



# **THE COURT MARTIAL AND THE SUMMARY APPEAL COURT GUIDANCE**

**Volume 2:  
Guide to Procedure**  
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## Section 1: Foreword

1.1 This Members' Guide is issued under the authority of the Judge Advocate General and the Director of the Military Court Service jointly and is for use by those specified as members of the Court Martial and/or Summary Appeal Court. Court procedure generally is set out in The Court Martial and the Summary Appeal Court Guidance – Volume 1: Guide to Procedure.

1.2 The proper briefing of members in the Court Martial has been held by the European Court of Human Rights (ECtHR) to be one of the key methods of compliance with the European Convention on Human Rights (ECHR) Article 6 (Right to a fair trial), and this Members' Guide is the main vehicle for that briefing. Thus, you must ensure that you have a good understanding of what is expected of you.

1.3 The first section of this Guide is applicable to members of both the Court Martial and the Summary Appeal Court. Sections 3 and 4 give specific guidance for the Court Martial and the Summary Appeal Court respectively. It is mandatory that members read the sections of the Guide that are relevant to the court of which they are to be members.

1.4 If you have any doubts about what is expected of you or believe that you need additional advice prior to your duty, you should contact the Military Court Service as soon as possible.

Once a case has begun, you should address any concerns by sending a note to the judge or the Court Officer.

1.5 This Guide is not confidential or classified and may be circulated freely.

**Judge Advocate General**

**Director, Military Court Service**

## **Section 2: Introduction**

### **Aim**

2.1 The aim of this Guide is to brief members of the Court Martial and the Summary Appeal Court.

### **Constitution of Court**

2.2 Every trial and sentencing hearing in the Court Martial comprises a judge (“the Judge Advocate”) specified by the Judge Advocate General to preside over it and the lay (that is, not legally qualified) members of the board who are officers and warrant officers but may be civilians if the defendant is a civilian. In the Court Martial (but not in the Summary Appeal Court nor where the board are all civilians) the senior officer of the members is called the President of the Board. The President of the Board has important duties and functions in relation to Court Martial proceedings, which are explained at paragraphs 3.8 and 3.9.

### **Duty to read Members Guide**

2.3 Being a member carries duties and responsibilities that help to ensure the fairness of the Service Justice System, and it is most important that all members are aware of their duties and responsibilities. It is therefore mandatory that they read the relevant parts of this Guide prior to taking part in proceedings and before sitting, they are required by the Court Officer to sign a certificate confirming that they have done so.

### **Qualification and Eligibility**

2.4 The defendant/appellant is (or was formerly) a member of the Services in most Court Martial proceedings and all Summary Appeal Court proceedings. When this is the case, the members of the court are also Service personnel. To be able to sit, each member of such a court must be both qualified and eligible, i.e., satisfy a two-stage test.

2.4.1 To be qualified to sit, each member must:

- Be an officer who has held a commission in any of her Majesty's Naval, military or air forces for not less than three years, or for periods amounting to not less than three years: or
- be substantive warrant officer: or
- have been a warrant officer immediately prior to being commissioned.

2.4.2 To be eligible to sit, each member must not:

- be or have been the Commanding Officer of the defendant/appellant at any time from the date of the alleged offence.
- serve or have served in the same unit as the defendant/appellant at any time from the date of the alleged offence.
- have taken part in any investigation or inquiry relating to the charge.
- be the Court Administration Officer or a member of his staff.
- be a Service Policeman.

- be a member of, or on the staff of, the Service Prosecuting Authority; or be a member of the Royal Army Chaplains' Department or the Royal Air Force Chaplains' Branch.

2.4.3 You must check that you are qualified and eligible to sit on a case. Failure to do so can lead to a trial being terminated unnecessarily or a conviction quashed on appeal. It could also lead to you being prosecuted for an offence. If any of the matters listed below apply, or if you have any other concerns, you must contact the Military Court Service as soon as possible and prior to attending for duty or inform the judge or Court Officer immediately if you realise this after proceedings start (for example when a witness you know comes into court to give evidence, but you did not know or recognize their name on the list of witnesses).

- if you think that you may not be qualified or eligible to be a member of the Court Martial or the Summary Appeal Court, or
- if you know the defendant/appellant in another capacity or
- have been in contact with them for any reason, or
- if you know any of the witnesses in the case or
- you know the prosecution or defence legal representatives,

### **Civilian Defendant**

2.5 If the defendant in the Court Martial is a civilian, all the members are likely to be civilians. Just as for Service members, any civilian member who knows or has been in contact with the defendant or any witnesses in the case must inform the Military Court Service as soon as possible prior to attending court or tell the judge or Court Officer if you realise this after proceedings start.

