



**Armed Forces Criminal Legal Aid Scheme  
Version 2.0**

**MINISTRY OF DEFENCE**

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# Chapter 1

## The Armed Forces Legal Aid Scheme policy and general guidance

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# Chapter 1

## The Armed Forces Legal Aid Scheme policy and general guidance

### General Guidance – JSP 838

1. **Aim.** The purpose of JSP 838 is to provide a single source of reference for all those who have any direct or indirect involvement with the Service Justice System (SJS), or who may require the services of the Armed Forces Criminal Legal Aid Authority (AFCLAA). For advice on specific matters not covered elsewhere in this publication, AFCLAA should be contacted, using the details provided at [Annex A](#).
2. **Superseded Regulations.** This JSP supersedes all previous single and joint Service regulations and other guidance in respect of all legal aid matters for Armed Forces and relevant civilian personnel.
3. **Glossaries.** A Glossary of Terms used throughout JSP 838 is contained at [Annex B](#); a separate glossary of abbreviations and acronyms is contained at [Annex C](#). The definitions are primarily in the context of the Armed Forces Legal Aid Scheme and the Service Justice System.
4. **Associated publications.** Throughout this JSP, reference is made to various publications; these are consolidated at [Annex D](#). HR discipline or unit admin offices should obtain access to the relevant JSPs or other MOD-sponsored publications; it may also be useful to hold a supply of the most current versions of the civilian information leaflets, to provide to defendants and other interested parties as required.
5. **Legal aid process flow chart.** For ease of reference for all users, two legal aid processes flow charts<sup>1</sup> have been produced at [Annex E](#); these are not intended to replace the detailed guidance contained within the separate chapters, but should be used as a quick reference guide to the application processes.

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<sup>1</sup> i.e. Legal Aid processes: Trials (inc Referral to DSP); Legal Aid processes: Summary Appeal and Elections for Trial.

## An Introduction to the Armed Forces Legal Aid Scheme

6. **Background.** The importance of access to justice for all and the right to legal representation has long been recognised in the UK. To support these principles, a formal legal aid scheme was established to provide publicly funded legal representation e.g. to defend against criminal charges in the magistrates' and Crown Courts, for those who would otherwise be denied access to justice because they could not afford to pay for it.

7. The principle that those who can afford to pay all or some of their defence costs should do so, underpins the legal aid scheme thereby enabling public funds to be used to assist as many people as possible whilst also providing value for money for the taxpayer. These principles remain as relevant today as when the first legal aid schemes were established in the UK in 1949<sup>2</sup>.

8. The Armed Forces Legal Aid Scheme is based upon the same basic principles as the civilian criminal legal aid scheme in England and Wales, and is designed to mirror that scheme as much as possible whilst making necessary adjustments to take into account the specific circumstances, and needs, of defendants and appellants, as well as the operational requirements of the Services and the Service Justice System. It is vital that the scheme ensures personnel receiving legal aid through AFCLAA are not significantly advantaged or disadvantaged when compared to another supported by the civilian scheme, simply because of their employment or place of residence.

### The Armed Forces Criminal Legal Aid Authority (AFCLAA)

9. The Armed Forces Criminal Legal Aid Authority is a tri-Service organisation, established on 01 April 2008, with responsibility for all legal aid related functions previously carried out by separate, single-Service, departments<sup>3</sup>.

### The Scope of the Armed Forces Legal Aid Scheme

10. **The Criminal Legal Aid Scheme.** The primary function of AFCLAA is to provide legal aid case management and funding for defendants or appellants who:

- a. Appeal against findings and/or awards following summary dealings, including applications for extension of the appeal period by the Summary Appeal Court, for leave to appeal out of time (Service personnel only); or
- b. Have a case referred to the DSP, for a decision on prosecution; this includes Schedule 2 offences which are referred directly to the DSP by the Service Police as well as matters referred to the DSP by the Commanding Officer; or
- c. Are to be tried in the Court Martial (CM) or the Service Civilian Court (SCC); or
- d. Wish to apply for leave to appeal to the Court Martial Appeal Court (CMAC); or
- e. Wish to appeal in the CM, against the finding and/or sentence after trial in the SCC (relevant civilians only); or
- f. Are to be tried by a criminal court outside the UK (see [Chapter 5](#))

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<sup>2</sup> At the same time, the Services accepted the need to make similar provisions for Service personnel prosecuted through the Courts-Martial. Each Service made separate provisions for their Service personnel, until the tri-Service Authority was established in 2008.

<sup>3</sup> I.e. the legal aid element of NCAO (RN), and the Army and RAF Legal Aid Authorities.

11. The Legal Aid Scheme applies equally to all members of the Armed Forces, including the reserve forces, whilst subject to Service law<sup>4</sup>, and to all relevant civilians (i.e. a civilian subject to Service discipline) as defined in JSP 830, Vol 1, Chapter 3 – Jurisdiction and Time Limits<sup>5</sup>.

12. **Non-criminal public funding.** In certain circumstances, there may be a requirement for legal proceedings involving Service or relevant civilian personnel, which fall outside the sphere of criminal proceedings, and therefore the general scope of the Armed Forces Legal Aid Scheme. Chapter 7 provides full details on the eligibility criteria for those who may require publicly funded legal representation, and the legal aid processes therein.

13. **Exclusions From the Armed Forces Legal Aid Scheme.** The Armed Forces Scheme is intended to provide support to Service, and relevant civilian, personnel who may otherwise be disadvantaged by virtue of their employment or place of residence due to Service/MOD commitments<sup>6</sup>. It is not intended to provide support, at public expense, where it would not be routinely available to a person working and/or residing within the UK. The scheme does not, therefore, include:

- a. Legal aid for personnel who have been charged with a criminal offence committed in the UK. The defendant should seek civilian legal aid instead<sup>7</sup>; or
- b. Legal aid for any civil or personal matters (e.g. housing, family/divorce/dissolution of civil partnership etc)<sup>8</sup>; or
- c. Legal aid for criminal cases heard in overseas courts, where the individual was in that country on purely personal business e.g. whilst on holiday. N.B. this does not include personnel overseas on permanent or detached duty; even if the charge or allegation relates to an 'off duty' incident (see [Chapter 5](#)).

14. **Incidents arising during the course of duty.** In certain circumstances, the MOD will consider paying for the defence of an individual who is charged with an offence arising from an act committed in the course of the individual's employment or duties, and in accordance with any applicable regulations/instructions or orders (insofar as this can be determined at the time); this would not be considered 'legal aid' or 'public funding' in the real sense of the meaning, but a legal representative may be provided by the MOD to represent the individual and MOD interests. Further advice may be sought from Central Legal Services (CLS) or Head AFCLAA in the first instance (see also [Chapter 5](#)).

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<sup>4</sup> JSP 830 (MSL) Vol 1 Ch 3 refers: The Royal Fleet Reserve, The RN Reserve, The RM Reserve, the Army Reserve, the TA, the RAF Reserve and the Royal Auxiliary Air Force.

<sup>5</sup> This includes, but is not limited to: UK-based Civilian employees (MOD civil servants; school teachers; NAAFI personnel etc) on permanent or detached duty outside the UK; dependants of Service or UK-based civilian employees where they are officially recognised as such by the MOD.

<sup>6</sup> The civilian legal aid scheme does not provide legal aid for any SJS related proceedings; nor does it provide for criminal proceedings heard in foreign jurisdictions.

<sup>7</sup> Further advice, and details of solicitors with experience in criminal or civil legal matters may be obtained from: Community Legal Advice ([www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice](http://www.direct.gov.uk/en/Governmentcitizensandrights/GettingLegalAdvice)); The Citizens Advice Bureau ([www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)); or The Law Societies of England and Wales ([www.lawsociety.org.uk](http://www.lawsociety.org.uk)), Scotland ([www.lawscot.org.uk](http://www.lawscot.org.uk)) or Northern Ireland ([www.lawsoc-ni.org](http://www.lawsoc-ni.org)).

<sup>8</sup> See footnote 6 above

## THE ARMED FORCES CRIMINAL LEGAL AID AUTHORITY (AFCLAA)

### Contact details

Address:	<b>Bldg 398</b>	
	<b>Trenchard Lines</b>	
	<b>Upavon</b>	
	<b>Pewsey</b>	
	<b>Wiltshire</b>	
	<b>SN9 6BE</b>	
Email address (Internal):		<b>LF-MCS-AFCLAA-&amp;Group</b>
Email address (external):		<b>LF-MCS-AFCLAA-&amp;Group@mod.uk</b>
<b>Phone Numbers:</b>		
External dialling code:		<b>(44) (0)1980 61 – followed by extension</b>
Internal dialling code:		<b>94344 – followed by extension</b>
Head:		<b>5973</b>
Dep Head:		<b>8915</b>
Team 1	Case Officer	<b>8035</b>
	Assistant Case Officer	<b>8814</b>
Team 2	Case Officer	<b>5974</b>
	Assistant Case Officer	<b>8041</b>
Team 3	Case Officer	<b>8028</b>
	Assistant Case Officer	<b>8982</b>
Office Manager:		<b>8008</b>
Fax:		<b>5691</b>
Out of Hours (Duty) Mobile:		<b>(44) (0)7766 511314</b>

## GLOSSARY (DEFINITIONS)

Term	Definition
Adjudication hearings (MCTC only)	Where a charge against a detainee has been referred to a judge advocate (the Adjudicator); free legal advice, and representation if required, is available to the detainee.
Adjusted Annual Income	The calculation carried out at the initial means test stage, to determine the applicant's annual income when adjusted to take account of their particular personal (family) circumstances. Applicant's whose adjusted annual income is below £12,475 will automatically be eligible for free legal aid.
Advice and Assistance	The free legal service provided by legal advisors to accused personnel interviewed after caution by the [Service] police.
[AFCLAA] Assistant Case Officer (ACO)	Responsible for processing applications for Legal Aid. Main Point of Contact (POC) for units throughout the application process.
[AFCLAA] Case Officer	Responsible for overall management of legal aid cases. Main POC for units and defence teams, in respect of all case management and funding issues.
Allowances	(In respect of MOD F2263– Application for Legal Aid) – those financial outgoings which are taken into account when assessing a defendant's likely maximum contributions.
Appropriate Adult	In respect of PACE interviews, an Appropriate Adult may be required to attend a PACE interview in support of a Juvenile, or a mentally disordered or mentally vulnerable adult. Further information may be obtained from JSP 397 – Service Police Codes of Practice.
CCRIO (Central Criminal Records Information Office)	Police incident record number, annotated on police-generated documentation. If known, this number should be annotated on the application form as AFCLAA use this number to identify different cases, and if appropriate, to link together any/all applications from co-accused.
Central Funds	<b><u>For proceedings instigated before 01 April 2013:</u></b> Where an applicant was not legally aided for their trial/appeal, and where they are acquitted (or their case was discontinued before trial), or their appeal was upheld on all counts, they may apply for some or all of their costs to be refunded from central funds (not to be confused with RAF Central Funds, which is a separate, non public, fund). See Chapter 7, Section 4 for details. <b><u>For all proceedings instigated on or after 01 April 2013:</u></b> There is no eligibility to reclaim private legal costs from central funds, irrespective of the outcome.
Child Protection Proceedings	Assessment or Protection Order hearings, presided over by a judge advocate. Public funding is generally available for the child(ren), the parents and/or others with parental responsibility. See <a href="#">Chapter 7</a> for further advice.
Civilian Criminal Courts (Overseas)	AFCLAA may provide legal aid for representation of personnel dealt with by local civilian criminal Courts outside the UK, but only where eligible personnel were in that country on permanent or detached duty (including residence) at the time of the alleged incident. For further guidance, see <a href="#">Chapter 5</a> .

Term	Definition
Co-accused	Defendants who are charged in connection with others for the same or related offences, where their cases may, or are to, be heard together.
Contributions: Capital/Equity (trials only)	The post-trial contribution which may become due (following conviction only) IF legal aid costs remain payable after taking account of pre-trial income contributions paid (if any) Liability only exists where the applicant has capital/equity in excess of £30,000.
Contributions: Income (Trial and Referral)	The contribution payable from disposable income following assessment of the applicant's financial and personal circumstances. Payment is due upon grant of legal aid, but can be paid in monthly instalments, subject to an agreed payment plan. Contributions refunded in full (with interest) following discontinuance or acquittal; overpayments refunded following conviction and final settlement of legal aid costs (without interest).
Contributions: Income (Summary Appeal and Elections)	The post-proceedings, fixed contribution which is determined by level of proceedings and outcome. Eligibility to contribute is determined by level of disposable income following assessment of the applicant's personal and financial circumstances.
Custody After Charge	Where a defendant is detained in custody after he/she has been formally charged (the case has been referred to the DSP, or the SPA have directed for trial).
Custody Without Charge	Where an individual is detained in custody pending further enquiries or interviews, or pending a decision to charge and/or refer the case to the SPA for consideration.
Defence Team	Those involved in the preparation of a defendant's case, and representation in court. Typically, this will include one, or more, of the following: (a) The legal representative(s) (solicitor, or solicitor advocate, and/or barrister); (b) Expert witness(es), if appropriate and authorised by AFCLAA; (c) An agent acting on behalf of the legal representative; (d) Trainee or support staff from solicitor's office or barrister's chambers (but only subject to prior approval/authority from AFCLAA).
Defendant(s)	The person(s) to be represented by the defence team. May also be referred to as: (LA) Applicant; the accused; or the client, depending on the situation.
Dependants	Family members, or persons otherwise financially dependent upon Service personnel or UKBC, where the MOD has recognised the dependent status (i.e. authorised to use MOD facilities such as Medical & Dental; authorised to travel at public expense for posting/relocation; in receipt of Boarding School Allowances or LOA)
Disposable income	The amount of income remaining after the applicant's household financial obligations (including their basic living allowance, adjusted according to their personal/household family responsibilities) is deducted from the applicant's (including spouse/civil partner, if applicable) gross annual income.



Term	Definition
Documentary Evidence	The evidence required to confirm, support and verify the financial details provided on the application form e.g. Pay statements (including JPA Print-outs); bank statements; mortgage statements etc. See <a href="#">Annex B to Chapter 3</a> for further guidance.
Duty Solicitor Scheme	The civilian scheme which provides access to legal advisors qualified to provide advice and assistance to an accused to be interviewed by the police; accused persons may request access to a local solicitor via the Duty Solicitor Scheme Call Centre. Alternatively, an accused may already have their own legal advisor, or may choose one from a list available at the [Service] Police station.
Expert (Witness)	The legal representative may feel it necessary to use an expert to assist in the preparation of the defence case. In all cases, the legal representative will discuss their requirements with, and request prior authority for funding from, AFCLAA.
HR Disc	HR Discipline Personnel, with access to relevant JPA information, or Unit Admin Personnel, responsible for ensuring defendant completes necessary documentation promptly. Also responsible for ensuring prompt and timely payment of legal aid contributions, as advised by AFCLAA; payment via JPA, or cash/cheques, as appropriate
Income Evidence Sanction	To be applied to contributions where the applicant fails to supply the documentary evidence required to support the financial information provided on the initial application form within a maximum 21 days (unless there are clear operational/Service reasons which prevent this). The sanction is an income contribution set at £900 per month, or 100% of disposable income, whichever is the greater.
Interests Of Justice (IOJ) Test	Used by AFCLAA to evaluate whether the applicant should be entitled to representation at public expense, based on the merits of the case and potential impact upon the applicant if guilt is determined. NOTE: cases in the CM (including referral stage and elections), SAC and overseas civilian criminal court cases automatically meet the IOJ test.
Interview After Caution (IAC)	An accused person, to be interviewed after police caution, has the right to consult privately with a legal advisor; free legal advice is available.
Juvenile	In respect of PACE interviews – a person who is, or who appears to be, under 17 years of age. An Appropriate Adult will be required to attend the interview to support the juvenile during questioning.
Legal Advisor	Primarily with reference to advice and assistance at PACE interviews (Interviews After Caution). A legal advisor may be a qualified solicitor, or an accredited or probationary representative.
Legally Aided (Defence) Costs	Authorised costs, incurred by the defence team as part of the preparation of the case, which are subject to scrutiny and payment by AFCLAA post-trial.
Legal Representative	The suitably qualified <sup>9</sup> solicitor or barrister who prepares the case for trial/appeal, and who represents the defendant at all hearings. This may be either a Service or a civilian lawyer, depending on the defendant's choice at initial application.

<sup>9</sup> A practising barrister or solicitor, as defined in The Armed Forces (Court Martial) Rules 2009, rule 39(2)

Term	Definition
Live Link	See VTC
Maximum Income Contribution	The maximum income contribution the applicant will be required to pay towards their legal aid costs. It can be paid monthly, over a period of 5 months (see also MDR) or in a single lump sum on or before the first monthly instalment is due.
Mentally disordered or mentally vulnerable	In respect of PACE interviews – where the Service Police consider, or are informed, that the accused may be mentally disordered or mentally vulnerable, they may request the assistance of an Appropriate Adult to support the accused. Further information is available in JSP 397 – Service Police Codes of Practice.
Minimum Drawing Rate (MDR)	The minimum rate of pay beyond which no further compulsory deductions can be made (JSP 754 Chap 2, Section 4 refers). Units are advised to contact AFCLAA immediately if the monthly contribution required takes the defendant beyond the MDR, to discuss a revised payment plan, allowing smaller monthly instalments over a longer period.
MOD Form 2263 Series:	Legal Aid Application Forms. Available on the AFCLAA and MOD Forms Index websites, via the Intranet/Internet. Electronic or faxed copies can be requested direct from AFCLAA where intranet access is not available.
MOD F2263	<b><u>Application for Legal Aid</u></b> – Initiated by the applicant and their unit. The applicant is required to provide personal and financial details which will inform the grant of legal aid and the level(s) of income and/or capital/equity contributions (if any) which are required.
MOD F2263A (Pt 1 – LA Offer)  MOD F2263B (Pt 1 – LA Offer)	<b><u>Contribution Order – MOD F2263A - Referral to DSP or Trial OR MOD F2263B – Summary Appeal or Elections for Trial.</u></b> Generated by AFCLAA: to be signed by the applicant to confirm acceptance of LA offer and their contribution(s) liability. To be signed, witnessed and returned to AFCLAA without delay, to complete the application process and enable formal instruction of the legal representative.
MOD F2263 (Pt 2 – LA Refused)	<b><u>Legal Aid Refused</u></b> – Initiated by AFCLAA. The form will give the reason(s) why the application was rejected. The applicant has the right to appeal the decision, and should refer to <a href="#">Appendix 2 to Annex B, Chapter 3</a> for guidance.
MOD F2263C	<b><u>Application for Review on Grounds of Hardship</u></b> – Initiated by the applicant where appropriate. To be completed when the applicant considers they have additional costs or other circumstances which were not included on the original application, and which may impact upon their ability to pay the contribution(s) as stated on the Contribution Order (MOD F2263A). Can be submitted at the same time as the application form (MOD F2263).
CP Insert	Annex A to Chapter 7: Discrete Areas of Non-Criminal Public Funding. To be completed by the applicant and submitted to AFCLAA with MOD F2263. See <a href="#">Chapter 7</a> for further advice.
Need for Representation Test (CP proceedings only)	The test, applied by AFCLAA, to determine whether there is a conflict of interest between two or more of the interested parties, which would prevent a single legal representative acting for all interested parties together.

Term	Definition
Nomination (of legal representative)	Defendants are able to nominate a particular legal representative to act on for them, or they can ask AFCLAA to nominate one on their behalf ( <a href="#">Annex A to Chap 3</a> refers).
Preparation	The work carried out by the defence team, in advance of an attendance at CM/SCC/SAC hearings.
Pre-Sentence Report (PSR)	Provided by CMRS for personnel pleading or found guilty at trial, the PSR is made available to the judge advocate and the Members of the Board for consideration when deliberating sentence; in some cases, an automatic PSR will not provided, however, one can be requested on application in Court.
Prior Authority	Legal representatives must obtain prior authority from AFCLAA before incurring additional costs not automatically covered by the grant of legal aid. This is a matter between AFCLAA and the legal representative only; neither the defendant nor the DAO can provide such prior authority.
Public Funding	The support available for Service, and relevant civilian, personnel who require public funding for legal advice, assistance and representation for certain types of legal proceedings for which there is no other provision under the Criminal Legal Aid Scheme.
Relevant Civilian	All civilian personnel subject to Service discipline. This includes, but may not be limited to, all UKBC on permanent or detached duty and all dependants of Service and UKBC personnel based overseas. See JSP 830 (MSL), Volume 1, Chapter 3 for clarification.
Representation	Attendance by the trial advocate (or a stand-in) at court, to represent their clients' interests.
Service Justice System	Any/all elements of the system and processes of justice for those subject to Service law and Service discipline.
Service lawyer	Where permitted under these regulations, a defendant who is based or residing overseas, or RN personnel generally, may wish to be represented by a Service Lawyer. Refer to <a href="#">Chapter 3</a> for further guidance.
Service Personnel	All serving members of the Armed Forces, including the Reserve Services (JSP 830 (MSL) Vol 1 Chapter 3 refers) while subject to Service law
Summary Hearing	Legal aid can be requested for appeals against the finding and sentence, or sentence alone, but not for the summary hearing itself. Legal advice may be sought in advance of a summary hearing, but this remains a personal liability which cannot be reclaimed from public funds.
Thresholds (gross annual income; capital/savings; equity)	The points at which the defendant's eligibility to contribute towards his legal aid costs is determined. See <a href="#">Chapter 3</a> for further details.
VTC	Video-Tele-Conferencing (facilities) or Live Link – widely available on or near MOD establishments, including MCCs, for use by defendants as necessary e.g. for short or urgent conferences with their legal representatives. Custody reviews, short court hearings and some witness testimonies may also be carried out via VTC, subject to court/judge advocate authority.
Warned List (Assize List)	A list detailed the hearings, trials or appeals scheduled to be heard in a particular MCC, during a stated period of time.

## GLOSSARY (ACRONYMS AND ABBREVIATIONS)

Acronyms and Abbreviations	Details
AFA 06	Armed Forces Act 2006
AFCLAA	Armed Forces Criminal Legal Aid Authority
AFLAS 11	Armed Forces Legal Aid Scheme 2011
BFSWS	British Forces Social Work Service
CAO	Court Administration Officer (Director MCS)
CCRIO	Police incident record number (Central Criminal Records Information Office)
CDS	Criminal Defence Service (the department within the LSC responsible for civilian criminal defence policy in England and Wales); the LSC, and its departments, will be subsumed into the Ministry of Justice on 01 April 2013.
CDS (F) O	Criminal Defence Service (Funding) Order
CEA	Continuity of Education Allowance
CILOCT	Charge In Lieu Of Council Tax
CILOR	Charge In Lieu Of Rations
CLA	Community Legal Advice – for free, confidential and independent legal advice (on civil, including family court, matters only); available via the DirectGov website.
CLS (civilian)	Community Legal Service (the department within the LSC responsible for (civilian) civil and family court policy in England and Wales)
CLS (MOD)	Central Legal Services
CM	Court Martial
CMAC	Court Martial Appeal Court
CMEA	Child Maintenance and Enforcement Agency (replacing the CSA)
CMRS	Court Martial Report Service
CO	Commanding Officer
COLA	Cost Of Living Allowance (UKBC equivalent of LOA)
CP	Child Protection (Regulations) or (Public Funding)
Csl	Counsel (Barrister representing at court)
CSA	Child Support Agency
DAO	Defendant's Assisting Officer
DH	Directions Hearings
DO	Divisional Officer [RN]
DOB	Date of Birth (for applicants who are aged 17 or under at the time of application)
DSP	Director of Service Prosecutions [Authority]
EHIC	European Health Insurance Card (for travel within Europe, outside the UK)
HQ MCS	Headquarters Military Court Service (Upavon)
HR	Human Resources
IAC	Interview After Caution [PACE interview]
IOJ (test)	Interests Of Justice (test)
JAG	Judge Advocate General
JPA	Joint Personnel Administration
JSP	Joint Service Publication

Acronyms and Abbreviations	Details
LA	Legal Aid
LAA	Legal Aid Agency (replaces the LSC from 01 Apr 2013)
LAIWG	Legal Aid Implementation Working Group
LEC	Locally Employed Civilian component – not eligible for legal aid through AFCLAA
LOA	Local Overseas Allowance
LSC	Legal Services Commission (to be replaced by the Legal Aid Agency on 01 Apr 2013)
MCC	Military Court Centre (part of MCS)
MCS	Military Court Service (generally referring to HQ MCS, Upavon)
MCTC	Military Corrective Training Centre (Colchester)
MDR	Minimum Drawing Rate
MSL	Manual of Service Law (JSP 830)
NCAO	Naval Courts Admin Office (Portsmouth)
NAAFI	Navy Army Air Force Institute
NFG	Notes For Guidance i.e. NFG in respect of logistics and admin matters, for Solicitors and Barristers (see also <a href="#">Chapter 6</a> ); NFG for the completion of the legal aid application form MOD F2263 (see Annex B to Chapter 3).
NPS	National Probation Service (work with CMRS to prepare PSRs)
NTT	National Taxing Team (civilian equivalent to elements of AFCLAA responsibilities - reviewing (taxing) civilian legal aid bills of costs)
OJAG	Office of the Judge Advocate General
P1	Personnel and Admin (Discipline) department [RAF]
PACE	[Service] Police Station Interview, carried out in accordance with the Police And Criminal Evidence Act 1984
PCMH	Plea and Case Management Hearing
PH	Preliminary Hearing
POC	Point Of Contact
PRG	Policy Rules and Guidance [Civil Service Regulations]
PSR	Pre-Sentence Report
QC	Queen's Counsel – Senior barristers, who have 'promoted' to 'take Silk' (aka Silk)
RAF	Royal Air Force
RM	Royal Marines
RN	Royal Navy
SAC	Summary Appeal Court
SBAA	Sovereign Base Area Authority (Cyprus)
SCC	Service Civilian Court
SCF	Service Custody Facility
SCSRSR	Service Custody and Service of Relevant Service Rules 2009
SFA	Service Family Accommodation
SJB	Service Justice Board
SJEG	Service Justice Executive Group
SJS	Service Justice System
SLA	Single Living Accommodation
Sols	Solicitor or Solicitor Advocate
SP	Service Police
SPA	Service Prosecuting Authority
SPCOP	Service Police Codes of Practice (JSP 397)
SPVA	Service Personnel and Veterans Agency

Acronyms and Abbreviations	Details
SSA	Staff Support Assistant (Army)
SSAFA-FH	Soldiers, Sailors, Airmen and Families Association – Forces Help
UKBC	UK-Based Civilian component (including Civil Servants, Teaching Staff, NAAFI staff etc, but not LEC)
VJAG	Vice Judge Advocate General
VTC (aka Live Link)	Video-Tele-Conferencing [facilities]

## ASSOCIATED PUBLICATIONS

Throughout these Regulations, reference is made to various publications and regulations. Most are listed below, together with others which may be of relevance to the reader, depending on their role or interest in the SJS.

