

The Commonwealth Model Law on Military Justice for Smaller Armed Forces



The Commonwealth

Office of Civil and
Criminal Justice Reform

Commonwealth Model Law on Military Justice for Smaller Armed Forces



The Commonwealth

The Model Law neither interprets nor clarifies international norms, standards or laws, and recognises that a member country's endorsement of the Model Law imposes no obligation or commitment, legal or otherwise, on the member country or any other entity.

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Preamble

- i. Emphasising our commitment to the values and principles set out in the Commonwealth Charter and other Commonwealth statements, including the Singapore Declaration of Commonwealth Principles, the Harare Commonwealth Declaration, the Millbrook Action Programme, the Latimer House Principles, and the Trinidad and Tobago Affirmation of Commonwealth Values and Principles.
- ii. Reaffirming our core Commonwealth principles of the rule of law, separation of powers, and human rights.
- iii. Reiterating that an independent, effective, and competent legal system is integral to upholding the rule of law.
- iv. Underscoring our support for an independent, impartial, and honest judiciary.
- v. Recognising the unique roles of military justice systems to reflect the nature of armed forces defending their nations and international security, to support discipline, operational effectiveness and morale of the armed forces, to extend the laws of the country to personnel outside the relevant country's general jurisdiction, and to ensure accountability and compliance with international and domestic law.
- vi. Emphasising the need to ensure that military justice systems form an integral part of the general justice and judicial systems that are established under the authority of a constitution or statute, and reflect international norms and standards, including international humanitarian law and international human rights law, to guarantee the proper administration of justice, due process of law, and equal access to justice.
- vii. Recognising the particular circumstances and needs of smaller armed forces, and desiring to support member countries in developing, reforming, or strengthening their military justice legislation through a model that is practical, fit for purpose, and aligned with Commonwealth values and international standards.
- viii. Affirming that military justice legislation should, where appropriate, strive to be consistent with the Commonwealth Military Justice Principles, which serve as a benchmark for key standards and safeguards applicable to military justice systems across the Commonwealth.
- ix. Welcoming these Commonwealth Model Laws for Smaller Armed Forces as a non-binding and aspirational resource, intended to guide and inform national legislative development, and noting that their use imposes no obligation or commitment, legal or otherwise, on any Commonwealth member country or other entity.

Part 1 – Jurisdiction

5. Members of the Defence Force¹

The following members of the Defence Force² are subject to this Act:

- (a) All members of the Regular Force.
- (b) All members of the Reserve Force who for the time being are –
 - (i) undertaking or required to undertake any military training or duty, whether in uniform or not, or
 - (ii) called out under any enactment in aid of the civil power, or
 - (iii) called out under any enactment to render assistance in a disaster.

6. Members of the Defence Force attached to the force of another country remain subject to this Act

A member of the Defence Force who is temporarily attached to the armed forces of another country pursuant to [the relevant visiting forces legislation or equivalent], or who is a member of a force established by the United Nations or another international organisation, does not cease to be subject to this Act by reason only of the member being so temporarily attached.

7. Members of other armed forces attached to the Defence Force

A member of the armed forces of another country who is temporarily attached to the Defence Force under [the relevant visiting forces legislation or equivalent] is, subject to the provisions of that Act and any express provision in the law of that other country to the contrary, subject to this Act.

8. Prisoners of war³

- (1) Subject to the provisions of the [Act incorporating the Geneva Conventions of 1949] and of sub-section (2), a prisoner of war⁴ in the custody of any part of the Defence Force is subject to this Act.⁵
- (2) The following sections of this Act do not apply to prisoners of war:
 - (a) [offences relating to cowardly behaviour]
 - (b) [offences in relation to capture by the enemy]
 - (c) [offences penalising any threat of force against a person who is on guard duty or watch]

¹ This draft omits the first four sections of the final Act to be enacted by a country adopting the Model Law. Those sections would provide for the Act's short title and commencement, interpretation, incorporation of principles of civil law, and extraterritorial operation. Model provisions from those first four sections are described in footnotes to the Model Law, where necessary.

² The terms 'Defence Force', 'Regular Force' and 'Reserve Force' will need to be adapted to conform with the existing statutory prescription or separately defined in the interpretation section.

³ Under the Third Geneva Convention, Articles 82 and 84, prisoners of war must be tried under military law by a Military Court, unless the law of the Detaining Power expressly permits that particular offence to be tried by a civil court if committed by a member of the Detaining Power's own forces.

⁴ Defined by the Third Geneva Convention, Article 4.

⁵ The Third Geneva Convention has the effect of modifying the home country's military law, as it applies to prisoners of war. See, for example, the limits on punishments imposed by Articles 89 and 90.

- (d) [offence of failure to suppress or report mutiny]
- (e) [offence of refusing to assist a provost officer or person acting under the authority of a provost officer]
- (f) [offence of desertion].

9. Commanding officer in relation to prisoners of war

Every person subject to this Act by virtue of Section 8 is, for the purposes of this Act, deemed to be under the command of the commanding officer of the unit or other part of the Defence Force by which the person is for the time being held in custody.

10. Certain civilians subject to this Act⁶

- (1) Sub-section (2) applies where any part of the Defence Force is in occupation of any part of a foreign country.
- (2) If this sub-section applies, where a person resident or present in the occupied territory (being a person not otherwise subject to this Act) is alleged to have committed an offence against this Act, that person is, on the recording of the allegation in the form of a charge, deemed to be subject to this Act, –
 - (a) until that person is acquitted by the Military Court or
 - (b) if that person is convicted, until the sentence has been carried out or that person has served the sentence (including any further sentence imposed upon the person while serving that sentence) or that person is released in due course of law from any imprisonment or detention imposed under the sentence.
- (3) [The Part of this Act which creates offences] does not apply to persons who are subject to this Act by virtue only of sub-section (2), except to the extent that the relevant offences provided for in that Part have been published in the occupied territory in the official language or languages of that territory.⁷
- (4) Where any part of the Defence Force is on operational service outside [the home country] –
 - (a) every person employed in the service of that part of the Defence Force and
 - (b) every person employed in the service of any member of that part of the Defence Force and
 - (c) every person who accompanies that part of the Defence Force –

is, while so employed or while accompanying that part of the Defence Force, subject to this Act.
- (5) Every person who is subject to this Act by virtue of sub-section (4) is deemed to be on operational service.
- (6) Every person to whom sub-sections (2) or (4) apply is for the purposes of this Act is deemed to be:
 - (a) under the command of any officer who is appointed that person's commanding officer by the officer commanding the part of the Defence Force which is on operational service outside [the home country] and

⁶ See Principle 4B of the *Commonwealth Military Justice Principles* and Principle No. 6 of the Yale Draft of the *Principles Governing the Administration of Justice Through Military Tribunals*.

⁷ Fourth Geneva Convention, Article 65.

- (b) subject to this Act in the same manner and to the same extent as if the person were a [soldier/marine], unless there is for the time being in force a certificate issued by the person's commanding officer stating that the person is entitled to be treated as an officer.
- (7) The following modifications apply to this Act in respect of every person to whom sub-sections (2) and (4) apply:
- (a) The person must be remanded for trial in the Military Court if the person's commanding officer is satisfied that a prima facie case has been made out and, if sub-section (2) applies to the person, the Military Court must try the person in the occupied territory.⁸
 - (b) If the person is convicted of an offence against this Act, the person may be fined a sum not exceeding \$[amount] in addition to or instead of any other penalty that may be imposed on the person; but no other punishment less severe than imprisonment may be imposed.
 - (c) The amount of compensation that the person may be ordered to pay must not exceed \$[amount].
 - (d) The person may be arrested –
 - (i) by a provost officer or
 - (ii) by a non-commissioned officer exercising authority under a provost officer or
 - (iii) by any other person acting on the order of an officer.
- (8) Any certificate issued by an officer under this section may at any time be revoked by that officer or by any other officer of an equivalent or higher rank.
- (9) Nothing in this section applies to any person who is subject to military law by virtue of any other section of this Act.

11. Operational service⁹

- (1) For the purposes of this Act, any part of the Defence Force is on operational service when:
- (a) there is for the time being in force an operational service order posting it for operational service or
 - (b) it is engaged in operations against the enemy or
 - (c) it is in armed occupation of any part of a foreign country.
- (2) For the purposes of this Act, every member of the Defence Force is on operational service when:
- (a) there is for the time being in force an operational service order posting that member for operational service or

⁸ Fourth Geneva Convention, Article 66.

⁹ This provision preserves the traditional understanding of 'active service' (see, for example, the definitions in Section 2(1) of the Defence Act (Barbados) and Section 2 of the Defence Act, 2003 (Antigua and Barbuda), while allowing for operational service to be extended by decision of the Defence Force's commander to include specific operations other than war, for example, interdiction of organised criminal groups in aid of the civil power. That flexibility is intended to reflect the reality of modern military operations in the Caribbean region.

- (b) the part of the Defence Force with which that member is serving or which that member is visiting is on operational service.
- (3) No person or part of the Defence Force that is for the time being on operational service shall cease to be on operational service until the issue of an active service order to that effect.
- (4) For the purposes of this section, '**operational service order**' means an order of the [commander of the Defence Force] for the purpose of:
 - (a) posting a part of the Defence Force or any member of the Defence Force on operational service or
 - (b) declaring that a part of the Defence Force or any member of the Defence Force has ceased to be on operational service.

12. Certain persons sentenced under this Act to remain subject to this Act¹⁰

- (1) Where a member of the Defence Force –
 - (a) is sentenced to a term of [imprisonment or] detention by the Military Court or to a term of detention by a disciplinary officer and
 - (b) is sentenced to dismissal or is discharged from the Defence Force –

that member remains subject to this Act until the member has served the sentence of [imprisonment or] detention or any further sentence of [imprisonment or] detention imposed in accordance with [insert relevant provisions] or has been released from that [imprisonment or] detention in due course of law.

- (2) [Where a person (other than a member of the Defence Force) who is subject to this Act is sentenced by the Military Court to a term of imprisonment and serves that sentence in a military penal establishment, the person remains subject to this Act until the person has served the sentence or is released from that imprisonment in due course of law.]

13. Trial and punishment of person who has ceased to be subject to this Act¹¹

- (1) Sub-section (2) applies to a person who has ceased to be subject to this Act and is alleged to have committed an offence while the person was so subject.
- (2) Subject to Section 15, a person to whom this sub-section applies may be charged with the commission of an offence against this Act and the charge may be tried by the Military Court.
- (3) On the recording of the allegation in the form of a charge, the person charged is deemed:
 - (a) to be a person subject to this Act until the charge is disposed of and

¹⁰ The options in square brackets indicate a policy choice. The home country may decide that any member of the Defence Force who is dismissed or discharged in conjunction with a custodial sentence should remain subject to military law while serving that sentence. Alternatively, it may be decided that only detainees need to remain subject to military law, and not persons sentenced to imprisonment. This policy choice will be affected by decisions such as whether a sentence of imprisonment, served in a civilian prison, should nevertheless be administered under military rather than civilian correctional law.

¹¹ See Principle 4B of the *Commonwealth Military Justice Principles* and Principle No. 6 of the Yale Draft of the *Principles Governing the Administration of Justice Through Military Tribunals*.

- (b) to hold the same status and rank as the person held immediately before the person ceased to be a person subject to this Act.
- (4) Where, by virtue of this section, a person is deemed to be subject to this Act:
 - (a) the person is not liable to arrest under this Act except under a warrant
 - (b) the person is under the command of any officer who is appointed that person's commanding officer by the [commander of the Defence Force]
 - (c) if the person is convicted of an offence against this Act, the Military Court may impose any sentence and make any order which the [High Court/ Supreme Court of the home country] could have imposed on or made in respect of that person for an equivalent offence.
- (5) [Where a person to whom this section applies is convicted by the Military Court of an offence and sentenced to a term of imprisonment, the person is deemed to be subject to this Act until the person has served that sentence or is lawfully released in due course of law from imprisonment, as the case may be.]¹⁰

14. Status and rank of person deemed to be subject to this Act when imprisoned or detained

Where, by virtue of Section 12 or Section 13, a person is deemed to be subject to this Act during any term of imprisonment or detention, the provisions of this Act apply to that person in the same manner and to the same extent as they apply to a [soldier/ marine] holding the rank of [lowest rank in the Defence Force].

15. Limitation of time within which charges may be heard or tried under this Act

- (1) A charge alleging that a person has committed an offence against this Act may be summarily heard or tried by the Military Court only if it is so heard or tried, or referred to the Director of Military Prosecutions, within three years after the alleged commission of the offence.
- (2) Sub-section (1) is subject to sub-sections (3) to (6).
- (3) Any time during which a person accused of an offence was a prisoner of war, or has been declared by a [board or court of inquiry] to have been absent without leave or other sufficient reason or was serving a sentence of imprisonment in a civil prison, must not be counted towards completion of the period of three years referred to in sub-section (1).
- (4) Notwithstanding anything to the contrary in this section, where –
 - (a) any person subject to this Act is charged with having committed an offence against [provision creating civil offences]¹² in relation to any act or omission which would, if the act or omission had taken place in [the home country], have constituted a civil offence within the meaning of that section and
 - (b) the Act constituting that civil offence or, if that Act does not so provide, any other Act provides for a limited period within which a charge may be laid in respect of that offence –

¹² A **civil offence** is an offence contrary to a law of the home country, other than the military law itself.

that period of limitation applies in respect of the person charged with having committed the offence against [provision creating civil offences].

- (5) A charge alleging that a person who, by virtue of Section 13, is deemed to be subject to this Act has committed an offence against this Act while the person was in fact so subject must be tried by the Military Court if the following apply:
 - (a) The charge is referred to the Director of Military Prosecutions within 12 months after the person ceased in fact to be subject to this Act.
 - (b) The offence is against any of the following provisions of this Act –
 - (i) [offences of assisting the enemy]
 - (ii) [offences of mutiny and failure to suppress or report a mutiny]
 - (iii) [offence of desertion]
 - (iv) [[specific] civil offences].
- (6) A charge alleging that a person has committed an offence against –
 - (a) [offences of assisting the enemy]
 - (b) [offences of mutiny and failure to suppress or report a mutiny]
 - (c) [offence of desertion]
 - (d) [[specific] civil offences] –

may be tried by the Military Court at any time after the alleged commission of the offence.

16. Person may not be tried under this Act and under the civil law in respect of same act or omission¹³

- (1) Where under this Act a person –
 - (a) has been charged with an offence before the Military Court and has been acquitted or convicted of the offence or
 - (b) has been charged with an offence before a disciplinary officer and the charge was, following a summary hearing, dismissed, or the person was acquitted or found guilty of the offence or
 - (c) has had an offence taken into consideration by the Military Court in sentencing the person for another offence –

the person must not subsequently be charged before a civil court with having committed any offence that is substantially the same as the offence of which the person was acquitted, convicted or found guilty or that is substantially the same as the offence contained in the charge that was dismissed, or that is substantially the same as the offence taken into consideration, as the case may be.

- (2) A civil court may not try a charge alleging that a person subject to this Act has committed an offence against one of the following provisions of this Act:
 - (a) [the provisions creating military offences] or
 - (b) [the provisions concerning parties and attempts], so far as they relate to offences against the sections specified in paragraph (a).

¹³ See the *International Covenant on Civil and Political Rights*, Article 14(7) and Principle 7(n) of the Commonwealth Military Justice Principles.

- (3) Except as provided in sub-section (1), nothing in this Act restricts the jurisdiction of a civil court to try a charge alleging that a person subject to this Act has committed an offence against any Act other than this Act.
- (4) Sub-section (5) applies if, whether in [the home country] or elsewhere, a person:
- (a) has been acquitted or convicted by a competent court of ordinary criminal jurisdiction, or by a court martial or other military tribunal of the armed forces of another country, of an offence against a law in force in the country or place in which that court, court martial or tribunal has jurisdiction or
 - (b) has had an offence taken into consideration by that court, court martial or tribunal in sentencing the person for another offence or
 - (c) has been found by that court, court martial or tribunal to be unfit to stand trial in relation to an offence and the proceedings against that person in the course of which the finding was made have been stayed.
- (5) The person must not subsequently be charged before the Military Court or before a disciplinary officer with an offence against this Act that is substantially the same as:
- (a) the offence of which the person was acquitted or convicted or
 - (b) the offence that was taken into consideration or
 - (c) the offence that was the subject of the stayed proceedings.
- (6) For the purposes of this section, the following apply:
- (a) A reference to an offence that is substantially the same as another offence is a reference to an offence of which the accused could have been convicted, under this Act or otherwise, on the same facts.
 - (b) A reference to a person having been convicted by the Military Court includes a reference to a person in respect of whom that court found the charge proved but did not convict the person.
 - (c) A reference to a person having been convicted by a competent court of ordinary criminal jurisdiction or by a court martial or other military tribunal of the armed forces of another country includes a reference to a person in respect of whom that court, court martial or tribunal found the charge proved but did not convict the person.
 - (d) A person must not be considered to have had an offence taken into consideration if the sentence passed on the person is subsequently quashed, or if the decision to take the offence into consideration has been annulled by an appellate court.