### **Reporting for Duty**

2.6 When you report to the Military Court Centre for duty as a member, you will be directed to a board room and will be briefed by a member of the court team. You must not discuss anything relating to court business with any other person/s. If you disregard this direction, you might inadvertently speak with, for example, a lawyer or a witness and this could result in you becoming ineligible to take part in proceedings, or in the case being prejudiced. If someone does speak to you and you have any doubts about your position in this respect, you should tell the judge or a member of the court team about it before the case starts.

### **Members Not Reported Upon**

2.7 The performance of a member will not be considered or evaluated in the preparation of any personal report, assessment or other document used in whole or in part for the purpose of determining whether that officer or warrant officer is qualified to be promoted or suited for appointments or training. The same applies to a Crown servant who serves as a civilian member of a court. This is to ensure that members exercise their judgement freely.

## **No External Influence**

2.8 Members of the Court Martial or the Summary Appeal Court must not be subjected to any external influence or pressure prior to, during, or after the proceedings. It is an offence under the criminal law of England and Wales (and consequently under Service law) to do anything to pervert the course of justice, or to attempt to do so, such as any interference with or attempt to influence any members of boards or juries, or witnesses in court proceedings. Anyone who becomes aware of any such attempt must report it to the judge immediately.

## **Forms of address**

2.9 The Judge Advocate is addressed as “Your Honour”.

## **Difficulties in carrying out duties or abiding by instructions**

2.10 If you have any concerns about your ability to carry out these duties and responsibilities, and to follow the instructions given, you should contact the Military Court Service as early as possible prior to starting your court duties. If you become concerned about this after the proceedings start you must inform the judge as soon as possible.

## **Complaints**

2.11 If you have a concern or complaint relating to your service as a member of the court which cannot be resolved with the judge or with the Court Officer during the course of your duty, you should write personally to the Director of the Military Court Service (who is the Court Administration Officer) at Wing Road, Ward Barracks, Bulford Camp SP4 9NA who will respond with advice, having consulted the Judge Advocate General if necessary. It is important that you do not raise such concerns or complaints with your chain of command as that might breach your oath.

## **Section 3: The Court Martial**

### **Types of Court Martial Proceedings**

3.1 For preliminary proceedings and proceedings at which a defendant is arraigned (required to plead), the judge sits alone. For trial proceedings and sentencing proceedings, the judge sits with a board of lay members. For variation proceedings (the “slip rule”), the judge sits with the board or with as many as are available and may sit alone if their attendance cannot be reasonably arranged.

### **Constitution of the Court Martial**

3.2 The constitution of the Court Martial for trial proceedings comprises the judge and the board of lay members. Boards usually comprise 3 or 5 members.

## **Waiting Member**



3.3 For each case at least one “waiting member” is nominated. They are available to take the place of a member (other than the President of the Board) who must stand down, for example following a successful objection, or because of illness, or because of knowing the defendant. It may be possible for a waiting member to be sworn in for proceedings as an “officer under instruction” if they wish. If so, the judge will allow the waiting member to sit in court during the hearing and retire with the judge and members, listening to their discussions. The waiting member takes no part in the discussions and the oath or affirmation which they take reflects their duty not to disclose the vote or opinion of any member of the board.

### **Role of Members**

3.4 Your role as a member of the Court Martial is similar – but not identical – to that of a juror in the Crown Court in England and Wales, as you and the other members are solely responsible for deciding the guilt or innocence of a defendant at contested trial proceedings, based on the evidence that is presented to you. The judge does not take part in your private deliberations, when deciding guilt or innocence.

### **Role of Judge Advocate**

3.5 The judge decides questions of law, practice and procedure and gives directions on these matters that are binding on you and all members of the board and parties to cases. It is important to listen carefully to any directions that the judge gives. Failure by you to follow a direction might jeopardise a trial, either causing the judge to order a retrial before a different board, or resulting in the terminating of proceedings, or the later quashing of a conviction which might be unfair to an alleged victim. In some cases, it could lead to a member being prosecuted.

### **Role of President of the Board**

3.6 The members of the Court Martial include a President of the Board. When some or all the members are Service personnel, the President of the Board is the senior officer present and is nominated in the notice from the Court Administration Officer specifying the members. If the members are all civilians, a foreperson is elected from among their number in the same way as the foreperson of a jury is elected by fellow jurors in the Crown Court.