<b>Publication</b>	<b>MOD Publications - Title</b>
JSP 397	Service Police Codes of Practice (SPCOP) (MOD)
JSP 752	Tri-Service Regulations for Allowances
JSP 800, Volume 5	Road Transport – The Management and Operation of Road Transport in the MOD
JSP 830, Volume 1:	Manual of Service Law (MSL) – CO Guide
Chapter 26	Safeguarding Children: Armed Forces Child Protection Powers
JSP 830, Volume 2:	MSL – Court Guide:
Chapter 27	The Summary Appeal Court Guide
Chapter 28	Court Martial constitution and roles
Chapter 29	Court Martial proceedings
Chapter 29, Annex B	Notes for the guidance of Defendant's Assisting Officer at the CM
Chapter 31	Court Martial Appeal
Chapter 32	Service Civilian Court
JSP 830, Volume 3	MSL – Legislation: Legal Compendium – the Armed Forces Act 2006 and the secondary legislation made under it, as well as other allied legislation and source material
JSP 833	Minor Administrative Action
JSP 834	Safeguarding Children
JSP 836, Vol 1	Court Martial and the Summary Appeal Court Guidance – Guide to Procedure
JSP 836, Vol 2	The Court Martial and the Summary Appeal Court Guidance – Guide for Court Members
JSP 837	Service Codes of Practice for the Management of Personnel in Services Custody and Committal to Service Custody Premises and Civil Prisons
Statement of Civilian Personnel Policy	Conduct, Discipline and Registrations Overseas
	<b>Civilian Publication<sup>10</sup> - Title</b>
Criminal Defence Service (CDS)	The CDS (Funding) Order 2007 (including amendments as necessary)
	Duty Solicitor Manual
Legal Services Commission Manual	Volume 4: Criminal Defence Service

In addition, the Government website ([www.direct.gov.uk](http://www.direct.gov.uk)) contains information, support and guidance in relation to all Government departments, including (civilian) Courts and their processes; Care Proceedings; Rights of parents and guardians; Benefits and allowances.

<sup>10</sup> To include the equivalent replacement documents, to be issued to coincide with demise of the LSC, and therefore the CDS, and the establishment of the Legal Aid Authority.

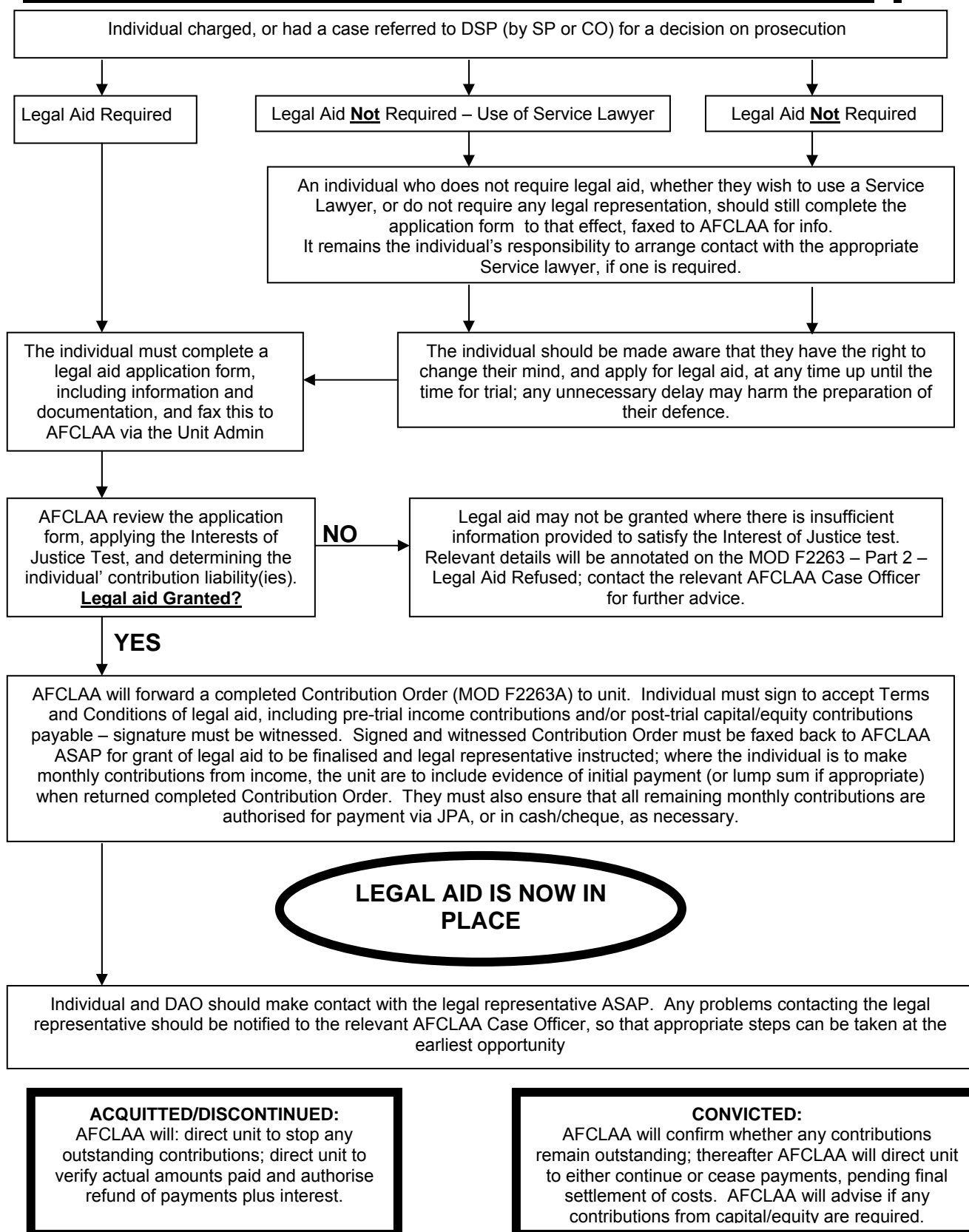
The following information documents, issued by the Criminal Defence Service (CDS), the Community Legal Service (CLS), Community Legal Advice (CLA) and Victim Support may be useful to personnel applying for legal aid or public funding; however, these documents should be taken in context with the regulations and other publications which are specific to the Service Justice System.

<b>Publication – Issued By</b>	<b>Civilian (non-MOD) Publications<sup>11</sup> - Title</b>
Community Legal Advice (CLA) - Information Guide C15	Care Proceedings – Finding help if your children may be taken into care
CLA - Information Leaflet 29	Care Proceedings – Parents’ and Carers’ Legal Rights
Criminal Defence Service	A Practical Guide to Criminal Defence Services
	Criminal Defence Services at the Police Station and in Court
Victim Support	Going to Court – information for witnesses and victims going to magistrates’ court or the Crown Court

<sup>11</sup> CLA information leaflets are available via the DirectGov website: [www.direct.gov.uk](http://www.direct.gov.uk); CDS information leaflets are available via the LSC website: [www.legalservices.gov.uk](http://www.legalservices.gov.uk). All CLA/CDS information refers specifically at the civilian legal systems, and should be taken in context with the relevant MOD publications when referring to proceedings in the Services Justice System.

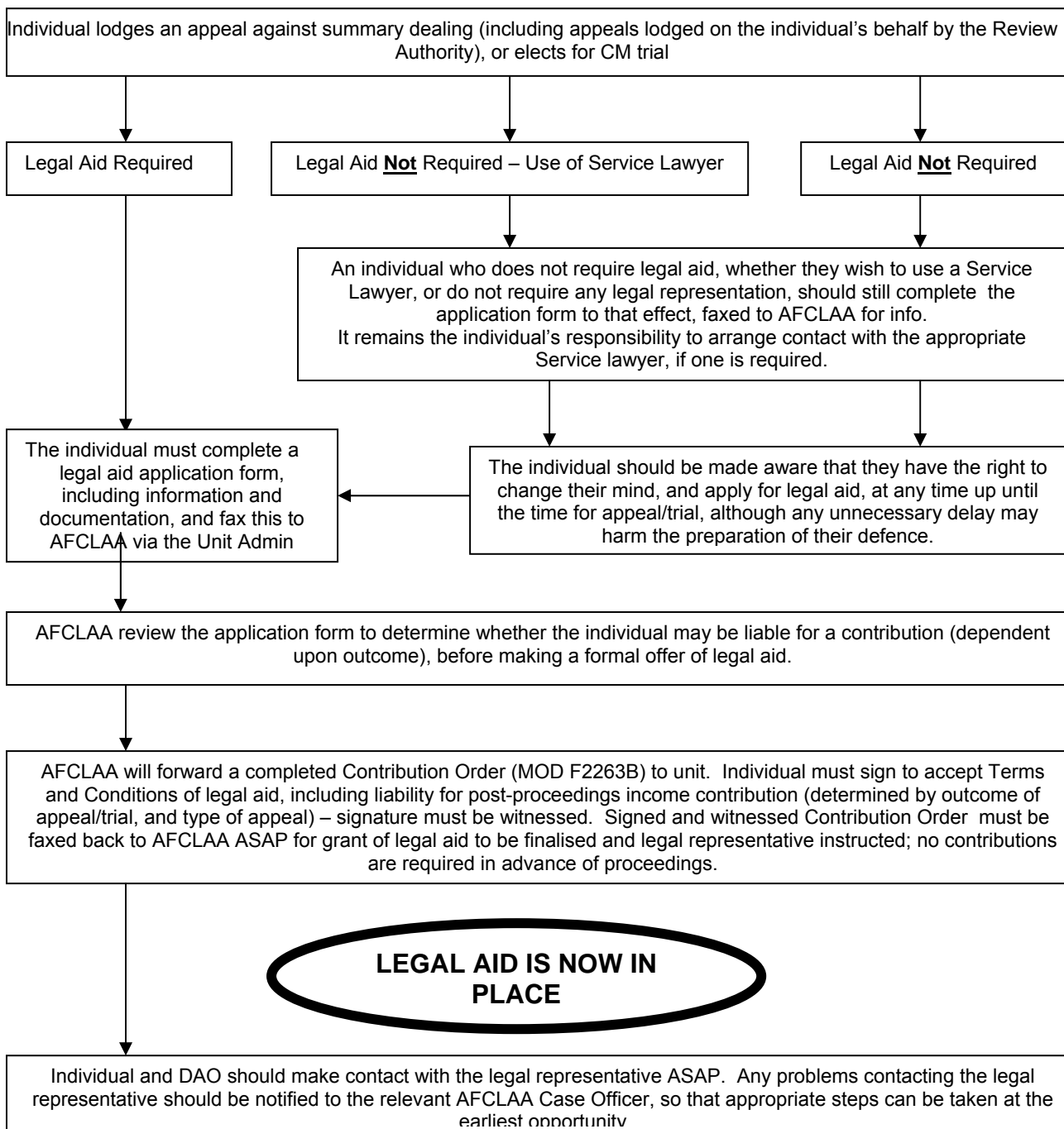


# **FLOW CHART – LEGAL AID PROCESSES: TRIAL (INCL REFERRAL TO DSP<sup>12</sup>)**



<sup>12</sup> Includes Court Martial (CM), Service Civilian Court (SCC) and overseas Criminal Court trials.

## **FLOW CHART – LEGAL AID PROCESSES: APPEALS AND ELECTIONS**



Individuals with a contribution liability (identified on their MOD F2263B) whose appeal was wholly or partially unsuccessful, or who were convicted after electing for trial, will receive formal notification of the level of contribution due and the payment schedule.

Where actual legal aid costs are less than the contribution paid following election, the individual will receive a refund of the balance.

Certain individuals will not be required to contribute: those whose appeal was lodged by the Reviewing Authority; those whose appeal was wholly upheld; those who were acquitted after electing for trial; those who were below the income threshold.

## Chapter 2

### Roles and responsibilities

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## Chapter 2

### Roles and responsibilities

#### The Service Justice System (SJS)

1. A number of different MOD and civilian organisations are involved in the various stages of the SJS, each with their own distinct areas of responsibility. The success of the SJS, necessary for the smooth and prompt resolution of cases, depends upon efficient processes within each organisation, and effective interaction between all parties involved.

2. The aim of this chapter is to give defendants, appellants, unit personnel and others who may be unfamiliar with the intricacies of the SJS, an insight into the roles and responsibilities of these organisations and key personnel within them. This should promote a better understanding of the processes, minimise confusion and reduce the potential for delay and its impact upon those directly or indirectly involved.

#### The Armed Forces Criminal Legal Aid Authority (AFCLAA)

3. The Armed Forces Criminal Legal Aid Authority is staffed wholly by MOD civil servants, and is outside the Service Chains of Command. It is responsible for all aspects of the grant and management of legal aid for Service, and relevant civilian, defendants prosecuted by the SPA through the Court Martial (CM) or the Service Civilian Court (SCC); for Service appellants to the Summary Appeal Court (SAC) and for Service and relevant civilians prosecuted through overseas civilian criminal courts.

4. **Head AFCLAA (Hd).** The Head is responsible for the overall management of AFCLAA, including the implementation of policy in line with the civilian legal aid scheme as far as is practicable, whilst also taking account of the SJS, and the Services' operational requirements. Although not involved in the day-to-day management of legal aid casework, the Head is ultimately responsible for the efficient and effective management of the Armed Forces Legal Aid Scheme, and the decisions made by AFCLAA staff during the course of their duties.

5. **Case teams.** There are 3 dedicated Case Teams in AFCLAA, consisting of a Case Officer and an Assistant Case Officer; each with their own discrete areas of responsibility for the management of cases within the terms of the Armed Forces Legal Aid Scheme. All legal aid casework is handled by the Case Team assigned to that case.

6. **Case Officer.** The Case Officer in each team has overall responsibility for ensuring all AFCLAA processes are undertaken in accordance with established procedures, and that all timelines are fully met. The Case Officer deals directly with legal representatives and other members of the defence legal team in all matters relating to fees and other financial or case management issues. This includes the negotiation of fees as necessary, and processing any requests for prior authority to incur additional costs.

7. **Assistant Case Officer (ACO).** The ACOs are responsible for processing all aspects of the grant of legal aid, and contribution reassessments pre-trial. This includes dealing directly with the unit discipline staff to ensure:

- a. Legal aid applications forms are completed correctly;
- b. All documentary evidence required is provided, and
- c. All documentation is submitted to AFCLAA at the earliest opportunity.

The ACO makes initial contact with the legal representative, following the grant of legal aid, and issues appropriate documentation to all interested parties, to hasten, advise or inform as necessary.

8. **Case management<sup>13</sup>.** Cases are allocated to a specific team upon receipt of any key documentation received by AFCLAA i.e. a completed application for legal aid from an applicant; an acknowledgement of case papers from SPA; or a notification of proceedings from Headquarters Military Court Service (HQ MCS). The appointed team remains responsible for all aspects of legal aid casework throughout the life of the case, from receipt of initial documentation through to final settlement of all fees and case closure. Closed case files are archived for a period of 7 years, in line with civilian practice, before destruction in accordance with standard MOD procedures.

9. Unit personnel, legal representatives and court staff with any enquiries about a particular case, are advised to contact either member of the appointed Case Team, as detailed on all documentation issued by AFCLAA. In the absence of both team members, queries will be dealt with in the first instance by another member of AFCLAA staff.

## **The Military Court Service (MCS)**

10. The Military Court Service is responsible for the administration of every aspect of the arrangement and running of trials, summary appeals and custody hearings for the Armed Forces. There are a number of different branches within the MCS, each with their own specific duties and responsibilities; more information on these roles and responsibilities can be found on the MCS defence intranet website.

11. The MCS works closely with (though is independent from) the Office of the Judge Advocate General, the Service Prosecuting Authority, the Service Chain of Command, the MOD Personnel branches, the National Probation Service (NPS), the Victim and Witness Services and military court advocates. The MCS incorporates the Court Martial Report Service (CMRS), which provide Pre Sentence Reports (PSR) for defendants who plead or are found guilty, via a contract with the NPS.

12. **The Court Administration Officer (CAO) and HQ MCS (Upavon).** The MCS is headed up by a B2 Grade civil servant (Director MCS), who is supported by 16 staff at the Headquarters in Upavon. All MCS staff are civil servants (some of whom are retired military personnel). The Director provides central direction, control and co-ordination for the MCS. Director MCS delegates powers for certain decision-making, administrative and management functions to other members of the HQ staff. Director MCS also fulfils the role of line manager for the Head of AFCLAA. The Court Officers, based in the Military Court Centres, are responsible for the day-to-day running of these centres and the operation of the court system.

13. In order to ensure his independence, the Director MCS is appointed by the Defence Council as Court Administration Officer (CAO), whose statutory powers are derived from the Armed Forces Act 2006. The CAO has a legislated function to administer military courts, specify lay members and notify witnesses. These duties are conducted in accordance with current legal requirements, taking into account the wider interests of Service justice and of Service personnel.

14. The CAO is responsible for the selection of the Service (and any civilian) members of the court<sup>14</sup> and ensuring they meet eligibility criteria; effectively jury selection. HQ MCS

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<sup>13</sup> For more detailed information on case management responsibilities, refer to Chapter 3.

<sup>14</sup> Service members are randomly selected from a list of candidates supplied by the Services; civilian members are randomly selected from a list of MOD civil servants provided by the Defence Business Service (DBS) People Services.

ensures that members are drawn from outside the reporting chain of the defendant. Court Martial and Summary Appeal Court hearings are usually scheduled during 2-week 'assize sessions', or Warned List Periods, which are held in Military Court Centres. Additionally, particularly lengthy or complex stand-alone trials or summary appeal hearings may be scheduled outside those 'assize sessions'.

15. HQ MCS assures the availability of judge advocates, notifies all proceedings to parties, establishes initial contact with witnesses (for both prosecution and defence) and specifies lay members. Thereafter the detailed administration of the court falls to the relevant Military Court Centre, where the Court Officer will manage the day-to-day running of all cases (including the management of witnesses).

16. **Military Court Centres (MCCs)** There are currently 4 permanently manned Military Court Centres in the UK: Bulford, Catterick, Colchester and Portsmouth. In addition, there is one Military Court Centre in Germany, at Sennelager, providing a total of 5 permanent MCCs worldwide. Each of the active MCCs is generally staffed by a Court Officer (currently most Court Officers are retired officers, of Lt Col rank), a Deputy Court Officer and two Court Assistants. The MCS currently employs 23 personnel at the MCCs, all of whom are civil servants.

17. Courtroom facilities also exist in Episkopi (Cyprus), Plymouth, Lossiemouth and Kinloss, all of which can be activated for temporary use as and when required. As the system is entirely 'portable', trials can be held outside of normal court facilities; recent examples have included Brunei, Belize, USA and Canada.

18. **Victim and Witness Support services.** Victim Support is an independent national charity, set up to provide emotional support and practical help to victims and witnesses of crime who are required to attend court (in civilian and Service courts); they are able to provide support before, during and after an appearance at court. The charity works with the MOD to support those attending Service Courts, but remains wholly independent of the Services and the SJS. The help they give is both free and confidential, and is readily available in the UK and in Germany. If necessary, it may also be available elsewhere in the world on request (excluding operational theatres).

19. The SJS positively promotes the use of Victim Support for the benefit of Service and civilian personnel called as witnesses, by providing details of the charity to witnesses when called forward. Court staff also ensure Victim Support are provided with details of witnesses before attending trial, especially if a witness appears to be particularly vulnerable, agitated or nervous about the whole process. The Court Martial Witness Service can be contacted on 01483 300 974, or for more general information, the Victim Support website is [www.victimsupport.org.uk](http://www.victimsupport.org.uk).

## **The Office of the Judge Advocate General (OJAG).**

20. Judges who preside over the CM, the SCC, the SAC and custody hearings are known as judge advocates, and it is their responsibility to oversee the conduct of the proceedings and to give rulings and directions on questions of law, procedure and practice in court. Appointed as judges by the Lord Chancellor, they are always civilians (although some are ex-Serving Officers) and they are always legally qualified. The Judge Advocate General is the judicial head of the SJS, and has power to specify judges for trials or other proceedings. More information about the OJAG and judge advocates is available on Her Majesty's Court Service website [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk).

## Service Prosecuting Authority (SPA)

21. The Service Prosecuting Authority is a tri-Service organisation, which is, like AFCLAA and the MCS, completely independent from all Service Chains of Command. The SPA, under the leadership of a civilian Director of Service Prosecutions (DSP), is responsible for the prosecution of cases heard in the CM and SCC, and acts as respondent in the SAC and CMAC.

## Units

22. Unit administration staff have a key role to play in supporting defendants as well as providing continuity and acting as a focal point for the various elements of the SJS. In particular, AFCLAA staff contact, and continue to work with, appropriate unit staff at key stages throughout the application process to ensure that:

- a. Timelines are met wherever possible;
- b. Delays are kept to a minimum; and
- c. Real or potential problems are identified and resolved at the earliest opportunity.

23. **Defendant's/Appellant's Assisting Officer (DAO/AAO).** Throughout the legal aid process, including preparation for trial/appeal and all court attendances, the DAO/AAO has a significant role in supporting the defendant/appellant and their legal representative. A properly prepared, and motivated DAO/AAO will work with the defendant, their legal representative and AFCLAA, to:

- a. Encourage the defendant to engage with the legal aid process;
- b. Attend upon defendant and legal representative before and after case conferences;
- c. Remain in attendance for part or all pre-trial conferences in some instances, but only at the request of defendant and/or legal representative;
- d. Maintain the integrity and confidentiality of all discussions involving the defendant, the legal representative and the case;
- e. Provide practical assistance as required, e.g. identify and/or locate potential defence witnesses, including character witnesses; obtain copies of unit documentation as required by the legal representative; book local travel and accommodation for overseas hearings etc (see Chapter 6 for further details);
- f. Once the defendant pleads, or is found, guilty – obtain information and/or documentation to inform and support any plea of mitigation; and
- g. Liaise with CMRS to ensure the defendant is prepared for, and attends, any PSR interview required;

24. Further guidance on the role and responsibilities of the DAO for CM is to be found in JSP 830 (Manual of Service Law), Chapter 29, Volume 2, Annex B.

25. **Divisional Officer (DO)/Adjutant/OC PSF<sup>15</sup>.** In the majority of cases, staff in these posts are the most suitably placed to provide any local administrative support necessary to facilitate accurate and timely actions throughout the application process. This includes

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<sup>15</sup> RN, Army and RAF respectively; includes Staff Support Assistant (SSA) (Army) and P1 staff (RAF).

ensuring monthly income contribution payments are processed via JPA, in accordance with payment plans agreed between the applicant and AFCLAA.

26. They may also be able to provide specific advice in instances where local difficulties or considerations need to be taken into account e.g. current or impending operational tours, extended exercise or leave periods etc, which may impact upon the legal aid process and/or contact between defendant, DAO and legal representative.

27. Throughout the legal aid process, especially at the initial application stage, AFCLAA Case Officers will contact the DO/SSA/P1 for specific assistance to obtain completed parts of the application form, complete with supporting documentation as necessary. Further details on this assistance are contained within Chapter 3 to this JSP.



## Chapter 3

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<sup>16</sup> Includes legal aid for applications to the Court Martial Appeal Court (CMAC) for leave to appeal, but only where there was no legally aided representation at the original trial.

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## Chapter 3

### Legal aid procedures

#### Introduction

1. The information required by AFCLAA, to determine whether an application for legal aid should be granted, is consistent with current practice within the civilian legal aid scheme as operated in England and Wales. It means that the allowances, limitations, thresholds and documentary evidence required are the same, or at least broadly similar, to those used in civilian system for matters heard in the Crown Court. The grant of legal aid, based upon the information provided, is the authority for AFCLAA to initiate legal aid procedures and therefore commit public funds on behalf of the applicant.

2. For ease of reference, this chapter is divided into separate Parts and thereafter, sections to enable the reader to determine the relevant processes and actions, appropriate to the stage and type of proceedings:

Part 1: Trials held in Court Martial (CM), Service Civilian Court (SCC)<sup>17</sup> or civilian criminal courts outside the UK;

Part 2: Appeals to the Summary Appeal Court (SAC) or the Court Martial Appeal Court (CMAC), or Elections for trial by CM.

3. The processes, particularly the contribution elements for SAC and Elections, differs from that for trials, and the reader should ensure they are reading the relevant section to save time and confusion.

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<sup>17</sup> This includes cases at the DSP referral stage.

## Part 1 – Legal aid for trials (CM/SCC/Criminal Courts overseas)

### Section 1 – General information

4. **Criminal courts overseas.** Applicants who have been arrested and charged to appear in a civilian criminal court overseas, should apply for legal aid without delay, using the application form (MOD F2263)<sup>18</sup>. Units are advised to contact AFCLAA immediately upon notification of arrest and/or charge to initiate the process. [Chapter 5](#) of this JSP provides more information for units and should always be referred to in the first instance.

5. **Legal aid/representation not required.** In all such instances, the individual should be encouraged to submit a fully completed application form to AFCLAA, to enable an estimated means test assessment of their ability to contribute towards their legal aid costs, should they change their mind at a later date<sup>19</sup>. This will enable the applicant to make a decision on whether they wish to continue with their application with full sight of their assessed income and/or capital/equity contributions. Submitting a completed application form will not commit the applicant to any financial liability, until and unless they sign the subsequent Contribution Order to accept the offer of legal aid provided.

6. Should the applicant choose not to apply for legal aid, whether they wish to use a Service lawyer or not, unit admin staff should endeavour to obtain an application form completed to that effect<sup>20</sup>, even if the applicant declines to provide any financial information. This is to provide evidence that the applicant:

- a. Was made fully aware of the availability of legal aid funding;
- b. Had an opportunity to make a considered decision about legal representation; and
- c. Freely made the decision not to apply for, or to decline an offer of, legal aid.

This will also provide an audit trail should the lack of funding and/or representation, and any subsequent delay, be used as the basis of a challenge in court at a later date. The applicant should complete all parts of the F2263, except Section 5 – Financial Statement.

7. Any applicant who does not obtain legal aid, whether they have instructed a Service lawyer or not, may change their mind and apply for legal aid at any point before trial. They should, however, be advised that a late application for legal aid is likely to cause unnecessary delay and may increase the costs incurred in the case, for which the applicant may be liable.

8. An exceptionally late application for legal aid e.g. after a guilty plea has been entered, but before sentence is passed, may be refused, especially if this is likely to delay the sentence hearing unnecessarily.

9. **Retrospective applications for legal aid.** Retrospective applications for legal aid (i.e. to fund costs incurred prior to the formal grant of legal aid) will not be considered by

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<sup>18</sup> Using the same application procedures as other types of cases, but it is necessary to act with more urgency as overseas civilian cases tend to proceed to trial within shorter timeframes, therefore it is imperative that appropriate legal representation is obtained without delay.

<sup>19</sup> Should the applicant wish to reapply for legal aid at a later stage, they will be required to complete a new application form and any changes to personal and/or financial circumstances are likely to alter the contributions payable.

<sup>20</sup> i.e. the applicant should complete their personal and unit contact details, tick the appropriate box to confirm they do not wish to apply for legal aid, or that they wish to use a Service lawyer; and sign the declaration at the bottom of the form; they are not required to provide any financial information in such instances.

AFCLAA. Any work carried out by a legal representative in advance of a formal grant of legal aid is a private matter between the representative and the applicant, who will remain personally liable for all costs incurred. It is therefore imperative for the applicant and the unit to ensure the application process is dealt with as quickly as possible, to prevent the applicant incurring an avoidable personal liability for costs (see paragraphs 15-17).

10. **Legal representation options.** Before completing the form, the applicant should think very carefully about the choices of legal representation available, which may be determined by the nature of the case, including whether it is a Service or overseas civilian prosecution. An ill-considered, or ill-advised, decision at this stage may result in delay, unnecessary costs or other complications should the applicant later change their mind.