17. Persons cannot be tried under this Act for offences already disposed of

- (1) This section applies if:
- (a) a person has been charged with having committed an offence against this Act and the charge was, following a summary hearing, dismissed, or the person was acquitted or found guilty of the offence by a disciplinary officer;
 - (b) a person has been acquitted or convicted of an offence by the Military Court;

- (c) a person has had an offence taken into consideration by the Military Court in sentencing the person for another offence;
 - (d) the proceedings against a person who was charged with having committed an offence against this Act have been stayed;
 - (e) a person who was charged with having committed an offence against this Act has been found to be unfit to stand trial and the proceedings against that person in the course of which the finding was made have been stayed.
- (2) A subsequent charge alleging that the person committed the offence disposed of in the manner referred to in sub-section (1) must not be tried by the Military Court or summarily heard.

Part 2 – Director of Military Prosecutions

18. Appointment of Director of Military Prosecutions

- (1) The [President or Governor-General] may, by warrant, appoint the Director of Military Prosecutions.
- (2) A person must not be appointed under sub-section (1) unless that person is eligible for appointment as the Director of Public Prosecutions under [relevant provision of the Constitution or other enactment].¹⁴
- (3) A person must not be appointed under sub-section (1) unless that person is an officer.¹⁵
- (4) The minister [responsible for national defence] must arrange for notice of an appointment under sub-section (1) to be published in the *Gazette* as soon as practicable after the appointment.

19. Functions and duties of Director of Military Prosecutions

The functions and duties of the Director of Military Prosecutions are:

- (a) to determine whether an accused is to be committed for trial in the Military Court;
- (b) to decide on what charge an accused should be tried;
- (c) to prepare and certify the charge sheet or charge sheets against an accused and
- (d) to give a copy of the certified charge sheet to the accused (including any amended charge sheet so certified).
- (e) to lay the charge sheet or charge sheets before the Registrar of the Military Court
- (f) if two or more persons are accused, to direct whether they are to be tried jointly or separately

¹⁴ The appointee must hold appropriate qualifications in law and be sufficiently senior in the legal profession to be able to exercise the prosecutorial function independently, especially in cases that might excite controversy either within the armed forces or wider society. See Principle 5 of the *Commonwealth Military Justice Principles*; Armed Forces Act 2006 (UK) s 364; National Defence Act (Canada) s 165.1(1); Defence Force Discipline Act 1982 (Australia) s 188GG(a); Armed Forces Discipline Act 1971 (New Zealand) s 101E(2)(b).

¹⁵ Given the substantial powers exercised and the special military context, the appointee must have a sufficient understanding of that context and enjoy appropriate status within the military community. In some Commonwealth countries, it is considered that this requires the appointment to be held by a senior officer. See National Defence Act (Canada) s 165.1(1); Defence Force Discipline Act 1982 (Australia) s 188GG; Armed Forces Discipline Act 1971 (New Zealand) s 101E(2)(a). However, the Armed Forces Act 2006 (UK) does not require the equivalent British appointment (Director of Service Prosecutions) to be held by an officer, and incumbents have in fact been civilians to date. That may reflect the substantial military support that is available within the office of the UK DSP. In a Caribbean country, such support is unlikely to be available and it may be necessary on pragmatic grounds for the appointment to be held concurrently by the Defence Force's chief legal adviser (as is currently the case in New Zealand). However, that is a policy option, which is indicated by the square brackets. The Model Law includes necessary provisions to ensure the independence of the office if the home country decides to adopt the approach of 'double hatting'.

- (g) to appoint counsel for the prosecution
- (h) to perform any other functions or duties imposed by this Act or any other enactment.

20. Power of Director of Military Prosecutions to direct investigation

- (1) The Director of Military Prosecutions may direct a provost officer to:
 - (a) investigate any matter which may constitute an offence against this Act or
 - (b) arrange the investigation of that matter.
- (2) A provost officer must comply with a direction given under sub-section (1).

21. Power of Director of Military Prosecutions to stay proceedings

- (1) The Director of Military Prosecutions may, on the application of a disciplinary officer or on the Director's own motion, issue an order that the proceedings against an accused under this Act be stayed for the period that the Director thinks fit.
- (2) The Director of Military Prosecutions must provide a copy of the order, together with
- (3) the Director's written reasons for the stay, to:
 - (a) the Director of Public Prosecutions and
 - (b) the disciplinary officer and
 - (c) the accused in question.

22. Director of Military Prosecutions to perform functions and duties, and exercise powers, independently of ministerial control and of command¹⁶

- (1) In performing the Director's functions and duties, and exercising the Director's powers, the Director of Military Prosecutions is not subject to:
 - (a) the control of the minister [responsible for national defence] or
 - (b) the command of any other officer.
- (2) Sub-section (1) applies despite [provisions of the Defence Act or any other enactment which confer powers of command or control over officers of the Defence Force].
- (3) To avoid doubt, sub-section (1) does not limit or affect the command relationship that exists between the Director of Military Prosecutions and any member of the Defence Force in respect of any of the Director's functions and duties other than those that are specified in Section 21.

¹⁶ See Principle 5 of the *Commonwealth Military Justice Principles*; Armed Forces Discipline Act 1971 (New Zealand) s 1011.

23. Director of Military Prosecutions must report annually to DPP on performance of functions and duties, and exercise of powers

The Director of Military Prosecutions must, not later than 30 June in each year, report to the Director of Public Prosecutions (DPP) on the performance of any functions and duties, and the exercise of any powers, imposed or conferred on the Director of Military Prosecutions under this Act.

24. Director of Military Prosecutions must act under general supervision of DPP

- (1) In performing functions or duties, or exercising powers, imposed or conferred by this Act [or any other named Act], the Director of Military Prosecutions must act under the general supervision of the Director of Public Prosecutions.¹⁷
- (2) However, sub-section (1) does not apply if the Director of Military Prosecutions considers that compliance with that sub-section is or would be inconsistent with any provisions of this Act [or any other named Act].

25. Delegation of functions, duties or powers of Director of Military Prosecutions

- (1) The Director of Military Prosecutions may, in writing, either generally or particularly, delegate any of the functions, duties and powers of the Director under this Act, except this power of delegation, to a person who holds the qualifications provided for in Section 18(2).
- (2) Subject to any general or special directions given or conditions imposed by the Director of Military Prosecutions, the person to whom any functions, duties or powers are delegated under this section may perform and exercise them in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by delegation.
- (3) The power of the Director of Military Prosecutions to delegate under this section does not limit any power of delegation conferred on the Director by any other Act or prevent the Director delegating to any other person, under that power, any of the functions, duties and powers of the Director under this Act.
- (4) Every person who appears to be acting under a delegation under this section is, in the absence of proof to the contrary, presumed to be acting in accordance with the terms of the delegation.
- (5) A delegation under this section does not:
 - (a) affect or prevent the exercise of any power or the performance of any function or duty by the Director of Military Prosecutions or
 - (b) affect the responsibility of the Director of Military Prosecutions for the actions of any person acting under the delegation.

¹⁷ This, alongside the preceding provision, brings the Director of Military Prosecutions under the umbrella of the constitutional appointment responsible for prosecutions in those Caribbean countries where the DPP is a constitutional appointment. See, for example, Constitution of Antigua and Barbuda s 88; Constitution of Barbados s 79; Constitution of Jamaica s 94; and Constitution of Trinidad and Tobago s 90. This reflects the principle that Military Courts, when they exist, should be part of a country's general judicial system; see Principle 1(a) of the *Commonwealth Military Justice Principles*. Currently, several Caribbean constitutions exempt court martial prosecutions from the jurisdiction of the DPP.

Part 3 – Summary Hearings

General provisions

26. Interpretation

In this Part:

CO means commanding officer.

Disciplinary officer means a CO, subordinate commander or superior authority exercising summary powers under this Part.

Subordinate commander means an officer to whom powers have been delegated under Section 29(1).

Superior authority –

- (a) means the Commander or an officer who is not below the rank of [naval captain/colonel] and who is appointed by the Commander to act as a disciplinary officer under this Part in respect of charges against officers of or above the rank of [lieutenant commander/major] but
- (b) does not include a CO or chaplain.

27. Disposal of charge by CO

Every CO must summarily hear a charge before that CO in the prescribed manner.

28. Disposal of charge by superior authority

- (1) A superior authority must summarily hear a charge before that authority in the prescribed manner.
- (2) However, the superior authority may stay proceedings on a charge before that authority for any time that the authority considers necessary if satisfied that proceedings for the matters to which the charge relates could be, and in the interests of the better administration of justice should be, taken against the accused otherwise than under this Act.

29. Disposal of charge by subordinate commander

- (1) A CO may, by written notice, delegate all or any of the CO's powers to act as a disciplinary officer under this Part to an officer or class of officers under the CO's command.
- (2) A subordinate commander must not act as a disciplinary officer for an offence alleged to have been committed by a member of the Defence Force holding a rank above that of [petty officer/sergeant].
- (3) The exercise of any powers by a subordinate commander under this section is subject to the limitations and restrictions (if any) as may be specified:
 - (a) in orders of the Commander and

- (b) in the notice given by the delegating CO and
- (c) in this Part.

When officer empowered to act as disciplinary officer

30. Officer is empowered to act as disciplinary officer

- (1) For the purposes of this Part, an officer is empowered to act as a disciplinary officer in relation to a charge if:
 - (a) the officer is a superior authority, a CO or a subordinate commander and
 - (b) the officer holds a rank at least two rank grades above that of the accused and
 - (c) the officer holds a certificate of competency as a disciplinary officer, as prescribed by the Commander, and
 - (d) in the case of a subordinate commander, the officer holds a delegation under Section 29(1).
- (2) However, for the purposes of this Part, an officer is not empowered to act as a disciplinary officer in relation to a charge if:
 - (a) the officer considers, at the relevant time, that it is necessary for the maintenance of discipline, or in the interests of justice, that the charge be referred to another person or
 - (b) the officer is personally interested in the charge or
 - (c) the maximum penalty for the offence alleged by the charge exceeds [two/five/seven] years' imprisonment.¹⁸
- (3) For the purposes of this Part, an officer is personally interested in a charge if:
 - (a) the charge alleges an offence against the officer or
 - (b) the charge alleges an offence against any member of the officer's family or
 - (c) the charge alleges an offence by any member of the officer's family or
 - (d) the charge is one in respect of which the officer or any member of the officer's family is the sole witness to any material ingredient of the offence or
 - (e) the officer otherwise has a personal interest in the charge that is likely to influence the officer's judgment.

Preliminary procedures and summary hearing of charges

31. Charge must be referred to subordinate commander in certain circumstances

- (1) This section applies if:
 - (a) an allegation has been recorded in the form of a charge and
 - (b) the accused is below the rank of [chief petty officer/staff sergeant] and

¹⁸ Summary proceedings should only be used to adjudicate minor offences; see Principle 10b of the *Commonwealth Military Justice Principles*.

- (c) the accused has a subordinate commander who is empowered to act as a disciplinary officer in relation to the charge.
- (2) The charge against the accused must be referred to the subordinate commander.

32. Charge must be referred to CO or superior authority

- (1) This section applies if:
 - (a) an allegation has been recorded in the form of a charge and
 - (b) either or both of the following apply:
 - (i) the accused is of or above the rank of [chief petty officer/staff sergeant]
 - (ii) the accused does not have a subordinate commander who is empowered to act as a disciplinary officer in relation to the charge.
- (2) The charge against the accused must be referred to:
 - (a) the accused's commanding officer if that officer is empowered to act as a disciplinary officer in relation to the charge or
 - (b) a superior authority, if that authority is empowered to act as a disciplinary officer in relation to the charge.

33. Accused must be remanded for trial in Military Court and charge must be referred to Director of Military Prosecutions in certain circumstances

- (1) If there is no person who is empowered to act as a disciplinary officer in relation to a charge:
 - (a) the accused must be remanded for trial in the Military Court and
 - (b) the charge must be referred to the Director of Military Prosecutions.
- (2) If a charge is referred to the Director of Military Prosecutions under this section, the Director of Military Prosecutions may, after giving due consideration to the circumstances of the case, refer the charge (together with all or any other charges) to the accused's CO with a direction that the CO must:
 - (a) record a charge or charges in relation to a different offence or offences which are disclosed by the particulars of the charge or charges referred and
 - (b) dismiss the charge or charges which were referred under this section.

34. Amendment of charge

- (1) A disciplinary officer may, after an accused is brought before the officer on a charge, amend that charge, substitute for it a different charge or add a new charge, if the disciplinary officer considers that it is in the interests of justice to do so.
- (2) If the disciplinary officer exercises the powers under sub-section (1) after summarily hearing the original charge, that hearing must be treated as a hearing

of the amended, substituted or additional charge unless the accused requires a new hearing to be conducted.

- (3) If the amended, substituted or additional charge differs substantially from the original charge, the disciplinary officer must:
 - (a) explain the amended, substituted or additional charge to the accused and
 - (b) advise the accused of the accused's right to seek an adjournment to consider the charge and
 - (c) if requested by the accused to do so, adjourn the proceedings for that purpose.

35. Assistance to accused

- (1) If an accused is brought before a disciplinary officer under this Part, that officer must ensure that a defending officer is assigned:
 - (a) to assist the accused in the preparation and presentation of the accused's case and
 - (b) to act on behalf of the accused.
- (2) Sub-section (1) does not apply if the accused states in writing that the accused does not require the assistance referred to in that sub-section.
- (3) The officer or non-commissioned officer assigned to act as defending officer:
 - (a) must hold an appropriate certificate of competency, as prescribed by orders of the Commander and
 - (b) must not be a lawyer.
- (4) The officer or non-commissioned officer assigned to act as defending officer for the accused may be changed by the disciplinary officer at any time if:
 - (a) the accused so requests or
 - (b) the disciplinary officer considers that it is necessary to do so, having regard to the exigencies of the Defence Force and
 - (c) it is reasonably practicable to do so.

36. Assignment of presenting officer

- (1) If an accused is brought before a disciplinary officer under this Part, that officer must ensure that a presenting officer is assigned to:
 - (a) assemble the evidence in support of the charge and
 - (b) present the case in support of the charge, to the extent required by the disciplinary officer.
- (2) The officer or non-commissioned officer assigned to act as presenting officer:
 - (a) must hold an appropriate certificate of competency, as prescribed by orders of the Commander and
 - (b) must not be a lawyer.
- (3) The officer or non-commissioned officer assigned as presenting officer may be changed at any time by the disciplinary officer if the disciplinary officer considers that it is necessary or desirable to do so.

37. Arraignment by disciplinary officer

When the accused is brought before a disciplinary officer under this Part, the disciplinary officer must:

- (a) inform the accused that the disciplinary officer is going to hear the charge and
- (b) ensure that the accused is correctly described in the record of proceedings and
- (c) read the charge to the accused and
- (d) ensure that the evidence in support of the charge has been adequately disclosed to the accused in the manner prescribed by the rules and
- (e) ask the accused to plead guilty or not guilty to the charge.

Plea of guilty

38. Plea of guilty

- (1) If the accused pleads guilty to the charge, the disciplinary officer must enter the plea on the record of proceedings if the disciplinary officer is satisfied that the accused:
 - (a) understands the nature of the charge and
 - (b) has made the plea voluntarily and
 - (c) understands the consequences of the plea.
- (2) The disciplinary officer must proceed as if the accused had pleaded not guilty if:
 - (a) the accused refuses to plead or
 - (b) the accused pleads unintelligibly or
 - (c) the disciplinary officer is not satisfied of any of the matters referred to in sub-section (1)(a) to (c).