### **Duties of the President of the Board**

3.7 The role of the President of the Board includes that of the foreperson of a jury but with additional functions. The President of the Board has the responsibility of securing the integrity of the deliberative process, by ensuring compliance by all members with this Guide. Despite the title of President of the Board, it is the Judge Advocate who always presides over the court. The following table sets out the functions and duties of the President of the Board when some or all the members are Service personnel, and of the foreperson when they are all civilian personnel.

### **Table 3.7**

<b>PRESIDENT OF THE BOARD</b>	<b>FOREPERSON OF THE BOARD</b>
All Service Members or Mixed	All Civilian Members
Chair the discussions during deliberations on the verdict	Chair the discussions during deliberations on the verdict
Ensure that all the members have an equal voice and vote	Ensure that all the members have an equal voice and vote
Protect the integrity of the deliberative process for the verdict by ensuring that the directions in this Guide are followed	Protect the integrity of the deliberative process for the verdict by ensuring that the directions in this Guide are followed
Ensures votes are cast by the junior member first and then in ascending order of seniority	Decides upon the order in which votes will be taken, save that the Foreman shall vote last
Announce each verdict in open court	Announce each verdict in open court
Sign the record of verdicts of the court	Sign the record of verdicts of the court
Participate in the deliberations on sentence along with the other members of the board, under the chair of the judge.	
Formally pronounce the sentence	
Sign the record of sentence of the court	
May make additional remarks relating to the case but only if permitted by the judge in advance.	

### **Service Dress and Uniforms**

3.8 The President of the Board is responsible for ensuring that military personnel in the court maintain a proper standard of dress and should address any comments about this via the judge. However, the President of the Board should not make any comment on the turn-out or dress of the defendant; any issues in relation to a serving defendant are handled by the Court Officer via the defendant's unit. In hot weather the President of the Board may permit shirt sleeve order to be worn.

### **Head-dress**

3.9 Head-dress is worn by all Service personnel in the courtroom at the beginning of the hearing until oaths are taken. The judge advocate gives instructions as to the removal and replacing of head-dress when required. Head-dress is replaced and worn during the announcement of verdicts, during the passing of sentences and at the conclusion of a case when the judge and board leave the courtroom. It is not necessary to replace and remove head-dress every time the court rises or resumes. The Court Orderly uniquely keeps head-dress on throughout proceedings.

### **Oaths and affirmations**

3.10 Before you sit as a member of the Court Martial in trial proceedings you are asked to take an oath (on the Bible or other holy book) or affirm in the manner set out in Annex A of this Guide.

### **Contact with people involved in a case which you are hearing**

3.11 If you have contact with anyone involved in the Court Martial such as the defendants, any witnesses, or the prosecution or defence legal representatives, you must inform the judge and Court Officer immediately. You should not initiate contact directly with the judge outside the courtroom. If there is a need to contact the judge, for example on administrative matters such as the days and times at which the court will sit, you should communicate through the Court Officer or the Court Orderly.

### **Duty not to discuss the case with others**

3.12 You must always adhere to the rule that you must not discuss any aspect of a case that you are hearing with anyone apart from the other members, and then only when all the members are together. This includes communicating by text or social media platform. If anyone asks you what is happening in the case, the simple answer is to tell them that the judge has ordered you not to talk about it until the case has ended.

### **Media**

3.13 If you are approached by the media to discuss a case you must make no comment, and you must report the approach to the Court Officer as soon as possible. The Court Officer will inform the judge.

### **Deciding the case only on evidence presented in court**

3.14 Your decision as to the guilt or innocence of a defendant must be based solely upon the evidence that is presented to you during the Court Martial proceedings.

You must not make any attempt to discover any details about the listed court cases prior to attending for duty, and after you are allocated to a court you must make no attempt to find out further information from any source, including the internet, about any case or the parties or witnesses involved. Failure to follow this direction has resulted in trials being unnecessarily terminated and Board members being prosecuted.

### **Asking questions of witnesses**

3.15 If you or your fellow members have any questions during the proceedings that you would like to have put to a witness (including the defendant, but only while they are giving evidence), you may do so only through the judge. You should write down the question and pass it to the judge via the Court Orderly. The judge decides whether it is appropriate for the question to be asked, and if so, asks it on your behalf. Bear in mind that the prosecution and defence are informed about the question.