11. **Service lawyer.** Within the scope of an existing Service Level Agreement between the Army and the RAF, personnel from these Services based outside the UK (including relevant civilians attached to Army and RAF units) may request representation by a Service lawyer from the other Service, provided one is available and willing to accept the case<sup>21</sup>. A similar provision exists within the RN, whereby RN personnel, regardless of location, can request representation by an RN barrister.

12. Where an applicant chooses Service lawyer representation, it remains the applicant's personal responsibility to ensure the Service lawyer is contacted and accepts the case. Although legal aid is not required, and AFCLAA bears no responsibility for cases where a Service lawyer is instructed, unit admin staff should ensure that the name and contact details of the lawyer are made known to AFCLAA, so any related documentation sent to AFCLAA can be forwarded to the instructed Service lawyer without delay.

13. **Limited legal aid for additional costs (Service lawyer only).** Although legal aid is not generally required where a Service lawyer is instructed, in exceptional cases it may become necessary to incur additional costs in order to properly prepare for trial e.g. to obtain an expert's report. Should such a requirement arise, AFCLAA will consider an application for legal aid, limited only to those additional costs, so long as a suitable justification, provided by the instructed Service lawyer, is attached to the application form. In such instances, the usual means test would be carried out, but any contribution payable will be limited to the additional costs authorised, or the maximum contribution determined by the applicant's personal and financial circumstances, whichever is the lower. Any contribution received will be refunded, with interest, following an acquittal.

14. **Privately funded (civilian) representation.** If the applicant wishes to instruct a legal representative who refuses to accept the Armed Forces Legal Aid Scheme terms and conditions, or where the applicant does not accept an offer of legal aid from AFCLAA, the applicant may choose to instruct the legal representative privately instead. Alternatively, if the applicant still requires legal aid, they can either nominate, or ask AFCLAA to nominate, an alternative legal representative who will accept the AFCLAA rates, terms and conditions.

15. When instructing a legal representative privately, the applicant will be required to agree a fee structure with the representative, usually at the firm's private rates; the applicant will remain personally liable for fees incurred throughout the process, until the matter is concluded.

16. For proceedings instigated before 01 October 2012 only: If the applicant is acquitted, the legal representative may apply to the Judge Advocate hearing the case for some or all of these fees to be reimbursed from public funds (see Chapter 7, Section 4, paragraph 32 for details); fees will not be reimbursed where the applicant is convicted. NOTE: If the case is

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<sup>21</sup> It is unlikely that a Service lawyer will be able to accept a case where the trial is to be held in a mainland UK court centre.

discontinued at any stage before formal court proceedings are instigated, the legal representative should apply direct to AFCLAA instead.

17. For proceedings instigated on or after 01 October 2012: There is no eligibility to reclaim private legal costs incurred from central funds, irrespective of the outcome, due to the availability of legal aid for all applicants<sup>22</sup>.

18. **Legally aided (civilian) representation.** An applicant who wishes to have civilian legal representation funded through AFCLAA, may either nominate a particular legal representative, or ask AFCLAA to nominate one on their behalf. [Annex A](#) to this chapter contains full details on the AFCLAA nomination process.

19. Once the legal representative accepts the case, and has received copies of relevant documentation, legal aid will only be transferred to a different legal representative at public expense at the applicant's request, if it can be shown that there are substantial and compelling grounds to do so<sup>23</sup>. Where the applicant is unable to provide suitable grounds for a transfer at public expense, changes to legal representation will only be authorised if the applicant agrees, in writing, to accept personal responsibility for all costs incurred by the originally instructed representative; this responsibility will be in addition to any income and/or capital/equity contribution liabilities the applicant has towards their legal aid costs. Should the legal representative request to be removed or replaced, irrespective of the reasons, AFCLAA will transfer legal aid to another representative at no cost to the applicant.

20. **Shared legal representation (co-accused).** Where 2 or more applicants are co-accused (i.e. jointly charged on the same charge sheet), they may wish to consider sharing legal representation as the legal aid costs will be shared equally amongst all co-accused involved. The proportion of liability remains the same, even if one or more co-accused is acquitted.

21. For instance, a case involves 3 co-accused, all using the same legal representative, but only 2 are convicted. Those convicted each remain liable for an equal third, and no more, of the overall legal aid costs; the third, acquitted, defendant continues to receive a full refund of any income contributions paid, with interest. This is not an option where there is a conflict between 2 or more co-accused, which prevents representation by a single legal representative.

22. **Legal aid costs.** One of the basic principles of legal aid is that, where an offender is required to contribute towards their legal aid costs, their contribution is to be limited to either their maximum contribution or their actual legal aid costs, whichever is the lower. The maximum contribution includes the full pre-trial income contributions plus any post-trial capital/equity contribution

23. Contributions will be used to cover the legal aid costs incurred during the preparation and representation stages of a case which results in a conviction<sup>24</sup>. These costs include an element for the legal representative's travel costs, however, this will be limited to a notional fee to prevent the offender being financially liable for travel costs which are beyond their control e.g. flights (typically to Germany or Cyprus); taxi or train fares to Court Centres or airports; car parking at airports etc. The use of a notional travel fee, instead of actual costs, will prevent applicants from being financially disadvantaged due to their location or the

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<sup>22</sup> Privately funded defendants in the SCC, where an application for legal aid failed to satisfy the IOJ test, and therefore legal aid was refused, may, following acquittal on all charges, apply to AFCLAA for a refund of some or all of their private legal costs.

<sup>23</sup> It is insufficient for a applicant simply to assert that they are not satisfied with the legal representative or the service provided. They must provide sufficient detail or examples to enable the Case Officer to make an informed decision. The Case Officer should be advised of a potential problem without delay. The applicant, or their legal representative, need not go into the specifics of their case, especially where to do so may break client/representative confidentiality or legal privilege.

<sup>24</sup> See also paragraphs 104-105 for costs incurred when trying to recover unpaid income contributions)

trial/hearing venues when compared to applicants prosecuted through the civilian criminal justice system.

24. Legal aid costs include all aspects of preparation and representation at court, including any additional costs for which the legal representative has obtained specific authority from AFCLAA e.g. an expert's report; medical reports; site visit costs etc. AFCLAA will apply the same principles as the civilian authority when considering requests to incur additional costs, and no reasonable and justifiable request will be refused.

25. Applicants, by their instructions to their legal representative(s), have some control over the costs incurred throughout the preparation and representation stages, and should discuss the implications with their legal representative(s) as part of the instruction process. In particular, applicants should discuss any requirements for additional costs, such as expert reports etc, with the caveat that the requirements for the proper preparation and representation of the case should always take priority over costs.

26. If the legal aid costs are less than the pre-trial income contributions received, the applicant will receive a refund of overpayments.

27. Where the legal aid costs exceed the income contributions received, the outstanding balance will be recovered from any capital/equity contribution payable, as stated on the Contribution Order.

28. Where legal aid costs exceed the maximum (combined) contributions as stated on the Contribution Order (amended if necessary, to take account of any changes in the applicant's circumstances), public funds will remain liable for those remaining costs.

29. **Judicial apportionment.** A judicial apportionment may be sought only in cases where the defendant<sup>25</sup> pleaded guilty to some, but not all, charges on the indictment and is subsequently acquitted on the remaining charges following a contested trial. In such instances, the convicted offender may, through their legal representative, apply to the Court Martial for an order that they should only pay a proportion of their legal fee on the grounds that it would be manifestly unreasonable to pay the whole amount.

30. An application for judicial apportionment is to be submitted to the Court within 21 days of sentence, and must include the grounds on which the application is made and the proportions (as a percentage) of the costs which the legal representative considers to be reasonable. The trial judge advocate, or in their absence, an appointed replacement, will consider the application and either grant or refuse it.

31. When considering the application, the judge advocate may seek further advice on costings from AFCLAA before making a final decision. Where an application is granted, the judge advocate will state on the order the percentage of costs payable; there is no requirement for any other convicted co-represented person to pay the outstanding balance of the applicant's costs. There is no right of appeal against a refusal.

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<sup>25</sup> This applies to legally aided defendants only; acquitted defendants, or those whose case was discontinued, who engaged legal representation privately should refer to Chapter 7, Section 4 for further advice.



## **Section 2 – Applying for legal aid: Trials (Court Martial; Service Civilian Court; civilian criminal courts overseas)**

32. **The application form (MOD F2263):** The application form is to be completed by the applicant, with assistance from HR Admin staff and DAO as necessary. The individual should be advised to complete a form in all cases, even where they do not want legal aid; this will show that they were made aware of the availability of legal aid, and the application is a true reflection of their decision.

33. Applying for legal aid at the DSP referral stage, even if they subsequently decline the offer, will provide the applicant with an indication of their future contributions should the matter proceed to trial and should the applicant then want legal aid. In such instances, due to the shortened timescale to trial, payment of the first contribution will be required immediately.

34. **Completing the application form.** The application process can be quite complex, especially if the applicant, and their support network at unit level, do not wholly understand the procedures or do not fully cooperate with AFCLAA during this time. Units, and especially DAOs, are advised to seek advice and assistance from the AFCLAA Case Team responsible for a case if they are unsure about any aspect or stage of the process.

35. A properly completed application form will provide all the information necessary to enable AFCLAA to process the application promptly and accurately. Annex B to this chapter is a guide to completing the form. In particular, it will ensure all relevant information is included in the means test, which will then enable an accurate assessment of what contributions, if any, are payable.

36. It is of paramount importance, therefore, that unit admin staff, and especially the DAO, give the applicant as much encouragement and support as possible at this stage of the process. The DAO, in particular, should:

- Explain the importance of seeking independent legal advice and representation;
- Discuss the implications of not obtaining such representation;
- Discuss the availability of legal aid to fund civilian representation if so required.

37. The completed form must be sent to AFCLAA by the fastest possible means, so it can be processed and an offer of legal aid made without delay. In most instances, faxing the application form to AFCLAA is the preferred option, as this will provide AFCLAA with proof of signature by both the applicant and the Certifying Officer. Where faxing is proving difficult due to location/operational requirements e.g. on board ship; in an operational theatre, the application may be emailed, so long as the Certifying Officer or their representative, confirms the original document has been signed as necessary and will be sent to AFCLAA at the earliest opportunity.

38. In all cases, irrespective of how the document was first sent to AFCLAA, the original document i.e. with the original signatures, not a photocopy, is to be sent to AFCLAA by recorded or registered delivery. As this is a legal document, authorising AFCLAA to incur costs to public funds on behalf of the applicant, it is necessary that this document, complete with original signatures, is retained by AFCLAA.

39. **Legal aid contributions: Automatic exemptions.** The following groups of applicants remain exempt from making any contributions towards their legal aid costs:

- a. Applicants\* aged 17 or under at the point of application;

- b. Applicants\* on certain welfare benefits, known as 'passporting benefits'<sup>26</sup>
- c. Applicants with 'Adjusted Annual Income'<sup>27</sup> below £12,475 per annum (as determined by the initial means test, see paragraph 53a) for more detail);
- d. Applicants with less than £3,398 disposable income per annum (as determined by the full means test, see paragraph 53b) for more detail).

\* As relevant to the applicant only; it does not apply to spouse/civil partner who may meet one or more of these criteria. Applicants aged 17 or under are to provide their date of birth for verification purposes; they are not required to complete Section 5 but must complete Section 6 in full.

40. **Contrary interests.** A spouse/civil partner is considered to have a contrary interest in a case where they are the victim, or a prosecution witness, in the case concerned. In such cases, the income and related outgoings of that person will not be taken into account during the means test; joint or family household income and outgoings e.g. child benefit; rent/mortgage etc will continue to be included in full.

41. **Multiple applications: Sole applicant (separate cases).** This information applies to applicants who have more than one case ongoing at any given time, and are required to submit separate applications for legal aid for each case; it does not apply where the applicant has multiple charges on a single indictment (charge sheet).

42. If they are already subject to an income contribution order (i.e. part-way through a payment plan) when they submit another application form in respect of a separate case, the contributions from the first application cannot be included as an allowable outgoing in the subsequent application. However, as an applicant can only be required to make one contribution per month, the remaining contributions in respect of any subsequent application (i.e. payments beyond the 'overlap') will only begin once the initial payment plan is completed. That is to say that once the initial contribution payment plan has concluded, the remaining contributions for the subsequent application will 'run on' directly from the initial contribution period<sup>28</sup>.

43. If the initial Contribution Order payment plan has been completed before any subsequent application is received, the applicant will be required to pay the full contribution as stated on the Contribution Order in respect of the second application.

44. If the applicant is acquitted, or the case is discontinued, in respect of the proceedings relating to the initial application, their contribution will be held over pending the outcome of the subsequent case, up to their maximum contribution.

45. If, following a conviction in the initial case, the contribution is greater than the actual legal aid costs, the excess will be added to the contributions received in respect of the second application, up to the maximum contribution. Should the

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<sup>26</sup> 'Passporting benefits' are: Income Support; Income-Based Job Seekers Allowance; Guarantee State Pension Credit; Income-Related Employment and Support Benefit. Although unlikely to be relevant to Service applicants, personnel who have left the Service, and some dependants may be eligible

<sup>27</sup> 'Adjusted Annual Income': Gross (household) income, weighted to take account of family circumstance i.e. whether the applicant has a spouse/civil partner, plus number and ages of dependant children (see paragraphs 58-60)

<sup>28</sup> For example, the applicant has paid 3 out of 5 contributions in respect of their first application when they apply again. The applicant continues to make the final 2 instalments for the first application, then continues to make a further 3 instalments in respect of the 2<sup>nd</sup> application, making a total of 8 monthly payments to cover both applications.

maximum contribution be reached, any additional monies will be refunded to the applicant, but without interest.

46. **Multiple applicants: Separate applicants, same household.** This applies only to cases where two members of the same household apply for legal aid during the same contribution period; this applies equally to instances where the applicants are co-accused in the same case (subject to any Contrary Interests – see paragraph 40), or are charged separately in unrelated cases.

47. Both applicants are required to provide the financial details of the other party (spouse/civil partner only; as dependants aged 17 or under are exempt from making contributions, their financial circumstances are not relevant here) on their application forms.

48. The normal means tests will be carried out on the first applicant's form, taking account of the total household income, outgoings and living allowances; this will include a Hardship Review, if applicable (see paragraphs 108-116). This applicant will be required to make the income contributions as determined by the means test.

49. The contributions payable by the first applicant will then become a financial commitment in the second applicant's means tests, ensuring any income contribution payable by the second applicant has been adjusted accordingly; in many instances, this will reduce the second applicant's contribution to nil. If the first applicant's case is subsequently discontinued, or the applicant is acquitted, but the second applicant remains charged, their means will be re-assessed as necessary, and may require the second applicant to make contributions; any contributions already received in respect of the first applicant will be taken into account.

50. It remains the responsibility of the applicants to inform AFCLAA of multiple applications from applicants within a single household, and of any changes to their financial circumstances.

51. **The means tests:** The means tests are used to assess the applicant's ability to contribute towards their legal aid costs, after taking account of their personal and financial circumstances at the time of application. The AFLAS 11 means test calculators are wholly based upon the calculators used when assessing applications for legal aid for Crown Court trials held in England and Wales, using the same thresholds and allowances.

52. There are two different types of means test. The Income means test is used to determine whether the applicant should make any pre-trial income contributions, and if so, what that contribution will be. The capital/equity means test is used to determine whether the applicant should make a post-trial contribution from capital and/or equity (see paragraphs 106-107 for further detail); a post-trial contribution will only be considered following a conviction.

53. The income means test consists of 2 parts:

- The Initial means test: the applicant's gross annual household income is 'weighted' to take account of family circumstances. This will determine the applicant's adjusted annual income and whether this is above or below that threshold (see paragraph 56). Applicants whose income is below the adjusted income threshold will be exempt from any (income) contribution liability; applications where the adjusted annual income exceeds that threshold will be subjected to the Full means test;

- The Full means test: deducts the allowable outgoings, living allowance ('weighted' to take account of family as necessary – see paragraphs 58-60) and Hardship Review (if applicable – see paragraphs 108-116 for detail), from their gross annual income, to determine their annual disposable income in relation to that threshold (see paragraph 56), and thereafter what, if any, income contribution they are required to contribute.

54. It is the applicant's responsibility, and in their own best interests, to ensure that the information provided on their application form is complete and is supported by the necessary supporting documentary evidence (see paragraphs 61-77 for further details on evidence requirements); this will ensure that the means test is a fair and accurate reflection of their ability to pay. A failure to disclose all relevant information may result in incorrect contributions i.e. contributions which are higher, or lower, than appropriate, given the applicant's actual personal and financial circumstances. In extreme cases, this may result in further investigations with a view to prosecute where an attempt to commit fraud is suspected.

55. It remains the applicant's personal responsibility to advise AFCLAA of any changes to their personal or financial circumstances during the contribution period e.g. Personal: marriage, divorce or increase in family size (excluding birthdays, as the form asks for children's ages at their next birthday); Financial: pay rise, promotion/demotion etc.

56. **Legal aid thresholds.** The MOD promulgates threshold levels, based upon those used in the civilian system for the Crown Courts, which determine the points above which a contribution is required. With effect from May 2011 and until further notice, these threshold points are:

- Adjusted Annual Income\* - £12,475; thereafter
- Disposable Annual Income\* - £3,398; and/or
- Capital/Equity in excess of £30,000.

\* see glossary for definitions.

57. **Allowances: Basic Living Allowance (applicant):** The basic living allowance, currently set at £5,676, per annum, is an automatic deduction from income, and is designed to take account of the basic living requirements of the applicant. This includes elements to cover average (annual) costs for food and non-alcoholic drinks; clothing and footwear; housing (excluding rent/mortgage/council tax for which actual costs are accounted for separately); fuel and power; household goods and services; health; transport; communication (i.e. phone and internet access); education (excluding school fees – see paragraph 116 for Boarding School fees); miscellaneous goods and services.

58. **'Weighted' basic living allowance (Dependants).** For applicants with family responsibilities i.e. spouse/civil partner, and/or dependant children living in the same house, the basic living allowance is increased in order to provide for the additional basic living costs for each member of the household. This involves incremental increases, according to the status and age of each additional member of that family at the time of application.

59. The spouse/civil partner's allowance equates to 0.64 of the applicant's basic living allowance (£3,632.64). Therefore, an applicant with a spouse/civil partner but no dependant children, would have a total basic living allowance of £9,308.64 to be included as part of the financial outgoings deducted from gross annual income to determine disposable income.

60. The allowances for each child, again based on the applicant's basic living allowance are (by age group): birth-1 = 0.15; 2-4 = 0.30; 5-7 = 0.34; 8-10 = 0.38; 11-12 = 0.41; 13-15 = 0.44; 16-18 = 0.59. Therefore an applicant with spouse/civil partner and 2 children aged 3 and 6, would have a total weighted allowance of 2.28 (consisting of 1 (applicant) + 0.64 (spouse/civil partner) + 0.30 + 0.34) x £5,676 = £12,941.28; this amount would be included as a deduction from gross annual income, along with other allowable financial outgoings (e.g. actual mortgage/rent, PAYE and NI etc), to determine disposable income.

61. **Documentary evidence:** All applicants are required to provide suitable documentary evidence of all income and outgoings included on their application form. This will enable the Case Officer to take full and proper account of allowable items at the earliest opportunity, and therefore ensure the contributions properly reflect the applicant's personal and financial circumstances. Failure to provide all the documentation evidence required may incur a sanction by way of increased contributions (see paragraphs 75-76)

62. As some documentary evidence may not be readily available, applicants are allowed a maximum of 21 days to provide all the required documentation before any sanctions are applied. Where there are Service or operational reasons which prevent this, the unit are to provide details to AFCLAA as soon as possible so that suitable adjustments can be made and unnecessary sanction action avoided.

63. **Pay statements.** In most cases, the three most recent pay statements are required; for Service personnel, JPA print-outs (i.e. pay statements) for the relevant months are acceptable, so long as they are legible when faxed to AFCLAA. Where the pay statement/print-out includes details of the following, further documentary evidence is not required:

- Income Tax (PAYE);
- National Insurance Contributions (NIC);
- Accommodation charges;
- Charge In Lieu Of Council Tax (CILOCT)
- Child Benefit and Kindergeld (where paid through salary only);
- Child Support Agency (CSA) or Child Maintenance and Enforcement Agency (CMEA) deductions (where deducted directly from salary).

64. Non-Service defendants, or spouse/civil partners of Service defendants, are to provide copies of their three most recent pay statements. As with JPA print-outs, where the pay statement includes details of payments listed above, further documentary evidence is not required.

65. **Pay statements – long term absentees (including Fast Track AWOLs).** Personnel who have been AWOL for a considerable time and who have not received any pay for the full three months preceding their application should provide the 3 most recent pay statements available. In addition, the applicant should provide pay statements or other documentary evidence to show alternative pay or funding during the 3 months prior to application; if this source of funding is no longer available to the applicant, this must be clearly stated on their application.

66. Applicants who have not received a full month's pay since their return, including those held on remand in MCTC, are unlikely to be required to make a pre-trial income contribution, unless they have been in receipt of other regular income

during the 3 month period prior to their return; they may still be required to make a post-trial contribution from capital/equity where appropriate.

67. **Other forms of evidence.** For income or outgoings not shown on pay statements, the applicant should provide such documentary evidence as is available. For State Benefits paid other than through salary e.g. Child Benefit ( and Kindergeld in Germany), Income Support, Tax Credits etc, copies of official notification showing rates and payment intervals are to be supplied. Recent bank statements, showing amounts and payee, may suffice in the short term for some items e.g. mortgage payments, maintenance, council tax etc, where these items are paid by direct debit or standing order<sup>29</sup>.

68. Evidence for childcare costs below £500 per calendar month will not usually be required, however, AFCLAA reserve the right to request proof by way of a current contract showing the child details (name, age), the applicable rates, and the service provider, for claims below £500 in certain circumstances. Failure to provide requested documentation may result in the item being disallowed, and may incur an Income Evidence Sanction (see paragraphs 75-76).

69. **Maintenance payments.** Copies of Court Orders or CSA/CMEA documentation, showing amount and frequency of payments, should be provided (see also paragraph 63). Where no formal order exists, proof of actual payment e.g. bank statements, may suffice, so long as the amount and payee are clearly identified (see footnote 13). In some circumstances, it may be necessary for AFCLAA to request a statement from the recipient, to confirm the amount, frequency of payments and the recipient's relationship to the applicant.

70. **Main/only residence.** Where the applicant lives in SLA/SFA<sup>30</sup> whilst owning their own private accommodation with the intention of using this as the family residence upon leaving the Service, the privately owned accommodation is deemed to be the main residence for the purposes of the means test, even where that property is rented out to another party in the short term.

71. In such circumstances, AFCLAA will only include both the SLA/SFA charge and the mortgage payments in the means test where the applicant also provides evidence of the income received from the rented property (see paragraph 73). If the privately owned property is not rented out to another party, AFCLAA will only include the larger payment of either the SLA/SFA charge or the mortgage.

72. **Mortgage payments.** A copy of the most recent annual mortgage statement is to be supplied. Where this is not readily available, a copy of a recent bank statement, with the relevant payment highlighted, will suffice in the short-term, pending receipt of the mortgage statement (see also footnote 13 below). For property valuation purposes, an estimate based upon similar properties within the local area is enough; it is not necessary to obtain a current valuation from a Chartered Surveyor.

73. **Privately rented accommodation.** Where the applicant is a tenant or a landlord of privately rented accommodation, a copy of any rental agreement or rent book should be provided. If a tenant, the applicant should also list any co-tenants e.g. 'common

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<sup>29</sup> Bank statements will only be accepted in the short-term, particularly where the applicant is unable to obtain more appropriate documentation due to Service or Operational requirements only. In all other circumstances, the Income Evidence Sanction will be applied where the applicant fails to provide more appropriate documentary evidence within 21 days of issue of the Contribution Order.

<sup>30</sup> Single Living Accommodation (SLA); Service Family Accommodation (SFA)

law' partners, or friends/colleagues (but excluding spouse/civil partner and/or dependants) who may be included on any rental agreement or who are otherwise resident in that property and who may therefore share responsibility for the rent.

74. **Council tax.** For applicants in SLA or SFA, where CILOCT is deducted from source, or those in privately rented accommodation with utilities included in the rent, no further documentary evidence is required. In all other instances, a statement/invoice from the service provider is required (see also footnote 13 below).

75. **Income evidence sanction.** The Income Evidence Sanction will be applied where documentary evidence required (see paragraph 61) is not provided within a maximum of 21 days from issue of the initial Contribution Order (F2263A), UNLESS there are clear Service or operational reasons for the delay; e.g. where an applicant is on an operational tour and the outstanding documentation cannot be provided directly to AFCLAA by a spouse/civil partner or other family member. In such instances, the applicant's unit are advised to contact AFCLAA as soon as a potential delay has been identified, to reduce administrative effort by all concerned.

76. The sanction will increase the monthly income contribution to either £900 or 100% of monthly disposable income, whichever is the greater. AFCLAA will issue a revised Contribution Order to that effect. Once the required evidence has been received, the information provided will be re-assessed and an updated Contribution Order will be issued if appropriate.

77. **Capital/equity.** Applicants should provide evidence of their capital assets, such as bank/savings account statements, at the time of application or within 21 days of the Contribution Order; for evidence to support equity claims, see also paragraph 72. Where applicants fail to provide evidence of their assets when requested, AFCLAA may remove the £30,000 threshold allowance and require the applicant to pay outstanding costs in full, up to the full amount of all capital/equity assets or their actual legal aid costs, whichever is the lower.

78. **Contribution Order (MOD F2263A Pt 1):** The Contribution Order can only be issued by the AFCLAA Case Officer, and then only once the completed application form has been received and the means test has been completed. The Contribution Order will contain full details of the any income and/or capital/equity contributions required. Applicants who are exempt from making any contributions, whether automatically or following the means test, will receive a Contribution Order showing a Nil contribution.

79. The applicant is to consider the Contribution Order and either accept or decline the offer therein, by annotating the appropriate box on the Contribution Order and returning the signed and witnessed document, along with proof of payment of the first instalment (if applicable), to AFCLAA by the fastest possible means. In most instances, this will be by fax. The original hard copy document is to be sent to AFCLAA by Recorded or Registered Delivery<sup>31</sup>.

80. Although an offer of legal aid has been made, the applicant is free to decline the offer if they so wish. Further information on declining legal aid is contained within paragraphs 123-124. When declining an offer of legal aid, especially at the DSP

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<sup>31</sup> In extreme instances, it may be necessary or more appropriate to use a courier, but the cost of this should be taken into account. Units should contact the AFCLAA Case Officer for advice if in doubt.

referral stage, the applicant is advised to take steps to ensure they have sufficient funds available to make the initial contribution immediately, should the matter proceed to trial and they then require legal aid.

81. **Contributions.** The level and type of contribution(s) payable by an applicant are determined by a number of factors i.e. the type of proceedings and particulars of the applicant's personal and financial circumstances. Applicants going to trial, including those whose case has been referred to the DSP for a decision on prosecution, may be liable for pre-trial income, and/or post-trial capital/equity contributions.

82. **Income contributions.** Monthly contributions from income are set at 90% of the applicant's (household) monthly disposable income<sup>32</sup>, as determined by the means test and any Hardship Review. The total income contribution payable, so long as the applicant abides fully by the agreed payment plan, is 5 x their monthly contribution. Income contributions are payable pre-trial, and in a lump sum or monthly instalments; see paragraphs 91-96 for details.

83. In some cases, application of the Minimum Drawing Rate (MDR) regulations may impact on the amount that can be paid each month, which will extend the payment period but not the overall total income contribution, see paragraphs 97-99 for further details.