39. Subordinate commander may inform accused of right to elect Military Court or refer charge to commanding officer.

- (1) If the disciplinary officer is a subordinate commander and enters a guilty plea on the record of proceedings:
 - (a) the presenting officer must inform the subordinate commander of the facts that are relevant to the charge and
 - (b) the subordinate commander may hear all or any of the evidence relating to the charge if the subordinate commander considers that it is in the interests of justice or discipline to do so and
 - (c) the subordinate commander must consider whether the subordinate commander –
 - (i) has sufficient powers of punishment in relation to the charge and
 - (ii) is empowered to act as a disciplinary officer in relation to the charge.

- (2) If the subordinate commander considers under sub-section (1) that the subordinate commander has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to the charge, the subordinate commander must inform the accused of the right to elect trial by the Military Court in accordance with Section 41.
- (3) If the subordinate commander considers under sub-section (1) that the subordinate commander has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to the charge, the subordinate commander must refer the charge to the accused's CO without recording a finding of guilty on the charge.
- (4) After a charge is referred to a CO under sub-section (3), that officer becomes the disciplinary officer in relation to the charge.

40. CO or superior authority receiving guilty plea or receiving referral must consider certain matters

- (1) This section applies if:
 - (a) the disciplinary officer is a CO or a superior authority, and enters a guilty plea on the record of proceedings or
 - (b) a charge has been referred to a CO under Section 39.
- (2) The presenting officer must inform the disciplinary officer of the facts that are relevant to the charge.
- (3) The disciplinary officer may hear all or any of the evidence relating to the charge if the disciplinary officer considers that it is in the interests of justice or discipline to do so.
- (4) The disciplinary officer must consider whether the disciplinary officer:
 - (a) has sufficient powers of punishment in relation to the charge and
 - (b) is empowered to act as a disciplinary officer in relation to the charge.

41. Accused who pleads guilty must be informed of right to elect trial by Military Court

- (1) If the disciplinary officer considers that the disciplinary officer has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to the charge, the disciplinary officer must:
 - (a) inform the accused that the accused has the right to elect either –
 - (i) trial by the Military Court or
 - (ii) for the disciplinary officer to impose summary punishment and
 - (b) adjourn the hearing and give the accused a reasonable period to consider the accused's election and
 - (c) give the accused the opportunity to consult a lawyer in respect of the accused's election if it is reasonably practicable to do so.
- (2) The period of adjournment under sub-section (1)(b) must be at least 24 hours if the accused wishes it.

42. Accused who pleads guilty to be punished in certain circumstances

- (1) This section applies if an accused is given the right to an election under Section 41 and elects:
 - (a) for the disciplinary officer to impose summary punishment or
 - (b) trial by the Military Court but withdraws that election in the prescribed manner.
- (2) The disciplinary officer must:
 - (a) record a finding of guilty on the charge and
 - (b) inform the accused of that finding and
 - (c) proceed under Sections 54 and 55.

43. Accused must be remanded for trial in Military Court and charge must be referred to Director of Military Prosecutions in certain circumstances

- (1) A disciplinary officer must remand the accused for trial in the Military Court and refer the charge to the Director of Military Prosecutions if the disciplinary officer considers under Section 40 that that officer has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to the charge.
- (2) A disciplinary officer must remand the accused for trial in the Military Court and refer the charge to the Director of Military Prosecutions if the accused is given the right to an election under Section 41 and either:
 - (a) the accused elects trial by the Military Court and does not withdraw that election in the prescribed manner or
 - (b) the accused does not make an election.
- (3) However, if the accused is given the right to an election under Section 41 and elects trial by the Military Court, the disciplinary officer must not act under sub-section (1) during the 24 hours following the accused's election.
- (4) Any referral to the Director of Military Prosecutions by a subordinate commander must be sent to the accused's CO in the first instance.
- (5) A CO who receives a referral from a subordinate commander under sub-section (4) must either:
 - (a) confirm the remand of the accused for trial in the Military Court and refer the charge to the Director of Military Prosecutions or
 - (b) dismiss the charge.

44. Procedure following mixed pleas

- (1) This section applies if:
 - (a) there is more than one charge against the accused contained in the same charge report and
 - (b) the accused pleads guilty to one or more but not all of the charges.

- (2) The disciplinary officer:
 - (a) must proceed under Sections 38 to 43 in respect of each charge to which the accused pleads guilty but
 - (b) must not proceed to punish the accused in respect of those charges until a finding is recorded for the other charges against the accused contained in the same charge report.
- (3) However, if the disciplinary officer is to refer a charge to the Director of Military Prosecutions, the disciplinary officer must not record a finding of guilty on that charge.
- (4) Each charge to which the accused has pleaded not guilty must be proceeded with in accordance with this Act.
- (5) This section is subject to Section 68.

45. Change or amendment of plea

- (1) If the accused pleads not guilty to the charge, the accused may withdraw that plea and substitute a plea of guilty at any time before the disciplinary officer records the finding on the charge.
- (2) If the accused substitutes a plea of guilty under sub-section (1), the disciplinary officer must, so far as is necessary, proceed as if the accused had originally pleaded guilty.
- (3) If the accused pleads guilty to the charge, the accused may withdraw that plea and substitute a plea of not guilty at any time before the disciplinary officer records the finding on the charge.
- (4) If the accused substitutes a plea of not guilty under sub-section (3), the disciplinary officer must, so far as is necessary, proceed as if the accused had originally pleaded not guilty.
- (5) If the accused pleads guilty to the charge and the disciplinary officer accepts the plea, the disciplinary officer may, if at any time during the proceedings it appears to the disciplinary officer that that plea should not have been accepted, amend the record and substitute a plea of not guilty.
- (6) If the disciplinary officer acts under sub-section (5), the disciplinary officer must, so far as is necessary, proceed as if the accused had originally pleaded not guilty.

Summary hearing following plea of not guilty

46. Procedure following plea of not guilty

- (1) If the accused pleads not guilty to the charge, the disciplinary officer must:
 - (a) enter the plea on the record of proceedings and
 - (b) ask the accused if the accused has had adequate time and facilities to prepare a defence.
- (2) If the disciplinary officer considers, after acting under sub-section (1)(b), that the accused has not had adequate time or facilities (or both) to prepare a defence, the disciplinary officer must adjourn the proceedings to allow the accused:
 - (a) adequate time to prepare a defence and
 - (b) a reasonable opportunity to obtain adequate facilities to prepare a defence.

47. Disciplinary officer must determine whether prima facie case is made out after hearing of evidence in support of charge

- (1) When the case is ready to proceed, the disciplinary officer may ask the presenting officer to outline the case in support of the charge and must ask the presenting officer:
 - (a) to call each witness in support of the charge who is to give evidence orally to give evidence in the presence of the accused and
 - (b) to produce, and to read aloud to the accused, any written statement that the disciplinary officer has decided to admit in evidence in support of the charge.
- (2) The disciplinary officer:
 - (a) must give the accused an opportunity to cross-examine each witness who gives evidence orally in support of the charge and
 - (b) may allow the presenting officer an opportunity to re-examine each witness who has been cross-examined and
 - (c) may put questions to each witness who gives evidence orally in support of the charge that the disciplinary officer considers are necessary to ensure that the disciplinary officer fully understands the witness's evidence.
- (3) After the disciplinary officer has heard the evidence in support of the charge, the disciplinary officer must determine whether a prima facie case has been made out.
- (4) If the disciplinary officer is not satisfied that a prima facie case has been made out, the disciplinary officer must dismiss the charge, record the finding and inform the accused.

48. Disciplinary officer must consider whether sufficiently empowered and able to act as disciplinary officer

- (1) If the disciplinary officer is satisfied that a prima facie case has been made out, the disciplinary officer must consider whether the disciplinary officer:
 - (a) has sufficient powers of punishment in relation to the charge and
 - (b) is empowered to act as a disciplinary officer in relation to the charge.
- (2) If the disciplinary officer is a subordinate commander who considers under this section that the subordinate commander:
 - (a) has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to the charge, the subordinate commander must inform the accused of the right to elect trial by the Military Court
 - (b) has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to the charge, the subordinate commander must refer the charge to the accused's CO without recording a finding.
- (3) After a charge is referred to a CO under sub-section (2)(b), that officer:
 - (a) becomes the disciplinary officer in relation to the charge and
 - (b) must summarily hear the charge as if the subordinate commander had not begun to summarily hear the charge and

- (c) must, after acting under paragraph (b), act under sub-section (1) if the officer is satisfied that a prima facie case has been made out.
- (4) If the disciplinary officer is a CO or a superior authority and considers under this section that that officer has insufficient powers of punishment or is not empowered to act as a disciplinary officer in relation to the charge, the CO or superior authority must remand the accused for trial in the Military Court and refer the charge to the Director of Military Prosecutions.

Right to elect trial by Military Court

49. Disciplinary officer must give accused right to elect trial by Military Court

- (1) If the disciplinary officer considers that that officer has sufficient powers of punishment and is empowered to act as a disciplinary officer in relation to the charge, the disciplinary officer must:
 - (a) inform the accused that the accused has the right to elect either –
 - (i) trial by the Military Court or
 - (ii) for the disciplinary officer to continue to summarily hear the charge and
 - (b) adjourn the hearing and give the accused a reasonable period to consider the accused's election and
 - (c) give the accused the opportunity to consult a lawyer in respect of the accused's election if it is reasonably practicable to do so.
- (2) The period of adjournment under sub-section (1)(b) must be at least 24 hours if the accused wishes it.

50. Disciplinary officer must remand accused for trial in Military Court or summarily hear charge

- (1) The disciplinary officer must remand the accused for trial in the Military Court and refer the charge to the Director of Military Prosecutions if, after having been given the right to an election under Section 49:
 - (a) the accused elects trial by the Military Court and does not withdraw that election in the prescribed manner or
 - (b) the accused does not make an election when asked to do so by the disciplinary officer.
- (2) However, if the accused is given the right to an election under Section 49 and elects trial by the Military Court, the disciplinary officer must not act under sub-section (1) during the 24 hours following the accused's election.
- (3) The disciplinary officer must continue to summarily hear the charge if, after having been given the right to an election under Section 52, the accused elects:
 - (a) summary hearing by the disciplinary officer or
 - (b) trial by the Military Court but withdraws that election in the prescribed manner.
- (4) Any referral to the Director of Military Prosecutions by a subordinate commander must be sent to the accused's CO in the first instance.

- (5) A CO who receives a referral from a subordinate commander under sub-section (4) must either:
 - (a) confirm the remand of the accused for trial in the Military Court and refer the charge to the Director of Military Prosecutions or
 - (b) dismiss the charge.

Hearing the defence case

51. Disciplinary officer must advise accused and hear evidence on behalf of accused

- (1) If the disciplinary officer is to continue to summarily hear the charge against the accused, the disciplinary officer must briefly advise the accused of the procedure to be followed in the remainder of the summary hearing.
- (2) After advising the accused under sub-section (1), the disciplinary officer must ask the accused:
 - (a) to outline the case on behalf of the accused and
 - (b) to tell the disciplinary officer whether or not the accused wishes to put forward evidence in reply and, if so, what form the evidence will take and
 - (c) to give evidence orally if the accused wishes to give evidence orally and
 - (d) to call each witness on behalf of the accused who is to give evidence orally (following the accused if the accused wishes to give evidence) to give that witness's evidence in the presence of the accused.
- (3) The disciplinary officer must, after complying with sub-section (2), read aloud any written statement that the disciplinary officer has decided to admit in evidence on behalf of the accused.
- (4) If evidence is put forward on behalf of the accused, the disciplinary officer:
 - (a) may allow the presenting officer to cross-examine each witness who gives evidence orally and
 - (b) if the presenting officer cross-examines a witness, must allow the accused an opportunity to re-examine the witness.
- (5) The disciplinary officer may put questions to each witness that the disciplinary officer considers necessary.

52. Presenting officer and disciplinary officer may call or recall witnesses

- (1) If evidence is put forward on behalf of the accused, the presenting officer may, at the conclusion of the evidence on behalf of the accused, with the leave of the disciplinary officer, call or recall any witness to give evidence on any matter raised by, or on behalf of, the accused:
 - (a) that the presenting officer could not properly have put before the disciplinary officer before the accused's defence was disclosed or
 - (b) that the presenting officer could not reasonably have foreseen.
- (2) The disciplinary officer may, at any time before finding the accused guilty or not guilty on the charge, call or recall any witness if it is in the interests of justice to do so.

- (3) If the disciplinary officer calls or recalls a witness under sub-section (2), the disciplinary officer may allow the presenting officer, the accused or both to put questions to the witness that the disciplinary officer may allow as proper.

53. Disciplinary officer must determine whether accused is guilty or not guilty

After the disciplinary officer has received all the evidence, the disciplinary officer must:

- (a) determine whether the accused is guilty or not guilty on the charge and
- (b) record the finding and
- (c) inform the accused and
- (d) give reasons for the finding.

Punishment

54. Procedures to be followed before imposing punishment.

- (1) If the disciplinary officer records a finding of guilty on the charge, the disciplinary officer must, before imposing a punishment:
- (a) examine the offender's service record and
 - (b) if a victim of the offence so wishes, read aloud a written statement from the victim setting out –
 - (i) any physical injury or emotional harm suffered by the victim through, or by means of, the offence and
 - (ii) any loss of, or damage to, property suffered by the victim through, or by means of, the offence and
 - (iii) any other effects of the offence on the victim and
 - (c) give the offender a reasonable opportunity to make an explanation or plea in mitigation of punishment and
 - (d) if the offender so wishes, give any witness on behalf of the offender a reasonable opportunity to give evidence in support of the explanation or plea in mitigation of punishment.
- (2) If the disciplinary officer records a finding of guilty on the charge, the disciplinary officer may, before imposing a punishment, obtain from the presenting officer:
- (a) a report on the offender's record and general conduct in the Defence Force and
 - (b) details of any period during which the offender was held in custody awaiting the hearing and
 - (c) details of any information in the possession of the military authorities relating to the offender's circumstances that may be relevant in considering punishment.
- (3) If the disciplinary officer records a finding of guilty of an offence which has a victim, the disciplinary officer must, before imposing a punishment, take into account:

- (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim
 - (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss or damage caused by the offender or ensure that the offending will not continue or recur
 - (c) the response of the offender to the offending
 - (d) any measures taken or proposed to be taken by the offender to –
 - (i) make compensation to any victim of the offending or
 - (ii) apologise to any victim of the offending or
 - (iii) otherwise make good the harm that has occurred
 - (e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.
- (4) If the disciplinary officer determines that, despite an offer, agreement, response, measure or action referred to in sub-section (3), it is appropriate to impose a punishment, the disciplinary officer must take that offer, agreement, response, measure or action into account when determining the appropriate punishment for the offender.
- (5) Without limiting any other powers of a disciplinary officer to adjourn, in any case contemplated by this section a disciplinary officer may adjourn the proceedings until:
- (a) compensation has been paid or
 - (b) the performance of any work or service has been completed or
 - (c) any agreement between the victim and the offender has been fulfilled or
 - (d) any measure proposed under sub-section (3)(d) has been completed or
 - (e) any remedial action referred to in sub-section (3)(e) has been completed.

55. Disciplinary officer may impose punishment, order offender to appear for punishment if called on, or discharge offender

- (1) The disciplinary officer may, after acting under Section 54:
- (a) impose on the offender any one or more of the punishments that the disciplinary officer is authorised under this Part to impose and considers just
 - (b) make an order under Section 56
 - (c) discharge the offender without acting under paragraph (a) or (b).
- (2) The disciplinary officer must give reasons for any action under sub-section (1).
- (3) Sub-section (1) does not limit Section 60 (which relates to orders for compensation and restitution).
- (4) The disciplinary officer must, after acting under sub-section (1), notify the offender of the offender's right of appeal under Part 4.

Deferral of punishment¹⁹

[Option A

56. Order to come up for punishment if called on

- (1) The disciplinary officer may, instead of imposing a punishment on an offender, order the offender to appear for punishment if called on to do so within the period specified in sub-section (2).
- (2) The period referred to in sub-section (1) is a period not exceeding one year, commencing with the date on which the finding of guilty is recorded, that the disciplinary officer may specify in the order.
- (3) If the disciplinary officer makes an order under sub-section (1), the disciplinary officer must record and attach to the record of proceedings a statement of the findings of fact made in relation to the charge.
- (4) The disciplinary officer may make orders for compensation or restitution in combination with an order under sub-section (1).

