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BARRISTERS

# COURTS MARTIAL ALL CHANGE

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## Courts Martial: All Change

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On the 31st October 2009 the Armed Forces Act 2006 (AFA)<sup>1</sup> and the Armed Forces (Court Martial) Rules 2009<sup>2</sup> (AF(CM)R 2009) will come into force. The advent of the AFA reflects the increased willingness of the service justice system to be more ‘in tune’ with the civilian criminal justice system. In the past, a number of defendants have sought to dispute, with varying degrees of success, the legality of the service justice system in both the domestic courts and the European Court of Human Rights. Their principal contention was that the system, or aspects of it, violated Article 6 (*the right to a fair trial*) of the European Convention of Human Rights. The court martial justice system responded to these legal challenges by making largely cosmetic modifications to the area under legal attack<sup>3</sup>. The introduction of the AFA, however, will herald a more ‘root and branch’ overhaul of the service justice system and will build upon the recent legal and administrative moves to civilianise its system.

### Administrative changes

The number of UK courts has reduced in number. There are now purpose built two-court centres in Catterick, Colchester, Bulford, Aldergrove (Northern Ireland) and a one-court centre in Portsmouth<sup>4</sup>. All the former courts in Germany will have closed by September 2009 and will be replaced by a new two-court centre in Sennelager<sup>5</sup>; there is also a court centre in Cyprus<sup>6</sup>. Each court centre has live link facilities, a dedicated staff including a Court Officer, and the aspiration of the Judge Advocates Department is that each centre will have its own resident Judge Advocate. A Judge Advocate, sitting alone, can now handle an increased amount of the court business including preliminary hearings (which deal with arraignment and plea and case management issues), matters of law, sentencing civilians and custody applications.

### Structure

Currently each Service is governed by its own Act, its own rules and its own Prosecuting Authority<sup>7</sup>. The AFA introduces one Act, one harmonised set of rules and one unified Service Prosecution Authority that will govern all the Services. This standardization of the administration of justice will remove differences that previously existed between the Services. As the law stands, distinctions exist between different types of court, such as District, General and Field General<sup>8</sup> and the courts martial are ‘ad hoc’- surviving only for the duration of each case. Under the AFA, the court martial will be given permanence and will be able to sit in any place inside or outside

<sup>1</sup> Provisions concerning complaints, the Director of Service Prosecutions and Service Inquiries are already implemented.

<sup>2</sup> The AF(CM)R 2009 is one of 59 Statutory Instruments that are needed to bring the AFA 2006 into force.

<sup>3</sup> Many of the legal challenges are detailed in ‘Two swords and two Standards’ by Ann Lyon [2005] Crim L.R. 850 and ‘The Armed Forces Act 2006 – Civilianising Military Justice’ by David Richards [2008] Crim L. R 191.

<sup>4</sup> Naval cases are still predominantly dealt with at Portsmouth. There are overflow courts at Faslane and Plymouth.

<sup>5</sup> Sennelager lies 5 kms north of Paderborn in Germany. The new Court Martial Centre will be officially opened in the first week of September 2009.

<sup>6</sup> Overseas, although Cyprus and Germany have their own centres, courts can be set up as and where needed. In recent years lengthy trials have taken in place in Belize and Brunei.

<sup>7</sup> The Army Act 1955, Naval Discipline Act 1957 and the Air Force Act 1955 provided for the discipline and making of rules for their respective service.

<sup>8</sup> In the Army and RAF.

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the UK (s. 154). It will not be dissolved at the conclusion of each case and convening orders will no longer be needed to bring the court into existence. The distinctions between the types of court will be abolished. There will be one court and the number of lay members<sup>9</sup> required on the Board will vary depending on the seriousness of the case (s. 155)<sup>10</sup>. The position of Director of Service Prosecutions (DSP) has been created<sup>11</sup> and the DSP is in charge of the unified Service Prosecution Authority (SPA)<sup>12</sup>. Both the Summary Appeal Court (SAC), which hears appeals from summary findings or punishments (s. 140), and the Standing Civilian Court (SCC), which deals with civilians who commit service offences outside the British Islands (s. 277), will continue to be permanent. Under the AFA, there will be a number of title changes: The Unit Defending Officer will be known as the Defendant's Assisting Officer (DAO) and the Court Orderly as the Court Usher; the Standing Civilian Court and the Courts-Martial Appeal Court will become the Service Civilian Court (s. 51) and the Court Martial Appeal Court (s. 272) respectively.

