



JUDGE ADVOCATE GENERAL'S PRACTICE MEMORANDUM 10 Better Case Management in the Court Martial 2023

BCM(CM)23

Introduction

Better Case Management was introduced into the Service Justice System (SJS) in 2016. Experience since then has shown that in order to work effectively, it requires the support and engagement of judges, advocates, the Service Prosecuting Authority (SPA) and defence solicitors. Proactive communication between all parties, case ownership and proportionate file-building are the keys to success and are the main features of this revised Practice Memorandum. This Practice Memorandum identifies how those factors should operate in the Court Martial when the Director of Service Prosecutions brings a charge or charges against a person. It replaces any previous Practice Memoranda on this subject.

Whilst this memorandum comes into force on 1 June 2023, it should be accepted that it will take some time for procedures to be revised. Full compliance should be expected by 1 September 2023.

This Practice Memorandum should be reviewed annually.

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Judge Advocate General

1 June 2023

1 Parties' proactive duty of direct engagement

This is key to success and the duty to engage lies equally on prosecution and defence. Proactive communication is essential in relation to matters such as pleas to the charges on the charge sheet or alternative charges and areas where evidence can be agreed. A phone call or email can identify the real issues and reduce the need to obtain unnecessary evidence. "There's no challenge to the medical records, is there?" can mean a busy A&E doctor does not need to make a statement and the police do not need to spend time trying to take it.

The SJS is quite compact and getting in touch should be much easier than in the Civilian Justice System (CJS). If a party cannot contact the other side, they should make further enquiries rather than let the matter rest.

If an advocate or legal representative is going to be out of office for any length of time (such as when on leave), the appropriate message should be shown, with an alternative contact name, email address and phone number of a person who can help sort out any issues which cannot wait.

If a party fails repeatedly to respond to contact, the court should be notified. The Resident judge will consider whether the case should be listed for mention.

2 The Full Code Test applied by the Service Prosecuting Authority

The Full Code (FCT) is applied by the SPA as follows:

- when all outstanding reasonable lines of inquiry have been pursued; or
- prior to the investigation being completed, if the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the Full Code Test, whether in favour of or against a prosecution.

The Full Code Test applied by the SPA requires prosecutors to be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge and, if there is, whether a prosecution is required in the public (including the Service) interest.

3 Cases in which guilty pleas can reasonably be anticipated

The first court hearing in the Court Martial is the Plea and Trial Preparation Hearing (PTPH). There is no equivalent to the Magistrates' Court where guilty pleas may be indicated at an early stage in the proceedings. It is therefore very important that cases where guilty pleas can be anticipated are flagged up by defence and/or prosecution so they can proceed with due expedition to PTPH.

3.1 Prosecution Responsibility

There will be some cases where it is appropriate for the SPA to bring a charge prior to the investigation being completed. In those cases, the SPA should initially serve the material available to the prosecutor when making the FCT charging decision. Further evidence, if required, may be served prior to the PTPH and thereafter, in accordance with the directions of the Court.

In cases where the evidence reasonably suggests a likely guilty plea (such as when the defendant has admitted an offence during his interview), the prosecutor should seek to engage with the defendant's representatives to ascertain whether the defendant is proposing to enter an acceptable plea (or pleas). If agreement is reached, the defence should notify the Court that the case can be listed for a plea and sentence hearing using the form available on the Military Court Service [website](#).

3.2 Defence Responsibility

Defence representatives should inform the prosecution and Military Court Service (MCS) as soon as they have been instructed.

As soon as defence legal representatives are aware that any guilty pleas will be entered, they should engage with the SPA to establish whether the pleas are acceptable and any basis of plea is agreed. Any basis of plea should always be in writing.

If the defence consider that their client may plead guilty to different charges, they should engage and discuss with the SPA at the earliest opportunity and not leave the discussions to PTPH.

In cases where acceptable pleas are to be entered and any basis of plea is agreed, the defence should invite the court to list the case for plea and sentence rather than PTPH, by completing the appropriate form on the Military Court Service [website](#). A judge advocate will determine whether to list the case for plea and sentence and whether a Pre-Sentence report (PSR) is required. This procedure will enable the case to be dealt with at one hearing, reducing delay and court time.

3.3 At Court

Judge advocates will not expect to see “trial ready” prosecution papers in cases where guilty pleas can reasonably be anticipated. In such cases it is likely, for example, that uncontentious evidence such as continuity statements and full transcripts of interviews will not have formed part of the body of material on which the FCT was based.

