown Court) the judge advocate is not involved in the “verdict”, which is a matter for the tribunal of fact, but his expertise in sentencing matters is given weight.
323. If there is an equal vote on finding, the person must be acquitted.

Section 161: Power of Court Martial to convict of offence other than that charged

324. This section provides that when the Court Martial finds a person not guilty of an offence but the allegations on the charge sheet amount to allegations of another service offence, including an attempted offence, the court may convict him of that offence.

Section 163: Court Martial rules

325. This section provides a power for the Secretary of State to make rules (by statutory instrument) with respect to the Court Martial. These rules may govern matters such as the administration, conduct and procedure of the Court Martial and may also create offences in respect of certain evidence provisions and provide for powers of arrest in relation to witness summonses. The rules may apply any enactment or subordinate legislation whenever passed or made, with or without modifications. The rules may also provide for a “slip rule” to allow for the correction of sentencing errors, and may provide for appeals against certain matters such as reporting restrictions that may be ordered by a judge advocate.

Chapter 3 – Punishments available to Court Martial

Section 164: Punishments available to Court Martial

326. The Table in subsection (1) specifies the punishments that may be awarded by the Court Martial. Some of these punishments are available only for certain categories of offender or only in certain circumstances. The Table is also subject to other provisions of the Act which impose restrictions on the court’s choice of punishments.
327. Subsection (4) enables regulations to provide that persons in specified categories (for example, specified trades or branches) cannot be reduced or disgraced below a particular rank or rate.
328. Subsection (7) gives effect to modifications made to this section by Schedule 3. That Schedule provides an alternative Table of punishments for civilians subject to service discipline, and another for persons previously subject to service law. The Table in section 164 applies only to offenders to whom neither of the Tables in Schedule 3 applies.

Section 165: Sentencing powers of Court Martial where election for trial by that court instead of CO

329. This section limits the powers of punishment of the Court Martial where it tries a person as the result of his electing to be tried by that court. In these circumstances the Court Martial may award a punishment up to the maximum punishment that the CO could have awarded if he had dealt with the person summarily. Where the Court Martial convicts a person who elected trial by it of two or more offences, the punishments it awards for both or all of them taken together must not exceed the maximum that the CO could have awarded if he had heard them summarily. These limitations on the powers of punishment of the Court Martial are to ensure that there is no disincentive to a person electing trial by the Court Martial (which is an ECHR-compliant court) instead of having his charge heard summarily.

Chapter 4 – Findings of Unfitness to Stand Trial and Insanity

Introduction

330. **Sections 166 to 172** enable the Court Martial to consider and determine issues of unfitness to stand trial and insanity and make appropriate orders in relation to persons who are unfit to stand trial or not guilty by reason of insanity. These provisions are similar to the relevant sections of the Criminal Procedure (Insanity) Act 1964 (“the 1964 Act”), as amended by the Domestic Violence, Crime and Victims Act 2004.

Section 166: Fitness to stand trial

331. Subsections (1) to (4) provide that on a trial by Court Martial the issue of whether the defendant is fit to stand trial must, subject to subsections (5) and (6), be decided as soon as it arises, and is an issue to be determined by the judge advocate alone. For the purposes of the Act, a person is unfit to stand trial if he is suffering from such a disability that apart from the provisions of the 1964 Act, it would preclude his being tried on indictment in England and Wales.
332. Subsection (5) provides that the judge advocate may postpone consideration of the defendant’s fitness to stand trial to the opening of the defence case if it is expedient to do so and in the defendant’s interest, and subsection (6) provides that if the defendant is found not guilty before that issue is considered, it shall not be determined.
333. Subsection (7) provides that a judge advocate may only determine whether a defendant is fit to stand trial after having considered the written or oral evidence of two or more registered medical practitioners, at least one of whom must be duly approved for the purposes of section 12 of the Mental Health Act 1983 (“the 1983 Act”).