### Jurisdiction

Under the AFA, the court-martial will have the jurisdiction to try any service offence (s. 50) committed by any member of the regular forces and, in more limited circumstances, of the reserve forces (ss. 367-369). The court-martial will have jurisdiction to try civilians who are subject to 'service discipline' (s. 370) and this will include offences committed abroad<sup>13</sup>. The 'service discipline' criterion, to establish service jurisdiction over civilians, will replace the previous one of 'active service'.

### The Commanding Officer (CO)

The CO at a summary hearing has the power to deal with less serious offences. Under the AFA, he will be given greater powers of punishment; more offences will qualify for summary disposal (ss. 53-4)<sup>14</sup>; he will need to provide detailed reasons for his sentence (s. 252, s. 253); and he will have increased powers of delegation. It will be compulsory for a CO to take into account when the accused admitted the offence (or indicated such an intention) in determining the reduction for a guilty plea (s.239). The CO will be required to notify the accused of the number of days of time spent in service custody that will count towards his sentence of detention (s. 246). His powers of detention will increase to 90 days<sup>15</sup> upon the grant of extended powers by higher authority (s.133). It will be possible to suspend detention for between three to twelve months (s. 190)<sup>16</sup> and activation

<sup>9</sup> Also known as Board members.

<sup>10</sup> The number is between 3-5 but there is power to have additional members in longer trials. s155(2).

<sup>11</sup> s364 AFA.

<sup>12</sup> Bruce Houlder QC was appointed DSP from 1/1/09.

<sup>13</sup> They are tried by the Service Civilian Court. The Judge Advocate sits alone unless the service offence is indictable only. s51(3)(a) and see s51(3) (b)-(d), (6). When lay members are required to try a civilian defendant, who is not an ex-service person, the jury should be entirely civilian.

<sup>14</sup> In respect of the Navy, however, there are now fewer summary offences and no power of dismissal.

<sup>15</sup> The previous maximum for the Army and RAF was 60 days and 90 days for the Navy.

<sup>16</sup> The power to suspend detention was available to the Navy under s90 Naval Discipline Act 1957.

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will be by the commission of a further service charge or a conviction in a civilian court<sup>17</sup>. The CO will have the power to impose a supervision and punishment order (s. 132), a service compensation order up to £1000 (s.137) and there will be new types of restrictions of privileges (which are not postponed pending appeal). New safeguards will exist to allow for summary findings and punishments to be reviewed by the Defence Council and referred to the Summary Appeal Court (s. 152).

### Police Powers

The AFA will introduce new powers of arrest, search, entry and seizure for the service police that will reflect in large measure the powers of the civilian police (ss. 67-97). An important change will be seen in the power of arrest. At present, under the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957<sup>18</sup>, a power of arrest only exists if an offence is being committed or if reasonable grounds for suspicion exist that an offence has been committed. Under the AFA, the service police will be able to arrest a person in anticipation of the commission of a service offence providing their suspicion is reasonable (s. 69); they will also have power to arrest an officer (without seeking permission) and a civilian subject to Service Discipline (s. 67). The powers of the Service Police will be set out in the Service Police Codes of Practice and the Manual of Service Law.<sup>19</sup>

### Proceedings

On 1st January 2008 procedures and notice periods were introduced under the Court Martial Rules (CMR) 2007 in respect of all Services for the admission of bad character<sup>20</sup>, hearsay<sup>21</sup> and offences being taken into consideration<sup>22</sup>. Disclosure was brought into line with the Criminal Procedure and Investigations Act 1996<sup>23</sup> and, significantly, defence case statements were required. More changes will occur from 31st October 2009. Statutory provision will exist for a defendant to be convicted of a lesser offence (s. 161(3) without the need to separately reflect that offence as a charge on the charge sheet<sup>24</sup>. The AF(CM)R 2009 rules will provide for proceedings to be in the absence of the defendant<sup>25</sup>, a charge to be left to lie on the file<sup>26</sup>, a sentence to be varied under the 'slip rule'<sup>27</sup> and, in order to meet the ever-changing needs of the forces across the world<sup>28</sup>, the Judge Advocate will have the discretion to direct any person to attend any proceedings by live link<sup>29</sup>. Section 309 AFA will make provision for a person to be dealt with for contempt of court with a power to commit the contemnor to service custody for a maximum of 28 days and / or impose a fine not exceeding

<sup>17</sup> The CO cannot activate any suspended sentence imposed by the court-martial.