If the anticipated guilty pleas are not entered at PTPH, the judge advocate will generally deal with the case as if it were a PTPH, arraign the defendant and make the usual staged directions. Where appropriate, they may allow time for further case preparation. Advocates will not be criticised by judge advocates when they have reasonably anticipated guilty pleas and tried to expedite a case.

3.4 Sentencing Hearings

If application has not been made for the case to be listed for plea and sentence, the judge advocate will consider at PTPH whether a PSR is required, and, if a Board of lay members is available, whether an oral report can be prepared by the Probation Service. Oral reports will not be produced in sex cases.

Prosecution advocates generally need not attend court in person and may attend sentencing hearings by video link without making an application to the court. Attendance in person will be appropriate for complex, serious or multi-handed cases, or if a defendant is not represented. When in doubt, the prosecutor should seek guidance from the court. If an advocate who is attending remotely intends to put material such as CCTV/BWV before the court they must make sure that a representative is in court and fully briefed on what they are required to do.

Defendants and their legal representatives should usually attend in person unless there is good reason not to, and application has been approved by the sentencing judge for attendance over video link. Attendance of the defendant over video link will not be appropriate where there is any possibility of a custodial sentence being imposed.

4 Not guilty cases

4.1 Prosecution Responsibility

As soon as the FCT is met, the SPA should direct the case for trial and provide the evidence which was available to the prosecutor when making the FCT charging decision. Prosecutors should not delay direction to obtain further evidence which can be served prior to PTPH or thereafter in the event of a not guilty plea(s). The Military Court Service will then list the case for PTPH within 42 calendar days (6 weeks).

In Full Code Test cases the prosecution should be willing to consent to the Stage 1 date being the date of PTPH, unless there is a clear reason justifying the need for a later Stage 1 date. Further evidence may be served during the period between direction and PTPH.

The prosecutor should complete the relevant parts of the BCM Form and send it to the defence and Military Court Service. Full contact details of all individuals shown on the form should be provided on the form (these may be added later but prior to PTPH).

If material required for Stage 1 has not been served, the judge advocate may make bespoke stage directions to progress the case.

4.2 Defence Responsibility

The PTPH will be listed not later than 42 days (6 weeks) after direction for trial. This period is 14 days longer than hitherto. It has been extended to give the prosecution more time to be in a position to consent to the Stage 1 date being the date of PTPH, and to allow time for the defendant to be allocated a Defendant's Assisting Officer (DAO) and, if they wish, obtain legal representation. If legal aid is sought, the defendant and DAO should make early application to the Armed Forces Criminal Legal Aid Authority (AFCLAA). Guidance is available in JSP 838 and the Judge Advocate General's Practice Memorandum No 8¹. The staff at AFCLAA are very helpful but there are forms to be completed and information about the defendant's financial circumstances to be provided. The defendant and DAO must tackle this task at an early stage or there will not be sufficient time for a legal representative to be instructed.

The court will expect a full conference with the defendant's legal advisor to be held in good time before PTPH. Such a conference will include:

- Explaining the allegations.
- Identifying the real issues in the case.
- Identifying any missing evidence/material or lines of enquiry which may have significance to the issues in the case
- Reviewing the adequacy of any disclosure management document and considering any reasonable lines of enquiry or data extraction issues of which the prosecution should be alerted²
- Reviewing any SFR1 served to identify whether it is accepted and if not what issue needs to be covered by an SFR2.
- Giving advice on plea and on credit for plea.

¹ <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judges/judge-advocate-general/>

² Extraction issues should be considered by reference to AG's Guidance on Disclosure 2022 Annex A on digital material and the CPS Guide on reasonable lines of enquiry and communications evidence July 2018 approved by the Court of Appeal in R v E [2018] EWCA Crim 2426 (pending a code of practice under s.42 PCS&C Act 2022)

The defence should complete the relevant sections of the BCM Form including all contact details and send to MCS and SPA. The form must be fully completed including a name and full contact details for all personnel identified on the form.

4.3 Joint Responsibility

The defence and prosecution should engage well before the day of the PTPH to review possible pleas, including to alternative offences, or other information required to ensure that the PTPH is effective. This is a joint responsibility, and one party should not wait for the other to make contact. Judge advocates will expect a report on what engagement has taken place between the parties and when it occurred.

5 Pre-PTPH review by judge advocates

Once the new digital case system is online (due 4 September 2023) Resident Judges will consider how best to provide an initial judicial look at all cases arriving in their courts.