57. Offender to come up for punishment

- (1) This section applies if an offender in respect of whom an order is made under Section 56:
 - (a) is convicted, or found guilty summarily, of a subsequent offence against this Act or any other Act or
 - (b) fails to comply with any other order referred to in Section 56(4) or
 - (c) fails to comply with any agreement, or fails to take any measure or action, to make amends to the victim that was brought to the attention of the disciplinary officer at the time the disciplinary officer made the order under Section 56.
- (2) An offender's CO may, at any time within the period specified in the order made under Section 56, order the offender to appear before the CO or another disciplinary officer to be dealt with for the original offence.
- (3) After an order is given under sub-section (2), the offender must be placed in close arrest and brought before the CO or other disciplinary officer at a time and place directed by the CO or disciplinary officer.
- (4) If a person appears before a CO or another disciplinary officer under this section and the CO or disciplinary officer is satisfied of any of the matters specified in sub-section (1), the commanding officer or disciplinary officer:
 - (a) must inquire into the circumstances of the original offence and the conduct of the offender since the order under Section 56 was made (including, if appropriate, the circumstances and seriousness of the subsequent offence (if any)) and
 - (b) may impose a punishment, or a combination of punishments, on the offender for the original offence.
- (5) This section is subject to Section 59.]

¹⁹ The provisions under this sub-heading provide two options: orders to come up for punishment if called on and suspended punishments. The model contemplates that the home country may select either one of these options, or neither.

[Option B

56. Punishment may be suspended

- (1) If the disciplinary officer imposes punishment, the disciplinary officer may suspend the operation of that punishment or any part of it for a period not exceeding 12 months.
- (2) If, prior to the end of the period of suspension, the suspension of the punishment or part of the punishment has not been terminated, the punishment or part of the punishment so suspended is deemed to be remitted.

57. Termination of suspension

If, while the punishment of an offender is suspended under Section 56, that offender is subsequently punished or sentenced in respect of a further offence against this Act, the disciplinary officer or the Military Court may make an order terminating the suspension of the suspended punishment.]

Summary punishments

58. Types and maximum amounts of summary punishments

- (1) The punishments that may be imposed on an offender found guilty at a summary hearing are those specified in Schedule 2.
- (2) The maximum amount of any one punishment that may be imposed on an offender in relation to a charge summarily heard by:
 - (a) a subordinate commander is that specified in Schedule 3 in relation to the rank of the offender as specified in that schedule
 - (b) a CO is that specified in Schedule 4 in relation to the rank of the offender as specified in that schedule
 - (c) a superior authority is that specified in Schedule 5.
- (3) A disciplinary officer who finds a person guilty of one or more offences may, if the disciplinary officer thinks it is just to do so, impose on that person more than one of the punishments authorised by this Part.
- (4) Sub-section (3) does not limit the power of a disciplinary officer to discharge an offender without imposing a punishment or to order that person to appear for punishment if called on to do so.

59. Punishment must be imposed for all offences of which person is found guilty

If, following a summary hearing in respect of two or more charges contained in the same charge report, a person is found guilty of the offences charged, or at least two of them if there are more than two, any punishment or punishments imposed on that person must be in respect of all of the offences of which the person has been found guilty.

Compensation and restitution

60. Orders for compensation and restitution

- (1) Every disciplinary officer who finds an offender guilty of an offence may, in addition to or in substitution for any punishment or punishments that may be imposed on the offender, order the offender, in the same manner and to the same extent as the Military Court:

- (a) to pay compensation or
 - (b) to make restitution (with or without compensation) or
 - (c) both to pay compensation and make restitution.
- (2) However, an offender may not be ordered under this section to pay an amount by way of compensation exceeding the offender’s basic pay for a period of 28 days.

Waiver of constitutional rights

61. Accused deemed to have waived certain constitutional rights in certain circumstances

- (1) An accused is deemed to have irrevocably waived, in relation to a charge, the constitutional rights referred to in sub-section (2) if, having been given the right to an election under:
- (a) Section 41, the accused elects –
 - (i) for the disciplinary officer to impose summary punishment or
 - (ii) trial by the Military Court, but withdraws that election in the prescribed manner
 - (b) Section 49, the accused elects –
 - (i) summary hearing by the disciplinary officer or
 - (ii) trial by the Military Court but withdraws that election in the prescribed manner.
- (2) For the purposes of this section, the constitutional rights are ... [*describe rights to legal representation and to a hearing by an independent and impartial court/tribunal, as applicable, under the Constitution of the home country*].

62. Implications of election must be explained to accused

- (1) When the accused appears before the disciplinary officer to indicate the accused’s election under Section 41 or 49, the disciplinary officer must, before the election is made, take reasonable steps to ensure that the implications of the election have been fully explained to the accused by:
- (a) the defending officer or
 - (b) an officer or a non-commissioned officer who holds a certificate of competency as a defending officer.
- (2) The implications referred to in sub-section (1) must include any matters prescribed by the rules.²⁰
- (3) The accused’s election under Section 41 or 49 must be recorded in writing in the prescribed form.
- (4) The disciplinary officer must take reasonable steps to ensure that the accused has read the election before the accused signs it.

²⁰ The rules should set out the pros and cons for an accused of electing either trial by the Military Court, or a summary hearing, in a fair, balanced and transparent manner.

63. Accused does not have certain constitutional rights at summary hearing

If a disciplinary officer summarily hears a charge:

- (a) the accused does not have, in relation to the relevant charge, the right to legal representation and
- (b) the accused does not have, in relation to the relevant charge, the right to [a hearing by an independent and impartial court/tribunal].²¹

Miscellaneous

64. Recording proceedings before disciplinary officer

A disciplinary officer must comply with any requirements of the rules to ensure that an audio recording, or a written summary, is made of the proceedings before the disciplinary officer.

65. Referral of charge must include referral of related charges

If a disciplinary officer is required to refer a charge against an accused to another person, the disciplinary officer must also refer to that person:

- (a) any charge against another person for an offence arising from the same incident or series of incidents and
- (b) any other charge against the accused for an offence arising from the same incident or series of incidents.

66. Documents and information to be provided to accused and Director of Military Prosecutions

- (1) If a charge is to be referred to the Director of Military Prosecutions (DMP) by a disciplinary officer, the disciplinary officer must, within seven days of deciding that the charge is to be referred to the Director of Military Prosecutions:
 - (a) ensure that the accused is provided with the information or documents that are prescribed by the rules for the purposes of this sub-section²² and
 - (b) inform the accused that the accused has seven days from the date of being informed in which to provide to the disciplinary officer any signed written statements for referral to the Director of Military Prosecutions.
- (2) A disciplinary officer (other than a superior authority) must, within 14 days of deciding that a charge is to be referred to the Director of Military Prosecutions, send to the officer's superior authority the documents that are prescribed by the rules for the purposes of this sub-section.
- (3) Within seven days of receiving the documents referred to in sub-section (2), the superior authority must send to the Director of Military Prosecutions:
 - (a) those documents and

²¹ Amend to reflect the relevant provision of the home country's Constitution.

²² This should include a transcript of the audio recording made under Section 64. This will generally be an important part of the evidence considered by the DMP in deciding whether or not to lay a charge in the Military Court.

- (b) a statement containing the superior authority's opinion as to whether prosecution of the charge is in the interests of military discipline.
- (4) If the disciplinary officer is a superior authority, that authority must, within 14 days of deciding that the charge is to be referred to the Director of Military Prosecutions, send to the Director of Military Prosecutions:
 - (a) the documents that are prescribed by the rules for the purposes of this sub-section and
 - (b) a statement containing the superior authority's opinion as to whether prosecution of the charge is in the interests of military discipline.

67. Reference back of charge by Director of Military Prosecutions

- (1) If a charge is referred by a disciplinary officer to the Director of Military Prosecutions under Section 43(1) or 48(4), the Director of Military Prosecutions may, after giving due consideration to the circumstances of the case, refer the charge (together with all or any other charges referred under Section 65) back to the disciplinary officer with a direction that the officer must:
 - (a) continue to act as a disciplinary officer in relation to the charge or charges or
 - (b) dismiss the charge or charges.
- (2) If, after a charge is referred by a disciplinary officer to the Director of Military Prosecutions under Section 43(2) or 50(1), the accused withdraws, in the prescribed manner, the accused's election for trial by the Military Court, the Director of Military Prosecutions may, after giving due consideration to the circumstances of the case, refer the charge (together with all or any other charges referred under Section 65) back to the disciplinary officer with a direction that the officer must:
 - (a) continue to act as a disciplinary officer in relation to the charge or charges or
 - (b) dismiss the charge or charges.
- (3) A direction under sub-section (1) or (2) may include:
 - (a) a direction to give the accused the right to elect trial by the Military Court and
 - (b) any other procedural directions that the Director of Military Prosecutions thinks fit.
- (4) If a charge is referred by a disciplinary officer to the Director of Military Prosecutions under Section 43(2) or 50(1), the Director of Military Prosecutions may, after giving due consideration to the circumstances of the case, refer the charge (together with all or any other charges referred under Section 65) back to the disciplinary officer with a direction that the officer must dismiss the charge or charges.
- (5) On reference back of a charge under this section, the disciplinary officer must dispose of the charge in accordance with the directions.
- (6) Reference back of a charge to a disciplinary officer under this section is without prejudice to the power of the disciplinary officer to prefer another charge if:
 - (a) the Director of Military Prosecutions so directs or
 - (b) the disciplinary officer thinks fit.

- (7) The Director of Military Prosecutions must inform the accused of any action that is taken affecting the accused under this section.

68. Director of Military Prosecutions may lay charge before Military Court

- (1) If a charge is referred to the Director of Military Prosecutions under this Part, the Director may lay the charge before the Registrar of the Military Court.
- (2) If the accused pleaded guilty to a charge referred to the Director of Military Prosecutions under this Part, that plea must not be taken into account by the Military Court when making a finding on the charge.

Evidence

69. Relevant evidence admissible unless excluded

- (1) All relevant evidence is admissible in proceedings under this Part and Part 4 except evidence that is excluded under sub-section (4).
- (2) Evidence that is not relevant is not admissible in proceedings under this Part or Part 4.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
- (4) The disciplinary officer or the Military Court must exclude evidence if its probative value is outweighed by the risk that the evidence will:
 - (a) have an unfairly prejudicial effect on the outcome of the proceeding or
 - (b) needlessly prolong the proceeding.
- (5) The disciplinary officer or the Military Court may, subject to sub-sections (1) to (4) and [section dealing with privileges and immunities], require a witness to answer a question that is put to them in proceedings under this Part or Part 4 (whether by the disciplinary officer, the court, a presenting officer, a defending officer or any other counsel appearing in the proceeding).

70. Evidence on oath

In proceedings before a disciplinary officer, oral evidence must be given on oath [or solemn affirmation].

71. Admission in evidence of written statements instead of oral evidence

- (1) A written statement of a person's evidence is, with the consent of the accused and the disciplinary officer, admissible in evidence instead of calling that person to give evidence orally.
- (2) However, a written statement of a person's evidence is admissible only to the same extent and for the same purpose as that evidence would have been admissible in the proceedings if given orally by the maker of the statement.
- (3) Despite sub-section (1), a disciplinary officer may require the person to attend and give evidence orally.
- (4) In a proceeding before a disciplinary officer, the accused and the presenting officer must each be given:

- (a) a copy of every written statement that the other party proposes to tender in evidence and
 - (b) a copy of every exhibit (if any) referred to in that statement or information that is sufficient to enable the recipient to inspect the exhibit or a copy of it.
- (5) A document or object accompanying a written statement tendered as evidence and referred to in the statement as an exhibit must be treated as if it had been produced as an exhibit and identified in evidence by the maker of the statement.

72. Disciplinary officers to take judicial notice of certain matters

- (1) Every disciplinary officer must take judicial notice of:
- (a) all matters of common knowledge and
 - (b) all other matters of which judicial notice would be taken by the [home
 - (c) country's ordinary criminal court].
- (2) The disciplinary officer may also take judicial notice of matters that may fairly be regarded as being within the general military knowledge of the disciplinary officer.

Other miscellaneous matters

73. General power to make orders or give directions

A disciplinary officer may, in respect of any proceeding under this Part, make or give any order or direction, not inconsistent with this Act or the rules, that seems to the disciplinary officer best calculated to do justice.

74. Construction of charges

- (1) In the construction of a charge sheet or charge there must be presumed in favour of supporting it every proposition that may reasonably be presumed to be impliedly included, though not expressed in it.
- (2) In respect of a charge, the statement of the alleged offence and the statement of the particulars of every act or omission constituting the alleged offence must be read and construed together.

75. Replacement of disciplinary officer

- (1) If at any time a disciplinary officer has begun to act under this Part in relation to a charge, and, because of death, illness or any other reason, the officer is unable to continue to act as the disciplinary officer in relation to the charge, the officer who becomes the disciplinary officer instead (the **replacement disciplinary officer**) may act under this Part in relation to the charge as if the officer replaced had not commenced to do so.
- (2) Despite sub-section (1), if the disciplinary officer who has become incapacitated had, before that incapacity, found the accused guilty, the replacement disciplinary officer must not hear the charge summarily but may instead, after inquiring into the circumstances of the charge, act under this Part as if the replacement disciplinary officer had found the accused guilty.
- (3) The rules may contain further provisions concerning how:
- (a) an officer becomes a replacement disciplinary officer and
 - (b) the replacement disciplinary officer must deal with the charge.

76. Objection relating to personal interest

- (1) If an accused, during the proceedings before a disciplinary officer, raises an objection that the disciplinary officer is personally interested in the charge, the disciplinary officer must ensure that the objection is recorded in the record of proceedings.
- (2) If, after an objection is made under sub-section (1), a disciplinary officer considers that that officer is personally interested in the charge:
 - (a) the officer must not continue to act as the disciplinary officer in relation to the charge and
 - (b) Section 75 applies.

Part 4 – Summary Appeals

Right of appeal

77. Right of appeal

Every person found guilty of an offence by a disciplinary officer may appeal to the Military Court against one or more of the following:

- (a) the finding of guilty
- (b) the punishment, or the combination of punishments, imposed in relation to that finding
- (c) an order of compensation or restitution (or both) made in relation to that finding
- (d) an order made under Section 56.

78. Notice of appeal

- (1) An appeal under Section 77 must be made by lodging a notice of appeal, in the prescribed form, with the Registrar within:
 - (a) the prescribed period or
 - (b) any further time that the Military Court may allow on application made before or after the expiration of that period.
- (2) An application under sub-section (1)(b) must:
 - (a) be in the prescribed form and
 - (b) be lodged with the Registrar with the notice of appeal if made after the expiration of the prescribed period.
- (3) Every notice of appeal must specify:
 - (a) the finding, punishment, combination of punishments or order appealed from and
 - (b) the grounds of appeal in sufficient detail to fully inform the Military Court of the issues in the appeal and
 - (c) any other particulars that are prescribed by the rules for the purposes of this section.
- (4) If the time for lodging a notice of appeal with the Registrar expires on a day on which the office of the Registrar is closed, and by reason of that closure the notice cannot be lodged on that day, the notice is deemed to be lodged in time if it is lodged on the day on which the office is next open.
- (5) In this section, **prescribed period** means:
 - (a) a period of 35 days commencing with the day after the day on which the finding of guilty by the disciplinary officer is recorded following a summary hearing outside [the home country]

- (b) a period of 21 days commencing with the day after the day on which the finding of guilty by the disciplinary officer is recorded following a summary hearing in [the home country].

79. Registrar and disciplinary officer must provide copies of documents

- (1) The Registrar must, as soon as practicable after receiving a notice of appeal, provide a copy of the notice of appeal to the disciplinary officer who made the finding of guilty and to the Director of Military Prosecutions.
- (2) The disciplinary officer must, within 14 days of receiving a copy of the notice of appeal under sub-section (1), send to the Registrar the documents that are prescribed by the rules for the purposes of this section.²³
- (3) The Registrar must, within seven days of receiving the documents under sub-section (2), send a copy of those documents to the Director of Military Prosecutions and to the appellant.

80. Abandonment of appeal

- (1) An appellant²⁴ may, at any time after the notice of appeal has been lodged, abandon the appeal by giving to the Registrar notice of abandonment in the prescribed form.
- (2) The signature of the appellant to a notice of abandonment must be witnessed by a lawyer or the appellant's commanding officer.

81. Effect of appeal on punishments and orders

A punishment, a combination of punishments or an order appealed against under this Part is not suspended by reason of the appeal unless:

- (a) the rules specify that the punishment, the combination of punishments or the order is suspended or
- (b) the Military Court directs that the punishment, the combination of punishments or the order is suspended.

