

REPUBLIC OF SOUTH AFRICA

**MILITARY DISCIPLINE
SUPPLEMENTARY MEASURES
BILL**

(As amended by the Portfolio Committee on Defence (National Assembly))

(MINISTER OF DEFENCE)

[B 31B—99]

REPUBLIEK VAN SUID-AFRIKA

**WETSONTWERP OP
AANVULLENDE MAATREËLS VIR
MILITÊRE DISSIPLINE**

(Soos gewysig deur die Portefeuljekomitee oor Verdediging (Nasionale Vergadering))

(MINISTER VAN VERDEDIGING)

[W 31B—99]

ISBN 0 621 29046 7

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

To provide for a new system of military courts with a view to improved enforcement of military discipline; and to provide for incidental matters.

ARRANGEMENT OF SECTIONS

1. Definitions 5

APPLICATION OF ACT

- | | | |
|----|-------------------------------|----|
| 2. | Objects of Act | |
| 3. | Application of Act | |
| 4. | Conflict with other acts | 10 |
| 5. | Extra-territorial application | |

MILITARY COURTS AND DISCIPLINARY FORUMS

- | | | |
|-----|--|----|
| 6. | Establishment of military court system | |
| 7. | Composition and jurisdiction of Court of Military Appeals | 15 |
| 8. | Powers of Court of Military Appeals | |
| 9. | Composition and jurisdiction of Court of Senior Military Judge | |
| 10. | Composition and jurisdiction of Court of Military Judge | |
| 11. | Jurisdiction of commanding officer | |
| 12. | Penalties | 20 |

CHAPTER 3

FUNCTIONS, SYSTEMS, STAFF, DIRECTION, CONTROL AND ACCOUNTABILITY OF MILITARY LEGAL SERVICES

13.	Assignment of functions	
14.	Minister's powers in respect of assignment	5
15.	Period of assignment	
16.	Members to be assigned	
17.	Removal from assignment	
18.	Oath or affirmation	
19.	General duties of military judges and senior military judges	10
20.	Military assessors	
21.	General duties of prosecution and defence counsel	
22.	Functions, direction and control of military prosecution authority	
23.	Right to legal representation	
24.	Functions, direction and control of military legal defence counsel authority	15
25.	Right to review of trial	
26.	Functions, direction and control of military review authority	
27.	Appointment of Adjutant General	
28.	Functions of Adjutant General	

CHAPTER 4 20

PRE-TRIAL PROCEDURES

29.	Arraignment	
30.	Preliminary investigations	
31.	Confinement of arrested persons	
32.	Trial scheduling and notification of trial dates and charges	25

CHAPTER 5

TRIAL PROCEDURES

33.	Trial procedures	
-----	------------------	--

CHAPTER 6

POST-TRIAL PROCEDURES 30

34.	Appeal and review	
35.	Promulgation	
36.	Bringing into operation of suspended sentences after trial	
37.	Warrants of committal or release	

CHAPTER 7 35

GENERAL PROVISIONS

38.	Privilege	
39.	Language	
40.	Administration	
41.	Delegation of powers	40
42.	Suspension awaiting trial or appeal	
43.	Repeal and amendment of laws	
44.	Transitional provisions	
45.	Short title and commencement	

SCHEDULES

Repeal of laws
Amendment of laws

Definitions

1. In this Act, unless the context otherwise indicates— 5
 - (i) “Adjutant General” means the Adjutant General referred to in section 27;
 - (ii) “appropriately qualified” includes the passing of a departmental course in military law;
 - (iii) “assigned” means assigned in terms of this Act;
 - (iv) “civilian court” means any competent court in the Republic having jurisdiction in criminal matters; 10
 - (v) “Code” means the Military Discipline Code referred to in section 104(1) of the Defence Act, 1957;
 - (vi) “commanding officer” means an officer who has been appointed to command any unit or formation in the South African National Defence Force and also an officer subordinate in rank to and authorised by such commanding officer to conduct disciplinary hearings; 15
 - (vii) “Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
 - (viii) “corrective punishment” means additional supervised training, work or drill for two hours per working day, done or carried out within unit lines; 20
 - (ix) “Court of Military Appeals” means the Court of Military Appeals referred to in section 6(1)(a);
 - (x) “Defence Act, 1957” means the Defence Act, 1957 (Act No. 44 of 1957);
 - (xi) “defence counsel” means a person referred to in section 13(2)(c); 25
 - (xii) “degree” means a degree conferred by any university in the Republic or a degree recognised in law to be equivalent to that degree;
 - (xiii) “degree in law” means a degree which has a preponderance of courses in law, including courses in— 30
 - (a) criminal law;
 - (b) the law of evidence;
 - (c) civil procedure;
 - (d) criminal procedure; and
 - (e) the interpretation of statutes;
 - (xiv) “disciplinary hearing” means a hearing referred to in section 6(1)(d); 35
 - (xv) “local representative of the Adjutant General” means an appropriately qualified officer with at least three years experience in the administration of criminal justice or military justice and assigned and authorised in writing by the Adjutant General to— 40
 - (a) manage, promote, facilitate and co-ordinate activities ensuring the effective administration of military justice and military legal services; and
 - (b) otherwise execute the functions of the Adjutant General in any designated area or place or in respect of any specific deployment, operation or exercise; 45
 - (xvi) “member” means any member of the South African National Defence Force in terms of the Defence Act, 1957;
 - (xvii) “military assessor” means a person referred to in section 20(1);
 - (xviii) “military disciplinary offence” means any offence in terms of the Code and any offence deemed in law to be an offence in terms of the Code, for which the maximum punishment prescribed in the Code does not exceed imprisonment for a period of one year; 50
 - (xix) “military court” means any one of the courts and the disciplinary hearing referred to in section 6;
 - (xx) “military judge” means a person referred to in section 10(1)(a); 55
 - (xxi) “Minister” means the Minister of Defence;
 - (xxii) “officer” means an officer as defined in section 1 of the Defence Act, 1957;
 - (xxiii) “Permanent Force” means the component referred to in section 5(a) of the Defence Act, 1957;