6 The Plea and Trial Preparation Hearing (PTPH)

6.1 Ensuring the PTPH is effective The PTPH must be a robust hearing building on the parties' engagement prior to the hearing. The defendant will be arraigned unless there is good reason not to. The judge will actively and robustly manage the case and make appropriate directions, identifying where there are going to be guilty pleas to the existing or alternative charges and/or establishing the real trial issues where there are pleas of not guilty.

CCTV/BWV must be available and playable at the hearing.

Advocates at PTPH are expected to be entirely familiar with their case and instructions, regardless of whether they are instructed for trial. "It's not my case" is unlikely to get a warm reception. Within the hearing, the judge may delay arraignment and put the case back in the list so that they can be satisfied that there has been the opportunity for the defendant to be fully advised, to see any relevant multi-media material, and that appropriate engagement between the parties has taken place.

The hearing should not be adjourned because one party is not ready unless very good reason is provided. The hearing should take place, whether or not arraignment is appropriate, and directions given to progress the case. Failure to seek legal aid in sufficient time is usually not a good reason unless, for example, operational commitments have limited time for contact with AFCLAA. However, it is valuable to have a represented defendant and for the instructed advocates on either side to attend the PTPH, and courts should be willing to move the date within the time limits to allow for legal aid to be confirmed or for the instructed advocates to attend. The advocate seeking to move the case should ensure they have availability dates for all other advocates.

Where problems concerning legal aid are reported at PTPH, judge advocates should consider rising and allowing enquiries to be made with AFCLAA to see if issues can be resolved.

Applications for significant adjournments to obtain psychiatric, medical or other evidence should generally be refused and the case listed for PTPH so that proper directions and a trial timetable can be set to at least Stage 2 with, where necessary, a FCMH date. It is particularly important that cases where the defendant has psychiatric issues do not drift.

6.2 Conduct of PTPHs

Wherever possible, the Resident Judges will conduct PTPHs, in order to achieve a consistent approach.

6.3 Section 28 YJCEA cases – pre-recorded cross-examination

If the prosecution intends to apply for s.28 cross-examination of witnesses the written application must be served on the court no less than 5 working days before the hearing, and the PTPH should be given a time estimate of 45 minutes.

6.4 Timing of the PTPH

The PTPH should take place within 42 days (6 weeks) after the MCS receives notification of direction from the SPA.

6.5 Attendance at PTPH

In most cases attendance at PTPH can be by video link for advocates, defendant and DAO, provided:

- a. A full conference has been held between the defendant and their legal advisors, and
- b. Effective engagement has taken place between the prosecution and defence.

If either of these have not been achieved the court should be notified and direction of the Resident Judge sought.

Defendants and DAOs must attend either from a MOD establishment which has good internet connectivity or their legal representative's office/chambers. A computer must be used - a mobile phone is not acceptable. In appropriate cases application may be made in advance for attendance from another location.

In complex or multi-handed cases, the Resident Judge may direct that attendance at PTPH in person is required. If in doubt, the advice of the court should be sought.

If the defendant is known to be unrepresented at PTPH, the SPA may attend by video link, since it is possible the judge advocate will adjourn the case for the defendant to pursue an application for legal aid. If it is clear that the defendant intends to proceed without representation, SPA should attend subsequent hearings in person.

A PTPH conducted over video link is a court hearing and court dress/Service dress should be worn.

6.6 Completion of the PTPH Form

All sections of the form should be fully completed, including all contact details for all individuals shown on the form.

In order to assist with case progression, it is helpful if specific orders which can confidently be ruled out at PTPH are marked N/A by the parties for consideration by the judge advocate at the hearing.

The stage dates should be realistic and may be adjusted to suit the case and the trial date, thereby reducing the need for applications for extensions. Longer stage dates may be possible in a case which cannot be listed for some time, and shorter dates may be appropriate for simple cases which can be trial-ready more quickly.

In appropriate cases, prosecutors will be willing to consent to the PTPH date being the Stage 1 date, although they should not be required to do so. Likewise, the Stage 2 date should not be reduced below 28 days without consent.

6.7 Arraignment at PTPH

The defendant will generally be arraigned at PTPH. Arraignment should be noted on the court record and by advocates. If a defendant is not arraigned, this should be clearly noted by all parties, who have a duty to remind the court at subsequent hearings or trial that arraignment is outstanding. As stated above, if there is good reason not to arraign, for example, there is an issue on fitness to plead, abuse of process, or dismissal application, the PTPH should proceed and the judge advocate will give directions for the determination of such issues and the ultimate resolution of the case.