Powers of Military Court

82. Appeals to proceed by way of *de novo* rehearing²⁵

- (1) An appeal under Section 77 against a finding is to be by way of:
 - (a) a *de novo* rehearing of the charge and
 - (b) except where Section 83(2) applies, a *de novo* rehearing as respects punishment.

²³ This would include a transcript of the audio recording made under Section 64.

²⁴ Provision may be made in this section for notice to be given by the appellant's representative, if it is contended that the appellant is mentally incompetent.

²⁵ An alternative option is for appeals to be heard on the same grounds as they are in criminal appeals heard by the home country's civilian appellate courts, rather than by way of a *de novo* rehearing. An example of this alternative approach is Part 5A of the Armed Forces Discipline Act 1971 (New Zealand).

- (2) An appeal under Section 77 against punishment (including any orders made in conjunction with or in lieu of punishment) is to be by way of a *de novo* rehearing as respects punishment.
- (3) In the case of the hearing of an appeal under Section 77, rulings and directions on questions of law, procedure or practice are to be given by the Military Judge.
- (4) Any rulings or directions given under sub-section (3) are binding on the Military Court.

83. Power of Military Court in respect of finding of guilty

- (1) The Military Court must, on an appeal against a finding that a person is guilty of an offence:
 - (a) confirm or quash the finding concerned or
 - (b) substitute for the finding concerned a finding that another charge has been proved.
- (2) Where the Military Court quashes the finding, or (if there is more than one finding) every finding, made in respect of the appellant, it must quash the punishment which relates to that finding or, as the case may be, to those findings.

84. Power of Military Court in respect of punishments

- (1) The Military Court may, on an appeal against a punishment or a combination of punishments:
 - (a) confirm the punishment or combination of punishments imposed or
 - (b) quash the punishment and impose in substitution for it any punishment or combination of punishments which –
 - (i) the disciplinary officer would have had the power to impose and
 - (ii) in the opinion of the Military Court, is no more severe than the punishment, or the combination of punishments, originally imposed.
- (2) If the punishment, or the combination of punishments, is varied, the varied punishment, or combination of punishments:
 - (a) is deemed to have been imposed by the disciplinary officer and
 - (b) has effect as if imposed on the day on which the original punishment, or combination of punishments, was imposed.

85. Power of Military Court in respect of orders for compensation and restitution and orders to come up for punishment if called on

- (1) The Military Court may, on an appeal against an order of compensation or restitution (or both) or an order under Section 56:
 - (a) confirm the order or
 - (b) quash the order or
 - (c) vary the order under sub-section (3).

[Option A:

- (2) If an order under Section 56 is quashed under sub-section (1)(b):
 - (a) the Military Court may impose a punishment, or combination of punishments, that the disciplinary officer would have had the power to impose and
 - (b) that punishment, or combination of punishments –
 - (i) is deemed to have been imposed by the disciplinary officer and
 - (ii) has effect as if imposed on the day on which the order under Section 56 was made.]

[Option B:

- (3) If an order under Section 56 is quashed under sub-section (1)(b), the suspended punishment has effect from the day on which the order under Section 56 was made.]
- (4) The Military Court may vary the order under sub-section (1)(c) by substituting an order:
 - (a) that the disciplinary officer would have had the power to make and
 - (b) that, in the case of an order requiring the payment of compensation, either reduces or increases the amount of compensation to be paid and
 - (c) that, in the case of an order requiring restitution –
 - (i) requires property additional to or different from that specified in the order to be restored to the person who appears to the court to be entitled to it or
 - (ii) excludes part of the property that is specified in the order if the court considers that the person to whom property is to be restored is not entitled to that part.
- (5) If an order is varied under this section, the varied order:
 - (a) is deemed to have been made by the disciplinary officer and
 - (b) has effect as if made on the day on which the original order was made.

86. Rules of procedure

- (1) The rules may make provision with respect to the hearing of appeals under this Part.
- (2) The procedure for a *de novo* rehearing under this Part may differ from the procedures followed by the Military Court in a trial conducted under Parts 5 and 6.

Decisions of Military Court and further appeal**87. Decisions of Military Court and further appeal**

- (1) The Military Court must state its reasons in writing for a decision on any appeal under this Part.
- (2) For the purposes of the appeal right granted by Section 152:
 - (a) an appellant is deemed to have been convicted by the Military Court if the court confirms a finding of guilt or substitutes a finding of guilt on another charge under Section 83(1)(b)

- (b) an appellant is deemed to have been sentenced by the Military Court if the court confirms a punishment or order imposed by the disciplinary officer, or imposes a punishment or order in substitution under Section 84(1)(b) or Section 85(1)(c).

Miscellaneous procedural provisions

88. Right of appellant to present case in writing

- (1) An appellant under this Part may, instead of having the appellant's case presented orally, have it presented in writing.
- (2) If sub-section (1) applies, the Military Court may deal with the appellant's case by way of a hearing on the papers.

89. Defence of appeals and representation of appellant

- (1) The Director of Military Prosecutions must undertake the defence of an appeal to the Military Court.
- (2) An appellant under this Part may be represented by a lawyer.

Part 5 – Military Court

Establishment of Military Court

90. Military Court of [home country] established

- (1) A court of record called the Military Court of [home country] is established.
- (2) In addition to the jurisdiction and powers specially conferred on the Military Court by this or any other Act, the court has all the powers inherent in a court of record.

91. Powers of Military Court may be exercised by Military Judge

- (1) The powers of the Military Court may be exercised by a Military Judge.
- (2) A Military Judge may exercise any powers of the Military Court even though one or more Military Judges are exercising any powers of the court at the same time.

Military Judges

92. Military Judges

- (1) The Military Court comprises:²⁶
 - (a) one Military Judge who is to be the Chief Military Judge of [home country] and
 - (b) at least one other Military Judge.
- (2) The Military Court's jurisdiction is not affected by a vacancy in the number of its Military Judges.

93. Eligibility for appointment as Military Judge

- (1) A person must not be appointed as a Military Judge unless that person:
 - (a) is eligible for appointment as a Judge under [relevant provision of the Constitution or other law which applies in the home country] or
 - (b) is a Judge.
- (2) A Judge [or Magistrate] who is appointed as a Military Judge may sit as, or exercise any of the powers of, a Judge [or Magistrate].

94. Appointment of Chief Military Judge

- (1) The [relevant authority]²⁷ may appoint a person as the Chief Military Judge of [home country] [under relevant provision of the Constitution or other law which applies in the home country].

²⁶ The number of Military Judges to be provided for should reflect the size of the home country's armed forces and therefore the likely case load of the Court. However, it is undesirable if the Chief Military Judge has no colleague on the military bench, in case of illness or other unavailability.

²⁷ This authority may be the President or Governor-General of the home country, or a judicial commission, as established under the Constitution of the home country. The relevant authority must be the same authority as that which appoints Judges of the superior courts which have jurisdiction in the home country.

- (2) A person must not be appointed as the Chief Military Judge unless that person is eligible for appointment as a Judge under Section 93.
- (3) The [relevant authority] may appoint a Military Judge as acting Chief Military Judge if:
 - (a) because of illness or absence from [home country], or for any other reason, the Chief Military Judge is unable to exercise the duties of that office or
 - (b) the office of Chief Military Judge is vacant.
- (4) While acting as Chief Military Judge, a Military Judge:
 - (a) may perform the functions and duties of the Chief Military Judge and
 - (b) may for that purpose exercise all the powers of the Chief Military Judge.

95. Appointment of other Military Judges

- (1) The [relevant authority] may appoint a person as a Military Judge [under relevant provision of the Constitution or other law which applies in the home country].
- (2) Military Judges who are appointed under this section have seniority among themselves according to the dates of their appointment.

96. Protection of Military Judges against removal from office

A Military Judge may not be removed from office except in accordance with [relevant provision of the Constitution or other law which applies to the removal of superior court Judges in the home country].²⁸

97. Military Judges must not hold other offices

A Military Judge must not undertake any other paid employment or hold any other office (whether paid or not) unless [the relevant authority]³ is satisfied that the employment or other office is compatible with judicial office.

[Option A.²⁹

98. Age of retirement

Each Military Judge must retire from office on attaining [the mandatory retirement age for superior court Judges under the Constitution or other law which applies in the home country].]

²⁸ The removal of a Judge for inability or misbehaviour is a grave step which is reflected by the processes required under the Constitutions of Caribbean countries. For example, in those countries over which the Eastern Caribbean Supreme Court exercises jurisdiction, such removal requires the approval of the Judicial Committee of the Privy Council; see *The West Indies Associated States Supreme Court Order 1967* (UKSI 1967/223), s 8(4).

²⁹ Security of tenure is an important element of judicial independence. Appointing Military Judges to an age of retirement is a well-respected method of assuring such security, which is followed in Commonwealth jurisdictions such as the United Kingdom and New Zealand. See *Armed Forces Act 2006* (UK) s 362 and *Courts-Martial (Appeals) Act 1951* (UK) s 32(2); *Court Martial Act 2007* (New Zealand) s 19.

[Option B.³⁰

98. Term of appointment

- (1) The term of an appointment made under Section 95(1) is [5/7/10] years.
- (2) A Military Judge whose term expires is not eligible for re-appointment.]

99. Salaries and benefits of Military Judges

- (1) Each Military Judge is to be paid salaries and benefits in accordance with [provisions of the Constitution or other law applicable in the home country, which prescribe the salaries and benefits of superior court Judges].
- (2) The salary and benefits payable for a period during which a Military Judge acts on a part-time basis must be calculated and paid on a pro rata basis as a proportion of the salary and benefits for a full-time equivalent position.
- (3) For the purpose of [relevant provisions of the Constitution or other law governing judicial remuneration], the payment of salary and benefits on a pro rata basis under sub-section (2) is not a reduction of salary.

Constitution of Military Court for proceedings

100. Composition of Military Court for trials

- (1) For the purpose of any trial in the Military Court [and of any proceeding under Section 136],³¹ the court must consist of:
 - (a) one Military Judge and
 - (b) either of the following –
 - (i) five military members if the proceedings relate to an offence for which the maximum penalty is life imprisonment or a term of imprisonment of [10/14/20] years or more (**a serious offence**) or
 - (ii) three military members in any other case.
- (2) For the purpose of an appeal under Part 4, the Military Court must consist of one Military Judge and one military member.
- (3) For the purpose of any other proceeding in the Military Court, including an application for bail, the Military Court must consist of one Military Judge.
- (4) The Chief Military Judge must assign the Military Judge for the proceedings.
- (5) If sub-section (1) or (2) apply, the Registrar must assign the military member or members in accordance with Sections 101 to 104.

³⁰ If the home country elects fixed term appointments, rather than appointment until a retiring age, it is important that the appointee is not eligible for re-appointment to preserve the public's confidence in judicial independence.

³¹ The words in square brackets would only apply if Option A is selected in respect of the deferral of sentences.

Assignment of military members of Military Court

101. Qualifications for membership

A person is qualified to sit as a military member only if the person:

- (a) is a member of the Defence Force or a Commonwealth force³² and
- (b) has served in the Defence Force or Commonwealth force for a period of more than three years (whether continuously or in aggregate) and
- (c) is not disqualified under Section 102.

102. Disqualifications for membership

A person is disqualified to sit as a military member if the person:

- (a) has been the commanding officer of the accused or appellant at any time between the date on which the accused or appellant was charged and the date of the hearing or
- (b) is or has been the prosecutor or a witness for the prosecution or
- (c) has investigated the charge against the accused or appellant, or was the officer who conducted the preliminary investigation into the case or
- (d) was the disciplinary officer who acted under Part 3 in respect of the charge against the accused or appellant or
- (e) was a member, Judge or Judge Advocate of a previous court that tried the accused or appellant in respect of the same offence or
- (f) has held, or was one of the persons holding, a court or board of inquiry into matters relating to the subject matter of the charge against the accused or appellant or
- (g) is a lawyer or
- (h) has a personal interest in the case.

103. Registrar must consider other factors in assigning military members

- (1) In any trial in the Military Court where the accused is an officer, the Registrar must assign:
 - (a) five officers to be military members if the trial relates to a serious offence or
 - (b) three officers to be military members in any other case.
- (2) In any trial in the Military Court where the accused is a [soldier/marine], the Registrar may assign:
 - (a) any of the following to be military members if the trial relates to a serious offence –
 - (i) five officers or
 - (ii) four officers and one warrant officer or
 - (iii) three officers and two warrant officers or

³² **Commonwealth force** would be a defined term, for example 'any military, naval or air force raised in any country or territory within the Commonwealth by the Government of that country but does not include the Defence Force'; see Defence Act Ch 211 (The Bahamas) s 2(1).

- (b) either of the following to be military members in any other case –
 - (i) three officers or
 - (ii) two officers and one warrant officer.
- (3) Unless the Registrar is of the opinion that it is not reasonably practicable to do so, the Registrar:
 - (a) must assign military members whose ranks reflect –
 - (i) the seniority of the accused and
 - (ii) the seriousness of the charge against the accused and
 - (b) must assign at least one military member who belongs to the same arm of the Defence Force as the accused³³ and
 - (c) must not assign officers or warrant officers who are all –
 - (i) from the same ship or unit as the accused or
 - (ii) from one ship or unit.

104. Substitute military members

- (1) The Registrar may, before the accused has entered a plea to the charge at the trial, assign:
 - (a) one or more officers to act as substitute military members for an officer or
 - (b) one or more warrant officers to act as substitute military members for a warrant officer.
- (2) A substitute military member may be assigned to fill a vacancy in the military membership of the Military Court if a military member:
 - (a) dies or becomes seriously ill or
 - (b) is absent or is found to be disqualified to sit as a military member or
 - (c) is discharged as a result of an objection under Section 119.
- (3) If, after the accused has entered a plea to the charge at the trial, a military member is unable to continue for one of the reasons specified in sub-section (2):
 - (a) if Section 103(1)(a) applies, the Military Court may continue the trial with four military members
 - (b) if Section 103(1)(b) applies, the Military Judge must discharge all of the military members and refer the charge back to the Director of Military Prosecutions.

³³ In a Caribbean context, this means that, if the accused is an infantry soldier, at least one of the military members must be an infantry officer or warrant officer. Whereas, if the accused is a member of the coastguard, at least one of the military members must be an officer or warrant officer in the coastguard.

Duties of members of Military Court

105. Duties of Military Judge

- (1) A Military Judge must ensure that every proceeding in the Military Court is conducted:
 - (a) in accordance with this Act and the rules of procedure and
 - (b) in a manner that is appropriate for a court of justice.
- (2) In presiding at a trial, a Military Judge must:
 - (a) rule on any informality or defect in –
 - (i) the charge sheet or
 - (ii) the constitution of the Military Court or
 - (iii) any other matter relating to the proceeding
 - (b) ensure that the prosecutor and defence counsel conduct themselves in accordance with the rules of procedure
 - (c) ensure that justice is administered and that the accused has a fair trial
 - (d) afford the accused every reasonable opportunity to make a defence
 - (e) ensure that no officer or warrant officer under instruction who is present expresses an opinion to a member of the Military Court on any matter relating to the trial before the court has announced its findings, nor on sentence before the court has passed sentence
 - (f) after the final addresses on behalf of the prosecution and the accused, sum up the evidence and direct the military members on the application of the law to the case before they retire to deliberate on their findings
 - (g) if the military members declare a finding of guilty and the Military Judge is of the opinion that the finding is contrary to law, advise the military members once (but only once) more of the findings that are, in the Military Judge's opinion, open to them in law.

106. Duties of military members

- (1) A military member must at all times during a proceeding in the Military Court:
 - (a) act in a manner that is consistent with achieving a fair hearing for the accused or appellant and
 - (b) behave in a manner that is appropriate for a member of a court of justice.
- (2) In particular, a military member:
 - (a) must consider all the evidence admitted by the Military Judge and
 - (b) must vote impartially on the finding and, if necessary, on the sentence and
 - (c) must not disclose any opinion of a member of the Military Court or how that member voted on the finding or sentence, or both.
- (3) A military member may ask questions to clarify any matters at the proceeding.

107. Seniority of military members

- (1) The most senior officer assigned by the Registrar as a military member is to be the senior military member of the Military Court.
- (2) The other persons assigned by the Registrar as military members have seniority among themselves according to their rank and according to their seniority within that rank.

108. Senior military member must submit report on command issues

The senior military member must submit a written report on any command issues that arise in the course of any proceeding before the Military Court to the Commander.

