



## JUDGE ADVOCATE GENERAL'S PRACTICE MEMORANDUM 11

### Procedure for Determining the Constitution of the Board in Cases Where a Defendant is a Civilian or Ex-Service Person

#### 1. INTRODUCTION AND SUMMARY

- 1.1 This guidance is issued pursuant to the decision of the Court Martial Appeal Court in [R v B \(2023\) EWCA Crim 1625](#), in which the Court determined that in cases where any defendant is not subject to Service law when their case is directed for trial by the Director of Service Prosecutions (the “commencement of proceedings<sup>1</sup>”), it is for a Judge Advocate to determine the constitution of the Board which will try the case and/or deal with sentencing proceedings.
- 1.2 In such cases, a Judge Advocate will determine whether the Board should comprise civilian members, Service members or a combination of Service and civilian members.
- 1.3 Persons subject to Service law at the time of direction will be tried by a Service board, irrespective of whether they have left the Services at the date of direction for trial, unless another defendant in the case was not subject to Service law at the time of direction. In such circumstances, they may be tried by a Service, civilian or mixed Board.
- 1.4 Persons subject to Service law at the time of direction will be sentenced by a Service Board unless they, or any other defendant who falls to be sentenced, are not subject to Service law when convicted. In such circumstances, they may be sentenced by a Service, civilian or mixed Board.
- 1.5 Members of the Reserve Forces within the provisions of section 367(2) Armed Forces Act 2006 are deemed to be subject to Service law.
- 1.6 References to civilian defendants are to civilian offenders for the purposes of Part 1 of Schedule 3 to the Armed Forces Act 2006 (the Act).

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<sup>1</sup> AF(CM)R 09 r33

- 1.7 References to ex-service defendants are to ex-servicemen etc for the purposes of Part 2 of Schedule 3 to the Act.

## **2. RELEVANT ARMED FORCES (COURT MARTIAL) RULES**

### ***Rule 27 Proceedings without lay members***

*(1) For proceedings to which this rule applies, there shall be no lay members.*

*(2) ...*

*(3) This rule applies to sentencing proceedings where every offender who falls to be sentenced is either—*

- (a) a civilian offender for the purposes of Part 1 of Schedule 3 to the 2006 Act; or*
- (b) an offender to whom Part 2 of that Schedule (ex-servicemen etc) applies, and who was convicted of every offence for which he falls to be sentenced either—*
  - (i) in trial proceedings for which no lay member was subject to service law; or*
  - (ii) on a guilty plea, where the court administration officer had previously notified him in writing that, if trial proceedings were required, none of the lay members would be subject to service law.*

### ***Rule 33 Civilians***

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

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

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

*(2) ...*

*(3)...*

*(4)...*

*(5) This rule applies to—*

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

*(d) appellate proceedings; and*

*(e) activation proceedings with lay members, if the offender is not subject to service law at the commencement of the proceedings.*

(6) ...

### **3. PROCEDURE**

#### **Military Court Service**

- 3.1 On receipt of a case where paragraph 1.1 applies, the Military Court Service will compile the following information and upload it to Case Center:
- a. Notification that para 1.1 may apply.
  - b. Whether, in the view of the MCS, the defendant is a civilian or ex-Service defendant.
  - c. If an ex-Service person, the date on which the defendant's service ceased.
  - d. The status of any other defendants (eg Serving, ex-Service, civilian).
  - e. The date of the alleged offence(s).
  - f. Any other relevant information.

#### **Judge Advocate**

- 3.2 The Judge Advocate specified to hear the case at the Plea and Trial Preparation Hearing (PTPH) will then consider the circumstances of the case. There will be cases in which the Judge Advocate can reach a provisional decision, for example for a civilian board to try a historic allegation of conduct decades before, or for a Service board to try a defendant in a case with a strong military context, who was discharged shortly before the case was directed for trial. In such cases, the Judge Advocate will upload that provisional decision to Case Center and invite submissions. Where submissions from the parties support the Judge Advocate's provisional view, the Judge Advocate may then give a direction to the Court Administration Officer (CAO) on the constitution of the Board. Alternatively, the issue can be set down for final determination at the PTPH.
- 3.3 In other cases, the Judge Advocate may direct the parties to upload submissions in writing to Case Center prior to the PTPH and the matter will be considered at the PTPH.
- 3.4 In cases where the defendant is unrepresented, or where representation has been granted shortly before PTPH, it may be necessary to raise the issue at PTPH and, depending on the circumstances, adjourn the hearing to allow legal advice to be sought.

### **Plea and Trial Preparation Hearing (PTPH)**

- 3.5 It is important to note that in order to engage the provisions of Rule 27 of the Armed Forces (Court Martial) Rules 2009, in the case of an ex-Service defendant, the decision on Board composition must be made prior to arraignment.
- 3.6 It will usually be possible to hear submissions and make the decision during the PTPH, but in cases where the issue may be better determined by the trial judge (if the trial judge is not the judge conducting the PTPH) or further time is required, the Judge Advocate should adjourn both the determination of the issue and, where there is an ex-Service defendant, arraignment to a further hearing before the allocated trial judge, and proceed with the remainder of the PTPH.
- 3.7 The decision on constitution may be appealed under Rule 50 of the Armed Forces (Court Martial) Rules 2009, if made in preliminary proceedings.