6.8 Procedure at PTPH

If a not guilty plea is entered at the PTPH the judge advocate will manage the case utilising the structure of the PTPH form, including:

- Setting a trial (or trial of issue) date.
- Establishing whether pleas to other charges may resolve the case without trial.
- Identifying the real issues for trial – “factual dispute” will not suffice.
- Confirming what matters are accepted – e.g. forensic evidence, evidence of injury, continuity.
- Reviewing any Disclosure Management Document (DMD) and the prosecution approach to disclosure and requiring the defence to identify any inadequacy in the DMD, consider with counsel any other reasonable lines of enquiry which are outstanding, and, in relation to digital devices or social media, work which is still required.
- Reviewing witness requirements in order to avoid witnesses being warned unnecessarily and completing the PTPH form accordingly. The OIC should not automatically be required to attend the trial but will be warned when their attendance is necessary.
- Giving orders as to whether witnesses may attend by video link in appropriate cases (e.g. experts or witnesses deployed overseas). NB this is a judicial decision. See also para 16 below.
- Making any directions for a witness summons or for Special Measures orders that do not require formal application or are agreed
- Providing a timetable with appropriate directions for the necessary pre-trial preparation using the four-stage structure– and marking as not applicable directions that clearly will not apply to the case.
- Determining what, if any, further hearings should be listed to ensure the proper management of the case.
- Making provision to resolve issues such as applications to dismiss, issues of fitness to be tried, and for a FCMH to be held, usually soon after Stage 3.
- Giving the defendant(s) appropriate warnings about the importance of the defence statement, and of the likely consequences of failing to attend the trial, as recorded on the form.
- In appropriate cases (e.g. lengthy, complex or multi-defendant trials) directing a draft opening note and a witness timetable for consideration at the FCMH.

7 Defence Statements

By the stage 2 date the defence must serve a defence statement or make application for an extension or serve notice that their client will not serve a defence statement and has been advised of the possible consequences.

The responsibility lies on the instructed defence solicitor or advocate to ensure compliance with the order for service of the Defence Statement. Whilst MCS will monitor compliance, it is important that a failure to serve a defence statement by Stage 2 is also highlighted by the SPA.

Non-compliance with the requirement to serve a Defence Statement can cause significant problems, particularly when a case is listed for trial soon after the final stage directions date, and if it occurs, it is essential that the court is notified immediately.

In addition to the defence statement, unless otherwise ordered, the defence must serve the defendant's final witness requirements on the prosecution with proper information about the issue on which the prosecution witness is required and estimates of the time a witness will be examined.

8 Witness Requirements and the Final Witness Table at Stage 2

Whilst experience has shown that time spent sorting out the real witness requirements at PTPH is well worth while, and in many cases they will not change subsequently, the PTPH will on occasion take place before the standard date for full service of the prosecution case (Stage 1). It follows that, unless the prosecution confirm at the PTPH that they have already served their full case, the defence final prosecution witness requirements cannot be provided at PTPH. Therefore, a defendant's final prosecution witness requirements (with considered estimates of the time required) must be confirmed at a later stage using the Final Witness Table. This is modelled on the Standard Witness Table in use in the Crown Court and should also be used to provide details of defence witnesses. Unless otherwise ordered this must be served by the defence on the prosecution at Stage 2. The standard order made at PTPH is for the provision of witness requirements by way of a Final Witness Table. Proper information about the issue on which the prosecution witness is required and estimates of the time a witness will be examined are also important to allow proper planning of the trial and the efficient use of court time.

9 Further Case Management Hearings (FCMHs)

Every case will be listed for FCMH soon after the Stage 3 date, and a date for the hearing will usually be identified at PTPH. Parties will usually be able to attend by video link. In appropriate cases (e.g. where it is clear that there will be no change of plea), the judge advocate may excuse the attendance of the defendant. Otherwise, defendants should attend by video link or in person as directed (in which case the defence advocate should usually also attend in person). The hearing will generally be held before the allocated trial judge.

At this hearing the judge advocate will consider case progression and trial readiness including:

- Identifying outstanding issues between the parties
- Ensuring the case cannot be resolved by appropriate guilty pleas
- Reviewing the witness requirements
- Reviewing the order of witnesses and time estimate
- Resolving outstanding legal arguments

During the period between PTPH and FCMH, parties should continue to engage together to progress the case and resolve issues. If obstacles are encountered, particularly if they might affect trial

readiness, the court should be informed and will endeavour to assist. Parties should not wait until FCMH to identify an issue which required earlier attention.