Section 167: Finding that defendant did the act or made the omission charged

334. Subsections (1) and (2) provide that where a judge advocate has determined that a person is unfit to stand trial, the trial shall not proceed further but the court must determine whether it is satisfied that the defendant did the act, or omission, which constitutes the offence with which he is charged. Subsections (3) and (4) provide that if the court determines that he did the act or omission, it must make a finding that he did the act or omission in respect of that charge, and that if it determines that he did not do the act or omission, it must find him not guilty of that charge.
335. Subsection (5) specifies the evidence on which a determination under subsection (2) must be made.
336. Subsection (6) provides that section 160 (Court Martial decisions) does not apply to a determination or finding under this section. It also provides that the question of whether the court is satisfied that the defendant did the act or omission charged against him is to be determined by the lay members alone, and an affirmative answer to that question may be given by a majority of those members.

Section 168: Findings of insanity

337. This section provides that if on a trial by the Court Martial the court is satisfied that the defendant did the act charged against him, and that at the time of that act he was insane, then the court must find the defendant not guilty of that offence by reason of insanity.
338. Subsection (3) specifies the medical evidence required before a finding under this section may be made.
339. Subsection (4) provides that a determination or finding under this section is to be made in the same way as a finding under section 167 is to be made. Only the lay members of the court have a vote; and the court is satisfied that the defendant did the act charged, and was insane, if a majority of those members vote to that effect.

Section 169: Powers where person unfit to stand trial or not guilty by reason of insanity

340. This section provides a range of disposals when there is a finding of unfitness to stand trial or not guilty by reason of insanity. The powers under this section may only be exercised by a judge advocate, the lay members having no role.
341. Subsection (2) sets out the court's options on a finding of unfitness or insanity. The first is to make a hospital order under section 37 of the 1983 Act, which can also be accompanied by a restriction order; the second is to make a service supervision order (defined by section 170), which is analogous to a supervision order under Schedule 1A to the 1964 Act; and the third is to order the person's absolute discharge.
342. Subsection (3) specifies that a hospital order means an order under section 37 of the 1983 Act and that a restriction order means an order under section 41 of that Act, both as modified by Schedule 4 to the Act. Subsection (4) provides that the criteria for imposing a hospital order, with or without a restriction order, are those in the 1983 Act as modified.
343. Subsection (5) provides that where the sentence for the offence in question is fixed by law, and the relevant criteria for making a hospital order are satisfied, then the court must make a hospital order with a restriction order.

Section 170: Service supervision orders

344. This section defines service supervision orders, and sets out the conditions that must be satisfied for them to be made. It also empowers the Secretary of State to make further provisions in regulations in respect of them.
345. Subsection (1) provides that a "service supervision order" means an order whereby the person in respect of whom it is made is subject to the supervision of a specified person (the "supervising officer") for a specified period. Under subsection (2) that period must not exceed the maximum period of a civilian supervision order set out in the 1964 Act (currently two years).
346. Subsection (3) specifies the criteria that the court must be satisfied are met before making a service supervision order.
347. Subsection (4) provides that a service supervision order may require, in accordance with the regulations made pursuant to subsection (5), a supervised person to submit to medical treatment.

Section 171: Remission for trial

348. Subsection (1) empowers the Secretary of State to remit for trial by the Court Martial a person who is the subject of a hospital order with a restriction order under section 169 if, after having consulted the medical practitioner in charge of the person's treatment, he is satisfied that the person is no longer unfit to stand trial.

*These notes refer to the Armed Forces Act 2006 (c.52)
which received Royal Assent on 8 November 2006*

349. Subsection (2) provides that where a person is remitted for trial under this section he must be transferred to service custody (at which point, under subsection (3), the hospital order and restriction order cease to have effect) and be brought as soon as practicable before a judge advocate for a review of whether he should continue to be kept in service custody. Subsection (2)(b) provides that on such a review he shall be treated as on a review of custody after charge under section 108.

Section 172: Provision supplementary to sections 166 and 168

350. Subsection (1) defines “duly approved” as approved by the Secretary of State for the purposes of section 12 of the 1983 Act as having special experience in the diagnosis or treatment of mental disorder as defined within that Act.
351. Subsection (2) provides that, subject to subsection (4), a report written by a registered medical practitioner may be received in evidence without further proof of the signature or the professional qualifications of the author of the report. Subsection (4) specifies certain protections for the defendant where it is not the defence that has put the report in evidence, including a requirement to have such a report disclosed to him (or his representative, or parent or guardian), and a right to have the report’s signatory called to give evidence.
352. Subsection (3) provides that the court may call the author of such a report to court to give evidence.