109. Prohibition on taking into account information about conduct of military members

- (1) This section applies to information about the way in which a military member, in the course of any proceeding before the Military Court:
 - (a) behaved as a member of the court or
 - (b) performed the functions or duties of a military member.
- (2) Any information to which this section applies must not be taken into account in any decision that affects, or is likely to affect, the conditions of service within the Defence Force of the military member to whom that information relates.
- (3) Conditions of service includes prospects of promotion, postings or career enhancements.

Part 6 – Jurisdiction, Procedures and Powers of Military Court

Jurisdiction and sittings of Military Court

110. Jurisdiction of Military Court

The Military Court has jurisdiction to hear and determine:

- (a) any charge against a person subject to this Act in respect of an offence against this Act, whether committed in [home country] or elsewhere, which is laid before the Registrar by the Director of Military Prosecutions
- (b) every application made by the Director of Military Prosecutions under [section re offender to come up for sentence, subs (2)]
- (c) every appeal against the finding of, or punishment imposed by, a disciplinary officer, lodged under Part 4
- (d) every other application made to the court under this Act (for example, an application for bail) or the inherent jurisdiction of the court.

111. Requirements for sittings of Military Court

- (1) The Military Court:
 - (a) must sit in open court unless Section 112 or 113 applies and
 - (b) may sit in any place, whether in [home country] or elsewhere and
 - (c) may conduct its proceedings by audiovisual link or by any means of communication that allows individuals a reasonable opportunity to participate in the proceeding.
- (2) When conducting a trial, the Military Court must sit in the presence of the accused unless the accused is legally represented and the accused:
 - (a) commits misconduct by so interrupting the proceeding as to render the continuation of that proceeding in the accused's presence impracticable or
 - (b) has actual knowledge of the proceeding and the Military Judge is satisfied that the accused has made a voluntary and informed decision to waive the accused's right to be present.
- (3) A sitting of the Military Court may be adjourned from time to time and from place to place.
- (4) In sub-section (2), **the presence of the accused** includes presence through an audiovisual link, if the Military Judge is satisfied that:
 - (a) the audiovisual link is reliable and
 - (b) it is in the interests of justice for the accused to be present through such a link.

112. When the Military Court must hold proceedings in closed court

- (1) The Military Court must hold its proceedings in closed court while:
 - (a) the military members deliberate on their finding
 - (b) the Military Judge and the military members deliberate on sentence.
- (2) The Military Court may hold its proceedings in closed court on any other deliberation.
- (3) When the Military Court holds its proceedings in closed court during a trial, only the following persons may be present:
 - (a) the members of the court referred to in sub-section (1)(a), (b) or (c) (as the case requires)
 - (b) in the case of proceedings referred to in sub-section (1)(a), the persons referred to in Section 113(2)(c)(iii) to (vii)
 - (c) any other persons authorised by the Military Judge.
- (4) When the Military Court holds its proceedings in closed court during the hearing of an appeal under Part 4, only the following persons may be present:
 - (a) the Military Judge
 - (b) any other persons authorised by the Military Judge.

113. Military Judge may limit scope of open court

- (1) In any proceeding in the Military Court, the Military Judge may make any of the orders specified in sub-section (2) limiting the scope of open court if the Military Judge considers that:
 - (a) a statement may be made or evidence given in the course of the proceeding that might lead to the disclosure of information that would or might –
 - (i) be directly or indirectly useful to the enemy or any foreign country or
 - (ii) be otherwise harmful to [home country] or
 - (b) the making of the order –
 - (i) is necessary in the interests of justice or
 - (ii) is desirable in the interests of public morality or
 - (iii) is necessary for the protection of the reputation of a victim of an alleged sexual offence or offence of extortion.
- (2) The orders referred to in sub-section (1) are as follows:
 - (a) An order forbidding publication of any report or account of the whole or any part of the proceeding, including any evidence adduced or submissions made.
 - (b) An order forbidding the publication of the name of any person connected, whether as a witness or otherwise, with the proceeding or of any name or particulars likely to lead to the identification of that person.
 - (c) An order excluding all or any persons from a trial, except the following –
 - (i) a military member
 - (ii) an officer or warrant officer under instruction

- (iii) the Director of Military Prosecutions or any person acting on behalf of the Director
 - (iv) the accused and any escort of the accused
 - (v) the accused's counsel or defender
 - (vi) the Registrar or any other officer of the Military Court
 - (vii) an interpreter required in the proceedings
 - (viii) a person expressly permitted by the Military Judge to be present.
- (d) An order excluding all or any persons from the hearing of an appeal under Part 4, except the following –
- (i) the Director of Military Prosecutions or any person acting on behalf of the Director
 - (ii) the appellant's counsel
 - (iii) the Registrar or any other officer of the Military Court
 - (iv) an interpreter required in the proceedings
 - (v) a person expressly permitted by the Military Judge to be present.
- (3) However, the Military Judge may make an order specified in sub-section (2)(c) or (d) that has the effect of excluding any accredited news media reporter from the proceedings only on the grounds specified in sub-section (1)(a), but not on any of the grounds specified in sub-section (1)(b).

114. Duration of order limiting scope of open court

An order specified in Section 113(2) limiting the scope of open court:

- (a) may be made for a limited period or permanently and
- (b) if made for a limited period, may be renewed for a further period or periods or made permanent by the Military Court at any time and
- (c) if made permanently, may be reviewed by the Military Court at any time.

Procedures

115. Preliminary procedure

- (1) The Registrar must:
- (a) fix the time and place for each sitting of the Military Court and
 - (b) give written notice of the time and place fixed (**notice of sitting**) to –
 - (i) the accused or appellant and
 - (ii) the Director of Military Prosecutions and
 - (iii) the Military Judge for the proceeding and
 - (iv) in the case of a trial, the military members for the proceeding.
- (2) At the beginning of a trial, the notice of sitting must:
- (a) be accompanied by a copy of the charge sheet certified by the Director of Military Prosecutions in accordance with Section 19(c) and laid before the Registrar in accordance with Section 19(e) and

- (b) in the case of a notice to the accused, be accompanied by a copy of all documents submitted to the Military Judge by the Director of Military Prosecutions in relation to the charge and
- (c) in the case of a notice to the military members, be accompanied by an information sheet that –
 - (i) describes the functions and duties of military members and
 - (ii) is in the prescribed form.

116. Military Judge may sit alone to rule on question of law or procedure or conduct pre-trial arraignment

- (1) The Military Judge for a proceeding must:
 - (a) arraign the accused on a charge if the accused makes a written request to be brought before the Military Court to plead guilty before the appointment of the military members
 - (b) rule on every question of law or procedure that arises during the proceeding and
 - (c) sit in the absence of the military members to determine the question of law or procedure if the Military Judge considers it would be desirable in the interests of justice to do so.
- (2) To avoid doubt, the Military Judge may sit alone under sub-sections (1)(a) or (b) before or after the appointment of the military members.
- (3) A ruling under sub-section (1) must be followed by the military members.
- (4) In this section, a question of law includes any question arising in respect of:
 - (a) a plea to the general jurisdiction of the Military Court
 - (b) a plea in bar of trial
 - (c) an application for the separation of trials
 - (d) an application for the severance of charge sheets
 - (e) an application for the severance of charges
 - (f) a submission that there is no case to answer
 - (g) the admissibility of evidence
 - (h) an application for a ruling referred to in Section 105(2)(a)
 - (i) an application for discovery
 - (j) the fitness of the accused to stand trial.

117. Power to summon witnesses

- (1) The Military Judge for the proceeding or the Registrar may issue a summons requiring any person to:
 - (a) attend at the time and place specified in the summons and
 - (b) give evidence and
 - (c) produce any papers, documents, records or things in that person's possession or under that person's control that are relevant to the subject of the relevant proceedings.

- (2) A summons:
 - (a) must be in the prescribed form and
 - (b) may be issued –
 - (i) on the initiative of the Military Judge or Registrar or
 - (ii) on the application of the Director of Military Prosecutions or the accused or appellant.

118. Service of summons

[Provision to mirror ordinary rules for service under the law of the home country.]

119. Objection to military members

- (1) At the commencement of any proceeding to which Section 100(1) or (2) apply, the names of the military member or members and any substitute military members must be read out.
- (2) Any party to the proceeding may object to a military member, on any reasonable ground.
- (3) The Military Judge must rule on any objection to a military member before the military member is sworn.
- (4) If an objection to a military member is upheld, the Military Judge must discharge that member.

120. Administration of oaths

- (1) At the commencement of every trial in the Military Court, an oath in the prescribed form must be administered to:
 - (a) every military member
 - (b) every officer or warrant officer under instruction in the Military Court
 - (c) every person responsible for recording or transcribing the proceedings in the court
 - (d) every interpreter attending the court.
- (2) Every witness before the court must be examined on oath administered in the prescribed form.
- (3) If the court considers that a child who is called as a witness does not understand the nature of an oath, the child's evidence may be received even though it is not given on oath, so long as the court is of the opinion that the child –
 - (a) has sufficient intelligence to justify the reception of the evidence and
 - (b) understands the duty of speaking the truth.
- (4) If any person referred to in sub-section (1) or (2) objects to being sworn, or it is not reasonably practicable to administer an oath to that person in a manner appropriate to the person's religious belief, the person may be permitted to make a solemn affirmation instead of swearing an oath.
- (5) The making of an affirmation under sub-section (4) has the same force and effect and has the same consequences as the taking of an oath.
- (6) Every oath or affirmation required to be administered under this Act must be administered in accordance with the rules of procedure.

121. Discharge of military members

- (1) The Military Judge presiding at a proceeding may discharge the military member or members if, before or after the beginning of the hearing, the Military Judge considers it to be necessary or expedient in the interests of the administration of justice.
- (2) If, after the beginning of a hearing, the Military Judge dies or is otherwise unable to attend:
 - (a) the Chief Military Judge must assign another Military Judge to preside and
 - (b) that Military Judge must discharge the military member or members.
- (3) If the military member or members are discharged under this section, they are released from their functions and duties to the court.

Bail

122. Military Judge may grant bail pending trial

- (1) This section applies to a person who:
 - (a) is accused of committing an offence against this Act and
 - (b) is being held in custody under this Act.
- (2) A Military Judge may, on application by the accused –
 - (a) grant bail to the accused
 - (b) impose any conditions of bail that the Military Judge thinks fit.
- (3) In determining whether to grant bail under this section, the Military Judge must [insert criteria which apply to the granting of bail under the law of the home country].

123. Military Judge may grant bail pending appeal

- (1) This section applies to a person (**the appellant**) who:
 - (a) has been convicted of an offence against this Act and
 - (b) is serving a sentence of imprisonment or detention under this Act in respect of the conviction pending the determination of an appeal against conviction or sentence, or both, to –
 - (i) the Military Court or
 - (ii) the Court of Appeal.
- (2) In determining whether to grant bail under this section, the Military Judge must [insert criteria which apply to the granting of bail pending appeal under the law of the home country].

124. Procedure for bail generally

- (1) If an application for bail is made under Section 122 or 123, the Registrar must forward a copy of the application to the Director of Military Prosecutions.
- (2) The Director of Military Prosecutions –
 - (a) must be the respondent to the application and
 - (b) may make recommendations to the Military Judge who is considering the application.

- (3) Before making a decision, the Military Judge must consider any recommendations that the Director of Military Prosecutions has made, including any recommendations on measures to ensure the attendance of the person concerned should bail be granted.

125. Issue of warrant to arrest person absconding or breaching bail condition

- (1) A Military Judge may issue a warrant in the prescribed form for the arrest of a person who has been released on bail under Section 125 or 126 if:
- (a) the Military Judge is satisfied by evidence on oath that –
 - (i) the person has absconded or is about to abscond for the purpose of evading justice or
 - (ii) the person has contravened or failed to comply with any condition of bail or
 - (b) the person –
 - (i) does not attend personally at the time and place specified in the grant of bail or
 - (ii) does not attend personally at any time and place to which during the course of the proceedings the hearing has been adjourned.
- (2) The warrant:
- (a) must be directed to every provost officer and every police officer and
 - (b) may be executed by –
 - (i) a provost officer
 - (ii) a person lawfully exercising authority under or on behalf of a provost officer
 - (iii) a police officer.
- (3) For the purpose of executing the warrant, a person referred to in sub-section (2)(b) may, at any time, enter on to any premises, by force if necessary, if that person has reasonable grounds to believe that the person against whom the warrant is issued is on those premises.
- (4) The person executing the warrant:
- (a) must be in possession of the warrant and
 - (b) must produce it on initial entry and, if requested, at any subsequent time and
 - (c) must, if not in uniform, produce evidence that the person is a person referred to in sub-section (2)(b).

126. Person arrested under warrant for absconding or breaching bail condition must be brought before Military Judge

- (1) A person who is arrested under a warrant issued under Section 125 must be brought before a Military Judge as soon as possible.
- (2) The Military Judge must reconsider the question of bail if satisfied that the person:
- (a) had absconded or was about to abscond or
 - (b) had contravened or failed to comply with any condition of bail.

Findings of Military Court

127. Finding of Military Court

- (1) The finding of the Military Court following the trial of a charge must be determined by the [unanimous/majority] vote of the military members.³⁴
- (2) If the military members are unable to reach a decision on the charge which [is unanimous/reflects the necessary majority prescribed by law], the Military Judge must refer the charge back to the Director of Military Prosecutions after discharging the military members in accordance with Section 124.
- (3) The Director of Military Prosecutions may then:
 - (a) decide not to proceed with the charge or
 - (b) lay the charge sheet again, or an amended version of the charge sheet, before the Registrar.
- (4) If sub-section (3)(b) applies, the Registrar must assign new military members in accordance with Sections 1 to 107.

Sentence of Military Court

128. Sentence of Military Court

- (1) The sentence of the Military Court (if any) must be passed by the majority of the votes of the Military Judge and the military members.
- (2) However, if there is an equality of votes on the sentence, the Military Judge has a casting vote.
- (3) If the court records a finding of guilty of an offence which has a victim, it must, before imposing a sentence, take into account:
 - (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim
 - (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss or damage caused by the offender or ensure that the offending will not continue or recur
 - (c) the response of the offender or the offender's family to the offending
 - (d) any measures taken or proposed to be taken by the offender or the offender's family, to –
 - (i) make compensation to any victim of the offending or that victim's family or
 - (ii) apologise to any victim of the offending or that victim's family or
 - (iii) otherwise make good the harm that has occurred
 - (e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.
- (4) In deciding whether and to what extent any matter referred to in sub-section (3) should be taken into account, the court must take into account:

³⁴ The law of the home country prescribes whether unanimity, a super majority or a simple majority is required to constitute a jury verdict in any particular case in the ordinary criminal courts. In principle, the home country may reflect that law by making equivalent prescription in respect of the military members of the Military Court.

- (a) whether or not it was genuine and capable of fulfilment and
 - (b) whether or not it has been accepted by the victim as remedying or mitigating the wrong.
- (5) If the court determines that, despite an offer, agreement, response, measure or action referred to in sub-section (3), it is appropriate to impose a sentence, the court must take that offer, agreement, response, measure or action into account when determining the appropriate sentence for the offender.
- (6) Without limiting any other powers of the court to adjourn, in any case contemplated by this section the court may adjourn the proceedings until:
- (a) compensation has been paid or
 - (b) the performance of any work or service has been completed or
 - (c) any agreement between the victim and the offender has been fulfilled or
 - (d) any measure proposed under sub-section (3)(d) has been completed or
 - (e) any remedial action referred to in sub-section (3)(e) has been completed.

129. Military Court to pass one sentence only³⁵

- (1) Subject to sub-section (2), where the Military Court convicts a person of more than one offence or, on convicting a person of one or more offences, agrees to take other offences which the offender admits to have committed into consideration when sentencing that offender, the court must pass only one sentence in respect of all the offences of which the offender has been convicted (including any offences which the offender has admitted).
- (2) A sentence passed under sub-section may, subject to the provisions of this Act, include more than one of the punishments prescribed by Schedule 1.]

130. Discretion of Military Court as to punishment

- (1) Where under this Act a person is liable on conviction by the Military Court to imprisonment for life or for any other term of imprisonment, the court may sentence that person to imprisonment for any shorter term, being, in the case of a person liable to imprisonment for life, a term not exceeding 14 years, or to one or more of the less severe punishments specified in Schedule 1.
- (2) No officer may be sentenced by the Military Court to detention.

131. Maximum term of detention

In no case must any person be sentenced by the Military Court to detention for a term exceeding two years.