<sup>18</sup> S. 74 Army Act 1955; Air Force Act 1955; s45 Naval Discipline Act 1957

<sup>19</sup> For details of the new powers of entry, search and seizure, see Richards [2008] Crim L.R 191.

<sup>20</sup> CMR 2007 rule 30 Navy; CMR 2007 Rule 33 Army and RAF.

<sup>21</sup> CMR 2007 Rule s31 Navy, CMR 2007 Rule 34 Army and RAF.

<sup>22</sup> CMR 2007 rule 76 Navy, CMR 2007 rule 79 Army and RAF.

<sup>23</sup> The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2008.

<sup>24</sup> CMR 2007 Navy; CMR 2007 Army and RAF.

<sup>25</sup> AF(CM)R 2009 rule 19 (save for arraignment)

<sup>26</sup> AF(CM)R 2009 rule 57.

<sup>27</sup> AF(CM)R 2009 118. Although the same lay members should be present for the variation application with a Judge

Advocate, he can sit alone. Lay members can attend via live link AF(CM)R 2009 Rules 121 and 18.

<sup>28</sup> This rule overcomes any arguable statutory restrictions relating to live links in the same country.

<sup>29</sup> AF (CM)R rule 18.

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level 4<sup>30</sup>. The current power of the Army and RAF prosecuting authorities to examine a witness on oath at a formal preliminary examination (FPE) before charge will no longer exist beyond the 30th October 2009.

### Sentencing

At present the court imposes one global sentence irrespective of the number of charges and there is no breakdown of the sentence. Under the AFA, to reflect the civilian system, a separate sentence will be passed in respect of each offence on which the defendant is convicted (s. 255). Where a defendant elects for a court martial trial (s. 129), instead of a hearing before a CO, the court will still impose a global sentence for multiple charges<sup>31</sup>; and the powers of the court will still be limited to those of the CO (s. 165). Significantly, there is currently no power to impose an indeterminate or extended sentence regardless of how 'dangerous' a service defendant is assessed to be. This lacuna is addressed by s. 219-224 of the AFA that incorporates the 'dangerousness provisions' of the Criminal Justice Act 2003. Further developments under the AFA will include the introduction of mandatory sentences for firearms offences (s. 227), a third domestic burglary (s. 226) and a third Class A drug trafficking offence (s. 225). Bearing in mind the Army's selection criteria and intolerant attitude to drug abuse, the actual use of such mandatory sentences for burglars and drug dealers will be rare. Other sentences soon to be available under the AFA will include a suspended sentence order (s. 200) and a detention and training order (s. 211). A new species of community sentence tailored towards the needs of the armed forces will be at the court's disposal. The service supervision and punishment order (SSPO) will be made for 30, 60 or 90 days and the defendant will forfeit one-sixth of his gross pay for its duration. Required activities will include extra work / drill and not to use leave entitlement (s. 173). The existing service community order, which was only available to civilians, will be extended to dismissed service personnel (s. 178). The extension to service personnel will raise practical difficulties as the implementation of community requirements upon a defendant, who is dismissed from the services and returning to the UK from abroad, will be onerous and in some circumstances unworkable. Under the AFA an ancillary order will exist to prohibit an acquitted or convicted defendant from harassing another<sup>32</sup>.

31 AF(CM)r 2009 rules 160-161

32 A service restraining order which has a maximum of 5 years: s. 229.

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The generosity and security of the service pension is often an important reason for a person to enlist into the Armed Forces and dismissal will adversely affect pension rights. The affects of dismissal from the service upon a member who has accrued a sizeable pension ‘pot’ over a number of years will be devastating and, often, disproportionate to his criminal offending. Prior to the AFA, dismissal automatically followed any sentence of imprisonment<sup>33</sup>. From 31st October 2009 dismissal from the services will be a separate sentencing consideration and this should reduce the number of unfair outcomes.

