

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order makes provision for retrials in respect of certain serious cases where there is new and compelling evidence. The provisions of this order are made in consequence of those relating to retrials for serious offences in Part 10 of the Criminal Justice Act 2003 (“the 2003 Act”). Part 10 of the 2003 Act reforms the law relating to double jeopardy by permitting retrials in serious cases where there has been an acquittal in court, but compelling new evidence subsequently comes to light against the acquitted person. This Order makes equivalent provision, but with modifications, for the retrial in the armed forces’ justice system of persons acquitted of serious offences.

Under article 3 the Order applies to “qualifying offences”. These include the serious criminal offences listed in Schedule 1. They also include a number of serious disciplinary offences, such as assisting an enemy, which are set out in the definition of “qualifying offence” in article 2.

Under article 4 the service police may re-investigate the possible commission of a qualifying offence by a person previously acquitted of the offence; but they may only do so with the consent of the Director of Service Prosecutions (the “Director”). However, article 5 allows the service police to take investigative steps without that consent where they are urgently necessary to prevent an investigation being prejudiced.

Article 6 prevents the arrest of a previously acquitted person for a qualifying offence, unless a judge advocate has issued a warrant for the arrest. The judge advocate may only do so if satisfied that there is new evidence which would be relevant to an application for a retrial.

Article 7 provides for a senior service policeman to refer the case to the Director whether, following an investigation, he considers that there is sufficient evidence to charge the person with a qualifying offence. The Director may then under article 7 direct the person’s commanding officer to charge the person with a qualifying offence for which the person was previously acquitted.

Article 8 empowers prosecuting officers to apply for a retrial of person charged under article 7. The application may only be made with the Director’s consent. Under article 27 section 365(4) of the 2006 Act does not apply, and any delegation of his functions under the Order must be to a specific prosecuting officer or a prosecuting officer of a description specified by the Director, who must be satisfied of certain matters, in particular that there is new and compelling evidence against the person charged and that it is in the public interest for the application to proceed.

Where an application is made under article 8, the Court Martial Appeal Court must under article 9(1)(a) order a retrial if satisfied that there is new and compelling evidence against the person charged and that it is in the interests of justice for the court to make the order. Article 10 sets out more fully the requirement for new and compelling evidence. Article 11 sets out more fully the requirement that making the order must be in the interests of justice.

Article 12 provides for notice and other information that must be given to the person previously acquitted and others where an application for a retrial is made. Article 13 requires that the application for a retrial must be considered at a hearing and sets out the rights of attendance of the person previously acquitted and the process for that person to oppose the application. Article 14 empowers the Court Martial Appeal Court to order the production of evidence and the attendance of witnesses at the hearing.

Article 15 amends the provisions of the Court Martial Appeals Act 1968 so as to provide for a right of appeal to lie to the Supreme Court against any decision of the Court Martial Appeal Court in relation to an application under this Order.

**Status:** Point in time view as at 01/08/2013.

**Changes to legislation:** There are outstanding changes not yet made by the [legislation.gov.uk](http://legislation.gov.uk) editorial team to The Armed Forces (Retrial for Serious Offences) Order 2013. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

Article 16 empowers the Court Martial Appeal Court to impose restrictions on publications if the court considers that publication would substantially risk prejudice to a retrial and it is in the interests of justice to impose a restriction. Such restrictions may, on the application of the Director, be imposed by the court once an investigation under article 4 has begun, though a notice of application for a retrial has not been given. Notice of an application for such restrictions must generally under article 16 be given to the person previously acquitted. However, where the restrictions are sought before notice of an application for retrial has been given, the court may order that notice is not to be given to the acquitted person until notice of the application for a retrial is served on that person. Under article 17 the Court Martial Appeal Court may vary or revoke an order imposing restrictions on publication. Article 18 creates an offence of publishing matter in breach of an order under article 16.

Article 19 provides that retrial under an order under article 9(1)(a) must be on a charge specified by the Court Martial Appeal Court. The person charged may not under such an order be arraigned more than 2 months after the date of the order, unless the court gives permission.

Article 20 deals with custody, or continued release from custody, of the previously acquitted person between the date he or she is charged under the Order and the giving of a notice under article 12 of the application for retrial. The question whether to hold the person in custody must be decided by a judge advocate. If no notice of an application for a retrial is given within 42 days from the judge advocate's first decision on custody, the person must be released from custody. If already released subject to conditions, the person ceases to be subject to those conditions. However a judge advocate may extend the 42-day period if satisfied that there is sufficient cause and that the prosecution has acted with due diligence and speed. Under article 21, once a notice of application for a retrial has been served, custody and release from custody must again be decided by a judge advocate. After release from custody a judge advocate has power under article 21 to revoke that order and authorise holding the person in custody. Article 22 applies to articles 20 and 21 provisions of the Armed Forces Act 2006 which govern custody, and release from custody, under that Act. These include (under sections 105 and 106 of the 2006 Act) provisions as to the conditions which must be met if a judge advocate is to order the person to be held in custody and as to the maximum period (generally of 8 days) for which a judge advocate can make such an order before having to make a further order and (under section 107 of that Act) the purposes for which any conditions imposed on release must be necessary. Article 23 deals with the surrender or arrest of a person whom a judge advocate authorises to be held in custody, if the person is not before the judge advocate when the order is made.

Under article 24 the Court Martial Appeal Court may decide on bail, or holding in custody, during the hearing on whether to order a retrial. The court may also order custody or bail if the court dismisses the application for a retrial but there is a possibility of appeal by the prosecution against the dismissal of the application. If the Court Martial Appeal Court does order a retrial, the court may under article 25 order the person to be held in custody for up to 8 days (or up to 28 days if the person is legally represented and consents). Article 25 also provides so that subsequently the provisions of the Armed Forces Act 2006 on custody after charge apply.

Part 8 of the Order contains supplementary provision. Article 26 makes provision for the service of documents. Articles 28 to 30 provide for certain powers of the Court Martial Appeal Court to be exercisable by the registrar of the court or by a single judge, subject to a right for the matter to be taken to the full court.

Article 31 provides for a prosecuting officer to be able to abandon an application for a retrial before the hearing of the application.

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