84. Failure to make any payment on time and in the full agreed amount will result in a penalty payment equivalent to an additional month's contribution (See paragraphs 100-101).

85. Applicants acquitted at trial (or those whose case was discontinued at any time before trial) will receive a full refund of all income contributions paid, plus a further 2% interest. The Case Officer will authorise the refund, plus interest, immediately following receipt of proof of payments from units; units are NOT to refund contributions without written authority from AFCLAA.

86. **Nil Contributions.** Applicants with Nil contributions from income, due to their age, or because they are receipt of certain benefits; or because their adjusted annual income, or disposable income, are below the thresholds, will receive a Contribution Order to that effect.

87. Some applicants with Nil contributions from income, may still be liable for a post-trial contribution following conviction, if they have capital/equity in excess of the relevant threshold. In such cases, a convicted offender will be required to contribute towards their legal aid costs up to the maximum of their contribution or their actual legal aid costs, whichever is the lower.

88. **Contribution caps.** As income contributions are determined by the applicant's disposable income, there is potential for applicants with high levels of disposable income to pay contributions which are significantly higher than the likely legally aided case costs. To minimise the risk of excessive overpayments, and the financial impact this would have upon such applicants, the scheme applies a 'cap' on contributions, using the same levels as the civilian scheme.

89. The contribution cap is linked directly to the upper levels of fees and other costs which are likely to be incurred through the life of a case, based initially on the seriousness of the charge. This means that the maximum contribution any applicant would pay, regardless of their actual levels of disposable income, is determined by the type of offence for which they are charged. Under the current rates (as at May 2011), the maximum contributions

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<sup>32</sup> The applicant's annual disposable income is divided by 12, to establish the monthly disposable income e.g. an annual disposable income of £8,500 ÷ 12 = £708.33 monthly disposable income. Monthly contributions therefore would be 90% of £708.33 = £637.97 for 5 months.



payable range from £6,731 (5 x £1,346.20) for some minor offences, such as burglary, through to £185,806 (5 x £37,161.20) for the most serious offences, such as murder and manslaughter.

90. As part of the means test process, the Case Officer will check the appropriate contribution cap, according to the nature of the offence, and will make the necessary adjustment on the Contribution Order where the means tested contribution exceeds the relevant contribution cap. To enable the appropriate offence cap to be applied, the applicant should ensure that the type or nature of offence is included on their application form; in the absence of any details of the offence, the highest contribution cap will be applied.

91. **Payment options.** Income contributions become liable within 28 days of the DSP referral, or at the end of the month of application, whichever is the sooner. Where applications are received 28 days or more after referral but before the SPA direct trial, the first payment is due immediately, although payment may be delayed until the last working day of the month where prior authority has been obtained from AFCLAA, and where proof of forthcoming debit direct from salary (i.e. via JPA) can be provided<sup>33</sup>.

92. Applicants who did not apply for, or declined an offer of, legal aid before the SPA direct for trial and who subsequently (re)apply at this stage, are advised to ensure they have access to sufficient funds to cover the first instalment immediately, to prevent further unnecessary delay to the grant of legal aid.

93. The applicant can choose whether to make regular monthly instalments, as stated on their Contribution Order or, where the MDR regulations are applicable, as otherwise agreed (in writing) with AFCLAA. Alternatively, they can elect to make a single, lump sum, payment of the full amount on or before the first instalment date.

94. Service personnel making regular payments are advised to arrange for these to be paid directly from salary via JPA. Not only will this ensure regular, prompt, payments and therefore reduce the risk of incurring the default penalty (see paragraphs 100-101), but it will also ensure that the Minimum Drawing Rate (MDR) regulation is applied where appropriate (see paragraphs 97-99 for further details).

95. Non-Service personnel, unable to make automatic payments from salary, should ensure they make arrangements to pay by cash or cheque through the unit responsible for providing administrative support. AFCLAA will only receive cheques for payment in extreme circumstances i.e. when immediate payment is due and the applicant is unable to process payment through any other means e.g. due to unit leave stand-down periods.

96. It will not be necessary to complete all payments before trial, so long as payments are made promptly and according to the agreed payment plan. Where instalments remain unpaid at the conclusion of the proceedings, the Case Officer will review the situation, taking account of the outcome of the trial, the contributions already received and the likely legal aid costs incurred, and advise the unit on actions to be taken (see [Section 4](#) for details).

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<sup>33</sup> Immediate payment of the first instalment will always be necessary where the case is listed for PCMH before the applicant submits their application form, or returns their signed Contribution Order.

97. **Minimum Drawing Rate (MDR).** As stated in Service regulations, the MDR is the minimum rate of pay beyond which no further compulsory deductions should be made from an individual's pay account<sup>34</sup>; this prevents any compulsory deductions which would reduce the individual 'take-home' wages below 50% of their net pay.

98. Where the application of the MDR regulation impacts upon the applicant's ability to make the full contribution as stated on the Contribution Order, the unit are to contact AFCLAA immediately to discuss an alternative payment plan; if the applicant has alternative sources of income, they can choose to authorise voluntary payments from salary which would take their pay below the MDR, but they cannot be required to do so. Where applicable, the AFCLAA Case Officer will adjust the monthly payments to enable the applicant to make smaller payments over a longer period of time, equal to the 5 x monthly contribution as stated on the original Contribution Order<sup>35</sup>.

99. As the application of the MDR regulation is beyond the control of the applicant, the defaulted payment penalty will not be applied in such cases, so long as the applicant ensures prompt and accurate payment of instalments according to the agreed payment plan. Should the applicant subsequently default or otherwise delay payment of the revised instalments, a defaulted payment penalty, equivalent to 1 x the pre-MDR monthly contribution, will become payable<sup>36</sup>.

100. **Default Penalty: Income contribution payment.** Applicants who choose to pay their income contributions by regular monthly instalments, whether or not that payment is subject to an MDR adjustment, remain responsible for ensuring all payments are made promptly and in full (i.e. as stated on their Contribution Order, revised and re-signed if appropriate). Failure to make any payment as required will result in the application of a Default Penalty. The default penalty is a further month's income contribution, increasing the total income contribution payable to 6 x monthly contributions instead of 5 x monthly contributions.

101. Those with an agreed alternative payment plan, necessitated by application of the MDR, will have their payment plan re-assessed, to take account of the additional amount payable; the default penalty is a further month's income contribution before the application of the MDR. This may increase the monthly payments (whilst still remaining within the MDR limitations), and/or may increase the number of monthly instalments.

102. **Collection and enforcement.** Unit admin staff and the DAO are required to provide local level assistance with all aspects of completing the application form and the legal aid processes. This includes providing confirmation that the necessary actions have been taken to activate payments through the most appropriate means. In most instances, this will be deductions from salary via JPA, paid directly into the legal aid budget UIN; while JPA business processes do not currently support a

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<sup>34</sup> JSP 754, Chapter 2, Section 4 refers.

<sup>35</sup> For example, a Serviceman is required to make 5 x £900 payments = £4,500, but a monthly payment would take him beyond his MDR by £50. A revised payment plan of 6 x £750 = £4,500 is agreed instead. The adjusted payment plan will be limited to the minimum number of instalments necessary to keep the monthly payment within the MDR limitations.

<sup>36</sup> Using the example in footnote 19 above, if he subsequently defaults on 1 or more payment of £750 from the revised payment plan, he will incur a default penalty of £900 (the pre-MDR monthly contribution), making his total contribution £5,400, payable over 7 months at £771 per month.

standing-order type rollover payment, it will allow administrators to make separate entries for sufficient consecutive months to cover all instalments.

103. Those responsible for the administration of non-Service applicants, or Service applicants wishing to make alternative payment arrangements (e.g. a single lump-sum payment or payment by cheque through an imprest account), are to contact AFCLAA for further advice without delay.

104. While admin staff and the DAO are required to provide such assistance as is necessary to ensure applicants comply with the agreed payment plans, it remains the applicant's personal responsibility to ensure all payments are made promptly and for the full amount agreed. Where enforcement action i.e. through the civil courts, becomes necessary to obtain unpaid contributions, the cost of such actions will be added to the applicant's liability.

105. Where enforcement action is required in respect of income contributions, and the applicant is subsequently acquitted, the extra costs of enforcement will be recovered from their contribution before refund action is taken, reducing the amount refunded to them.

106. **Capital/equity contributions.** Applicants with capital and/or equity in property, held in their own name or jointly with another, which exceeds the current threshold of £30,000 may be liable for a post-trial contribution from that source. Capital/equity contributions are only recoverable from convicted offenders where any income contributions paid did not fully cover the legal aid costs incurred. The capital/equity contribution will be limited to either the maximum amount shown on the Contribution Order i.e. the amount of capital/equity above the threshold, or the outstanding balance of legal aid costs, whichever is the lower<sup>37</sup>.

107. Acquitted applicants and convicted offenders whose income contributions were sufficient to cover their legal aid costs, will be not be required to make any contribution from capital/equity.

108. **Hardship Review (MOD F2263C):** To be completed by the applicant, with the assistance of unit admin staff, and the DAO, as necessary, where the applicant considers they have financial commitments which may not have been included in the main application form.

109. **Eligibility.** Every applicant is eligible to apply for a Hardship Review in respect of their financial circumstances and their income contributions, and should be encouraged to submit a completed application alongside their main application form wherever possible. In addition to reducing unnecessary administrative action by AFCLAA and unit admin staff, and therefore time, this will enable the Case Officer to provide a Contribution Order which is an accurate reflection of the applicant's ability to pay.

110. A Hardship Review application can be submitted at any time while a Contribution Order payment plan is in force i.e. whilst monthly contributions are still being paid, where the applicant's financial circumstances have changed e.g. a fine or County Court Judgement (CCJ); or a new or amended CSA or maintenance payment; or the cessation of a regular payment included in the initial means test.

111. Changes to personal circumstances, especially where there are changes to the applicant's householder responsibility, would require a new application form to be submitted

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<sup>37</sup> For instance, an applicant has pre-trial income contributions totalling £4,500, and capital/equity contribution of up to £20,000 (i.e. has capital/equity of £50,000 before the threshold of £30,000 is applied). His legal aid costs total £8,000. He will be required to contribute £3,500 from capital/equity.

to AFCLAA without delay, so a fresh means test can be carried out. For example, any birth or adoption; or marriage/civil partnership occurrence, including divorce or formal separation.

112. A successful Hardship Review, whether submitted with or after the initial means test assessment, may reduce, or even remove, any income contribution liability based on the information provided on the main application form (MOD F2263) alone.

113. New financial commitments, including loans or HP agreements (including 'pay day loans'), entered into after the applicant has been notified that a case has been referred to the DSP, or after a Contribution Order has been issued, may be subjected to further scrutiny as part of the Hardship Review process and may be excluded.

114. **Evidence requirements.** Unlike evidence for information on the main application form, the evidence to support a Hardship Review is to be submitted at the same time as the Review application; units are advised to contact the Case Officer without delay if the applicant is unable to provide the requisite evidence for Service and operational reasons only.

115. The evidence required is determined by the item in question. In most instances, it will be necessary to provide documentary evidence supplied by the organisation to which the debt or other payment is made:

- a copy of the loan agreement, Individual Voluntary Arrangement (IVA) or Bankruptcy Order, detailing the start date and the payment schedule, plus proof of recent payment;
- a copy of the latest credit or store card statement, showing the outstanding balance, the most recent payment and the minimum payment due.

NOTE: For credit or store cards, only the minimum payment required, as shown on the most recent statement, will be allowed as an outgoing for the Hardship Review.

116. **Boarding school fees.** Where the applicant has boarding school fees for Service or operational reasons and is, as a result, in receipt of Continuity of Education Allowance (CEA), they should include full details of the allowance received and their parental contributions. It is especially important that they include details of any parental responsibility payments due during the income contribution period, and identify any allowances paid with salary during the 3 months prior to application; CEA payments included with salary will not be included as income for the purposes of the means test.

117. **Legal aid not in place (MOD F2263A Pt 2):** This document, issued by the Case Officer, will be issued where legal aid is refused or declined, stating the reasons why legal aid is not in place. Legal aid can be refused by the applicant i.e. the applicant can 'refuse to apply for legal aid' (see paragraph 118), or it can be declined i.e. the applicant can decline an offer of legal aid following receipt of the Contribution Order.

118. **Legal aid refused.** An applicant can refuse to apply for legal aid either because they do not wish to have legal aid funding at the time i.e. where the applicant wishes to instruct a legal representative privately; or they wish to use a Service lawyer to represent them. The applicant should ensure they annotate the relevant box on the application form.

119. If the applicant chooses to use a Service lawyer, it remains their responsibility to make contact with the relevant organisation to establish availability (see paragraph 12).

120. Applications submitted for matters where there is no entitlement to legal aid e.g. for internal administrative action, or for a civilian case to be heard in a UK court, will be rejected as ineligible.

121. **Legal aid refused: IOJ test.** AFCLAA may refuse an application for legal aid where it does not meet the Interests of Justice (IOJ) test. Further details on the IOJ test, and how to appeal a refusal, are contained within Appendix 2 to Annex B to this chapter.

122. In practice, this applies only in a limited range of SCC cases, where the charge would normally be heard in a Magistrate's Court in England and Wales; applications for CM trials (including at the DSP referral stage) and civilian criminal court cases overseas will automatically pass the IOJ test.

123. **Legal aid declined.** Once the means test has been conducted, and a Contribution Order issued, the applicant must either accept or decline that offer. The applicant is to annotate the appropriate box on the Contribution Order and return it to AFCLAA for further action without delay.

124. In all cases, an applicant can change their minds and re-apply for legal aid at any point up to the time of trial. However, delaying an application can add unnecessary delay, increase the legal aid costs incurred, and will require the applicant to make an immediate payment in respect of their first monthly contribution before legal aid can be granted; in some instances, where an application is submitted very late in the proceedings (e.g. after pleading but before sentence), legal aid may be refused.

### **Section 3 – Actions following the grant of legal aid**

125. **Completing the application process.** Where the applicant accepts an offer of legal aid, and upon receipt of the signed and witnessed Contribution Order, complete with proof of payment in respect of the first contribution, the Case Officer will contact the nominated legal representative to establish their acceptance of the case. Formal notification will then be sent to all interested parties, especially the applicant and their DAO. The applicant and DAO are advised to contact the named legal representative as soon as possible and certainly within 7 days of the date of the formal notification letter.

126. Once legal aid has been granted, the applicant has entered into a formal and binding agreement with AFCLAA for the provision of legal aid. This means that they have agreed in writing to accept the terms and conditions of the Armed Forces Legal Aid Scheme, including an undertaking to pay such contributions towards their legal aid costs as deemed appropriate, based upon their personal and financial circumstances and the case against them.

127. Once legal aid is in place, it is not possible for an applicant to later withdraw their application and terminate their legal aid contract with AFCLAA. This does not include cases discontinued at any point prior to trial, where the Case Officer will automatically take the necessary action to discontinue legal aid and instigate the process to refund contributions to the applicant (see paragraphs 131-132).

128. **Legal aid at the DSP referral stage (CM and SCC only).** Legal aid granted at this stage is limited, in that it will only provide funding for the legal representative to hold initial conferences with their client, until such time as the SPA notify their decision on whether the case is to proceed to trial or be discontinued.

129. In most cases, the funding limitations imposed by AFCLAA are sufficient to cover an initial conference and advice. If, after speaking to their client, the legal representative considers there to be good grounds, they may request an increase, subject to the provision of suitable justification. The Case Officer will consider the request and may increase the limitations if appropriate.

130. Legal aid will not, however, be extended to include full preparation for trial, or to incur additional costs e.g. to instruct an expert, until and unless the SPA issue notification of trial.

131. **Case not proceeding to trial (CM and SCC only).** If the SPA decide not to prosecute a case, whether the matter is wholly discontinued or referred back to the CO for summary dealing, the Case Officer will make contact with the legal representative at the earliest opportunity, to confirm that legal aid is discontinued with immediate effect. Any work carried out by the legal representative after this point is a matter between that legal representative and their client and will not be payable by AFCLAA.

132. The Case Officer will also make urgent contact with the unit, however, if this does not happen within 1 working day of receipt of notification at unit level, unit admin staff should contact the Case Officer without delay, providing a copy of the written notification as issued by the SPA.

133. **Case proceeding to trial (all):** Upon receipt of notification of trial, the Case Officer will write again to the legal representative, confirming legal aid is extended to cover all trial preparation and representation.

134. Where legal aid is not in place before a case is notified for trial, irrespective of whether the case is to be heard in the CM, the SCC or a civilian criminal court overseas, the unit are advised to work closely with AFCLAA and the applicant, to ensure they are aware of the availability of legal aid and to support them through the application process.

135. As there is likely to be only a few weeks (or, in civilian criminal courts overseas, only days) between notification and the first hearing, it is imperative that the applicant is encouraged to engage with the process as soon as possible, so that any decision they make regarding legal aid and legal representation can be made with full knowledge and as soon as possible.

## Section 4 – Actions following the conclusion of proceedings

136. **Relevant Factors:** The procedures instigated by AFCLAA, once proceedings are concluded, are determined by a number of factors, namely:

- The stage at which the proceedings concluded i.e. discontinued before trial, at the conclusion of the trial, or after submission of an application for leave to appeal to the CMAC;
- The outcome of the trial i.e. whether the applicant was acquitted or convicted;
- The type of contribution(s) paid or payable i.e. pre-trial income contributions, and/or post-trial capital/equity contribution, or Nil contribution;
- The final legal aid costs (for convicted offenders who were liable for contributions).

137. **Acquitted on all charges (including cases discontinued before trial):** Following a discontinuance or an acquittal on all charges, and upon receipt of written documentation to that effect (i.e. SPA discontinuance letter, or the TRN1 to confirm the trial result), the Case Officer will:

- a. **Income contributions payable:** Contact the unit within 1 working day of receipt of the written documentation (SPA letter or TRN1), asking the unit to provide documentary evidence to prove contributions made up to that point<sup>38</sup>; they will also advise the unit to stop any future deductions; and
- b. Upon receipt of required proof, issue written authority for the unit to refund payments made plus interest (currently set at 2%) accrued, without further delay. Full refunds, with interest, are only payable following discontinuance or acquittal of all matters in a case.

NOTE: Units are **NOT** to stop ongoing contribution payments, nor refund contributions, without the specific authority of the AFCLAA Case Officer.

- c. **Nil contributions:** As the defendant made no pre-trial contributions, no further AFCLAA or unit action is required.

138. Where AFCLAA have not made contact within this timescale, especially following discontinuance, the unit should contact the Case Officer as soon as possible, providing a copy of the written confirmation as supplied by the SPA.

139. Full refunds are only payable following discontinuance of the whole case, or acquittal on all charges on the relevant indictment. Applicants acquitted on some, but not all, charges on a single indictment may be eligible to request a reduction in their legally aided costs (known as Judicial Apportionment), but only in specific circumstances (see paragraphs 29-31 for details).

140. **Conviction: Applications for Leave to Appeal.** A convicted offender who pleaded, or was found, guilty of some or all charges, may wish to seek leave to appeal against the outcome, to the Court Martial Appeal Court (CMAC) Before taking any further action, the offender should obtain legal advice from their representative.

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<sup>38</sup> E.g. JPA pay statements showing the date and amount of each payment made; imprest account receipts showing amounts paid via the unit pay office.



141. Should the representative(s) involved in the case advise the offender to appeal, legal aid funding for the preparation of an Application for Leave to Appeal (Form 1) is automatically available; where the offender had legal aid for the trial<sup>39</sup>, there is no need to re-apply for legal aid at this stage, unless the offender is also requesting a different legal representative. The CMAC will consider the application and, if the appeal is allowed, the CMAC will assume responsibility for all associated legal aid funding requests thereafter.

142. If the CMAC does not grant the initial Application for Leave to Appeal, any subsequent applications are a matter between the offender and their representative; neither the Armed Forces Legal Aid Scheme nor the CMAC will provide legal aid funding for this work.

143. If the offender re-applies for legal aid because they wish to use a different legal representative, the Case Officer may contact the original representative to obtain a précis of the advice on appeal, as part of the IOJ test when considering the application. The information provided by those directly involved in the original trial will indicate whether an appeal has any merit, and would therefore be an appropriate use of public funds. Where the advice supports an appeal, legal aid may be granted for the costs for preparation of an Application for Leave to Appeal and for submitting it to the CMAC.

144. Where the advice specifically indicates that an appeal would lack merit, the Case Officer may decide to refuse legal aid. Should legal aid be refused, this will not prevent the offender from entering into a private arrangement with the new representative. If an Application for Leave to Appeal is made and in the event is successful, the CMAC may reimburse the offender for the private fees paid.

145. **AFCLAA Actions:** Once the representative has submitted any Application for Leave to Appeal to the CMAC, or if there is to be no application, the bill of costs is to be submitted directly to AFCLAA for consideration (taxation) and payment; fees claimed for work carried out after this point will be rejected by AFCLAA.

146. Upon receipt of a TRN1 confirming conviction, the Case Officer will carry out an initial assessment of the likely legal aid costs, based upon a number of contributory factors which can only be fully known at the conclusion of the proceedings, namely:

- Whether the offender pleaded guilty, and at what point in the proceedings, or was only found guilty at the conclusion of a contested trial; and
- The number of days in Court (including all hearings ahead of trial, and trial days); and
- The amount of prosecution papers (served before and during trial), and
- The number of prosecution witnesses, and
- The type and level of legal representative(s) involved, and
- Whether there were any additional costs incurred e.g. notional travel; expert(s) reports and subsequent attendances at Court during the trial.

147. **Outstanding Contributions.** The Case Officer will then carry out an interim review of the income contributions paid up to the point of trial and the amount of any outstanding contributions, before contacting the unit to either:

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<sup>39</sup> Offenders who did not have legal aid for their trial, whether they had a Service lawyer, a privately funded civilian legal representative, or were unrepresented, should refer to Chapter 3, Part 2 for further information on applying for legal aid for the application to the CMAC.

- **Suspend any outstanding contributions:** where contributions already received are likely to significantly exceed the likely legal aid costs, the Case Officer may authorise the unit to suspend payment of any outstanding contributions until all legal aid fees have been agreed.

- If, once all the legal aid fees have been agreed, and the contributions received do not fully cover the offender's legal aid costs, the Case Officer will contact the unit to request payment of the remaining shortfall, up to the limitation of the outstanding contributions previously suspended.

**OR**

- **Continue payment of outstanding contributions:** Where the contributions paid to the point of trial are unlikely to cover the probable legal aid costs at that point, the Case Officer will direct the unit to continue with the existing payment plan, at least until all legal aid fees have been agreed and the offender's legal aid cost liability has been determined.

- Where an offender receives a period of detention, payment of the outstanding contributions are to be held in abeyance until they are released from MCTC and returned to their unit. In many cases, their legal aid costs liability will be known at this point, and the unit notified of the amount remaining to be recovered.

NOTE: Units are NOT to stop ongoing contribution payment, nor refund contributions paid, without the specific authority of the AFCLAA Case Officer.

148. **Full assessment of legal costs.** Upon receipt of the legal representative(s) bill of costs, the Case Officer will carry out a full assessment (taxation) of their costs, in accordance with standard procedures, before authorising payment. Once all fees are agreed with the legal representative(s), the Case Officer will carry out a final review of the contributions paid by the applicant, and take one of the following actions:

**a. Income contributions exceed legal aid costs: Refund:** The Case Officer will contact the unit to obtain documentary evidence to confirm the amount paid in contributions. Upon receipt of the requisite evidence, the Case Officer will confirm the balance of contribution to be repaid, and authorise the unit to make a refund; in most instances, this should be paid back via JPA into salary.

**OR**

**b. Legal aid costs exceed income contributions paid: Actions:** If outstanding contributions had been previously suspended (see paragraph 147 above), the Case Officer will confirm the amount remaining to be recovered i.e. the balance of either the legal aid costs or the outstanding contribution, whichever is the lower, and authorise the unit to take appropriate action.

**c. Capital/Equity Contributions:** The Case Officer will then establish whether the applicant was liable for a post-trial contribution from capital/equity and the limitations of such a liability. If the applicant is liable, the Case Officer will write to the applicant to advise them of the amount outstanding and the ways in which that contribution can be made.

**d.** If there is no liability for a post-trial contribution, the Case Officer will confirm that the actual legal aid costs exceeded the income contributions paid, and therefore no refund will be forthcoming.

## Part 2 – Legal aid for appeals<sup>40</sup> and elections for trial

### Section 5 – General information

149. The means test processes and contribution liabilities for summary appeals or elections for trial by Court Martial are significantly different to those in place for other CM, SCC or civilian criminal court overseas. It is therefore imperative that the appellant or person electing is fully aware of the difference, in particular with reference to the way contributions are assessed and paid, before making a decision on legal representation. Paragraphs 175-178 cover the means test processes, whilst Section 8 provides detailed information in respect of contribution payments.

150. **Legal aid/representation not required.** In all such instances the individual should be encouraged to submit a fully completed application form to AFCLAA, to enable an estimated means test assessment of their ability to contribute towards their legal aid costs, should they change their mind at a later date<sup>41</sup>. Submitting a completed application form will not commit the applicant to any financial liability, until and unless they sign the subsequent Contribution Order to accept the offer of legal aid provided.

151. Should the applicant choose not to apply for legal aid, whether they wish to use a Service lawyer or not, unit admin staff should endeavour to obtain an application form completed to that effect<sup>42</sup>, even if the applicant declines to provide any financial information. This is to provide evidence that the applicant:

- a. Was made fully aware of the availability of legal aid funding;
- b. Had an opportunity to make a considered decision about legal representation; and
- c. Freely made the decision not to apply for, or to decline an offer of, legal aid.

This will also provide an audit trail should the lack of funding and/or representation, and any subsequent delay, be used as the basis of a challenge in court at a later date. The applicant should complete all parts of the application form, except Section 5 – Financial Statement.

152. Any applicant who does not obtain legal aid, whether they have instructed a Service lawyer or not, may change their mind and apply for legal aid at any point before trial or summary appeal. They should, however, be advised that a late application for legal aid is likely to cause unnecessary delay and, where the applicant has elected for trial, may increase the costs incurred in the case.

153. An exceptionally later application for legal aid e.g. less than 2 working days before appeal or trial is to be heard, may be refused, especially if this is likely to delay proceedings unnecessarily.

154. **Retrospective applications for legal aid.** Retrospective applications for legal aid (i.e. to fund costs incurred prior to the formal grant of legal aid) will not be considered by AFCLAA. Any work carried out by a legal representative in advance of a formal grant of legal

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<sup>40</sup> Includes legal aid for applications to the Court Martial Appeal Court (CMAC) for leave to appeal, but only where there was no legally aided representation at the original trial.

<sup>41</sup> Should the applicant wish to reapply for legal aid at a later stage, they will be required to complete a new application form and any changes to personal and/or financial circumstances are likely to alter the contributions payable

<sup>42</sup> i.e. the applicant should complete their personal and unit contact details, tick the appropriate box to confirm they do not wish to apply for legal aid, or that they wish to use a Service lawyer; and sign the declaration at the bottom of the form; they are not required to provide any financial information in such instances.

aid is a private matter between the representative and the applicant, who will remain personally liable for all costs incurred. It is therefore imperative for the applicant and the unit to ensure the application process is dealt with as quickly as possible, to prevent the applicant incurring an avoidable personal liability for costs (also see paragraphs 159-161).