### Reviews

Currently, the defendant can submit grounds of appeal (a petition)<sup>34</sup> to the reviewing authority of his respective Service to ‘review’ his conviction and/ or sentence before applying for leave to appeal to the Courts-Martial Appeal Court. This review still occurs when a petitioner fails to lodge a petition<sup>35</sup>. The reviewing authority acts with the benefit of advice from a Judge Advocate and has power to, inter alia, quash a conviction or impose a sentence that is not more severe than the original sentence. Under the AFA the review stage will no longer exist. Although the review stage can be seen as anachronistic with no civilian equivalent, the defence will rue its demise as it not only provided the defendant with an automatic safeguard, it also gave the defence an ‘extra’ appeal before any application to the Courts-Martial Appeal Court. Under the AFA there will be power to refer an unduly lenient sentence to the Court-Martial Appeal Court (s. 273).

### Transitional changes

The transitional provisions in the new court martial rules presume that, if a defendant is arraigned prior to the implementation of the AFA 2006, the case will be also be concluded prior to its implementation. An assize period between Monday 19th – Friday 30th October 2009 will be provided, in the UK and abroad, to allow for a two-week ‘safety period’ when Judge Advocates, courts<sup>36</sup> and Boards will be available to ‘mop up’ outstanding court martial business and no fresh trials or sentence work will be listed during that ‘safety period’. Since Monday 13th July 2009 defendants are not being arraigned at the preliminary hearing but intended pleas are being indicated. Defendants will only be subsequently arraigned if their case will be safely completed prior to the implementation of the AFA on 31/10/09; otherwise cases are being adjourned for arraignment post implementation of the AFA<sup>37</sup>.

<sup>33</sup> A sentence of imprisonment is served in a civilian prison.

<sup>34</sup> CMR 2007 rule 88 Army and Air Force; CMR 2007 rule 88 Navy.

<sup>35</sup> The review shall begin as soon as practicable after the end of the period within which a petition may be presented: s70 Naval Discipline Act 1957, s113 Army Act and s113 Royal Air force Act 1955.

<sup>36</sup> In the UK and abroad.

<sup>37</sup> This information was derived from guidance issued jointly by the Office of the Judge Advocate General and the Military Court Service on 1st April 2009.

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### The Future...

The clear ambition of the Service justice system is to use its best endeavours to mirror the civilian criminal justice system and that this will be a continuing process. This declaration of intent is enshrined in rule 26 of the AF(CM)R 2009 which states, inter alia, that in circumstances not provided for by the AFA ‘the Judge Advocate must ensure that proceedings are conducted in such a way as...most closely resemble the way in which comparable proceedings of the Crown Court would be conducted in comparable circumstances.’

Disparities between the service justice system and the civilian criminal justice system will continue to be ironed out not just through Acts and rules but also through judicial guidance. A recent example is the Goodyear indication. Since Goodyear [2005] EWCA Crim 888, a civilian defence lawyer has been able to ask for a binding indication of the maximum sentence his lay client would receive for a guilty plea at that time. This valuable defence tool was not available in a court martial until a few months ago because Judge Advocates were reluctant to bind the hands of the lay members who, in a court martial, are not only judges of fact, but also, they each have a vote when deciding upon sentence. Following guidance, however, from the Judge Advocate General<sup>38</sup>, Goodyear indications are now available. The reasoning for this *volte-face* can be found in s. 84B Army Act 1955 (3) and (4) which provides that rulings on questions of law shall be given by the Judge Advocate and are binding on the court<sup>39</sup>. As Goodyear indications are binding as to the range/type of sentence available, these are questions of law to be determined by the Judge Advocate.

Post the implementation of the AFA, areas of potential unfairness will survive in the service justice system. These areas include the conviction of a service defendant by a simple majority of 2-1 or 3-2<sup>40</sup>, service defendants being tried by lay members who are not their peers<sup>41</sup>; the ability of the lay members to outvote a Judge Advocate when deciding sentence (s.160); and the absence of any proper ‘legal’ training for the lay members. It is of concern to note that lay members, with virtually no experience of sentencing, will each have a vote in deciding the appropriate sentence in complex and / or serious cases that could engage the dangerousness provisions. Furthermore they could, if so inclined, outvote a full time and experienced Judge Advocate. If the Judge Advocate sat alone to determine sentence, as in the civilian criminal justice system, concerns of sentencing unfairness will disappear.

38 His Honour Judge Blackett.

39 This section will be s159 AFA.

40 This equates to being convicted even though 33% and 40% respectively of a civilian jury acquit you.

41 The lay members are predominantly drawn from the officer ranks.

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Although potential areas of unfairness still exist, the survival of the service justice system is not predicated upon its adoption of the civilian criminal justice system, and its obvious willingness to absorb and assimilate large parts of civilian law is a welcome dawn!

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