10 Trial Readiness Hearings and Certificates

A further trial readiness hearing should generally not be necessary. Unless the FCMH has been held relatively close to the trial date and it is clear that the case is trial-ready, trial readiness certificates will be required and the judge advocate will set a date for service or remind the advocates of the date which has been determined at PTPH.

11. Changes After FCMH

If witness requirements or the time estimate for the trial changes after FCMH (whether it is longer or shorter), the court must be informed or court time may be wasted.

12 Applications

12.1 Presumption that applications will be dealt with administratively

Many applications can be dealt with administratively without need for a hearing. The court will not readily list a case “for mention”. Where a party seeks a direction from the court (other than in cases where a standard form is provided), they should apply to the Military Court Service, copied to all parties, setting out the order sought and the reasons. If a hearing is sought, the reason why it is necessary must be given. Before making an application, a party should engage with the other affected parties to see if matters can be agreed – for example, when seeking a change in date for a hearing, the party making the application should establish suitable alternative dates for all sides.

12.2 Applications for further time – timetable extensions

Where a party seeks extra time to comply with an order, the applicant should propose not only a single extension but a fully revised timetable using the form available on the Military Court Service [website](#). Before making the application, the party should engage with other parties in good time before the expiry of the period to see if agreement to a revised timetable can be reached. An agreed application to vary a time limit which does not affect the date of any hearing or significantly affect the progress of the case is likely to be approved without a hearing, provided the court is promptly informed.

13 Case Progression and Compliance

All participants have a duty to prepare and conduct the case in accordance with the overriding objective and to inform the court and all parties of any significant failure to take any procedural step required by the Armed Forces (Court Martial) Rules, any practice direction or any direction of the court³.

Parties are expected to comply with the timetables set. If, exceptionally, an element required by a particular stage is not available that is not to be regarded as a reason for not serving the remainder.

Effective case progression is essential for BCM. The case progression officers for MCS, SPA and defence must be identified on the BCM Form.

³ Armed Forces (Court Martial) Rules 2009 rule 3B

MCS case progression officers will monitor case progression and alert the Resident Judge in all cases where there are failures to comply with Stage 2 and service of Certificates of Readiness, whether or not they are promised imminently.

A case may be listed for mention to investigate non-compliance and occasionally (e.g. where significant non-compliance has led to a break in fixture) a legal representative may be ordered to attend court in person and wasted costs considered.

Certificates of Readiness must be fully completed and identify any outstanding work.

14 Change of plea to guilty

Where a defendant awaiting trial has decided to enter acceptable guilty pleas the defence should inform the court and the SPA as soon as is practicable. Any basis of plea should be provided in writing. The defence should normally make application for the case to be listed for plea and sentence using the form available on the Military Court Service [website](#).

15 Police attendance at PTPH, other pre-trial hearings and trial

The police and SPA must ensure that the prosecution advocate at all hearings is able to contact a police representative who will be available to answer questions arising at the PTPH.

The court will not require the officer in the case (OIC) to attend PTPHs but it is often helpful, particularly in complex or serious cases, if OICs are able to attend by video link so they can be aware of matters discussed at the hearing and, if necessary, provide assistance to the court.

It can be helpful to have the OIC present at court for trial, but police time is valuable and an OIC should not be warned to attend by the defence as a matter of routine and only if they are likely to be required to give evidence. De-warning an OIC on the first day of trial is different from de-warning a local police officer in the civilian courts, and officers have been flown from the Falkland Islands in the past who have not been required to testify. Judge advocates will seek an explanation for the requirement of the OIC to attend. Application may be made for the OIC to attend over video link. OICs may be required to attend by prosecution advocates.

16 Witness attendance at trial

Application may be made at PTPH for a witness to attend trial over video link. If this is granted for a Service witness the default position is that the witness must give their evidence over video link using a computer (not tablet or mobile phone) from a MOD establishment which has good internet connectivity. In appropriate cases a party may apply for a witness to give evidence over video link from another location.

17 Ineffective trials

If a trial is not effective, a Cracked and Ineffective Trial Form must be completed identifying the reasons. Forms are required for all trials which become ineffective after the FCMH. Prosecution and Defence advocates must contribute so that the reasons are agreed and clearly identified and processes may be improved. The form will be provided by court staff and subsequently scrutinised by Resident Judges and Court Officers to identify any systemic issues.