**155. Legal representation options.** Before completing the form, the applicant should think very carefully about the choices of legal representation available to them. An ill-considered, or ill-advised, decision at this stage may result in delay, unnecessary costs or other complications should the applicant later change their mind.

**156. Service lawyer.** Within the scope of an existing Service Level Agreement between the Army and the RAF, personnel from these Services based outside the UK (including relevant civilians attached to Army and RAF units) may request representation by a Service lawyer from the other Service, provided one is available and willing to accept the case<sup>43</sup>. A similar provision exists within the RN, whereby RN personnel, regardless of location, can request representation by an RN barrister.

**157.** Where an applicant chooses a Service lawyer representation, it remains the applicant's personal responsibility to ensure the Service lawyer is contacted and accepts the case. Although legal aid is not required, and AFCLAA bears no responsibility for cases where a Service lawyer is instructed, unit admin staff should ensure that the name and contact details of the lawyer are made known to AFCLAA, so any related documentation sent to AFCLAA can be forwarded to the instructed Service lawyer without delay.

**158. Privately funded (civilian) representation.** If the applicant wishes to instruct a legal representative who refuses to accept the Armed Forces Legal Aid Scheme terms and conditions, or where the applicant does not accept an offer of legal aid from AFCLAA, the applicant may choose to instruct the legal representative privately instead. Alternatively, if the applicant still requires legal aid, they can either nominate, or ask AFCLAA to nominate, an alternative legal representative who will accept the AFCLAA rates, terms and conditions.

**159.** When instructing a legal representative privately, the applicant will be required to agree a fee structure with the representative, usually at the firm's private rates; the applicant will remain personally liable for fees incurred throughout the process, until the matter is concluded.

**160. For proceedings instigated before 01 April 2013 only:** If the applicant is acquitted, or the appeal is wholly successful, the legal representative may apply to the judge advocate hearing the case for some or all of the fees to be reimbursed from public (central) funds (see also Chapter 7, Section 4, paragraph 32 for details); fees will not be reimbursed where the applicant is convicted or an appeal wholly or partially denied. NOTE: if the election is withdrawn, or appeal abandoned before formal court proceedings are instigated, the legal representative should apply directly to AFCLAA instead.

**161. For proceedings instigated on or after 01 April 2013:** There is no eligibility to reclaim private legal costs incurred from central funds, irrespective of the outcome.

**162. Legally aided (civilian) representation.** An applicant who wishes to have civilian legal representation funded through AFCLAA, may either nominate a particular legal representative, or ask AFCLAA to nominate one on their behalf. [Annex A](#) to this chapter contains full details on the AFCLAA nomination process.

**163.** Once the legal representative accepts the case, and has received copies of relevant documentation, legal aid will only be transferred to another at public expense at the

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<sup>43</sup> It is unlikely that a Service lawyer will be able to accept a case where it is likely to be heard in a mainland UK Court centre.

applicant's request, if it can be shown that there are substantial and compelling grounds to do so<sup>44</sup>. Where the applicant is unable to provide suitable grounds for a transfer at public expense, changes to legal representation will only be authorised if the applicant agrees, in writing, to accept personal responsibility for all costs incurred by the originally instructed representative; this responsibility will be in addition to any contribution liabilities the applicant has towards their legal aid costs. Should the legal representative request to be removed or replaced, irrespective of the reasons, AFCLAA will transfer legal aid to another representative at no cost to the applicant.

**164. Legal aid for applications to the CMAC<sup>45</sup> (legal aid not previously in place).** Where a convicted offender, who did not have legal aid for the original proceedings (whether they were unrepresented, or were represented by a Service or a privately funded legal representative), requests legal aid to enable an application for leave to appeal to be submitted to the Court Martial Appeal Court (CMAC), they will be subject to the same application and contribution process as those appealing to the SAC.

**165. Legal aid costs: Summary appeals.** Summary appeal fees are fixed according to the type of appeal lodged i.e. appeal against finding and sentence or against finding only. The post-appeal contributions are directly linked to those fees, so no appellant will pay more than the actual costs of their appeal. In some exceptional cases, the fees may be increased to reflect the seriousness of the case, but this will not impact upon the fixed post-appeal contribution payable by the appellant.

**166. Appeals lodged by the Reviewing Authority.** Where the Reviewing Authority has lodged an appeal on behalf of a Service person, that appellant will not be required to make any contributions towards their summary appeal costs, irrespective of the outcome. The appellant will not be required to complete any financial details on their application form (Section 5), but will be required to complete their personal and contact details, and their choice in respect of legal representation. The form is to be signed by the appellant and their unit, and submitted to AFCLAA in the usual way.

**167. Legal aid costs: Election for trial.** Legal aid costs for elections cover preparation and representation in court, and are not fixed in the same way as fees for summary appeals. However, the applicant's liability will be limited to either the actual legal aid costs in the case, or the post-trial fixed contribution, whichever is the lower.

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<sup>44</sup> It is insufficient for a applicant simply to assert that they are not satisfied with the legal representative or the service provided. They must provide sufficient detail or examples to enable the Case Officer to make an informed decision. The Case Officer should be advised of a potential problem without delay. The applicant, or their legal representative, need not go into the specifics of their case, especially where to do so may break client/representative confidentiality or legal privilege.

<sup>45</sup> Where legal aid was in place for the original proceedings, this included costs incurred in relation to an application for leave to appeal being submitted to the CMAC, so no further application is required.

## Section 6 – Applying for legal aid

168. **The application form (MOD F2263):** The application form is to be completed by the applicant, with assistance from HR Admin staff and the Appellant's Assisting Officer (AAO) as necessary. The individual should be advised to complete a form in all cases, even where they do not want legal aid; this will show that they were made aware of the availability of legal aid, and the application is a true reflection of their decision.

169. **Completing the application form.** The application process can be quite complex, especially if the applicant, and their support network at unit level, do not wholly understand the procedures or do not fully cooperate with AFCLAA during this time. Units, and especially the AAO, are advised to seek advice and assistance from the AFCLAA Case Team responsible for a case if they are unsure about any aspect or stage of the process.

170. A properly completed application form will provide all the information necessary to enable the Case Officer to process the application promptly and accurately. [Annex B](#) to this chapter is a guide to completing the form. In particular, it will ensure all relevant information is included in the means test, which will then enable the Case Officer to accurately assess whether the applicant may be liable to make a contribution.

171. It is of paramount importance, therefore, that unit admin staff, and especially the AAO, give the applicant as much encouragement and support as possible at this stage of the process. The AAO, in particular, should:

- a. Explain the importance of seeking independent legal advice and representation;
- b. Discuss the implications of not obtaining such representation;
- c. Discuss the availability of legal aid to fund civilian representation if so required.

172. The completed form must be sent to AFCLAA by the fastest possible means, so it can be processed and an offer of legal aid made without delay. In most instances, faxing the application form to AFCLAA is the preferred option, as this will provide AFCLAA with proof of signature by both the applicant and the Certifying Officer. Where faxing is proving difficult due to location/operational requirements e.g. on board ship; in an operational theatre, the application may be emailed, so long as the Certifying Officer, or his/her representative confirms the original document has been signed as necessary and will be sent to AFCLAA at the earliest opportunity.

173. In all cases, irrespective of how the document was first sent to AFCLAA, the original document i.e. with the original signatures, not a photocopy, is to be sent to AFCLAA by recorded or registered delivery. As this is a legal document, authorising AFCLAA to incur costs to public funds on behalf of the applicant, it is necessary that this document, complete with original signatures, is retained by AFCLAA.

174. **Legal aid contributions: Automatic exemptions.** The following groups of applicants remain exempt from making any contributions towards their legal aid costs:

- a. Applicants\* aged 17 or under at the point of application;
- b. Applicants\* on certain welfare benefits, known as 'passporting benefits'<sup>46</sup>

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<sup>46</sup> 'Passporting benefits' are: Income Support; Income-Based Job Seekers Allowance; Guarantee State Pension Credit; Income-Related Employment and Support Benefit. Although unlikely to be relevant to Service applicants, personnel who have left the Service may still be eligible.

- c. Applicants with 'Adjusted Annual Income' below £12,475 per annum (as determined by the initial means test, see paragraph 176a for more detail);
- d. Applicants with less than £3,398 disposable income per annum (as determined by the full means test, see paragraph 176b for more detail).

\*As relevant to the applicant only; it does not apply to spouse/civil partner who may meet one or more of these criteria. Applicants aged 17 or under are to provide their date of birth for verification purposes; they are not required to complete Section 5 but must complete Section 6 in full.

**175. The means test:** The means tests are used to assess the applicant's ability to contribute towards their legal aid costs, after taking account of their personal and financial circumstances at the time of application. The AFLAS 11 means test calculators are wholly based upon the calculators used when assessing applications for legal aid for Crown Court trials held in England and Wales, using the same thresholds and allowances.

**176.** The income means test consists of 2 parts:

- a. The Initial means test: the applicant's gross annual household income is weighted to take account of family circumstances. This will determine the applicant's adjusted annual income and whether it is above or below that threshold (see paragraph 179a). Applicants whose income is below the adjusted income threshold will be exempt from any contribution liability; applications where the adjusted annual income exceeds that threshold will be subjected to the Full means test:
- b. The Full means test: deducts the allowable outgoings, living allowance ('weighted to take account of family as necessary – see paragraphs 181-183) and Hardship Review (if applicable – see paragraphs 205-213 for detail), from their gross annual income, to determine their annual disposable income in relation to that threshold (see paragraph 179b), and thereafter whether they may be liable for any contributions, dependant upon the outcome of the proceedings.

**177.** It is the applicant's responsibility, and in their own best interests, to ensure that the information provided on their application form is complete and is supported by the necessary supporting evidence (see paragraphs 185-198 for further details on evidence requirements); this will ensure that the means test is a fair and accurate reflection of their ability to pay. A failure to disclose all relevant information may result in an incorrect liability assessment, which, in extreme circumstances, may result in further investigations with a view to prosecute where an attempt to commit fraud is suspected.

**178.** It remains the applicant's personal responsibility to advise AFCLAA of any changes to their personal or financial circumstances between submitting the application form and the conclusion of the proceedings e.g. divorce or increase in family size (excluding birthdays, as the form asks for children's ages at their next birthday); Financial: pay rise, promotion/demotion etc.

**179. Legal aid thresholds.** The MOD promulgates threshold levels, based upon those used in the civilian system for the Crown Courts, which determine the points above which a contribution is required. With effect from May 2011 and until further notice, these threshold points are:

- a. Adjusted Annual Income<sup>47</sup> - £12,475; thereafter
- b. Disposable Annual Income<sup>48</sup> - £3,398.

180. **Allowances: Basic Living Allowance (applicant):** The basic living allowance, currently set at £5,676, per annum, is an automatic deduction from income, and is designed to take account of the basic living requirements of the applicant. This includes elements to cover average (annual) costs for food and non-alcoholic drinks; clothing and footwear; housing (excluding rent/mortgage/council tax for which actual costs are accounted for separately); fuel and power; household goods and services; health; transport; communication (i.e. phone and internet access); education (excluding school fees – see paragraph 213 for Boarding School fees); miscellaneous goods and services.

181. **‘Weighted’ basic living allowance (Dependants).** For applicants with family responsibilities i.e. spouse/civil partner, and/or dependant children living in the same house, the basic living allowance is increased in order to provide for the additional basic living costs for each member of the household. This involves incremental increases, according to the status and age of each additional member of that family at the time of application.

182. The spouse/civil partner’s allowance equates to 0.64 of the applicant’s basic living allowance (£3,632.64). Therefore, an applicant with a spouse/civil partner but no dependant children, would have a total basic living allowance of £9,308.64 to be included as part of the financial outgoings deducted from gross annual income to determine disposable income.

183. The allowances for each child, again based on the applicant’s basic living allowance are (by age group): birth-1 = 0.15; 2-4 = 0.30; 5-7 = 0.34; 8-10 = 0.38; 11-12 = 0.41; 13-15 = 0.44; 16-18 = 0.59. Therefore an applicant with spouse/civil partner and 2 children aged 3 and 6, would have a total weighted allowance of 2.28 (consisting of 1 (applicant) + 0.64 (spouse/civil partner) + 0.30 + 0.34) x £5,676 = £12,941.28; this amount would be included as a deduction from gross annual income, along with other allowable financial outgoings (e.g. actual mortgage/rent, PAYE and NI etc), to determine disposable income.

184. **Non-legally aided legal advice allowance (pre- or post- summary dealing).** As there is no entitlement for legal aid funding to cover the cost of any legal advice sought before or after a summary dealing, an allowance of £500, to contribute towards the cost of any privately funded legal advice obtained, is included as a deduction against income for the purposes of the means test assessment.

185. **Documentary evidence:** All applicants are required to provide suitable documentary evidence of all income and outgoings included on their application form. This will enable the Case Officer to properly assess the applicant’s contribution liability.

186. As some documentary evidence may not be readily available, applicants are allowed a maximum of 21 days to provide all the required documentation before the Case Officer disallows the item concerned and re-evaluates the applicant’s contribution liability. Where there are Service or operational reasons which prevent this, the unit are to provide details to AFCLAA as soon as possible, so that suitable adjustments can be made.

187. **Pay statements.** In most cases, the three most recent pay statements are required i.e. JPA print-outs (i.e. pay statements) for the relevant months are

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<sup>47</sup> ‘Adjusted Annual Income’: gross (household) income, weighted to take account of family circumstances i.e. whether the applicant has spouse/civil partner; plus number and ages of dependant children; see paragraphs 181-183).

<sup>48</sup> ‘Disposable Annual Income’: gross annual income, less allowable outgoings and weighted living allowance (i.e. a basic living allowance, see paragraphs 180-183).



acceptable, so long as they are legible when faxed to AFCLAA. Where the pay statement/print-out includes details of the following, further documentary evidence is not required:

- Income Tax (PAYE);
- National Insurance Contributions (NIC);
- Accommodation charges;
- Charge In Lieu Of Council Tax (CILOCT);
- Child Benefit and Kindergeld (where paid through salary only);
- Child Support Agency (CSA) or Child Maintenance and Enforcement Agency (CMEA) deductions (where deducted directly from salary).

188. Ex-Service applicants are to provide copies of their three most recent pay statements. As with JPA print-outs, where the pay statement includes details of any/all of the payments listed above, further documentary evidence is not required.

189. **Pay statements – long term absentees.** Personnel who have been AWOL for a considerable time and who have not received any pay for the full three months preceding their application should provide the 3 most recent pay statements available. In addition, the applicant should provide pay statements or other documentary evidence to show alternative pay or funding during the 3 months prior to application; if this source of funding is no longer available to the applicant, this must be clearly stated on their application.

190. Applicants who have not received a full month's pay since their return, including those held on remand in MCTC, are unlikely to receive any contribution liability, unless they have been in receipt of other regular income during the 3 month period prior to their return

191. **Other forms of evidence.** For income or outgoings not shown on pay statements, the applicant should provide such documentary evidence as is available. For State Benefits paid other than through salary e.g. Child Benefit ( and Kindergeld in Germany), Income Support, Tax Credits etc, copies of official notification showing rates and payment intervals are to be supplied. Recent bank statements, showing amounts and payee, may suffice in the short term for some items<sup>49</sup> e.g. mortgage payments, maintenance, council tax etc, where these items are paid by direct debit or standing order.

192. Evidence for childcare costs where these are below £500 per calendar month will not generally be required, however, AFCLAA reserve the right to request proof by way of a current contract showing the child details (name, age), the applicable rates, and the service provider, for claims below £500 in certain circumstances; failure to provide requested documentation may result in the item being disallowed and the contribution liability re-assessed

193. **Maintenance payments.** Copies of Court Orders or CSA/CMEA documentation, showing amount and frequency of payments, should be provided

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<sup>49</sup> Bank statements will only be accepted in the short-term, particularly where the applicant is unable to obtain more appropriate documentation due to Service or Operational requirements only. In all other circumstances, the item will be disallowed, and their contribution liability re-assessed where the applicant fails to provide more appropriate documentary evidence within 21 days.

(see also paragraph 187). Where no formal order exists, proof of actual payment e.g. a bank statement, may suffice in the short term. In some circumstances, it may be necessary for AFCLAA to request a statement from the recipient, to confirm the amount, frequency of payments and the recipient's relationship to the applicant.

194. **Main/only residence.** Where the applicant lives in SLA/SFA<sup>50</sup> whilst owning their own private accommodation with the intention of using this as the family residence upon leaving the Service, the privately owned accommodation is deemed to be the main residence for the purposes of the means test, even where that property is rented out to another party in the short term.

195. In such circumstances, AFCLAA will only include both the SLA/SFA charge and the mortgage payments in the means test where the applicant also provides evidence of the income received from the rented property (see paragraph 197). If the privately owned property is not rented out to another party, AFCLAA will only include the larger payment of either the SLA/SFA charge or the mortgage.

196. **Mortgage payments.** A copy of the most recent annual mortgage statement is to be supplied. Where this is not readily available, a copy of a recent bank statement, with the relevant payment highlighted, will suffice in the short-term, pending receipt of the mortgage statement (see footnote 32 above). For property valuation purposes, an estimate based upon similar properties within the local area is enough; it is not necessary to obtain a current valuation from a Chartered Surveyor.

197. **Privately rented accommodation.** Where the applicant is a tenant or a landlord of privately rented accommodation, a copy of any rental agreement or rent book should be provided. If a tenant, the applicant should also list any co-tenants e.g. 'common law' partners, or friends/colleagues (but excluding spouse/civil partner and/or dependants) who may be included on any rental agreement or who are otherwise resident in that property and who may therefore share responsibility for the rent.

198. **Council tax.** For applicants in SLA or SFA, where CILOCT is deducted from source, or those in privately rented accommodation with utilities included in the rent, no further documentary evidence is required. In all other instances, either a statement/invoice from the service provider or a recent bank statement is required (see footnote 32 above).

199. **Contribution Order (MOD F2263B):** The Contribution Order can only be issued by the AFCLAA Case Officer, and then only once the completed application form has been received and the means test has been completed. The Contribution Order will confirm whether the applicant has a contribution liability, and the level of contribution which will be required, as determined by the type and level of proceedings involved. Some applicants, including those whose summary appeal was lodged by the Reviewing Authority, will receive a Nil Contribution Order.

200. The applicant is to consider the Contribution Order and either accept or decline the offer

201. Therein, by annotating the appropriate box and returning the signed and witnessed document to AFCLAA by the fastest possible means. In most instances,

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<sup>50</sup> Single Living Accommodation (SLA); Service Family Accommodation (SFA)

this will be by fax. The original hard copy document is to be sent to AFCLAA by Recorded or Registered Delivery<sup>51</sup>.

202. Although an offer of legal aid has been made, the applicant is free to decline the offer if they so wish. Further guidance on the process for declining legal aid is contained within paragraphs 217-218.

203. **Contributions:** Contributions for summary appeals and elections for trial by CM are only payable following the conclusion of the proceedings. See Section 8 below for full details.

204. **Nil Contributions.** Applicants with Nil contributions i.e. because of their age, or their financial/personal circumstances, or because their appeal was lodged by the Reviewing Authority, will receive a Contribution Order to that effect.

205. **Hardship Review (MOD F2263C):** To be completed by the applicant, with the assistance of unit admin staff, and their AAO, as necessary, where the applicant considers they have financial commitments which may not have been included in the main application form.

206. **Eligibility.** Every applicant is eligible to apply for a Hardship Review in respect of their financial circumstances and their contributions, and should be encouraged to submit a completed application alongside their main application form wherever possible. In addition to reducing unnecessary administrative action by AFCLAA and unit admin staff, and therefore time, this will enable the Case Officer to provide a Contribution Order which is an accurate reflection of the applicant's ability to pay.

207. A Hardship Review application can be submitted at any time before the appeal hearing or trial start, where the applicant's personal and/or financial circumstances have changed e.g. a fine or County Court Judgement (CCJ); or a new or amended CSA or maintenance payment; or the cessation of a regular payment included in the initial means test.

208. Changes to personal circumstances, especially where there are changes to the applicant's householder responsibility, would require a new application form to be submitted to AFCLAA without delay, so a fresh means test can be carried out. For example, any birth or adoption; or marriage/civil partnership occurrence, including divorce or formal separation.

209. A successful Hardship Review may reduce, or even remove, any income contribution liability as determined by the main application form alone.

210. New financial commitments, including loans or HP agreements (including 'pay day loans'), entered into after the applicant has lodged an appeal, or elected for trial by CM, may be subjected to further scrutiny as part of the Hardship Review process and may be excluded.

211. **Evidence requirements.** Unlike evidence for information on the main application form, the evidence to support a Hardship Review is to be provided with that application form; units are advised to contact the Case Officer without delay if the applicant is unable to provide the requisite evidence for Service and operational reasons only.

212. The evidence required is determined by the item in question. In most instances, it will be necessary to provide documentary evidence supplied by the organisation to which the debt or other payment is made:

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<sup>51</sup> In extreme instances, it may be necessary or more appropriate to use a courier, but the cost of this should be taken into account. Units should contact the AFCLAA Case Officer for advice if in doubt.

- a copy of the loan agreement, Individual Voluntary Arrangement (IVA) or Bankruptcy Order, detailing the start date and the payment schedule, plus proof of recent payment;
- a copy of the latest credit or store card statement, showing the outstanding balance, the most recent payment and the minimum payment due.

NOTE: For credit or store cards, only the minimum payment required, as shown on the most recent statement, will be allowed as an outgoing for the Hardship Review

213. **Boarding school fees.** Where the applicant has boarding school fees for Service or operational reasons, and is, as a result, in receipt of Continuity of Education Allowance (CEA), they should include full details of the allowance received and their parental contributions. It is especially important that they include details of any parental responsibility payments due during the income contribution period, and identify any allowances paid with salary during the 3 months prior to application; CEA payments included with salary will not be included as income for the purposes of the means test.

214. **Legal aid not in place (MOD F2263A Pt 2).** This document, issued by the Case Officer, will be issued where legal aid is refused or declined, stating the reasons why legal aid is not in place. Legal aid can be refused by the applicant i.e. the applicant can 'refuse to apply for legal aid' (see paragraph 215), or it can be declined i.e. the applicant can decline an offer of legal aid following receipt of their Contribution Order.

215. **Legal aid refused.** An applicant can refuse to apply for legal aid either because they do not wish to have legal aid funding i.e. where the applicant wishes to instruct a legal representative privately, or they wish to use a Service lawyer to represent them. The applicant should ensure that annotate the relevant box on the application form. If the applicant chooses to use a Service lawyer, it remains their responsibility to make contact with the relevant organisations to establish availability (see paragraph 157).

216. Applications submitted for matters where there is no entitlement to legal aid e.g. for internal Administrative Action, or for civilian cases to be heard in a UK court, will be rejected as ineligible.

217. **Legal aid declined.** Once the means test has been carried out, and a Contribution Order issued, the applicant must either accept or decline that offer. The applicant is to annotate the appropriate box on the Contribution Order and return it to AFCLAA for further action without delay.

218. In all cases, an applicant can change their mind and re-apply for legal aid at any point up to the time of appeal or trial. However, delaying an application can add unnecessary delay to the proceedings, and may, in some instances, result in the application being refused by AFCLAA.

## **Section 7 – Actions following the grant of legal aid**

219. **Legal aid in place.** Upon receipt of the signed and witnessed Contribution Order, and where the applicant has accepted the offer of legal aid, the Case Officer will contact the nominated legal representative to establish their acceptance of the case. Once this is confirmed, formal notification will be sent to all interested parties, especially the applicant and their AAO. The applicant and AAO are advised to contact the named legal representative as soon as possible and certainly within 7 days of the date of the formal notification letter.

220. Once the application process has been completed and legal aid has been granted, the applicant has entered into a formal and binding agreement with AFCLAA for the provision of legal aid. This means that the applicant has agreed in writing to accept the terms and conditions of the Armed Forces Legal Aid Scheme, including an undertaking to pay such contributions towards their legal aid costs as deemed appropriate based upon their personal and financial circumstances and the case against them.

221. Once legal aid is in place, it is not possible for an applicant to subsequently withdraw their application and terminate their legal aid contract with AFCLAA, unless and except where the applicant has withdrawn their appeal, or their election for trial request (see paragraphs 222 and 224).

222. **Appeal or Election request withdrawn by applicant.** Where an appeal is abandoned, or an election request is withdrawn, AFCLAA will contact the legal representative at the earliest opportunity, to confirm that legal aid is discontinued with immediate effect.

223. **Uncontested summary appeal.** If the SPA decides not to contest an appeal, the Case Officer will make contact with the legal representative at the earliest opportunity, to confirm that legal aid is discontinued with immediate effect.

224. Irrespective of the reasons why an appeal or elected trial did not proceed to court, the applicant will not be required to make any contribution towards legal costs incurred up to the point where legal aid was discontinued, however any work carried out by the legal representative after this will be a matter for the legal representative and their client, and will not be payable by AFCLAA.

## Section 8 – Actions following the conclusion of proceedings

225. Once the outcome is known by AFCLAA, usually upon receipt of the TRN2, the Case Officer will contact the unit to advise upon contributions and payments as necessary.

226. **Summary appeal.** The appellant's contribution is determined by the type of appeal, and the outcome:

227. **Appeal against finding and sentence:**

- **Successful:** Where an appeal against both finding and sentence was wholly successful, that is to say that the finding, and therefore the sentence, were completely quashed, the appellant will not be liable for any post-appeal contributions;
- **Partially successful:** Where an appeal against finding was dismissed, but the sentence is reduced, the appellant will be liable for a post-appeal contribution of £250, to be paid either as a lump sum, or in instalments as agreed with AFCLAA.
- **Unsuccessful:** Where an appeal against finding and sentence was dismissed in full, the appellant will be liable for a post-appeal contribution of £500, to be paid either as a lump sum, or in instalments as agreed with AFCLAA.

228. **Appeal against sentence only:**

- **Successful:** Where an appeal against sentence is successful, that is where the sentence was altered, the appellant will not be liable for any post-appeal contribution;
- **Unsuccessful:** Where an appeal against sentence is denied, that is to say the sentence was not changed, the appellant will be liable for a post-appeal contribution of £250, to be paid either as a lump sum, or in instalments as agreed with AFCLAA.

229. **Election for trial.** Applicants who elect for trial by CM will only be liable for a post-trial contribution towards costs following a conviction. Their contribution will be limited to £1,000 or their actual legal aid costs if lower. Payment of the contribution can be paid either by way of a single lump sum payment or in instalments as agreed with AFCLAA.

230. The Case Officer will assess the legal aid costs as normal, and will refund the applicant any overpayment as soon as the fees are agreed with the legal representative.

231. **Applications to the CMAC.** Once the application has been submitted to the CMAC, the legal aid provided by AFCLAA is complete. The CMAC will either grant the application and assume responsibility for legal aid from that point onwards, or they will reject the application. AFCLAA will not provide legal aid to cover costs associated with any subsequent application to the CMAC, should the original application fail.

232. **Application rejected.** If the application is rejected by the CMAC, the applicant will be required to make a contribution of £250 towards their legal aid costs, which is to be paid either by way of a single lump sum payment or in instalments as agreed with AFCLAA.

233. **Payment of contributions.** If the applicant is detained in MCTC following conviction or summary dealing, they will be required to make their contributions upon release.

234. **Elections and applications to the CMAC only.** If the legal aid costs are agreed with the legal representative before the applicant is able to complete their contribution payments, the unit will be advised of the final costs (if lower than the relevant maximum contribution) and the payment plan amended accordingly.