### **Documents and mobile phones**

3.16 You must not bring into the courtroom a mobile telephone, own notebook, reference documents (except the Guides), or similar items. These items may be left in the members' retiring room. If the board has retired to deliberate you must ensure all mobile telephones are switched off. You must not remove any materials from the courtroom during the trial. At the end of the trial nothing may be removed from the courtroom except for those exhibits and notes which the judge permits to be taken to the members' retiring room during deliberations.

### **Deliberations on Verdict**

3.17 The law permits a board in the Court Martial to reach a verdict of guilt or innocence by a simple majority, but it is preferable and desirable for any verdicts to be unanimous if possible. In the rare case where there is an even number of members, if there is equality of votes, the court must acquit the defendant. Before the board retires to deliberate on the verdict, the judge will give you further directions on this point, as well as on other matters.

### **Consequences of decision during deliberations on the verdict**

3.18 The consequences of your decision are not relevant when you are deciding your verdict in a case. You should not discuss possible sentencing options or the implications of your verdict with anyone during the trial process.

### **Sentencing stage**

3.19 If a defendant pleads guilty to a charge, or the board decides on the evidence that the defendant is guilty of a charge, you will join with the judge to decide upon the appropriate sentence. The judge, who chairs the sentencing deliberations, provides guidance to the members about the range of sentencing options available in law, the applicable sentencing guidelines, the way aggravating and mitigating factors are considered, and the way those factors relate to the facts of the offence and the circumstances of the offender. Each member and the judge have a vote on sentence, and if there is an equality of votes the judge has a casting vote. At this stage the role of a member differs significantly from that of a juror in the Crown Court, who plays no part in sentencing. In cases with a civilian board, the members do not participate in the sentencing process.

### **Order of Voting**

3.20 When the members are Service personnel, if a vote is taken upon the verdict the President of the Board must invite the most junior member to vote first and proceed to take the remaining votes in reverse order of seniority. When voting on sentence the judge also takes the votes in reverse order of seniority and then votes after the members have cast their votes.

### **Newton Hearings**

3.21 Sometimes following a Guilty plea there is a dispute about the factual basis of the plea, which may affect sentence, and which needs to be resolved at a hearing (known as a Newton hearing) as part of the sentencing proceedings. Under these circumstances the judge and the members all take full part in the hearing to decide the issue. The finding is by most votes (judge and members combined). If there is equality of votes, the court must resolve the issue in favour of the offender.

## **After the case has ended**

3.22 Even after the court proceedings are concluded you remain bound by the oath or affirmation you took at the start of the trial not to disclose the vote or opinion of any member of the board. Whilst you may discuss with other people matters that were dealt with in open court and so are part of the public record, you must not discuss the deliberations as to the verdict or sentence with anyone unless you are required to do so in due course of law. You may also be directed by the judge that you cannot reveal the name of the complainant or any information which might lead to their identification. When discussing a case, particularly in an informal or social context, you must be careful not to cross the line about what you can and cannot talk about. Board members have been prosecuted in the Court Martial for doing this.

## **Section 4: The Summary Appeal Court (SAC)**

### **Origins and Purpose**

4.1 The SAC was established in 2000, after it was found that summary trial (Royal Navy) or summary dealing (Army/RAF) procedures were not of themselves ECHR compliant. It is the right to appeal to the SAC (which is an ECHR compliant court), together with the unfettered right to elect trial in the Court Martial, which makes the summary hearing process compliant. Everyone who is dealt with summarily has a right to appeal to the SAC, and a person may appeal against either the finding and punishment, or the punishment only.

### **Nature of Hearings**

4.2 An appeal against finding and punishment is an entire re-hearing of the facts, but in an appeal against punishment only the facts of the case are usually read to the court as undisputed. The court hears any submissions or evidence on mitigation from the appellant, before considering the punishment. On rare occasions in an appeal against punishment only, the appellant may accept that he committed the offence, but dispute the alleged facts as presented at the summary hearing. In such circumstances although the appeal is only in respect of punishment, there is held a 'Newton hearing'. A Newton hearing is a limited hearing of only the evidence relevant to the disputed facts of the offence, so that the court can decide upon which facts the punishment should be based.

### **Constitution**

4.3 The SAC comprises a Judge Advocate who is specified by the Judge Advocate General to conduct the hearing, and two "lay" members (referred to in this Guide as members) who are officers or warrant officers qualified and eligible to sit (see paragraph 2.4). There is no President of the Board in the SAC.