### **Court Administration Officer (CAO)**

- 3.8 Once a Judge Advocate has ruled on Board constitution, the Court Administration Officer must constitute the Board in accordance with the Judge Advocate's ruling. Specification of individual Board members is a matter for the CAO and may not be the subject of any order of a Judge Advocate (Rule 15(1) Armed Forces (Court Martial) Rules 2009).
- 3.9 Where the case involves a civilian defendant or the Judge Advocate determines that an ex-Service defendant should be tried by a civilian Board, Rule 27 of the Armed Forces (Court Martial) Rules 2009 deals with the requirement for a Board in sentencing proceedings.
- 3.10 In the case of an ex-Service defendant, the CAO should, prior to arraignment, serve notification in writing on them that if they plead guilty, and they fall to be sentenced alone or with other civilian or ex-Service defendants coming within Rule 27, they will be sentenced by the Judge Advocate alone and not by the Judge Advocate and Board members. No notification is required for civilian defendants, although civilian defendants falling to be sentenced with ex-Service defendants may be affected by non-compliance with Rule 27.

### **Proceedings held over video link and unrepresented defendants**

- 3.11 Where an ex-Service defendant is appearing over video link and is legally represented, they can be notified during the hearing by uploading the notification (which should have been prepared in advance) to Case Center.
- 3.12 Where an ex-Service defendant is unrepresented and not attending in person, suitable arrangements should be made in advance to provide the written notification once the judicial decision is made. If the defendant is present in court, the notification can be handed to them. This must take place before arraignment.

- 3.13 In most cases it will be possible to continue with arraignment and the remainder of the PTPH, but if further time is required, the hearing may be adjourned.

#### **4. CONSEQUENCES OF NON-COMPLIANCE WITH RULE 27**

##### **Civilian defendants**

- 4.1 The notification requirement in Rule 27 does not apply to sentencing proceedings for civilians. Any civilian defendant who falls to be sentenced alone or with other civilian or ex-Service defendant who come within Rule 27, and who has pleaded guilty or has been convicted by a civilian Board, will be sentenced by the Judge Advocate sitting alone.

##### **Ex-Service defendants**

- 4.2 Rule 27 provides that an ex-Service defendant who falls to be sentenced either alone or with other ex-Service defendants who come within Rule 27, or with civilian defendants, and who has either pleaded not guilty and been convicted by a civilian Board, or pleaded guilty and received prior notification from the CAO, will be sentenced by a Judge Advocate sitting alone.
- 4.3 If notification under r27(3)(b)(ii) above was required but not provided, the Judge Advocate will sentence with a Board of civilian or Service members. Matters set out in this document will assist the Judge Advocate in determining the appropriate constitution of the Board.

#### **5. SENTENCING PROCEEDINGS WHERE ANY DEFENDANT WHO FALLS TO BE SENTENCED IS NOT SUBJECT TO SERVICE LAW WHEN CONVICTED**

- 5.1 Rule 33 also applies to sentencing proceedings where a defendant who falls to be sentenced was not subject to Service law when convicted. See r33(5)(b). This could be the case, for example, where a defendant was subject to Service law at the time of direction, and therefore subject to r33(5)(a), but who subsequently left the Services, thereby becoming an ex-Service defendant. In the event of a not guilty plea at PTPH, the Judge Advocate would direct a Service Board to try the case, in accordance with R v B. If the defendant was convicted at trial, the same Board would proceed to sentence with the Judge Advocate.
- 5.2 If, however, the defendant pleaded guilty, r33(5)(b) is engaged and the defendant may be sentenced by a Service, civilian or mixed Board.
- 5.3 It should be noted that r33(5)(b) applies when any defendant who falls to be sentenced is not subject to Service law when convicted.

## **6. FACTORS WHICH MAY BE CONSIDERED WHEN DETERMINING THE CONSTITUTION OF A BOARD**

6.1 Factors which may be considered in determining the constitution of the Board include:

### **6.1.1 Jurisdiction**

If the alleged offence was committed abroad, jurisdiction to hear the case in the UK may be restricted to the Court Martial. A range of offences which are committed abroad can be tried in the civilian courts. These are listed on the CPS [website](#).

### **6.1.2 Time**

- How long prior to direction of the case did the alleged offence(s) occur?
- How long prior to direction of the case did defendant leave the Services.

The shorter either of these periods, the more likely that a Service Board will be required. As a guide, a civilian Board is likely to be appropriate in cases where at least five years has elapsed between the defendant leaving the Services and the case being directed.

### **6.1.3 Investigation**

When did the investigation begin? If the investigation began whilst the defendant was serving, this is likely to indicate that a Service board is appropriate.

### **6.1.4 Service context**

How strong is the Service context? The stronger the Service context, the more likely that a Service Board will be required. A case committed against Service personnel on Service premises has a stronger Service context than an offence committed against a civilian in a civilian environment. A case of dishonesty involving Service allowances (eg Continuation of Education Allowance) or a fraud on the Ministry of Defence has a stronger Service context than an allegation of dishonesty involving a civilian organisation (eg eBay). A case involving Service operational procedures (eg live firing exercises, navigation incidents, incidents during military training) may have a strong Service context.

### **6.1.5 Involvement of other Service personnel as witnesses**

Are other Service personnel involved, for example as witnesses of fact? If so, and particularly if they are still serving, a Service board may be more appropriate.

### **6.1.6 Service Personnel as co-defendants with civilian or ex-Service defendants**

If one or more co-defendants is subject to Service law when the case was directed, there is a strong presumption that the Board will include Service members. The

number of Service members required will depend on the circumstances of the case and factors identified above.