### **Part 3 – AFCLAA: Through-life case management**

235. Each case is allocated to a Case Team who retains full responsibility for every aspect of the (legal aid) case management until all matters are concluded. In many instances, this is limited to the routine administration of all legal aid aspects of the case, including but not restricted to:

- a. Ensuring relevant documentation (e.g. application form) is received and processed according to set timelines;
- b. Prompting units to obtain further documentation as necessary (e.g. Hardship Review form; documentary evidence supporting financial information);
- c. Liaising with unit HR/JPA administrators, to ensure contribution payments are made according to agreed payment plans (CM, SCC, civilian criminal court cases overseas only); OR
- d. Liaising with unit HR/JPA administrators to ensure appropriate action is taken to recover post-proceedings contributions as necessary (SAC and Elections for trial only);
- e. Instigating collection and enforcement action, via unit HR/JPA administrators where appropriate;
- f. Recording and monitoring hearing dates (e.g. for plea, trial and/or sentencing etc);
- g. Taking note of directions, orders, rulings of the judge advocate at every stage where they affect the legal aid costs incurred;
- h. Reviewing (taxing) all bills of costs submitted in respect of a case, including legal representative(s) and expert(s) fees and disbursements, in accordance with agreed structures, and authorise payment(s) as necessary, within set timelines;
- i. Providing information, and support to DAO/AAO, unit and the legal representative/defence team as necessary;
- j. Maintaining financial and procedural audit trails on all files, according to AFCLAA and MOD policies.

236. In more complex cases, the Case Officer will liaise directly with the DAO/AAO, the unit and the legal representative/defence team as necessary to:

- a. Negotiate fees and/or fee structures as appropriate with the legal representative, subject to the provision of suitable justification;
- b. Review and process requests for prior authority to incur additional costs e.g. to obtain an expert's report, subject to the provision of a suitable justification and a written estimate of costs;
- c. Consider requests to obtain additional legal representation e.g. to instruct leading counsel, in line with AFCLAA and equivalent civilian scheme policies;
- d. Carry out a detailed review (taxation) of bills post-trial, challenging claims and/or re-examining initial taxation decisions as necessary and where justified;
- e. Liaise with all parties to promote or maintain lines of communication e.g. where regular contact between applicant, DAO/AAO and the legal representative is proving difficult;

- f. Respond to requests for information on specific cases from the Courts, and the judge advocates, as necessary;
- g. Provide advice on legal aid and funding issues to interested parties as necessary.

237. To maintain the integrity of the Armed Forces Legal Aid Scheme, and to protect the applicant, the DAO/AAO and public funds, it is essential that neither the applicant nor the DAO/AAO enter into any financial discussions or commitments with the legal representative. The legal representative should discuss with their client (the applicant) any requirements which might result in incurring additional costs, but must not discuss amounts for costs, fees or other payments; the legal representative is advised, at the outset, that these matters may only be discussed directly with AFCLAA.

238. Any attempt by a legal representative, or anyone in the defence team, to discuss fees, or any other kind of payment, must be reported to AFCLAA without delay. Legal representatives are not permitted to charge both AFCLAA and the applicant personally for the same item of work or expenditure; such instances must also be reported to AFCLAA without delay.

239. Other than in specific circumstances relating to travel between mainland UK and Northern Ireland<sup>52</sup>, neither the applicant nor the DAO, are to enter into any private financial arrangement with the legal representative.

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<sup>52</sup> Applicants who nominate a legal representative whose attendance at court would necessitate travel between mainland UK and Northern Ireland, are required to accept personal responsibility for the additional travel costs incurred – unless the hearing venue is changed after instruction, whereupon no personal liability will be necessary. Should the applicant not accept this personal responsibility, they are requested to nominate an alternative legal representative more suitably located.



## PROCESSES FOR THE NOMINATION OF CIVILIAN LEGAL REPRESENTATIVE<sup>53</sup>

1. Under the Armed Forces Legal Aid Scheme, applicants are required to make a positive decision about the type of legal representation they receive. Applicants who elect for civilian legal representation funded by the Armed Forces Legal Aid Scheme are then required to choose whether they wish to nominate a particular representative themselves, or ask AFCLAA to nominate one on their behalf.

2. **Nomination by applicant.** In many cases, the applicant may have received advice and assistance from a legal advisor at previous police station interview(s) and/or custody review(s) in the present case. If happy with the service received, the defendant may choose to nominate that legal advisor on the application form.

3. In other cases, the applicant may have heard about a particular representative through family, friends or colleagues; or sought legal advice or assistance from a local solicitor or firm on other matters; or they may have previously attended a trial by CM or a summary appeal hearing in progress, and may choose to nominate a legal representative they have seen 'in action'.

4. Regardless of how, or why, an applicant nominates any particular legal representative, AFCLAA will honour that nomination so long as the representative is suitably qualified<sup>54</sup> and is willing to accept the terms and conditions of the Armed Forces Legal Aid Scheme<sup>55</sup>. If the representative, firm or chambers are not already known to AFCLAA, the Case Officer will make contact, to establish whether they will accept the case under those terms (providing legal aid is granted). The representative will also be asked if they may be interested in accepting other cases if nominated by AFCLAA in the future.

5. If the representative refuses to accept those terms and conditions, the applicant may either nominate an alternative, or ask AFCLAA to nominate on their behalf. If the applicant does not wish to change their nomination, the Case Officer will have to refuse legal aid, and the applicant will be able to instruct the representative privately instead.

6. For proceedings directed before 01 April 2013 only: If the applicant is subsequently acquitted, the legal representative may apply to the judge advocate for some or all of their costs to be refunded from central funds. Chapter 7, Section 4, paragraph 32 refers; if the case is discontinued before reaching court, the legal representative should apply directly to AFCLAA instead.

7. For proceedings directed on or after 01 April 2013 only: There is no eligibility to reclaim privately incurred legal costs from central funds.

8. **AFCLAA nomination.** The option of requesting AFCLAA to nominate a legal representative on behalf of an applicant exists as a special facility, unique to the Armed Forces, to support those who wish to instruct a civilian representative but who are not in a position to find someone themselves e.g. personnel on board ship, overseas or serving in an operational theatre. Furthermore, as many Service applicants are unfamiliar with the workings of either the civilian or the Service courts, they are often unsure of how, or where, to obtain suitable representation. This option gives them the opportunity to overcome these

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<sup>53</sup> The guidance contained in this Annex is supplementary to the main chapter, and does not apply to applicants who do not require legal aid or who wish to be represented by a Service lawyer (paragraphs 11-13, or 156-157 of the main chapter refer)

<sup>54</sup> A practising barrister or solicitor, as defined in The Armed Forces (Court Martial) Rules 2009, rule 39(2).

<sup>55</sup> The Armed Forces Legal Aid Scheme broadly follows the civilian legal aid scheme, and is therefore known to the majority of criminal law practitioners.

difficulties and obtain independent legal advice and representation from a legally qualified and experienced representative.

9. Where the applicant has asked AFCLAA to nominate, the Case Officer will take into account key factors such as:

- a. The location of the defendant;
- b. The likely trial/appeal venue;
- c. Any particulars of the charge (if known at the time of nomination) which may warrant a representative with specific skills, experience or training e.g. computer-related charges; serious fraud or firearms offences;
- d. Any factors relating to the applicant, or alleged victim, which may warrant particular skills e.g. a juvenile defendant and/or witnesses;
- e. Whether the charge relates to specifically Service discipline-related offences, which may benefit from using a representative with previous Service experience, or who is experienced in dealing with Service offences;
- f. Wherever possible, the Case Officer will try to determine which legal advisor attended any previous police station interviews. Where the legal advisor is identified but not nominated by the applicant, the Case Officer will attempt to contact the unit to establish whether this was a deliberate choice by the applicant; where the applicant confirms this to be a positive choice, the Case Officer will nominate an alternative legal representative instead.

10. AFCLAA operates an 'all inclusive' nomination process, which does not limit applicant or Case Officer choices to only named representatives within any pre-determined list or grouping. The AFCLAA database, which maintains full records of all cases, holds details of every legal representative who has received legal aid payments from AFCLAA since 2002<sup>56</sup>, this includes legal advisors attending PACE interviews carried out by Service police outside England and Wales.

11. Legal representatives, even if they have not previously acted for applicants in the SJS, may contact AFCLAA to register an interest, and may be added to the database records. They are requested to provide documentation, including a CV, to show their previous experience and any specialist areas of law practiced. This allows Case Officers to identify and nominate suitably experienced representatives as required, from the widest practicable field.

12. The AFCLAA system is therefore able to remain current, while permitting competition across the various areas of expertise. This method also ensures a good geographical spread of representatives, so applicants, wherever they are based, are not limited to a small number of possible representatives; this also reduces the chances of difficulties due to conflicts of interest which could arise if the scheme were reliant on too limited a number of representatives in any particular area of the UK.

13. AFCLAA staff are not permitted to recommend particular legal representatives (including firms or chambers) in advance of an applicant completing the application form. If there is any suggestion that a unit appears to be favouring a particular representative, firm or chambers, the Case Officer may contact that unit to remind those concerned that the right to choose representation remains solely with the applicant.

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<sup>56</sup> This includes every legal representative who received payment from the Army Criminal Legal Aid Authority (ACLAA) before it was subsumed into the tri-Service AFCLAA on 01 Apr 08.

14. Conventionally a solicitor is instructed to represent a defendant in the first instance, and a barrister ('Counsel') may be briefed for the hearing(s) by the solicitor if required. Some solicitor-advocates appear at hearings themselves. It is also possible for AFCLAA to brief barristers directly, without the involvement of a solicitor; this practice is followed in many cases, particularly where the hearings are expected to take place outside the UK.

## GUIDANCE NOTES – LEGAL AID APPLICATION FORMS (MOD F2263 Series)

1. The information requested on the legal aid application form will be used by AFCLAA to confirm eligibility for legal aid under the Armed Forces Criminal Legal Aid Scheme, and thereafter provides the requisite authority for AFCLAA to provide the applicant with legal aid.
2. The information provided will be used to determine what, if any, contributions the applicant will be required to make towards their legal aid costs. It is therefore imperative that the form is completed as fully, honestly and accurately as possible, to ensure the contributions are a true reflection of the applicant's ability to pay, based upon their own particular personal and financial circumstances.
3. The applicant must read the Notes for Applicants at the start of the application form, as their signature at the end of the form will be accepted as proof that they have read, and understood, the conditions under which legal aid is granted.

### MOD F2263 – Application for Armed Forces Criminal Legal Aid

#### Section 1 - Personal Particulars

BOX	EXPLANATION/COMMENT
Service/Status	RN, Army, RAF, RM, UK-based Civilian staff or dependants. This will ensure the correct departments are informed as necessary.
Service No, & Rank/Rate	For dependants, include parent's Service number, annotated as appropriate i.e. son/daughter/child/spouse/civil partner of...
Unit Title, Address & Postcode	Full postal details are required to ensure documentation is delivered without delay.
Are there any co-accused?	It is vital that the existence of any/all co-accused is notified to AFCLAA asap, to ensure that appropriate action can be taken. It is especially important if there are co-accused in different units, so Case Officers can deal directly with all units, preventing unnecessary delay to the process. It will also ensure that all interested parties are kept informed of relevant details e.g. co-accused's legal representative's details.
Co-accused details	
Nature of Charge	This will help determine the level of legal aid available, and may affect contributions, should the applicant require legal aid at the DSP referral stage. It may also assist the Case Officer, should the applicant wish AFCLAA to nominate a legal representative on their behalf (see Annex A for the processes for the nomination of civilian legal representation)
Investigation Reference Number (IRN)	If known – this will identify separate cases (if the applicant has more than one case ongoing), and all case-related documentation – including that of co-accused not previously known or identified on application forms.

#### Section 2 – Legal representation

BOX	EXPLANATION/COMMENT
	<i>The information provided here by the applicant will clarify their choice of legal representation, and therefore the public funds committed on their behalf. They may seek advice from their AO, and independent legal advisor, or unit admin staff (who may, in turn, seek advice from AFCLAA), but the final decision on legal aid and representation MUST remain with the applicant. Care should be taken to ensure that they are aware of this right, and the potential costs and implications.</i>
Tick box – applicants aged 17 or under	Applicants aged 17 or under at the point of application must provide their date of birth, to confirm eligibility to receive free legal aid; when signing the unit declaration at Section 6b, the Certifying Officer is confirming this information. As no costs will be incurred by the applicant, they are not required to complete Section 5, but must complete all other Sections.
<b>Tick Box 2a</b>	To be ticked where the applicant already has legal aid in place for the case(s) concerned, but needs to re-apply because of changes in their personal circumstances (see paragraph 111 or 208). The applicant should also include their AFCLAA Case Reference (as shown on AFCLAA documentation) in the boxes provided.
<b>Tick boxes 2b-2e</b>	<b>The applicant MUST tick one box only to ensure their choice of legal representation is taken into account from the outset.</b>
2b	Ticking this box will not prevent the applicant from applying for legal aid at any time up to the date of trial, however, they should be made aware that a late application may result in additional delay to the trial process, and may incur additional costs, for which they may be liable <sup>57</sup> .
2c	If the applicant ticks this box, it is <u>their</u> responsibility to ensure that a Service lawyer is contacted and accepts the case. A tick here will not prevent them from applying for legal aid at any time up to the date of trial, however, they should be made aware that a late application may result in additional delay to the trial process, and may incur additional costs, for which they may be liable (see also footnote 40, below).
2d	If this box is ticked, AFCLAA will appoint a legal representative on behalf of the applicant, taking into account the requirements of the applicant (see Annex A for further details)
2e	If the applicant ticks this box, they must also provide full contact details of the legal representative nominated. It is not sufficient to simply put a name and location. It is not necessary to nominate a legal representative who is already know to AFCLAA, so long as that legal representative is suitably qualified and is willing to accept the terms and conditions of the Armed Forces Legal Aid Scheme.
<b>2d &amp; 2e</b>	<b>Ticking either of these boxes will authorise AFCLAA to enter into a formal agreement with the legal representative, to provide legal representation for, and on behalf of, the applicant.</b>

<sup>57</sup> A late application, especially once the matter has been referred for trial, is likely to require the immediate payment of the first contribution (if applicable) before legal aid can be granted.

### Section 3 – Entitlement to Apply for Legal Aid

BOX	EXPLANATION/COMMENT
3 a-l generally	<b>The correct detail here will ensure the Case Officer take the appropriate internal admin actions, according to type and stage of the proceedings, and will ensure that the representative is properly advised from the outset.</b>
3a-d	Applicants whose summary appeal has been lodged by the Reviewing Authority will not be required to make any contribution, regardless of outcome. Such applicants should ensure their application is annotated accordingly, and are not required to complete Section 5.
3e	<b>For personnel detained in Custody After Charge only.</b> Personnel in custody without charge should have access to legal advice and assistance under the Duty Solicitor Scheme, accessed via the Service Police Station (Chapter 4 refers)
3g	This box should only be ticked where the case has been directed for trial, but legal aid is not yet in place for that case.
3j	A copy of the indictment (charge sheet) should be enclosed wherever possible. <b>NOTE:</b> There is no entitlement to legal aid through AFCLAA unless the defendant is subject to Service law or discipline, and the alleged incident occurred while the defendant was in the country concerned on permanent or detached duty, at the time of the incident.
3k	This box should only be ticked where the defendant pleaded or was found guilty at trial, but wishes to appeal his case to the Court Martial Appeal Court (CMAC) using a different legal representative. Legal aid will not be transferred if the original legal representative confirms there are no grounds upon which to appeal. There is no need to re-apply for legal aid if the original legal representative is preparing the appeal.
Interests of Justice (IOJ) Test	It may be necessary to clarify the reasons why a case may meet the IOJ test. Applicants should refer to Appendix 1 to this Annex before completing this part of the form.

### Service Points of Contact

BOX	EXPLANATION/COMMENT
<b>POC Details:</b> Div Officer/HR Disc/Defendant's Assisting Officer (DAO) (to include Appellant's Assisting Officer, as appropriate.	It is essential that ALL the requested information is provided, including Service and civilian access dialling codes and internal and external email addresses, as this information will be used by AFCLAA for case admin and will be passed to the civilian legal representatives and their support staff, to enable and maintain contact throughout the process. Alternative contact numbers, especially mobile phone numbers, will be held on file by AFCLAA, and will only be provided to the legal representative as necessary.

## Section 5 – Financial Statement for Armed Forces Criminal Legal Aid (AFLAS 11)

If, at any stage, there is any doubt about what information or documentary evidence is required, HR Disc admin staff or the DAO are advised to contact AFCLAA immediately<sup>58</sup>. If an AFCLAA Case Officer has already made contact with any of these parties, that Case Officer should remain the main POC throughout the process, unless otherwise informed.

This information is not required where the applicant is aged 17 or under at the time of application, as they will not be required to make any contribution towards their costs. Nor is it required where the applicant has ticked either box 2a or 2b, as neither options incurs publicly funded legal aid costs. If the applicant later changes their mind and re-submits an application requesting legal aid and/or civilian legal representation instead of a Service lawyer, Section 5 must be completed in full.

BOX	EXPLANATION/COMMENT
5a – Personal Details	Income contributions are based upon a means test which takes into account a living allowance, which is adjusted according to family composition. To ensure the applicant's living allowance is accurate, it is essential that the marital status, and ages of every child is annotated on the form.
5b-d – All boxes: "You", "Spouse/Civil Partner"	The applicant <b>must</b> complete all boxes. Married applicants, or those who are in a civil partnership <b>must</b> also complete all boxes in respect of their spouse/civil partner, so that all relevant information is taken into account when assessing what, if any, income and or capital/equity contributions are payable. Where information requested is not pertinent to the applicant, 'none' or 'N/A' should be added.
5a - Gross salary, and Gross income from part-time job/gainful employment	For Service personnel, legible JPA pay statements are acceptable. For non-Service personnel, or for additional income from civilian sources, pay statements covering the most recent 3 months prior to application are required. Original documentation should be provided, and will be returned after copying for retention on file; photocopies provided by the applicant are not acceptable.
Any other income	This includes any money received on a regular basis, and which forms part of the household income e.g. rental income on house/holiday home let; interest earned e.g. trust fund (where this is paid into a current account – interest accrued on savings where this is added to the savings account should be included under 5d)
Income from State Benefits e.g. Child benefit (including Kindergeld) etc; Income from Child or Working Tax Credits; Housing benefit.	Full details of any/all State Benefits are required. Some benefits may be considered 'passports' to free legal aid (see paragraph 39b or 174b) of the main Chapter), but can only be considered if appropriate and current supporting documentation is provided i.e. documentation issued by the Department for Works and Pensions (DWP) or Council, detailing type and/or level of benefit entitlement.

<sup>58</sup> The applicant should only contact AFCLAA directly in the absence of either HR disc staff or the DAO where an urgent response is required.

BOX	EXPLANATION/COMMENT
Maintenance payments received by applicant or partner	Details of the amount and frequency of the payments is to be provided, along with supporting evidence e.g. statement from the CSA/CMEA, detailing payment schedule, or bank statement with payment clearly identified (see footnote 13 or 32 for limitations on use of bank statements).
5c – Quartering, accommodation; CILOCT; Income tax; National Insurance	Where these items are shown on the applicant's pay statements, no further documentary evidence is required; where one or more item during the most recent 3 month period is not shown, separate documentary evidence is required.
Private rent; mortgage payment; Council tax	Applicants living in their own, or privately rented, accommodation, <b>must</b> provide documentary evidence of these payments. Applicants with both Service provided accommodation and mortgage/private rent must provide evidence of both items, but only the highest monthly payment will be included in the means test, unless the applicant is also in receipt of rent from a tenant, which is to be shown as income at 5b.
Childcare costs (registered childcare provider)	Childcare costs can only be included where the care is provided by a fully registered childcare provider. The applicant <b>must</b> provide documentary evidence in all instances where their childcare costs exceed £500 per calendar month; where costs are below £500 per calendar month, documentary evidence is not routinely required. In some instances, however, AFCLAA may request documentary evidence where the monthly costs are below £500, and a failure to provide evidence when requested will cause this item to be excluded.
Maintenance payments to a 3 <sup>rd</sup> party	The applicant must provide documentary evidence to show the amount and frequency of payments, and to define their relationship to the dependant i.e. Court Order or CSA/CMEA payment schedule. Where there is no formal agreement, bank statements with the payment clearly identified may be acceptable (see footnote 13 or 32 for limitations on use of bank statements) ; in some circumstances, AFCLAA may require a statement from the recipient, confirming the amount and frequency of the payment, and the nature of the relationship between themselves, the dependant and the applicant. Failure to provide suitable evidence may cause this item to be excluded from the means test.
5d – Capital, Savings & Investments	Applicants who have elected for trial, or who are appealing to the Summary Appeal Court, are not required to complete this section as they will not be liable for any post-trial contributions from capital, savings, investments.
Main/only dwelling, and properties other than main/own	The requested information is required for each property owned or being purchased by the applicant. Where the applicant has more than 1 property in addition to their main/only dwelling, they should attach a separate sheet containing all the relevant details.
The current value of the property (equally applicable to any/all property owned or part-owned by the applicant)	It is not necessary to obtain a formal valuation from a Chartered Surveyor; an accurate estimate, based on current valuations of similar properties in the area will suffice for properties not recently purchased. For properties purchased shortly prior to the application, the applicant may provide solicitor or estate agent documentation relating to the sale showing the valuation figure.



<b>BOX</b>	<b>EXPLANATION/COMMENT</b>
Amount of outstanding mortgage(s)	The latest annual statement will suffice, provided it was issued during the 12 months prior to application. Where the purchase took place less than 12 months prior to application, the applicant should provide the mortgage agreement.
Savings, Stocks & Shares	Full details of all savings held, including bank and/or building society accounts, ISAs, PEPs, National Savings etc, and of Stocks and/or Shares held, must be provided.

## **Section 6 – Declaration**

### **“6a – Your Declaration”**

Before signing the application form at Section 6, the applicant should take note of the declarations made in sub-paragraphs set out at Section 6a. By signing the declaration, the applicant is confirming that:

- The information provided is a true statement of their personal and financial circumstances, and that of their spouse/civil partner, at that time;
- They understand that making a false statement, or withholding information, may lead to a prosecution, and that they may become liable for the full cost of any defence work carried out by their legal representative;
- They understand AFCLAA will carry out a means test, which may require them to make a pre-trial, and/or post-proceedings, contribution(s) should their disposable income exceed the relevant thresholds;
- They may be subject to additional contribution payments if they default on agreed payments, or fail to produce required documentary evidence within agreed timelines, as set by AFCLAA;
- Their legal aid contributions will be deducted directly from salary via JPA wherever possible, and, if necessary, from any monies payable on discharge.
- Any/all contributions made will be refunded, with 2% interest, following a full acquittal of all charges (including instances where the case is discontinued at any point before trial);
- That any contributions paid in excess of the applicant’s legal aid costs liability, will be refunded by AFCLAA once all defence bills have been paid (such a refund will not attract interest payment)

### **“6b – Unit Declaration”**

The Certifying Officer is to sign the application form to verify the identification of the defendant<sup>59</sup>, and to certify the financial information provided, as far as can be proved from either JPA or documentary evidence supplied, to be accurate at the day of signing.

Section 6 must be signed by both the Certifying Officer and the applicant, even those who have ticked boxes to confirm they do not require legal aid, either because they wish to use a

<sup>59</sup> This includes verification of the applicant’s age or Date of Birth, where they have stated at Section 2 that they are aged 17 or under at the time of application.

Service lawyer, or because they do not wish to apply for legal aid at that point. This will provide evidence that the applicant was fully aware of the availability of legal aid and their eligibility to apply.

**Immediately upon completion, this form, and a Hardship Review application form if appropriate, must be faxed to AFCLAA on 94344 5691 or 01980 615691, without delay. This will ensure the application is processed at the earliest opportunity.**

Where it is not possible to fax the completed document(s) to AFCLAA immediately, it should be emailed to AFCLAA ([LF-MCS-AFCLAA-Group@mod.uk](mailto:LF-MCS-AFCLAA-Group@mod.uk)) in the first instance. In either case, the original (hardcopy) application form must be sent to AFCLAA by either Recorded or Registered Delivery, to ensure safe receipt.

All documentary evidence requested on the main application form, is to be sent to AFCLAA as soon as possible, and certainly within 21 days of submitting the initial application form, unless Service or Operational reasons make this impossible. Should this be the case, AFCLAA should be advised at the earliest opportunity; failure to provide this evidence within 21 days, or later only where agreed with AFCLAA, will incur additional costs to the defendant.

### **MOD F2263C – Application for Review on Grounds of Hardship**

All applicants, except those exempt from making contributions (see paragraphs 39 or 174), should be encouraged to consider submitting a completed Hardship Review application form at the same time as their main application. This will enable AFCLAA to fully and accurately assess their ability to contribute from the outset, which may prevent an applicant from making higher than appropriate contributions and reduce the likelihood of delay to the grant of legal aid.

The Hardship Review is the applicant's opportunity to include additional items of expenditure not included in the main application form. This includes specific financial commitments entered into before their case was referred to the DSP, such as loans etc, but does not include day-to-day living expenses, such as telephone, electricity or gas bills, for which a nominal amount is included in the basic living allowance as part of the means test. For full details of the household items included in the basic living allowance, and how this allowance is 'weighted' where the applicant has householder responsibilities, see paragraphs 57-60 or 180-183 of this Chapter.

Documentary evidence to support the Hardship Review is to be provided at the same time as the review application form. Items without the necessary supporting evidence will not be processed unless, and until, suitable evidence has been provided. This means the applicant's contribution will be assessed based upon the information provided on the main application form, and any items from the Hardship Review for which appropriate evidence has been provided.

An applicant can submit an Hardship Review application form at any time whilst making contributions, where their financial situation has changed; financial commitments entered into after a case has been referred to the DSP, or after a case has been notified for trial, or while a contribution payment plan is underway, may be subjected to further scrutiny by AFCLAA and may be disallowed.

**Part A – Personal Particulars**

<b>BOX</b>	<b>EXPLANATION/COMMENT</b>
Personal details (Number/Rank etc)	To be completed in full, even when submitting this form with the main application form, to ensure documents are processed together.
Date offer of legal aid made by AFCLAA	Only complete where Hardship Review application is submitted after a Contribution Order has been issued by AFCLAA.