132. Punishment by fine

- (1) Every fine imposed for an offence against this Act must be a specified amount of money.
- (2) Any fine imposed for an offence against this Act may be recovered from the offender:

³⁵ The Model Law is drafted on the basis that the home country will adopt the traditional approach of requiring the imposition of one sentence for all offences. However, the home country has the option of requiring a separate sentence for each offence. If that option is adopted, consequential amendments to other provisions of the Model Law would be required.

- (a) if a member of the Defence Force, by means of deductions from pay in accordance with regulations made under this Act or
 - (b) in the case of any other person subject to this Act who is paid by the [Government of the home country], by means of deductions from the offender's salary or wages, or from any other emoluments payable to the offender.
- (3) Except when imposing punishment on a person convicted of a civil offence, the Military Court must not impose a fine exceeding:
- (a) in the case of a member of the Defence Force, an amount equal to the member's basic pay for 84 days or
 - (b) in the case of any other person, [specify maximum in local currency].

133. Compensation for loss of or damage to property

- (1) Subject to the provisions of this section, on convicting any person for an offence against this Act, the Military Court may, in addition to or in substitution for any punishment that it has power to impose, order the offender to pay to any person (including the Government of [home country]) such sum as it thinks just by way of compensation for any emotional harm, or for any loss or destruction of or damage to property, or for any expense, suffered by the last-mentioned person through or by means of the offence.
- (2) Where on the arrest of the offender any money was found in the offender's possession, the Military Court may, in its discretion, if it is satisfied that the money was obtained through or by means of the offence, order the whole or any part of the money to be applied to any such payment.
- (3) Except as provided in sub-section (2), the total amount of compensation awarded by the Military Court must not exceed:
 - (a) in the case of a member of the Defence Force, an amount equal to the member's basic pay for 60 days or
 - (b) in the case of any other person, [specify maximum in local currency].
- (4) An order under this section does not affect the right of any person to recover by civil proceedings any sum in excess of the amount recovered under the order.

134. Restitution of property

- (1) Where the Military Court convicts anyone of an offence against [provisions creating offences relating to the unlawful acquisition or possession of property], the court may, in addition to or in substitution for any punishment that it may impose, order the whole or any part of any such property found in the offender's possession, or in the possession of any other person acting on the offender's behalf, to be delivered to such person as appears to be entitled to it.
- (2) If any property (other than money) that appears to the Military Court to have been obtained by the conversion or exchange of any property unlawfully obtained is found in the possession of the offender, the court may order that the property so found be delivered to such person as appears to be entitled to it.
- (3) Where an order is made under sub-section (1), and it appears to the Military Court that a purchaser has bought the property in good faith and without knowledge that it was unlawfully acquired or possessed, the court may order

that on the restitution of the property the offender must pay to the purchaser a sum not exceeding the amount paid for the property.

- (4) Where anyone is convicted of an offence against [provisions establishing property offences within military context], and it appears to the Military Court convicting that person that the property has been pawned to a pawnbroker, the court may order the pawnbroker to deliver it to the person appearing to the court to be entitled to it, either on payment or without payment to the pawnbroker of the amount of the loan or any part of it, as the court in all the circumstances of the case thinks just.
- (5) Before an order is made under sub-section (4) for the delivery of property without payment to a pawnbroker, the pawnbroker must be given the opportunity to be heard.
- (6) If the person in whose favour any order under sub-section (4) is made thereby obtains delivery or possession of the property, that person must not afterwards question the validity of the pawn.
- (7) Except as provided in sub-section (6), no order made under this section has any further effect than to change possession of the property; and no such order prejudices any right of property, or any right of action in respect of any property, existing or acquired in it either before or after the offence was committed.
- (8) Sub-sections (4) to (6) apply only in respect of pawnbrokers carrying on business in [home country], or in places over which [home country] is for the time being exercising sovereignty, or in respect of pawnbrokers over which [home country] or the Defence Force or any part of the Defence Force has jurisdiction by virtue of any treaty or agreement with the country in which the pawnbrokers are carrying on business.

Deferral of sentence³⁶

[Option A:

135. Order to come up for sentence if called on

- (1) If the accused is convicted of an offence, the Military Court may, instead of passing sentence, order the accused to appear for sentence, if called on to do so within the period specified in sub-section (2).
- (2) The period referred to in sub-section (1) is a period not exceeding one year, commencing with the date of conviction, that the Military Court may specify in the order.
- (3) If the Military Court makes an order under sub-section (1), the court must record and attach to the record of proceedings a statement of its findings of fact in relation to the charge.
- (4) The Military Court may make orders under Section 133 or 134 in combination with an order under sub-section (1).

136. Offender to come up for sentence

- (1) This section applies if an offender for whom an order is made under Section 135:

³⁶ The provisions under this sub-heading provide two options: orders to come up for sentence if called on and suspended sentences. The Model Law contemplates that the home country may select either one of these options, or neither.

- (a) is convicted or found guilty summarily of a subsequent offence against this Act or any other Act or
 - (b) fails to comply with any other order referred to in Section 135(4) or
 - (c) fails to comply with any agreement, or fails to take any measure or action, to make amends to the victim, or the victim's family, that was brought to the attention of the court at the time the court made the order under Section 135.
- (2) The Director of Military Prosecutions may, at any time within the period specified in the order, apply to the Military Court to have the offender brought before the Military Court to be dealt with for the original offence.
- (3) On an application under sub-section (2), the offender is to be placed in close arrest and brought before the Military Court at the time and place directed by the Registrar.
- (4) If a person appears before the Military Court under this section and the Military Court is satisfied of any of the matters specified in sub-section (1), the Military Court:
- (a) must inquire into the circumstances of the original offence and the conduct of the offender since the order was made (including, if appropriate, the circumstances and seriousness of the subsequent offence (if any)) and
 - (b) may sentence the offender for the original offence.]

[Option B:

135. Sentence may be suspended

- (1) If the Military Court passes sentence, the court may suspend the operation of that sentence or any part of it:
- (a) in the case of a sentence of imprisonment or detention for a term exceeding 12 months, for a period equivalent to that term or
 - (b) in any other case, for a period not exceeding 12 months.
- (2) If, prior to the end of the period of suspension, the suspension of the sentence or part of the sentence has not been terminated, the sentence or part of the sentence so suspended is deemed to be remitted.

136. Termination of suspension

If, while the sentence of an offender is suspended under Section 135, that offender is subsequently sentenced in respect of a further offence against this Act, the Military Court may make an order terminating the suspension of the suspended sentence.]

137. Other offences may be taken into account in passing sentence

- (1) A person who is found guilty by the Military Court of an offence may request the court to take into account any other offence that the person admits to having committed, if the other offence:
- (a) is similar to that of which the person has been found guilty and
 - (b) is not an offence that is punishable by imprisonment for life.

- (2) If a request is made under sub-section (1), the court may take the other offence into account in sentencing the accused.
- (3) If the court takes the other offence into account, it must not, in passing sentence, impose a punishment of greater severity than the maximum punishment that it may impose for the offence of which the accused was found guilty.
- (4) The court may exercise, in respect of any other offence taken into account under this section, any of the powers to order payment of compensation under Section 133 or the restitution of property under Section 134.

138. Announcement of finding and sentence

- (1) The Military Judge must announce in open court:
 - (a) the finding of the Military Court on each charge tried by the court and
 - (b) any sentence passed by the court.
- (2) The Military Judge must give reasons for the sentence (if any) passed by the court.

Miscellaneous provisions

139. Court must take judicial notice of certain matters

- (1) The Military Court must take judicial notice of:
 - (a) all matters of common knowledge and
 - (b) all other matters of which judicial notice would be taken by the [High Court/ Supreme Court].
- (2) The Military Court may also take judicial notice of matters that may fairly be regarded as being within the general service knowledge of members of the court.

140. Representation of accused

- (1) Any person who is to appear before the Military Court as an accused or appellant may be represented by a lawyer.
- (2) The [Minister/Commander] may prescribe regulations providing for the provision of legal assistance at public expense to a person who is to appear before the Military Court as an accused or appellant.

141. Proceedings not invalid for want of form, etc.

No proceedings before the Military Court may:

- (a) be held invalid by reason only of want of form or
- (b) be liable to removal into any court by means of any prerogative writ or order or
- (c) be liable to review by any court.

142. Evidence of military members' deliberations

- (1) A person must not give evidence about the deliberations of the military members of the Military Court in a particular proceeding.

- (2) Sub-section (1) does not prevent the giving of evidence about matters that do not form part of the deliberations of the military members, including (without limitation):
 - (a) the competency or capacity of a military member or
 - (b) any conduct of, or knowledge gained by, a military member that is believed to disqualify that person from holding that position.
- (3) Sub-section (1) does not prevent a person from giving evidence about the deliberations of the military members if the Military Judge is satisfied that the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given.
- (4) In determining, under sub-section (3), whether to allow evidence to be given in any proceedings, the Judge must weigh:
 - (a) the public interest in protecting the confidentiality of military members' deliberations generally
 - (b) the public interest in ensuring that justice is done in those proceedings.

143. Views

- (1) If, in any proceeding, the Military Judge considers that a view is in the interests of justice, the Military Judge may order a view.
- (2) A view may be ordered on the application of any party or on the Military Judge's own initiative.
- (3) A view may be ordered to be held at any time during a trial before the military members retire to deliberate, and the Military Judge may order a further view of the same place or thing during the military members' deliberations.
- (4) Information obtained at a view may be used as though that information had been given in evidence.
- (5) The parties and their lawyers are entitled to attend a view, but any party, or that party's lawyer, may waive that entitlement.
- (6) In this section, **view** means an inspection by the Military Court of a place or thing that is not in the courtroom.

144. Further evidence after closure of case

- (1) A party may not offer further evidence at trial after closing that party's case, except with the permission of the Military Judge.
- (2) The Military Judge may grant permission to the prosecution under sub-section (1) if:
 - (a) the further evidence relates to a purely formal matter or
 - (b) the further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen or
 - (c) the further evidence was not available or admissible before the prosecution's case was closed or
 - (d) for any other reason the interests of justice require the further evidence to be admitted.

- (3) The Military Judge may grant permission to an accused under sub-section (1) if the interests of justice require the further evidence to be admitted.
- (4) The Military Judge may grant permission under sub-section (1) at any time until the military members retire to deliberate on their finding.

145. Application of law of evidence to proceedings in the Military Court

- (1) The rules of evidence that apply in the [High Court/Supreme Court] for criminal proceedings (including the rules of evidence contained in any enactment) are the rules of evidence to be followed in proceedings of the Military Court.
- (2) Accordingly, a person is not required to answer any question or to produce any document in proceedings of the Military Court that that person could not be required to answer or produce in criminal proceedings before the [High Court/Supreme Court].

Administrative provisions

146. Seal of Military Court

The Military Court is to have a seal, which is to be judicially noticed by all courts and for all purposes.

147. Chief Military Judge may delegate functions, duties or powers to Military Judge or Registrar

- (1) The Chief Military Judge may, either generally or particularly, delegate:
 - (a) to a Military Judge any of the Chief Military Judge's functions, duties and powers (except the power of delegation) or
 - (b) to the Registrar the Chief Military Judge's duty to assign a Military Judge for any proceedings of the court.
- (2) A delegation:
 - (a) must be in writing and
 - (b) may be made subject to any restrictions that the Chief Military Judge thinks fit and
 - (c) is revocable at any time, in writing and
 - (d) does not prevent the performance or exercise of a function, duty or power by the Chief Military Judge.
- (3) A Military Judge or the Registrar may perform any functions, duties or powers delegated under sub-section (1) in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by delegation.
- (4) If a Military Judge or the Registrar appears to act under sub-section (1), that person is presumed to be acting in accordance with the terms of delegation in the absence of evidence to the contrary.

148. Appointment of Registrar, clerks and other officers of Military Court

- (1) The Chief Military Judge must appoint a person to act as the Registrar.

- (2) The Registrar may appoint clerks or any other officers of the Military Court as may be required.
- (3) An appointment under this section must be made by giving written notice to the person concerned.
- (4) A person appointed under this section must not undertake any other paid employment or hold any other office (whether paid or not) unless the Chief Military Judge or the Registrar (as the case may be) is satisfied that the employment or other office is compatible with that person's appointment.

149. Attendance of clerk, etc., at sitting of Military Court

- (1) The Registrar must arrange for the attendance at every sitting of the Military Court of:
 - (a) a clerk of the Military Court and
 - (b) a person responsible for recording or transcribing the proceedings and
 - (c) if necessary, a competent interpreter.
- (2) The clerk of the Military Court must:
 - (a) liaise with the officer in command or the person in control of the place where the court is to sit on matters regarding the provision of administrative support to the court and
 - (b) perform any other functions or duties that are conferred or imposed on him or her by or under this Act or any other enactment.

150. Registrar may delegate functions, duties or powers to clerk or other officer of Military Court

- (1) The Registrar may, in writing, either generally or particularly, delegate to a clerk or any other officer of the Military Court appointed under Section 148(2) any of the Registrar's functions, duties and powers, except:
 - (a) any function, power or duty delegated to the Registrar by the Chief Military Judge and
 - (b) this power of delegation.
- (2) A delegation:
 - (a) must be in writing and
 - (b) may be made subject to any restrictions and conditions that the Chief Military Judge or the Registrar thinks fit and
 - (c) is revocable at any time, in writing and
 - (d) does not prevent the performance or exercise of a function, duty or power by the Registrar.
- (3) A clerk or any other officer of the Military Court to whom any functions, duties or powers are delegated may perform and exercise them in the same manner and with the same effect as if they had been conferred on him or her directly by this Act and not by delegation.
- (4) A clerk or any other officer of the Military Court who appears to act under a delegation is presumed to be acting in accordance with its terms in the absence of evidence to the contrary.

Part 7 – Appeals to the Court of Appeal

Rights of appeal

151. Appeal against decision of Military Court relating to bail

- (1) This section applies to a decision made by a Military Judge to:
 - (a) grant or refuse bail to a person in custody under this Act or
 - (b) impose or substitute or revoke or vary any condition of bail or
 - (c) refuse to impose any condition of bail or any particular condition of bail or
 - (d) refuse to vary or revoke any condition of bail.
- (2) Either the Director of Military Prosecutions or the accused may appeal to the Court of Appeal against a decision to which this section applies –
 - (a) within 21 days after the date of the decision or
 - (b) within any further time that the Court of Appeal may allow.
- (3) For the purposes of an appeal under this section, the failure of a Military Judge to impose any condition of bail, or any particular condition of bail, on any occasion on which the condition could lawfully have been imposed is deemed to be a refusal to impose the condition.
- (4) On an appeal under this section, the Court of Appeal may:
 - (a) confirm the decision or
 - (b) vary the decision or
 - (c) set the decision aside.
- (5) If sub-section (4)(c) applies, the Court of Appeal may make any other decision that:
 - (a) could have been made in the first place and
 - (b) the court thinks appropriate.

152. Appeal against ruling

- (1) This section applies to a ruling given by a Military Judge on a question of law or procedure that arises during proceedings in the Military Court.
- (2) Either the Director of Military Prosecutions or the accused may, with the leave of the Court of Appeal obtained in accordance with Section 153, appeal to that court against a ruling to which this section applies.
- (3) On an appeal under this section, the Court of Appeal may:
 - (a) confirm the ruling or
 - (b) vary the ruling or
 - (c) set the ruling aside.

- (4) If sub-section (3)(c) applies, the Court of Appeal may make any other ruling that:
 - (a) could have been made in the first place and
 - (b) the court thinks appropriate.

153. Procedure for obtaining leave of court to appeal against ruling

- (1) If a person wishes to obtain the leave of the Court of Appeal to appeal under section 152, he or she:
 - (a) must, within ten days after the ruling is given, give notice of the application for leave to appeal in any manner that may be directed by rules of the court and
 - (b) may do so –
 - (i) whether or not reasons for the ruling are given at a later date and
 - (ii) whether or not any formal steps to sign, enter or otherwise perfect the ruling are necessary or are taken later.
- (2) The time within which notice of an application for leave to appeal to the court under this section must be given may be extended at any time by the court.
- (3) Despite the making of an application for leave to appeal under this section, the Military Court may, if it is satisfied that it is in the interests of justice to do so, proceed with the trial without awaiting the determination of the application.