### **Role of Members**

4.4 The duties and responsibilities of the members of the SAC are set out below. Many of the paragraphs given above for the Court Martial apply equally to the SAC. The role of a member of the SAC is like that of a lay magistrate in England and Wales sitting with a judge in the Crown Court to hear an appeal from a Magistrates' Court. It is the judge who presides at

a hearing of the SAC, and it is important that members pay careful attention to any directions that the judge gives.

### **Appeals against Findings**

4.5 As mentioned, an appeal against finding (or a Newton hearing) is a fresh hearing of the relevant evidence. At the conclusion of an appeal against finding the court decides whether to confirm the original finding or quash that finding. On rare occasions another option may exist, that of substituting a different offence in place of the offence in the original finding, and the judge advises if this option is possible. If the court quashes a finding, it follows that the original punishment awarded is also quashed and the appellant is free to go. If the court confirms the finding of guilt, or substitutes a finding that a different offence is proved, the court then proceeds to consider the punishment. If there is a Newton hearing the court decides the facts upon which the punishment is to be based.

### **Appeals against Punishment Only**

4.6 If the appeal is against punishment only and the facts of the case are not disputed, they are presented to the court by the respondent (that is, the prosecution).

### **Consideration of Punishment**

4.7 Before the court decides upon the appropriate punishment, the respondent addresses the court on matters such as the appellants disciplinary and criminal record, his service history, any time already spent in custody, and the appellant has an opportunity to present matters in mitigation, including the evidence of character witnesses. There may also be reports on the appellant to consider. The court (that is, the judge and the two members together) retires to decide what punishment to award. The options are limited to confirming the original punishment or substituting a punishment that is no more severe than the original punishment awarded at the summary hearing.

### **Duty Not to Discuss Proceedings**

4.8 In accordance with the terms of the oath, you must not discuss the proceedings with anyone other than the judge and the other member, and even with them only when all three are together. Whilst most appeals are short enough to be concluded within one day, it is nevertheless important to remember this duty if there is an adjournment.

### **Decisions Based on Evidence Presented**

4.9 Decisions as to whether findings should be confirmed, substituted, or quashed, and the appropriate punishment, must be based upon the evidence that is presented to you during the SAC proceedings. It is a matter for the judge to decide what evidence is admissible and if any evidence is brought to your attention which should not have been because it is inappropriate or irrelevant to the matters in issue, the judge will instruct you to disregard it. It is important that all participants in the appeal see and hear the same evidence as that upon which you make your decision.

## **OATHS AND AFFIRMATIONS**

1. As a member of the Court Martial or the Summary Appeal Court you are required to swear an oath or affirm in the manner set out below.

### **PART 1 MANNER OF ADMINISTERING OATHS AND AFFIRMATIONS**

2. The person taking the oath shall hold the appropriate Holy Book in their uplifted hand and shall say, or repeat after the person administering it, the oath provided in Part 2 of this Annex for that category of person.

3. If any person to whom an oath is administered desires to swear in the form and way an oath is usually administered in Scotland, they may do so with uplifted hand and saying, or repeating after the person administering it, the Scottish oath provided in Part 3 of this Annex.

4. If none of the forms of oath provided in this Annex is appropriate to the religious beliefs of the person taking the oath, an oath may be administered in such a form and manner as the person taking the oath declares to be binding on their conscience in accordance with their religious beliefs.

5. A person making a solemn affirmation instead of taking an oath shall say or repeat after the person administering it the affirmation provided for in Part 4 of this Annex.

### **PART 2 FORM OF OATH**

#### **Member of the Court Martial or the Summary Appeal Court**

6. I swear by Almighty God that I will well and truly try the defendant(s)/appellant(s) 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/Summary Appeal Court, unless required to do so in due course of law.

#### **Person under instruction**

7. I swear by Almighty God that I will not on any account, at any time whatsoever, disclose the vote or opinion of any member of the Court Martial/Summary Appeal Court unless required to do so in due course of law.

### **PART 3 FORM OF SCOTTISH OATHS**

8. The form of Scottish oath shall in each case be the same as the form of oath set out above for the relevant category of person except that for the words:

“I swear by Almighty God...”

there shall be substituted the words:

“I swear by Almighty God and as I shall answer to God at the Great Day of Judgement...”.

#### **PART 4 FORM OF SOLEMN AFFIRMATION**

9. The form of affirmation shall in each case be the same as the form of oath set out above for the relevant category of person except that for the words:

“I swear by Almighty God...” there shall be substituted the words:

“I solemnly, sincerely and truly declare and affirm...”.