**Part B – Reason for Review on Grounds of Hardship**

<b>BOX</b>	<b>EXPLANATION/COMMENT</b>
Denied access to income	<p>This section should only be completed where the applicant who is still subject to a contribution payment plan, no longer receives funding which was included on their initial application form e.g. child maintenance payments have been stopped, or Working Tax Credit has been temporarily halted. A Hardship Review application should only be submitted where the entitlement still exists, but payment has been halted for some reason. If the entitlement no longer exists, because a dependant no longer lives with the applicant, or is no longer considered a dependant because of their age, or because an income-related benefit has stopped because of a change in circumstances, the applicant should submit a completely new application form, so that a full re-assessment of their personal and financial circumstances can be carried out.</p> <p>The applicant must provide details of the amount no longer available to them, the frequency of payments, and the date when payment was expected but not received.</p>
Extra expenditure:	<p>The applicant should only include items of expenditure which were not already included in the main application form. The applicant must provide details of the type of item, the amount and frequency of payments, and must provide suitable documentary evidence to support their application. Lists of the types of item which may, or may not, be considered as part of a Hardship Review application follow; while these lists are comprehensive, there may be unusual items of expenditure not listed – in such instances, the unit/DAO should contact AFCLAA for further advice.</p> <p>NOTE: financial commitments taken out after a case has been referred to the DSP, or for trial, may be subject to further scrutiny, and may be disallowed.</p>
- Permissible items	Loans: Secured/unsecured loans; Car loans.
	Credit/Store cards: payments will be limited to the minimum monthly payment as shown on the monthly statement.
	Student Loans
	Individual Voluntary Arrangements, or other formal repayment plans, entered into in, in respect of personal debt recovery (e.g. rent arrears)
	Fines/County Court Judgements
	Necessary and regular prescription charges (e.g. monthly charges, for long-term or permanent illness or disability)
	Boarding school fees: Permitted only where it can be shown that

BOX	EXPLANATION/COMMENT
	<p>these are necessary for Service or Operational reasons.</p> <p>Travel and other costs associated with specialised medical or educational needs of a dependant.</p> <p>Private Pension Plans</p>
- Disallowed items	Items already covered by the basic living allowance, & therefore already accounted for (see paragraph 57 or 180 for details)
	Food & non-alcoholic drinks
	Clothing & footwear
	Fuel & power (e.g. fuel bills)
	Household goods & services (e.g. satellite/cable tv; broadband/internet)
	Health (e.g. prescriptions, unless for long-term or permanent illness or disability)
	Transport (e.g. car insurance, fuel, repairs)
	Communications (e.g. home/mobile phone costs)
	Miscellaneous goods and services (e.g. window-cleaning; gardening etc)
	Education (e.g. school fees (except where necessary for Service or Operational reasons), school outings; extra-curricular activities etc)
	Housing (other than rent/mortgage/council tax already included as actual in means test e.g. insurances (household; building; contents), general maintenance/repair costs etc
	'Luxury' items
	Tickets to events, including season tickets for sports matches etc
	Any costs associated with owning a pet, including insurance, vets bills, quarantine etc
	Family activities (e.g. outings, photographic sessions etc)
	Miscellaneous items (e.g. mess or club subscriptions; donations to charitable organisations; voluntary payments to family members (other than maintenance paid for dependant children)
Additional circumstances	<p>This box should be used to provide any/all additional information which may further assist the AFCLAA Case Officer to determine the extent to which the applicant's ability to pay is affected by circumstances which may or may not be beyond their control. This may include a brief explanation to support particular healthcare requirements, or to explain why costs in respect of an item may be significantly higher than normal, for example additional dietary, travel or medical costs necessary for a dependant with special needs. In such cases, further advice should be sought from AFCLAA in the first instance.</p>
Declaration Unit Declaration	<p>Please refer to the guidance notes in respect of the main application form, above.</p>

## THE INTERESTS OF JUSTICE TEST

1. The Interests of Justice (IOJ) test determines whether an applicant should be entitled to representation at public expense based on the merits of the case<sup>60</sup>. The IOJ test is applicable only to cases heard in the Service Civilian Court or in civilian criminal courts overseas, and only where the charges would ordinarily be heard in a magistrates' court had the offence taken place in England or Wales, therefore applicants for trial by CM, including elections, or for appeals in the SAC or CMAC do not need to complete this section.
2. The applicant must indicate which of the listed criteria they believe applies to their case. They must also provide sufficient details regarding the potential personal impact of the case and any subsequent conviction, to satisfy the Case Officer that legal aid should be granted.
3. The applicant is not required to provide details in respect of every criterion listed, but should complete only those which apply to the particular circumstances of the case.

Criteria	Explanation and examples
If convicted, it is likely that I will lose my liberty and/or my livelihood	<p><b>Liberty:</b> Where a conviction may result in a period of detention or (civilian) imprisonment. Other instances where this may be relevant include:</p> <ul style="list-style-type: none"> <li>cases where the current charge may not necessarily attract a period of detention/imprisonment by itself, but a prior conviction may have to be taken into account when sentencing;</li> <li>applicants who have already received a suspended sentence in a previous case, and the current application refers to a new case arising during the period of suspension, which may cause the original suspended sentence to be activated.</li> </ul> <p><b>Livelihood:</b> This applies where the likely sentence may affect the convicted offender's livelihood and/or income e.g. a period of imprisonment.</p> <p>May also apply to certain trades/employments where a lesser sentence awarded may impact upon the applicant's eligibility for that trade/role e.g. employment where a clean Criminal Record Bureau (CRB) record is required, such as in schools or other places involving interaction with children.</p>
If convicted, it is likely that I will suffer serious damage to my reputation	Where the nature of the charge, with or without a subsequent conviction, may cause <u>serious</u> damage to a person's reputation e.g. a school teacher charged with offences relating to children; an accountant charged with offences relating to honesty.

<sup>60</sup> This is also known as the 'Widgery Criteria', as the IOJ is based upon the criteria contained in the 1966 Report of the Committee on Legal Aid in Criminal Proceedings, chaired by Mr Justice Widgery.

<b>Criteria</b>	<b>Explanation and examples</b>
A substantial question of law is involved	E.g. issues of identification or victim's consent may be raised. If the defendant considers this criterion is applicable, they are advised to seek further legal advice before completing.
I may not be able to understand the court proceedings or present my case	Primarily affecting prosecutions in overseas civilian criminal courts where proceedings are not held in English.  It may also be applicable in some SCC trials, where the applicant is a minor, or has a disability, or someone who might not fully understand the court proceedings or the implications of the trial/case for other reasons.
Witnesses have to be traced and/or interviewed on my behalf (state circumstances)	Give brief details of the nature of the witnesses' anticipated role e.g. witness of fact, not personally known to the applicant.
The case involves expert cross examination of a prosecution witness (give brief details)	This may include instances where it is not in the best interests of the prosecution witness to be cross-examined directly by the applicant e.g. where the victim of an assault is a minor or a current/former spouse/partner of the applicant.

## APPEAL PROCESS – LEGAL AID REFUSED

1. This Appeals process applies only to those cases where legal aid has been refused by AFCLAA. It does not apply in cases where the applicant did not want legal aid, or where the applicant chose to use a Service lawyer. In these circumstances, if the applicant has changed their mind and wants legal aid funding for a civilian legal representative, they simply complete a new application form and submit this to AFCLAA without delay.
2. Where an application is refused because it does not meet the requirements of the IOJ test, the Case Officer responsible will forward a MOD F2263 Pt 2 – Legal Aid Refused, annotated with the reason(s) why the IOJ test was not met. In accordance with the basic principles of legal aid, where there is any uncertainty about a case and whether it fully meets the IOJ test, the decision is always resolved to the benefit of the applicant.
3. When an application is refused<sup>61</sup>, the applicant is advised of their right to appeal this decision. They are told that any appeal should be submitted in writing, and should be forwarded to AFCLAA within 7 days of receipt of the MOD F2263 Pt 2<sup>62</sup>. Any appeal should provide as much additional information as available; this may include further detailed clarification of information previously submitted. The applicant may also seek specific legal advice as part of this process; civilian solicitors are accustomed to dealing with the IOJ test in respect of civilian legal aid applications, and, in the majority of cases, will be able to provide more assistance than the DAO or other Service personnel<sup>63</sup>.
4. There are two, slightly different, appeal processes, determined by the stage of the proceedings at the time of application:
  - a) Referral to DSP:
    - I) Where the application is refused at this stage, and before the SPA have decided whether to discontinue or direct for trial<sup>64</sup>, the applicant should submit any appeal to AFCLAA in accordance with paragraph 3 above.
    - II) The Case Officer will review the application, taking all new information into account. If, after reconsideration, the Case Officer is still not satisfied that the application adequately meets the minimum requirements of the IOJ test, they will refer the matter to Head or Deputy Head AFCLAA.
    - III) If Head or Deputy Head AFCLAA, after reviewing the whole matter, and after seeking independent legal advice if appropriate, considers there is any uncertainty as to whether the application meets the IOJ test in any way, the appeal will be accepted and legal aid granted. However, if they are in agreement with the Case Officer's decision, the appeal will fail.
    - IV) If the appeal is again refused, the applicant will be provided with the grounds for this decision, and advised that they should re-apply for legal aid if/when the SPA direct for trial. A refusal at the referral stage will not be taken

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<sup>61</sup> Except where an application has been submitted where no eligibility for legal aid under the terms of AFLAS 11 exists e.g. for internal Admin Action; for a civil matter; for a criminal matter to be heard in a Magistrate's or Crown Court within the UK.

<sup>62</sup> If there are Service, operational or other practical reasons why an appeal cannot be submitted within 7 days of receipt of the completed MOD F2263 Pt 2, the defendant, their DAO or the unit, are advised to contact AFCLAA as soon as possible, to request an extension to this time limit.

<sup>63</sup> Alternatively, personnel based outside the UK (or RN personnel, regardless of location) may seek further advice from a Service legal representative instead.

<sup>64</sup> If the SPA direct for trial while the appeal process is underway, AFCLAA will automatically review the application in that context, and advise the applicant accordingly; if the SPA decide to discontinue the matter, the appeal process will cease.

into account when assessing any subsequent application for legal aid, should the matter be directed for trial and the applicant re-applies for legal aid.

b) Case directed for trial:

I) The applicant should submit their appeal to AFCLAA, in accordance with paragraph 3 above. The Case Officer will carry out an initial review of the application and all information provided to support the application and appeal.

II) If, after reconsidering all relevant information, the Case Officer is satisfied that the IOJ test has been met, legal aid will be granted. However, if the Case Officer is still not satisfied that the application adequately meets the IOJ test, the appeal will be referred to Head or Deputy Head AFCLAA.

III) If Head or Deputy Head AFCLAA, after reviewing the whole matter, and after seeking independent legal advice if appropriate, considers there is sufficient uncertainty about the merits of the application, the appeal will be accepted and legal aid granted. However, if they are in agreement with the Case Officer's decision, the appeal will fail.

IV) In the event that AFCLAA do not revise the original decision to refuse legal aid, even after consideration of all new and relevant information, the matter will be referred by AFCLAA directly to the OJAG for consideration by a judge advocate. The judge advocate will review the application, and make a recommendation whether or not legal aid should be granted. AFCLAA will abide by the recommendation made by the judge advocate.

5. Even if the applicant chooses not to appeal the original decision to refuse legal aid, or appeals and is unsuccessful at all stages, they can still instruct a legal representative privately. See paragraphs 14-17 (for trials) or paragraphs 158-161 (for appeals or elections) of the main chapter for further guidance.



## Chapter 4

### PACE and Custody

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## Chapter 4

### Pace and custody

#### General

1. In the UK, any person who is brought to a police station under arrest or arrested at the station having gone there voluntarily, is entitled to receive free and independent legal advice and assistance if they are questioned by the police, whether they have been arrested or not; this includes the right to consult privately with a legal advisor. Service and civilian<sup>65</sup> personnel, arrested by the Service Police or detained within MOD detention facilities<sup>66</sup>, are similarly entitled to free and independent legal advice and assistance; wherever in the world they may be questioned or detained in custody<sup>67</sup>.

#### PACE interviews

2. The regulations, as they apply to Service Police and those they question, are contained within JSP 397, Service Police Codes of Practice (SPCOP). The Codes provide a clear statement of the rights of the individual and the powers of the Service Police. Copies of the SPCOP must be readily available in all Service Police establishments for consultation, as necessary, by the Service Police, suspected/arrested persons and members of the public.

3. Where an accused person wishes to obtain the services of a legal advisor, they must make this known to the Arresting or Investigating Officer without delay. As they have an automatic entitlement to free legal advice and assistance, they are not required to complete any formal application for legal aid from the Armed Forces Legal Aid Scheme at this stage.

4. The accused person, depending on location of the interview, may access free legal advice and assistance by requesting:

- (a) A named legal advisor of their own choice, so long as that legal advisor is willing to accept the fees payable under the Duty Solicitor Scheme (for interviews conducted within England and Wales), or by AFCLAA for interviews carried out elsewhere (including all other parts of the UK); or
- (b) A legal advisor<sup>68</sup> via the 'Duty Solicitor Scheme' which operates mainly within England and Wales, but is usually able to locate a solicitor who is willing to travel; or
- (c) A legal advisor from a list held in the police station, of those willing to provide legal advice, or
- (d) A Services legal advisor<sup>69</sup>. This facility is only available to Army and RAF personnel (including civilian personnel attached to Army or RAF units) who are interviewed by the Service Police outside the UK, or to RN personnel worldwide.

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<sup>65</sup> This refers to all civilian personnel subject to Service discipline, including UK-based civilians whether they are overseas on permanent or detached duty, and dependants.

<sup>66</sup> For further information, refer to the Service Police Codes of Practice (JSP 397).

<sup>67</sup> Access to a civilian legal advisor in some circumstances, particularly within operational theatres, may not be possible, however, access to an independent Service legal advisor will be available in the first instance.

<sup>68</sup> With effect from 31 October 2009, a 'legal advisor' may be a qualified solicitor, or an accredited or probationary representative.

<sup>69</sup> Under an existing Service Level Agreement between the Army and the RAF, the accused will generally have access to a Service lawyer from the other Service. RN personnel have access to RN legal advisors.

5. If the named legal advisor is unwilling to accept the fees payable, the accused will be given the opportunity to either request another solicitor, in accordance with paragraph 4 above, or agree fees privately with the legal advisor – such fees, and all ancillary expenses, become the personal responsibility of the accused, and cannot be reclaimed later from public funds.

6. Where the legal advisor accepts fees payable by the Duty Solicitor Scheme or AFCLAA, that legal advisor may not enter into any other financial agreement with the accused. Any attempts by the legal advisor to obtain additional fees, or reimbursement for incidental expenses, are to be made known to AFCLAA without delay.

7. If the publicly funded legal advisor has any questions regarding fees, they are to be advised to contact either the Duty Solicitor Scheme or AFCLAA directly. There is to be no attempt, by Service police, the accused or any other Unit or Service representative, to deal with any such query.

### **Custody Without Charge Reviews**

8. Those held in custody without charge at any Service Custody Facility, are entitled to receive free legal advice and advocacy in respect of all detention reviews. The different ways to access a legal advisor, and other relevant information, are detailed in paragraphs 4-7 of this chapter.

9. Where an accused undergoing interview after caution is detained in custody pending further enquiries or interviews, an initial custody review will be held by a judge advocate no later than 48 hours after the start of the period of custody. Where an application to continue a period of custody is made, the judge advocate will hold custody reviews at regular intervals. In most instances, the legal advisor attending the PACE interviews, or another representative from the same firm, will also represent the accused at all such custody reviews.

### **Custody after Charge Reviews**

10. Detainees who have been granted legal aid for a forthcoming trial, will receive legal advice and advocacy for all related custody reviews under that legal aid authority; this includes those who are detained following a period of AWOL, where legal aid may have been previously granted in respect of an unrelated offence. Units are advised to ascertain whether a detainee has legal aid, and therefore had dealings with a particular legal advisor in respect of another case, before contacting an alternative legal representative.

11. Anyone held in custody after charge, not already in receipt of legal aid, is advised to submit a completed application form to AFCLAA without delay. However, it should be noted that a duty solicitor is most likely to be called to represent a detainee at the first custody review, due to the short timescale with which such hearings are arranged. In any subsequent reviews, the solicitor engaged by AFCLAA following completion of the application process will attend. In the event that the detainee wishes to retain the same solicitor throughout, full details must be included on the application form.

12. Any detainee who has previously declined the opportunity to apply for legal aid, or where an earlier application has been refused, may request access to a legal advisor, free of charge, to provide advocacy at any custody review using the same processes as those held in custody without charge.

13. As part of the process of applying to have an accused placed in custody after charge, the unit are to verify the accused's wishes in respect of legal representation at the earliest opportunity. In many instances, the accused will wish to use the services of the legal advisor who attended the previous PACE interview(s); however, it is unwise to assume this will always be the case.

14. It should be noted that most custody after charge applications involve AWOL charges. As these cases do not, as a rule, involve any Service police investigation, a duty solicitor is most likely to be approached in the first instance (paragraph 11 refers). Should the accused request an alternative legal advisor, the unit is to make initial contact, and establish whether the new advisor is suitably qualified<sup>70</sup> to represent the accused.

15. Regardless of whether the accused wishes to retain his/her previous (Police Station) legal advisor, or obtain a new one, the unit is to contact the nominated legal advisor to establish availability and acceptance of the case, before submitting a formal application for a custody review in front of a judge advocate. Units are reminded that the initial custody review must be held as soon as is practicable i.e. within 24 hours of charge.

16. The first review is always conducted 'in person' before the judge advocate. All subsequent reviews are automatically 'on the papers' and are conducted by a judge advocate sitting alone in chambers. The legal advisor has the right to make an application to the judge advocate for a review 'in person' at any time whilst the accused remains in custody. In all instances, the accused must be given the opportunity to consult the legal advisor, in private, before, during and after custody reviews, and throughout the period of detention as necessary.

## **Travel & Accommodation for Legal Advisors outside England/Wales**

17. Legal advisors attending upon an accused person in respect of Custody without Charge reviews, or any Interview After Caution conducted by Service police at any Service police station outside England/Wales, are engaged on official MOD business which is funded by AFCLAA but for which no prior authority or documentation is provided. Such legal representatives are therefore fully covered by the provisions of [Chapter 6](#) of this JSP and units (including Service police, if appropriate) are advised to consult this chapter before entering into discussions about travel or accommodation with the legal advisor.

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<sup>70</sup> A practising barrister or solicitor, as defined in The Armed Forces (Custody Proceedings) Rules 2009, rule 2(1) and rule 18.

## Chapter 5

### Legal aid for criminal courts outside the UK

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## Chapter 5

### Legal aid for criminal courts outside the UK

#### General provision

1. Personnel based or living outside the UK, who are investigated in respect of criminal matters while overseas, are entitled to receive the same support as personnel living in England and Wales<sup>71</sup>. This includes the right to apply for legal aid to fund their defence in a local Criminal Court.

2. In countries where accused personnel have no access to publicly funded legal aid from the country, or the local criminal court, in which they are to be prosecuted, AFCLAA may provide legal aid. This is to ensure that such individuals are not disadvantaged when compared to their counterparts in the UK.

#### Eligibility

3. Access to legal aid through AFCLAA, for proceedings in non-UK criminal courts, is limited to personnel who are, or were, based, or otherwise officially resident in the country where they are to be prosecuted, at the time of the incident to which the proceedings refer. This includes:

- a. Service personnel in a country on permanent or detached duty;
- b. UK-Based Civilian (UKBC) employees in a country on permanent or detached duty. This includes MOD Civil Servants, School Teachers, NAAFI personnel and others. However, only personnel recruited in the UK and 'posted' abroad are covered under this provision;
- c. Dependants of Service, and eligible UKBC, personnel officially recognised as resident in that country by the MOD. This includes boarding school pupils during holiday periods, while with their parent(s) or guardians who are based overseas; and
- d. Service and eligible UKBC personnel en route to their permanent or detached duty station, provided they are travelling at public expense, are on an authorised route, or are using authorised transport.

4. Personnel arrested or otherwise prosecuted, who do not meet the criteria described in paragraph 3, may not be eligible to apply for legal aid from AFCLAA. This includes, but may not be limited to:

- a. Locally Employed Component (LEC), living and working in their country of residence or nationality;
- b. Personnel, whether UK- or overseas-based, travelling outside their country of duty or residence on personal business, including holidays;

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<sup>71</sup> In certain circumstances, the MOD will consider paying for the defence of an individual who is charged with an offence arising from an act committed in the course of the individual's employment or duties, and in accordance with any applicable regulations/instructions or orders (insofar as this can be determined at the time). Further advice may be sought from Central Legal Services (CLS) or Head AFCLAA in the first instance.

- c. UK-based personnel visiting family or friends based outside the UK;
- d. Overseas-based personnel visiting family or friends also based overseas, but in a different country; or
- e. Non-Service personnel visiting family or friends based or resident overseas. This includes spouses, siblings, non-dependant adult children, or dependant children not officially recognised by the MOD as resident in a particular country.

All personnel who are travelling outside their usual country of residence on personal business, including holidays, are advised to take out suitable personal and travel insurance, before starting any journey.

## **Individual and unit responsibilities**

5. An individual is personally responsible for informing their CO, as soon as possible, of any ongoing or likely civilian police investigation. Unlike matters prosecuted through the Service Justice System (SJS), AFCLAA is not routinely advised of any forthcoming civilian criminal prosecution. AFCLAA is therefore unable to initiate any form of guidance or support until advised of a situation by the unit concerned.

6. In many countries, criminal matters are brought to court within very short timescales. Units should therefore ensure that AFCLAA is made aware of a potential civilian criminal case at the earliest opportunity. To prevent or reduce unnecessary delay, units should email or fax AFCLAA as soon as they are notified by the individual that they are under investigation by the local civilian police or authority. The AFCLAA group mailbox – [LF-MCS-AFCLAA-Group@mod.uk](mailto:LF-MCS-AFCLAA-Group@mod.uk) is to be used wherever possible; alternatively, notification should be faxed to 00 44 1980 615691 or 94344 5691.

7. Upon receipt of notification of a potential requirement for legal aid, an AFCLAA Case Officer will contact the unit, by appropriate means depending on unit location and time differences, to advise on further action required. Units are advised to contact AFCLAA urgently, by telephone or email, if a response to the initial notification is not received within one working day.

## **Application process**

8. The individual should complete a Legal Aid Application Form (MOD F2263), submitting it to AFCLAA by fax or email, without delay. Wherever possible, the documentary evidence required to support the financial information should be forwarded with the completed application form.

9. Where the defendant is on detached duty, and thus unable to provide the documentary evidence immediately, the form should be annotated accordingly. In such instances, the defendant should make every attempt to obtain and forward the documentation at the earliest opportunity. The Case Officer reviewing the application will not delay processing an application pending receipt of these documents. Units are, however, to ensure that relevant JPA pay and deduction print-outs are provided from the outset.

10. The Case Officer will process the application in the usual manner, after establishing eligibility for legal aid from AFCLAA. Where eligibility is confirmed (see paragraph 3), a MOD F2263A – Contribution Order - will be faxed or emailed to the unit for the defendant to consider, and sign if they wish to accept the offer. If the applicant is found to be ineligible for legal aid from AFCLAA (see paragraph 4) an MOD F2263 Pt 2 - Legal Aid Refused – will be issued instead.

11. Units and defendants should give the Contribution Order their urgent attention, as the legal aid application process cannot be completed until the defendant signs this document to confirm acceptance of the Terms and Conditions of Legal Aid, and returns it to AFCLAA. As soon as the completed Contribution Order, with proof of contribution payment if appropriate, has been received by the Case Officer, prompt action to formally instruct the legal representative will be taken.

12. Until, and unless, all stages of the legal aid process are completed according to prescribed procedures, legal aid cannot be granted and AFCLAA cannot be responsible for any costs incurred.

13. Any work undertaken by the legal representative in advance of formal instructions from AFCLAA, will be at the individual's private expense; such costs cannot be reclaimed from either AFCLAA or from the applicant's unit. An offer or grant of legal aid cannot be backdated to cover work undertaken in advance of AFCLAA issuing formal instructions.

### **AFCLAA responsibilities**

14. Once legal aid has been granted, and the legal representative formally instructed, AFCLAA will assume full responsibility for all financial aspects of legal aid in respect of the case, dealing directly with the legal representative at all times. This will include processing requests from the legal representative for authority to incur additional costs, such as authorising expert witnesses or to commission other reports.

15. Defendants, DAOs and units are not to discuss any financial aspects of legal aid with the legal representative, but should advise them to contact the relevant AFCLAA Case Officer without delay.

16. Defendants are not permitted to enter into any financial agreement with the legal representative, as this may invalidate the grant of legal aid. If, regardless of the circumstances, an instructed legal representative asks for money, other than through AFCLAA, the details are to be immediately reported to AFCLAA.

17. Following the conclusion of the proceedings, the legal representative will submit the bill of costs to AFCLAA for consideration. AFCLAA will review (tax) the bill, and authorise agreed costs for payment.

18. Acquitted defendants will receive a full reimbursement of contributions made, plus interest. Convicted offenders whose contributions exceed the actual legal aid costs will have the balance of their contribution returned once the legal aid costs have been settled with the legal representative; no interest will be payable on such refunds. In some instances, it may be necessary for the convicted offender to make a further contribution from capital/equity if their income contribution does not fully cover their legal aid costs (see [Chapter 3](#) for more details on the application and contribution processes).

### **Detention in custody, in advance of charge**

19. If, due to the nature of charge and/or local custom, a defendant is immediately detained in custody, legal representation should be obtained at the earliest opportunity. In such circumstances, AFCLAA should be contacted as soon as practicable and within one working day of the start of the detention period.

20. Exceptionally, in such cases, AFCLAA will fund the initial advice and, if applicable, representation at court, in advance of receiving an application for legal aid. However, in order to regularise the situation the defendant must apply for legal aid in the normal manner, at the earliest opportunity. If Unit/DAO access to the defendant is restricted by the civil



authorities, AFCLAA must be advised without delay, so that temporary measures can be instigated.

21. Failure to apply for legal aid without good reason may render the defendant liable for the full costs of his/her legal representation, with the exception of the cost of any initial advice and/or representation at court obtained whilst the defendant was in custody and before AFCLAA could be contacted.

### **Sovereign Base Area Cyprus**

22. Personnel investigated and/or prosecuted by the Sovereign Base Area Authority (SBAA) are not eligible to apply for legal aid from AFCLAA. They should seek further advice or assistance from the Service lawyers at HQ BF Cyprus, if available, or apply to the SBAA Court Legal Aid Office for assistance.

## Chapter 6

### Miscellaneous

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## Chapter 6

### Miscellaneous

#### General

1. The provisions within this chapter, where applicable, are subordinate to the relevant single and joint Service regulations contained within the following publications, which remain the overarching and definitive policy source-documents:

- a. JSP 752 – Tri Service Regulations for Allowances.
- b. JSP 800 Volume 5 – Road Transport – The Management and Operation of Road Transport in the MOD.

#### Definitions

2. **Applicant.** The term ‘applicant’ includes Service personnel, members of the UKBC, and other non-Service personnel who have been granted legal aid by AFCLAA. For practical reasons, all defendants are covered by the provisions contained within this chapter, unless and except where their specific terms of employment make alternative provision. In particular, UK-based civil servants may wish to consult the relevant Civil Service Policy Rules and Guidance (PRG) for further advice.

3. **Legal representative.** For the purposes of this chapter, the term ‘Legal Representatives’ includes any member of the civilian ‘defence team’ where their attendance has been formally authorised by AFCLAA. This includes:

- a. The instructed lawyer, as named on relevant AFCLAA correspondence, or their representative and, subject to prior authorisation by an AFCLAA Case Officer;
- b. Expert witness(es) tasked, by the instructed lawyer, to undertake investigations and/or interviews in order to prepare a report(s) to assist in the preparation of the defence case; and/or
- c. Other non-legally qualified agents or staff, who may be tasked to obtain information for, or on behalf of, the instructed lawyer.

4. In case of doubt regarding the status of any legal representative as defined in paragraph 3 above, the unit or DAO must contact AFCLAA directly for confirmation. This should be done before any travel or accommodation arrangements are made, to prevent any misuse of public funds, services or amenities by unauthorised civilians.

5. **Prior authority.** Before a legal representative incurs any additional costs, other than those already encompassed in the relevant letter of instruction issued by AFCLAA, written prior authority must first be obtained from an AFCLAA Case Officer. Without the appropriate authority, especially in respect of any travel and/or accommodation costs, the legal representative cannot be classified as being on official duty, and is therefore not authorised to travel in any MOD vehicle, and is ineligible to use any MOD facilities.