154. Right of appeal against conviction or sentence

- (1) A person convicted by the Military Court may appeal to the Court of Appeal against:
 - (a) the conviction or
 - (b) the sentence imposed for the conviction (unless the sentence is one fixed by law) or
 - (c) both.
- (2) The Director of Military Prosecutions may appeal to the court against the sentence imposed by the Military Court, unless the sentence is one fixed by law.
- (3) An appeal under this section must be brought:
 - (a) within 21 days after the date of the decision appealed against or
 - (b) within any further time that the Court of Appeal may allow.
- (4) If an appeal under sub-section (2) against a sentence of imprisonment or detention is not heard before the date on which the convicted person has completed serving that sentence, the appeal:
 - (a) lapses on that date and
 - (b) is deemed to have been dismissed by the Court of Appeal for non-prosecution.
- (5) For the purposes of this section, **sentence** includes any method of disposing of a case following conviction.

155. Determination of appeals against conviction

- (1) On an appeal to the Court of Appeal against conviction, the court must:

- (a) allow the appeal if it considers that –
 - (i) the finding of the Military Court should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or
 - (ii) the finding of the Military Court involves a wrong decision on a question of law or
 - (iii) there was, on any ground, a miscarriage of justice or
 - (iv) the trial was a nullity or
 - (b) dismiss the appeal in any other case.
- (2) However, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred even though it considers that the point raised in the appeal might be decided in favour of the appellant.
- (3) If the Court of Appeal allows an appeal, the court:
- (a) may quash the conviction and
 - (b) may do any of the following –
 - (i) direct a judgment and finding of acquittal to be entered or
 - (ii) direct a new trial; or
 - (iii) make any other order that justice requires.
- (4) If all of the convictions are quashed, any sentence which has been imposed by the Military Court in relation to those convictions is deemed to be quashed without the need for an appeal under Section 156.

156. Determination of appeals against sentence

On an appeal to the Court of Appeal against sentence, the court must:

- (a) do either of the following if it thinks that a different sentence should have been imposed –
 - (i) quash the sentence imposed and impose any other sentence warranted in law (whether more or less severe) in substitution for the sentence that was quashed or
 - (ii) vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it or
- (b) dismiss the appeal in any other case.

157. Substitution of conviction on different charge

- (1) This section applies if:
- (a) an appellant has been convicted of an offence and
 - (b) the Military Court could have found the appellant guilty of some other offence (being an included offence or an offence that was recorded as an alternative charge in the charge sheet) and
 - (c) on the finding of the Military Court, it appears to the Court of Appeal that the Military Court must have been satisfied of facts that proved the appellant guilty of that other offence.
- (2) The Court of Appeal may, instead of allowing or dismissing the appeal:

- (a) substitute for the finding of the Military Court a finding of guilty of that other offence and
- (b) impose a sentence in substitution for the sentence imposed that may be warranted in law for that other offence (which must not be a sentence of greater severity).

158. Variation of conviction so as to attract different sentence

- (1) Where an appellant has been convicted of an offence committed under circumstances involving the higher of two degrees of punishment, and it appears to the Court of Appeal that the Military Court ought to have convicted the appellant of the offence under circumstances involving the lower degree of punishment, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction recorded by the Military Court a conviction for the offence as being committed under circumstances involving the lower degree of punishment.
- (2) Subject to sub-section (3), where the Court of Appeal exercises the power conferred by sub-section (1), it may pass on the appellant, in substitution for the sentence passed on the appellant by the Military Court, such sentence as it thinks proper.
- (3) A sentence passed on the appellant under sub-section (2) must:
 - (a) be warranted by this Act for the offence specified or involved in the substituted conviction
 - (b) not be of greater severity than the sentence actually passed by the Military Court.

159. Appeal against [acquittal/order made on mental health grounds]

[Insert provisions providing for appeals against acquittal by reason of insanity, or a finding of unfitness to stand trial, and any consequential orders, on the same basis as such appeals are permitted from the ordinary criminal courts of the home country.]

160. Appeal to [Caribbean Court of Justice/Privy Council]

- (1) With the leave of the [Caribbean Court of Justice/Judicial Committee of the Privy Council], a party to an appeal under this Act may appeal to that court against any decision of the Court of Appeal in that appeal.
- (2) An application for leave to appeal under this section must be made:
 - (a) within 28 days after the date of the issue of the decision or within any further time that the [Caribbean Court of Justice/Judicial Committee of the Privy Council] may allow and
 - (b) in the manner that may be directed by rules of court.

161. Effect of appeal

Neither an application for leave to appeal, nor an appeal, under Section 160 operates as a stay of proceedings on the decision to which the application or the appeal relates unless the [Caribbean Court of Justice/Judicial Committee of the Privy Council] orders otherwise.

162. Powers and procedure of [Caribbean Court of Justice/Judicial Committee of the Privy Council]

In an appeal to the [Caribbean Court of Justice/Judicial Committee of the Privy Council] under Section 160:

- (a) the [Caribbean Court of Justice/Judicial Committee of the Privy Council] has the same powers as the Court of Appeal and
- (b) this Act, as far as it is applicable and with any necessary modifications, applies to the appeal as it applies to an appeal to the Court of Appeal.

163. Supplementary powers of the Court of Appeal

- (1) For the purposes of this Act the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice:
 - (a) order the production of any document, exhibit, or other thing connected with the proceedings the production of which appears to the court to be necessary for the determination of the case
 - (b) order that all necessary steps be taken to obtain from any military member who sat in the Military Court at the trial of the appellant, or from the Military Judge at that trial, a report that –
 - (i) sets out that person’s opinion on the case or on any point arising in the case or
 - (ii) contains a statement of any facts that the court considers to be in need of clarification because they appear to the court to be material for the purpose of the determination of the case
 - (c) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in the prescribed manner before any Judge of the Court of Appeal or before any other person appointed by the court for that purpose, and allow the admission of any depositions so taken as evidence before the court
 - (d) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness
 - (e) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court conveniently be conducted before the court, order the reference of the question in the prescribed manner for inquiry and report to a special commissioner appointed by the court, and act upon the report of any such commissioner so far as the court thinks fit to adopt it
 - (f) appoint any person with special expert knowledge to act as an assessor to the court in any case where it appears to the court that such special knowledge is required for the proper determination of the case
 - (g) issue any warrants necessary for enforcing the orders or sentences of the court.
- (2) The Court of Appeal must not make an order under sub-section (1)(b) for the purpose of obtaining a report from a military member of the Military Court unless:

- (a) it also makes an order for the purpose of obtaining a report from the Military Judge at the trial or
- (b) it is satisfied that obtaining a report from the Military Judge at the trial is impracticable or would involve undue delay.

164. Right of appellant to be present

[Provide that the law applicable in the home country, concerning the right of the appellant to be present at a criminal appeal in the Court of Appeal, applies to the Model Law with any necessary modifications.]

165. Defence of appeals

On an appeal under this Act to the Court of Appeal against a conviction by the Military Court, it is the duty of the Director of Military Prosecutions to undertake the defence of the appeal.

166. Costs of appeal

[Provide that the law applicable in the home country, concerning the payment of costs and expenses arising in connection with a criminal appeal in the Court of Appeal, applies to the Model Law with any necessary modifications.]

167. Proceedings to be in open court, unless it is necessary to clear the court

- (1) Subject to sub-section (2), the proceedings of the Court of Appeal under this Act must be conducted in open court, except when the court is dealing with matters of procedure or is deliberating.
- (2) Sections 113 and 114 apply to proceedings in the Court of Appeal under this Act, with the necessary modifications.

168. Court may make an order for the payment of compensation or restitution of property

- (1) On hearing an appeal under this Act, the Court of Appeal may in the appropriate case order the appellant to:
 - (a) pay compensation under Section 133 or
 - (b) make restitution of property under Section 134 (with or without compensation under Section 133) or
 - (c) both to pay compensation and to make restitutionin the same manner and to the same extent as the Military Court, notwithstanding that the Military Court made no such order.
- (2) Where the Military Court has made an order under Section 133 or Section 134, the Court of Appeal may, on hearing an appeal against that order:
 - (a) confirm the order or
 - (b) quash the order or
 - (c) in the case of an order requiring the payment of compensation, vary the order by requiring a reduced amount of compensation to be paid, or by requiring an increased amount of compensation to be paid or

- (d) in the case of an order requiring restitution of property to be made, vary the order by –
 - (i) requiring property additional to or different from that specified in the order to be restored to the person who appears to be entitled to it
 - (ii) if the court thinks that the person to whom property is to be restored by an order is not entitled to the whole of it, vary the order by excluding the part to which that person does not appear to be entitled.

169. Person not to be tried again if conviction quashed

- (1) A person whose conviction by the Military Court for an offence has been quashed by the Court of Appeal is not liable to be tried again for that offence by the Military Court or by any other court.
- (2) Sub-section (1) is subject to Section 155(3).

170. Judge may grant bail pending appeal

- (1) On an appeal under Section 154(1), the appellant may not go at large without bail.
- (2) A Judge of the Court of Appeal may, on an application for bail by the appellant:
 - (a) grant bail to the appellant
 - (b) impose any conditions of bail that the Judge thinks fit.
- (3) In determining whether to grant bail under this section, the Judge must [insert criteria which apply to the granting of bail pending appeal under the law of the home country].

171. Issue of warrant to arrest appellant absconding or breaching bail condition

- (1) A Judge of the Court of Appeal may issue a warrant in the prescribed form for the arrest of an appellant who has been released on bail under Section 170 if:
 - (a) the Judge is satisfied by evidence on oath that –
 - (i) the appellant has absconded or is about to abscond for the purpose of evading justice or
 - (ii) the appellant has contravened or failed to comply with any condition of bail or
 - (b) the appellant does not attend personally at the time and place specified in the grant of bail.
- (2) The warrant:
 - (a) must be directed to every provost officer and every police officer and
 - (b) may be executed by –
 - (i) a provost officer
 - (ii) a person lawfully exercising authority under or on behalf of a provost officer
 - (iii) a police officer.

- (3) For the purpose of executing the warrant, a person referred to in sub-section (2)(b) may, at any time, enter on to any premises, by force if necessary, if that person has reasonable grounds to believe that the appellant against whom it is issued is on those premises.
- (4) The person executing the warrant:
 - (a) must be in possession of the warrant and
 - (b) must produce it on initial entry and, if requested, at any subsequent time and
 - (c) must, if not in uniform, produce evidence that that person is one of the persons referred to in sub-section (2)(b).

172. Appellant arrested under warrant for absconding or breaching bail condition must be brought before Judge

- (1) An appellant who is arrested under a warrant issued under Section 171 must be brought before a Judge of the Court of Appeal as soon as possible.
- (2) The Judge must reconsider the question of bail if satisfied that the appellant:
 - (a) had absconded or was about to abscond or
 - (b) has contravened or failed to comply with any condition of bail.

Special references to the Court of Appeal

173. Special references to Court of Appeal

- (1) The Minister may refer to the Court of Appeal a finding made, a conviction entered or a sentence passed in any proceedings in the Military Court if the Minister thinks that it is in the interests of justice or discipline to do so.
- (2) A referral under this section must, for the purposes of this Act, be treated as an appeal against conviction by the person convicted.
- (3) In this section, **finding** includes a judgment, decree, order, direction or determination.

174. Person concerned must be informed of reference and may comment

- (1) The Registrar of the Court of Appeal must, as soon as practicable after receiving a reference from the Minister under Section 173, send to the person who is the subject of the reference:
 - (a) a copy of the reference and
 - (b) a notice, in the prescribed form, that –
 - (i) asks for the person's written views on the finding, conviction or sentence concerned to be sent to the Registrar within the prescribed period and
 - (ii) asks for the person's written advice as to whether the person wants to be legally represented at an oral hearing of the matter to be sent to the Registrar within the prescribed period and
 - (iii) advises the person of the effect of sub-section (2).

- (2) The Court of Appeal may deal with a reference from the Minister by way of a hearing on the papers if the person who is sent a notice under sub-section (1):
 - (a) indicates that the person does not want to be legally represented at an oral hearing of the matter or
 - (b) otherwise indicates that the person does not require an oral hearing of the matter or
 - (c) does not provide written advice under sub-section (1)(b)(ii) within the prescribed period.
- (3) In this section, **prescribed period** means a period of 21 days commencing on the day after the day that the notice under sub-section (1)(b) is sent.

Miscellaneous

175. Rules of court

- (1) Without limiting the power to make rules of court under [provision of the law applicable in the home country], rules of court may be made under that section regulating the procedure and practice to be followed in the Court of Appeal in appeals under this Act.
- (2) Rules of court made for the purposes of any provision of this Act may make different provision in relation to different classes of cases and may provide for any incidental or supplementary matters for which it appears to be necessary or expedient for the purposes of that provision to provide.

Schedule 1: Scale of Punishments that May be Imposed by Military Court

ss 129, 130

- (1) The punishments that may be imposed on an offender convicted by the Military Court are as follows:

[Insert scale of punishments.]

- (2) Except as provided in clauses 3 and 4, a punishment specified in any paragraph of the scale prescribed by clause 1 is less severe than any of the punishments that are specified in the preceding paragraphs of that scale.
- (3) Detention is not a less severe punishment than imprisonment if the term of detention is longer than the term of imprisonment.
- (4) A combination of punishments is less severe than any other combination of punishments if the most or more severe punishment of the first-mentioned combination is less severe than the most or more severe punishment of the other combination.
- (5) In comparing any two combinations of punishments as provided in clause 4, any punishment in one combination that is the same in kind and amount as a punishment included in the other combination must be excluded from consideration.
- (6) A combination of punishments is less severe than a single punishment if the most or more severe punishment of the combination is less severe than the single punishment.

Schedule 2: Scale of Authorised Summary Punishments

s 58

- (1) The punishments that may be imposed on an offender by a disciplinary officer are as follows:
 - (a) detention
 - (b) reduction in rank
 - (c) stay of seniority
 - (d) a fine
 - (e) a reprimand
 - (f) confinement to [ship or barracks] (including extra work and drill for a period equal to the period of the confinement)
 - (g) extra work and drill
 - (h) stoppage of leave
 - (i) extra duty not exceeding two hours a day
 - (j) a caution.
- (2) Except as provided in clauses 3 and 4, a punishment specified in any paragraph of the scale prescribed by clause 1 is less severe than any of the punishments that are specified in the preceding paragraphs of that scale.
- (3) A combination of punishments is less severe than any other combination of punishments if the most or more severe punishment of the first-mentioned combination is less severe than the most or more severe punishment of the other combination.
- (4) In comparing any two combinations of punishments as provided in clause 3, any punishment in one combination that is the same in kind and amount as a punishment included in the other combination must be excluded from consideration.
- (5) A combination of punishments is less severe than a single punishment if the most or more severe punishment of the combination is less severe than the single punishment.

Schedule 3: Summary Punishments that may be Imposed by Subordinate Commander

s 58(2)(a)³⁷

Column 1		Column 2
Rank of offender		Punishments
1	Senior non-commissioned officer ³⁷	A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days
2	Junior non-commissioned officer	A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution
3	[Private/ marine/ seaman]	A fine, not exceeding 28 days' basic pay A reprimand Confinement to [ship or barracks] for a period not exceeding 21 days Extra work and drill for a period not exceeding 21 days Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution

³⁷ This term, or its equivalent, will need to be defined with reference to the rank structure of the home force.

Schedule 4: Summary Punishments that may be Imposed by Commanding Officer

s 58(2)(b)

Column 1		Column 2
Rank of offender		Punishments
1	Officer or a warrant officer	Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand
2	Senior non-commissioned officer ⁴¹	Reduction in rank Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days
3	Junior non-commissioned officer ⁴¹	Reduction in rank A fine, not exceeding 60 days' basic pay, with the prior approval of a superior authority A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution
4	[Private/ marine/ seaman]	Detention for a period not exceeding 28 days A fine, not exceeding 28 days' basic pay A reprimand Confinement to [ship or barracks] for a period not exceeding 21 days Extra work and drill for a period not exceeding 21 days Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution

Schedule 5: Summary Punishments that may be Imposed by Superior Authority

s 58(2)(c)

Column 1		Column 2
Rank of offender		Punishments
1	Officer or a warrant officer	Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand
2	Senior non-commissioned officer ⁴¹	Reduction in rank Stay of seniority for a period not exceeding 12 months A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days
3	Junior non-commissioned officer ⁴¹	Reduction in rank A fine, not exceeding 60 days' basic pay, with the prior approval of a superior authority A fine, not exceeding 28 days' basic pay A reprimand Stoppage of leave, not exceeding 21 days Extra duty for a period not exceeding 21 days A caution



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