6. Prior authority may be granted to allow the legal representative to undertake a number of different, specified, activities in connection with a case e.g.: to visit the site of an alleged incident; to obtain access to documentation or equipment in situ; to attend upon a

defendant who is unable to travel; to interview a number of potential defence witnesses in the same location or general area where it is more time and cost-effective to do so. In all cases, the legal representative will be required to submit a formal request to AFCLAA, giving a full justification for the request and, if appropriate, including a written estimate of costs from the service provider.

7. The DAO, or unit representative, should satisfy themselves that prior authority has been obtained before accepting any commitments, financial or otherwise, for, or on behalf of, the legal representative. If there is any doubt, the DAO or unit representative must contact AFCLAA for further advice or clarification.

8. **Custody/PACE (Service Police) interviews.** Legal representatives attending upon an accused person in respect of custody without charge reviews, or any Interview After Caution conducted by Service Police at any Service police station outside England/Wales, are engaged on official MOD business which is funded by AFCLAA but for which no prior authority or documentation is provided. Such legal representatives are therefore fully covered by the provisions of this chapter, but only insofar as their services are requested by the accused as either a 'duty' or 'own' solicitor, and where such attendance is acknowledged by an appropriate disciplinary authority.<sup>72</sup> Legal representatives attending custody after charge hearings do so in accordance with their formal grant of legal aid instruction. Further guidance on PACE interviews and custody is available in [Chapter 4](#) to this JSP.

## Authorised travel

9. **Applicants.** Service<sup>73</sup>, and relevant civilian, applicants, in receipt of legal aid for their defence, are entitled to travel at public expense to consult with their legal representative. They should be accompanied by their DAO or equivalent, who is also entitled to travel at public expense. Where necessary, this may also include an 'Appropriate Adult', who may be the parent or guardian of a defendant under 17 years of age.

10. As such journeys are considered to be 'duty travel', the general principles laid down in JSP 752<sup>74</sup> should be applied at all times. Personnel should travel via a recognised direct route, and in the most economical manner. In particular, personnel returning to the UK at public expense should use air trooping flights wherever possible. Applicants and their DAO should therefore endeavour to book meetings with their legal representative to coincide with appropriate air trooping flights.

11. All travel and related costs (including accommodation and subsistence<sup>75</sup>, where necessary) for applicant and DAO remain a unit responsibility; this includes costs associated with an 'Appropriate Adult' if necessarily travelling with the applicant.

12. Unless there are clear operational, Service or compassionate reasons which prevent or restrict an applicant's capability to travel, all meetings with a legal representative (as defined in paragraph 3 above) are to be held at the legal representative's offices or chambers.

13. Personnel who are unable to travel for medical reasons, or because they are in detention or custody in advance of trial or appeal, will not be expected to travel. In such cases, the unit or DAO should advise the AFCLAA Case Officer at the earliest opportunity, so that appropriate authorisation to incur travel costs can be issued to the legal representative.

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<sup>72</sup> E.g. Service police; Unit chain of command; P1 etc

<sup>73</sup> JSP 752, paragraph 04.0121 applies.

<sup>74</sup> JSP 752, paragraph 04.0101 applies.

<sup>75</sup> JSP 752, Chapter 3 applies.

14. Where there may be specific operational or Service reasons which prevent an applicant travelling, the unit or DAO are to contact AFCLAA for advice before authorisation to incur travel costs can be issued to the legal representative. Failure to allow an applicant to travel to see their legal representative without suitable justification may cause the unit to be held liable for any travel and accommodation costs (including travelling time) incurred by the legal representative.

15. It is essential that the applicant has at least one face-to-face meeting with the legal representative before any trial or appeal. Serious or complex cases will usually require more than one such meeting. In some cases it may be possible, and more practicable, for applicants to use Video-teleconferencing (VTC) links instead to hold short conferences with their legal representative. Further advice on this option may be sought directly from AFCLAA.

16. **Legal Representatives.** Where AFCLAA have authorised the attendance of civilian legal representatives, they are classified as MOD contractors<sup>76</sup>, and are therefore permitted to travel at public expense in MOD vehicles, but only insofar as the journey undertaken can be considered as 'duty travel' and is in direct relation to the case in which they are instructed.

17. The use of MOD transport should be limited to situations where it is not possible, practicable or cost-effective for the legal representatives to use either public or privately owned transport. This will mainly apply to cases outside mainland UK, and will be limited to transportation between a local train station or airport and the Military Court Centre (MCC) and, if appropriate, local overnight accommodation.

18. There may be other instances where the use of MOD transport may be appropriate; however, units are to be aware of the principles of duty travel when considering such requests, and to seek further advice directly from AFCLAA if in doubt.

### **Unauthorised travel**

19. Legal representatives are not to have use of MOD transport for personal or social travel, other than that which is necessary for journeys to and from the MCC or other duty venue. The legal representative should use public transport, including taxi if necessary, and obtain receipts which must be submitted to AFCLAA for consideration along with their final bill of costs.

20. At no time are legal representatives permitted to drive MOD owned or hired road transport.

21. Unauthorised civilian personnel travelling with a legal representative, such as trainees, spouses or other family members, are not permitted to travel at public expense in MOD vehicles. Further confirmation of the status of any member of the civilian defence team should be obtained from AFCLAA before proceeding.

### **Accommodation (hotels and messes, UK and overseas)**

22. Where it is envisaged that the trial or hearing location, likely duration or other factors may require overnight accommodation near to the venue, legal representatives must seek prior authority from AFCLAA before incurring accommodation and subsistence costs; at no time are the unit, DAO or applicant to authorise such expenditure on AFCLAA's behalf. Where overnight accommodation is authorised, the legal representative may elect to stay either in a local Officers' Mess or hotel.

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<sup>76</sup> JSP 800, Vol 5, Chapter 2, paragraphs 2.018 (a) (i); 2.068; 2.076 apply.

23. The DAO is usually expected to arrange appropriate accommodation, in consultation with the legal representative. However, before making any bookings for accommodation for the duration of a trial/appeal, the DAO MUST contact the relevant MCC to establish which hotels are deemed 'Out of Bounds' for the defendant's legal team because of use by either the judge advocate or Board members hearing the case. This is to prevent any potential conflict of interest.

24. Where the legal representative elects to stay in a local Officers' Mess, the Mess Manager should be informed that the legal representative is attending on official business, fully funded by the MOD, and should therefore be charged 'entitled persons' rates for food and accommodation. Should the Mess Manager have any queries, AFCLAA will provide specific written authority as necessary.

25. As with any public transport costs, the legal representative must obtain receipts for all food and accommodation costs, and will be required to submit all original receipts to AFCLAA with their final bill of costs, for consideration and, if appropriate, payment. Items such as personal phone calls, laundry or entertainment (including alcoholic beverages) are considered to be personal and are therefore must not be reclaimed from the applicant, the DAO or the unit. AFCLAA will not reimburse such items if claimed.

26. Where the legal representative has obtained prior authority from AFCLAA to travel other than in direct relation to court proceedings, the same regulations regarding travel and accommodation apply (except the need to verify which hotels may be 'Out of Bounds').

### **Medical attention/facilities (outside UK)**

27. Should the legal representative fall ill whilst overseas on authorised business, he is entitled to receive treatment at either a Service Primary Health Care facility (Medical Centre) or on referral to DGP (the contracted hospital).

28. For 'non-elective treatment' the legal representative may attend a Medical Centre. The DAO should ensure that appropriate arrangements are made; they should also ensure the Court Officer is informed.

29. These facilities should only be used for treatment for conditions arising while the legal representative is overseas on official business; appointments are not to be made to receive treatment or medication for pre-existing conditions unless there is an urgent, and unforeseen, requirement to do so. Legal representatives should be advised that Service medical facilities typically cater for military populations and that many medicines routinely found in civilian practice may not be available. Legal representatives should ensure that they carry sufficient medication and medical equipment with them for the duration of their trip.

30. Before travelling to another EU country outside the UK, legal representatives are advised to obtain a European Health Insurance Card (EHIC) if they do not already hold one. In the event of an emergency arising whilst in Germany, they can present an EHIC in the interim if transferred to a local hospital (not DGP), as they are covered under BFG HS while on MOD business.

31. Units based in countries where the EHIC is not valid are to ensure that they are aware of the procedures for obtaining similar medical assistance for legal representatives, as part of the staff clearance process.

### **Insurance**

32. As a general rule, the MOD does not purchase commercial insurance for the risks it faces as it is more cost effective for the Department to bear the risk of receiving claims. Where it is necessary for a legal representative to travel to/within operational theatres, or

travel on MOD aircraft, in connection with a forthcoming trial or appeal<sup>77</sup>, and an individual sustains an injury or loss, the MOD will consider any claim on a legal liability basis. Where it can be shown that the loss or injury was caused through MOD negligence, the MOD will pay appropriate compensation.

33. If a legal representative's insurance company were to reject a claim under a life assurance policy for reasons solely due to the deployment to an operational area or travel on a MOD aircraft in the performance of official duties for the MOD, then the MOD would indemnify the individual to the extent of the benefit that would otherwise have been payable under the policy.

34. If a need to travel into an operational area is identified, AFCLAA will ensure that those deploying are made aware of the relevant provisions, and will ensure that appropriate administrative action is taken locally.

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<sup>77</sup> Including any other case-related matter, for which prior authority has been obtained from AFCLAA.

## Chapter 7

### Discrete areas of non-criminal public funding

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## Chapter 7

### Discrete areas of non-criminal public funding

#### Introduction

1. The purpose of this chapter is to provide details of the support available to Service, and relevant civilian<sup>78</sup>, personnel who may require public funding for legal advice, assistance or representation for certain types of legal proceedings, for which there is no other provision under the terms of the Armed Forces (Criminal) Legal Aid Scheme. The intention of these provisions is to ensure that those who may be subject to such proceedings heard by a judge advocate are not disadvantaged when compared to others participating in similar proceedings within the civilian system in the UK.

2. As soon as a potential requirement for public funding under the terms of this chapter is identified, AFCLAA should be notified without delay, using the most appropriate means available<sup>79</sup>. This will ensure that all appropriate actions by AFCLAA, individual and unit, are taken promptly and in accordance with the equivalent civilian practices where applicable and/or practical. It is important that those contacting AFCLAA have readily to hand as much information available as possible, before making contact.

3. For ease of reference, this chapter is arranged into sections, each dealing with a single discrete area of public funding. To assist those seeking guidance here, each section will detail the specific Service regulations and other documentation relevant to that proceeding or public funding issue.

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<sup>78</sup> As defined in JSP 830, Vol one, Chapter 3.

<sup>79</sup> I.e. A phone call in the first instance, to any AFCLAA number (See Annex A to Chapter 1) during standard (UK) working hours. Outside those hours, using Hd AFCLAA or out of hours (duty) mobile numbers, leaving a voicemail if necessary. Emails should be marked Urgent, and sent to the group mailbox [LF-MCS-AFCLAA-Group@mod.uk](mailto:LF-MCS-AFCLAA-Group@mod.uk) as this mailbox is monitored throughout the working day.

## Section 1: Legal Representation - Child Assessment or Protection Order Hearings

4. The MOD has a responsibility for safeguarding and promoting the welfare of children residing or staying outside the UK with Service families or with families of civilians subject to Service discipline. In doing so, the MOD seeks to replicate, as far as appropriate and practical, the same procedures and levels of service as would be found in England and Wales; this includes the same access to publicly funded legal representation for those who would be entitled to receive such help in similar circumstances in the UK (see paragraph 8 for further clarification).

5. **Reference documents.** The listed documents are the primary sources of reference in respect of Child Protection (CP) regulations as they apply to children residing or staying outside the British Isles with Service families or the families of civilians subject to Service discipline:

- a. JSP 834: Safeguarding Children;
- b. JSP 830 Manual of Service Law: Chapter 26 – Safeguarding Children: Armed Forces Child Protection Powers;
- c. The Armed Forces (Protection of Children of Service Families) Regulations 2009 (2009 SI 1107); and
- d. The Armed Forces Act 1991, Sections 17-23, as amended by the Armed Forces Act 2006, section 353 and Schedule 13 – Protection of Children of Service Families.

6. In addition, personnel directly affected by legal proceedings concerning the care or protection of children may obtain useful general guidance from the Directgov website [www.direct.gov.uk](http://www.direct.gov.uk) or by phoning (0044) (0)845 345 4 345; details of solicitors who are experienced in dealing with such proceedings may be obtained from the Legal Adviser Directory at [www.legaladviserfinder@justice.gov.uk](mailto:www.legaladviserfinder@justice.gov.uk) or from the Law Society [www.lawsociety.org.uk](http://www.lawsociety.org.uk).

7. **The scope of the armed forces legal representation scheme.** The Armed Forces (Protection of Children of Service Families) Regulations 2009 may be applied to any child who:

- a. Forms part of the family of a person subject to Service law, or a relevant civilian subject to Service discipline, where that person is serving or based outside the UK, and
- b. Resides outside the UK with that family or another such family; or
- c. Staying with such a family (for however short a time), whereupon the child will be considered as residing with that family for the purposes of the relevant proceedings.

8. The provisions within this chapter are designed to support those who are entitled to receive public funding for legal representation at Assessment or Protection Order hearings. This may include:

- a. The child (with the support/assistance of an appropriate independent adult e.g. a member of the British Forces Social Work Service (BFSWS) as necessary);
- b. The parent(s); and/or

- c. Any other person with parental responsibility.

9. As the regulations may be applied to any child, regardless of residency status (see paragraph 7c) above), the provisions of this chapter apply equally to the parents or those with parental responsibility for such a child. This means that any person who is a parent or has parental responsibility for a child who is the subject of legal proceedings under the Armed Forces (Protection of Children of Service Families) Regulations, may apply for public funding for their legal representation from AFCLAA, regardless of whether they are:

- a. Overseas on official or personal business;
- b. Service or relevant civilian personnel, or their dependants; or
- c. Temporary visitors staying with friends or family, where a person within the 'hosting' family is subject to Service law or Service discipline.

10. Persons entitled to receive public funding for legal assistance and representation for CP proceedings under the terms of this chapter will be granted funding without reference to means, prospect of success or reasonableness; however, following civilian practice, the Need for Representation Test will be applied. This will ensure that the different parties are not unnecessarily represented separately where a common legal position is shared between some or all parties with an interest in the CP proceedings (see paragraphs 16 -18 for further guidance).

11. **Applying for publicly funded legal representation.** Persons who require publicly funded legal representation for Assessment or Protection Order Hearings must submit a completed MOD F2263 – Application for Legal Aid<sup>80</sup> to AFCLAA without delay. As this type of public funding is without reference to means, the applicant (as described in paragraph 8 above) need only complete:

- a. MOD F2263 – Sections 1 – 4, and 6<sup>81</sup>.
- b. Insert to T002 – Application for Public Funding for Representation at Assessment/Protection Order Hearing ([Annex A](#)).

Further guidance for the completion of MOD F2263 is available in [Chapter 3](#): Section 2 and [Annex B](#).

12. The applicant is required to complete the CP Insert to MOD F2263 ([Annex A](#)), in as much detail as possible, to ensure that AFCLAA are aware of all aspects of the case, and can therefore take appropriate action.

13. As the timescales between submitting an application for an Assessment or Protection Order to the judge advocate, and the hearing are relatively short<sup>82</sup>, it is imperative that the applicant complete and submit their application form as soon as possible, so that AFCLAA can authorise funding, and the instruction of legal representation, without delay. Should the applicant have any concerns about the application process, or is aware of any issues which may cause delay to that process, they should contact AFCLAA immediately, for advice<sup>83</sup>.

14. **The scope of publicly funded legal representation.** AFCLAA will contact the legal representative as soon as possible following receipt of the completed MOD F2263 and CP

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<sup>80</sup> A blank copy of MOD F2263 is available via Unit Admin Offices, or on the AFCLAA website via the internet or Defence Intranet.

<sup>81</sup> The applicant is not required to complete the 'nature of Charge' box, nor Section 5, as any relevant information will be requested on the Insert to MOD F2263, at Annex A to this chapter.

<sup>82</sup> The Court Administration Officer must give those involved (including parents and others with parental responsibility) 7 clear days' notice of the hearing.

<sup>83</sup> Using any AFCLAA number during standard (UK) working hours (see Annex A to Chapter 1) or the AFCLAA out of hours (duty) mobile outside these hours.

Insert, to discuss and agree the level of funding and representation as required in the circumstances. This will include any issues relating to the legal representative's travel to either the hearing venue overseas, or, if appropriate, to the nearest suitable venue for a live link. The judge advocate hearing the application may authorise the use of a live link if this is considered to be in the best interests of the child, or the most practical and expeditious way for representations to be heard.

15. The grant of public funding in a CP case will cover legal representation at any subsequent application to have an Assessment or Protection Order varied or discharged. Once an Assessment or Protection Order has been discharged, any subsequent applications for a new Assessment or Protection Order will require a new application for legal aid to be submitted to AFCLAA.

16. At the conclusion of the proceedings, the legal representative is advised to submit their bill of costs to AFCLAA for consideration and payment. As funding is a matter between the legal representative(s) and AFCLAA, neither the applicant nor any other interested party is authorised to enter into any financial agreement with the legal representative, for the payment of fees or any related costs.

17. **Need for representation test.** Should those seeking public funding, or their legal representative once instructed, consider there to be a conflict between themselves and another interested party, they must inform AFCLAA without delay. This is likely to be of relevance where parents or other parties with parental responsibility would appear to have the same interests in the proceedings and, in the case of a couple, they are not living separately and apart.

18. If separate representation is to be justified on the basis of a known conflict of interests, brief details of the conflict must be given<sup>84</sup>. If a conflict is anticipated, AFCLAA should be given an indication of the nature of this potential conflict. These details are required to provide the necessary justification before incurring the additional cost of instructing separate representation. It is unlikely that children in the same family who are the subject of proceedings will be in conflict with one another at the commencement of the proceedings.

19. Where a conflict of interest is identified after authorisation has been granted by AFCLAA, the applicant or their legal representative must contact the AFCLAA Case Officer immediately, so appropriate actions to instruct an additional legal representative can be taken without causing unnecessary delay to the proceedings.

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<sup>84</sup> The applicant, or their legal representative, need not go into the specifics of their case, especially where to do so may break client/representative confidentiality or legal privilege.

## Section 2: Legal representation at adjudication hearings (MCTC only)

20. **Reference of a charge to the adjudicator.** Where, under SCSRSR Rule 47<sup>85</sup>, the Commandant refers a charge against a detainee to a judge advocate (referred to in the regulations as “an adjudicator”), that detainee is automatically entitled to receive legal advice, and if required, legal representation at the adjudication; such legal advice and representation will be at public expense.

21. **Procedure for obtaining legal advice.** Under SCSRSR Rule 45, save in exceptional circumstances, every charge brought to the adjudicator shall be heard within four days of referral by the Commandant MCTC. Given that the detainee is entitled to receive legal advice before the adjudication hearing, it is imperative that a suitably qualified legal representative<sup>86</sup> is instructed without delay.

22. Once a detainee has been informed that the matter has been referred to the adjudicator, he/she should make contact with a suitably qualified legal representative without delay; MCTC Welfare staff will be able to assist the detainee in this matter. As the right to legal advice and representation in such matters is automatic, the detainee is not required to apply for legal aid in advance of seeking legal advice.

23. **MCTC welfare staff action.** MCTC Welfare staff are to provide such assistance as is necessary, to enable detainees to discuss their case with their legal representative i.e. access to phone and meeting room facilities in accordance with MCTC rules. Using the Record Sheet provided at [Annex B](#) to this chapter, the Welfare staff are to keep accurate records of the date, time and duration of phone calls and conferences; they are also requested to keep a record of the date, time and duration of the adjudication hearing. Once the adjudication hearing is concluded, the Welfare staff are to fax the completed form to AFCLAA, in order that the legal representative’s bill of costs can be verified and authorised for payment.

24. At the conclusion of the adjudication proceedings, the legal representative is advised to submit their bill of costs to AFCLAA for consideration and payment. As funding is a matter between the legal representative and AFCLAA, neither the applicant nor any other interested party is authorised to enter into any financial agreement with the legal representative, for the payment of fees or any related costs.

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<sup>85</sup> 2009 SI 1096 – The Service Custody and Service of Relevant Sentence Rules 2009. See also JSP 837 (Service Codes of Practice for the Management of Personnel in Services Custody & Committal to Service Custody Premises and Civil Prisons), Chapter 7 – Breaches of Discipline and Mechanical Restraints.

<sup>86</sup> As defined in Pt 1, paragraph 1(2) of 2009 SI 1096 – The Service Custody and Service of Relevant Sentence Rules 2009.

### **Section 3: Legal representation – Appeals to the Court Martial Appeal Court (CMAC)**

25. **A convicted person's appeal to the CMAC.** A convicted person may appeal to the CMAC, whether against sentence only or conviction and sentence, only with the leave of the CMAC. The trial advocate will advise their client on the merits of such an appeal; where applicable, the original legal aid order, issued by AFCLAA for the proceedings in the Court Martial, covers the legal representative for the work necessary to prepare and complete the Application for Leave to Appeal (Form 1), and the submission of that form to the CMAC for its decision whether to allow or refuse the application. Should the application be allowed, the CMAC will assume responsibility for all further legal aid matters (see also paragraphs 140-144 of Chapter 3).

26. Where the convicted person did not have legal aid funding for their trial, whether they were unrepresented, or instructed a Service lawyer or a privately funded legal representative, they may apply for legal aid to fund the preparation of their Application for Leave to Appeal to the CMAC.

27. The convicted person should refer to Chapter 3, Part 2, for further information and guidance on how to complete the application form; depending on their circumstances, they may have a contribution liability, which will become due should their application be rejected by the CMAC.

28. **SPA appeals to the CMAC.** The SPA has the right of appeal to the CMAC where a judge advocate makes a ruling in relation to a trial in the CM. If the prosecution appeal against a ruling is unsuccessful, it follows that the defendant is acquitted on the charges(s) to which the ruling relates.

29. In such instances, the defendant is entitled to be legally represented by their instructed representative; that legal representation is automatically included within the original legal aid order, and no further application for legal aid is required.

30. **Unduly lenient sentences.** If the Attorney General considers that a sentence or any other order made by the CM is unduly lenient<sup>87</sup>, he/she may, with the leave of the CMAC, refer the case to the CMAC for it to review the sentencing of the offender.

31. The CMAC assumes responsibility, including funding, for the offender's legal representation throughout these proceedings. Thus there is no requirement for the offender, or their legal representative, to apply to AFCLAA for public funding.

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<sup>87</sup> See JSP 830 (Manual of Service Law), Volume 2 Chapter 31, paragraph 14 for clarification.

## Section 4: Reimbursement of legal fees from central funds<sup>88</sup>

32. **Proceedings instigated before 01 October 2012.** Applicants who choose to instruct a legal representative privately<sup>89</sup>, and who are subsequently acquitted of all charges, may apply to the judge advocate (through their legal representative) to have some or all of those private fees reimbursed from public (Central) funds.

33. In cases where the judge advocate makes a recommendation for costs to be awarded from central funds, the recommendation may be made as:

a. A fixed sum, as agreed between the judge advocate and the person in whose favour the order is to be made; or

b. A sum to be determined by AFCLAA, in accordance with the relevant regulations (see paragraphs 31 – 32); or

c. The sum recommended may be limited to that which the judge advocate considers a just and reasonable amount. This may be expressed as a formula, such as a percentage of the total costs. In such cases, the judge advocate should make a record of the circumstances considered during the deliberations which lead to the opinion that there were circumstances which make it inappropriate for the full amount of costs to be reimbursed to the defendant or the legal representative.

34. Where the judge advocate recommends the total sum should be reimbursed (sub-paragraph b) above, the legal representative is to submit the full bill of costs, complete with the full case file, to AFCLAA within 3 months of the conclusion of the proceedings to which they refer. AFCLAA will tax (review) these private fees using the same principles as the National Taxing Team (NTT) when taxing costs from central funds in respect of civilian Crown Court trials.

35. Where the case is discontinued by the SPA at any stage before formal court proceedings are instigated, the legal representative should apply directly to AFCLAA instead. In such instances, AFCLAA will tax (review) the private fees using the same principles as the National Taxing Team when taxing costs from central funds in respect of civilian cases.

36. **Proceedings instigated on or after 01 October 2012.** There is no eligibility to recover private legal aid costs from central funds, irrespective of the outcome, due to the availability of legal aid to all applicants; this includes cases discontinued before formal court proceedings are instigated<sup>90</sup>.

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<sup>88</sup> Not to be confused with the RAF Central Funds, which is a separate, non public, fund.

<sup>89</sup> See Chapter 3 paragraphs 14-15 (trials) or 153-154 (summary appeals/elections) – “if the applicant wishes to instruct a legal representative who refused to accept the Armed Forces Legal Aid Scheme terms and conditions, or where the applicant does not accept an offer of legal aid from AFCLAA, the applicant may choose to instruct the legal representative privately instead”

<sup>90</sup> Privately funded defendants in the SCC, where an application for legal aid failed to satisfy the IOJ test, and therefore legal aid was refused, may, following an acquittal on all charges (including case discontinued by the SPA before trial), apply to AFCLAA for a refund of some or all their private legal costs.

**CP INSERT TO MOD F2263 – APPLICATION FOR PUBLIC FUNDING FOR  
LEGAL REPRESENTATION AT ASSESSMENT/PROTECTION ORDER  
HEARING**

A.	Surname*		
B.	First Name*		
C.	Service/Status*		
D.	Direct contact phone number (to be passed to legal representative)		
E.	Overseas residency status (e.g. Permanent duty station or temporary visitor)		
F.	Type of Hearing	Assessment Order/Protection Order <sup>□</sup>	
G.	Names of the child(ren) concerned in the Proceedings and your relationship to them <sup>‡</sup>	Child's Name	
		Your relationship	
		Child's Name	
		Your relationship	
		Child's Name	
		Your relationship	
H.	Please provide the name of any other interested party to the proceedings, and their role (e.g. parent; step-parent; others with parental responsibility) <sup>‡</sup>	Surname and Initials	
		Role	
		Surname and Initials	
		Role	
		Surname and Initials	
		Role	
I.	Are you aware of any conflict of interest between yourself and any of those named at serial H, which would require you to be separately represented? Please provide brief details <sup>‡</sup>	Yes or No <sup>□</sup>	
J.	Date, Time and Location of Hearing (if known)		

\*for cross-referencing only

<sup>□</sup>delete as applicable

<sup>‡</sup>continue on a separate sheet if necessary



**SERVICE DETENTION  
ADJUDICATION HEARING – RECORD SHEET (MCTC USE ONLY)**

Serial	Detainee Information			
A.	Surname and initial(s)			
B.	Service number			
C.	Service/status			
	<b>Legal Representative Details</b>			
D.	Name of Representative			
E.	Name of Firm/Chambers			
F.	Address			
G.	Phone and Fax Numbers (including dialling code)	Phone:		
		Fax:		
	<b>Attendance Details</b>	<b>Date</b>	<b>Start Time</b>	<b>Duration</b>
H.	Initial (phone) contact			
I.	Subsequent phone contact or initial attendance (if applicable)			
J.	Subsequent contact (if applicable)			
K.	Adjudication hearing			

**To be returned to AFCLAA within 1 month of adjudication hearing using fax number:  
94344 5691 or 01980 615691**