- (xxiv) “presiding judge” means a senior military judge or a military judge, as the case may be;
- (xxv) “prosecution counsel” means, in relation to any trial before or in a court referred to in section 6(1)(b) or (c), any person assigned to act as prosecution counsel; 5
- (xxvi) “Reserve Force” means the components referred to in sections 5(b) and (c) and 6 of the Defence Act, 1957;
- (xxvii) “review counsel” means a person referred to in section 13(2)(b);
- (xxviii) “rule of the Code” means a rule contemplated in section 104(3) of the Defence Act, 1957, and includes a regulation contemplated in section 10 44(3)(b);
- (xxix) “senior military judge” means a person referred to in section 9(1)(a).

CHAPTER 1

APPLICATION OF ACT

Objects of Act 15

2. The objects of this Act are to—
- (a) provide for the continued proper administration of military justice and the maintenance of discipline;
 - (b) create military courts in order to maintain military discipline; and
 - (c) ensure a fair military trial and an accused’s access to the High Court of South Africa. 20

Application of Act

3. (1) This Act shall, subject to subsection (2), apply to any person subject to the Code irrespective whether such person is within or outside the Republic.
- (2) For the purposes of the application of this Act and the Code, “person subject to the Code” includes, to the extent and subject to the conditions prescribed in this section and in the Code— 25
- (a) all members of the Permanent Force;
 - (b) every member of the Reserve Force—
 - (i) while rendering any service, undergoing any training or doing any duty in terms of the Defence Act, 1957; or 30
 - (ii) when liable or called up therefor, fails to render that service or to undergo that training or to do that duty;
 - (c) all persons, other than members of a visiting force, lawfully detained by virtue of or serving sentences of detention or imprisonment imposed under the Code or this Act; 35
 - (d) every member of the auxiliary services established in terms of section 80 of the Defence Act, 1957, being on service as defined in the Code;
 - (e) every person attached to the South African National Defence Force in terms of section 131 of the Defence Act, 1957; 40
 - (f) all students under instruction at a military training institution, in accordance with section 77(3) of the Defence Act, 1957;
 - (g) every person not otherwise subject to the Code who, with the consent of the commanding officer of any portion of the South African National Defence Force, is with or accompanies or performs duty with that portion of the Defence Force which is— 45
 - (i) outside the borders of the Republic; or
 - (ii) on service:
- Provided that any person who is subject to the Code by virtue of any consent given under this paragraph shall be so subject— 50
- (aa) where that consent has been given in writing, on the basis indicated in that consent; or
 - (bb) where consent has not been given in writing, on the basis on which he or she has been accepted and treated for living and messing facilities; and

- (h) every prisoner of war as contemplated in Articles 4 and 33 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, or by customary international law, and who is in the power of the Republic and detained by the South African National Defence Force.

(3) When a person who is subject to the Code is suspected of having committed murder, treason, rape or culpable homicide in the Republic, the matter will be dealt with in accordance with section 27 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and any ensuing trial shall take place in a civilian court. 5

Conflict with other acts

4. (1) If any conflict relating to any matter dealt with in this Act arises between this Act and the provisions of any other law, save the Constitution or any Act expressly amending this Act, the provisions of this Act shall prevail. 10

(2) Subject to subsection (1) and sections 43 and 44, the provisions of the Defence Act, 1957, and the Code shall remain in force and shall be applied subject to the changes required by the context. 15

Extra-territorial application

5. Whenever this Act is enforced outside the Republic, any finding, sentence, penalty, fine or order made, pronounced or imposed in terms of its provisions shall be as valid and effectual, and shall be carried into effect, as if it had been made, pronounced or imposed in the Republic. 20

CHAPTER 2

MILITARY COURTS AND DISCIPLINARY FORUMS

Establishment of military court system

6. (1) There is hereby established a military court system, consisting of— 25
- (a) the Court of Military Appeals;
 - (b) the Court of a Senior Military Judge;
 - (c) the Court of a Military Judge; and
 - (d) the commanding officer's disciplinary hearing.

(2) Every military court contemplated in subsection (1) shall exercise the jurisdiction and powers conferred on it by this Act. 30

(3) A Court of Military Appeals shall be the highest military court and a judgement thereof shall bind all other military courts.

Composition and jurisdiction of Court of Military Appeals

7. (1) The Minister shall appoint a Court of Military Appeals—
- (a) in matters where treason, murder, rape or culpable homicide committed outside the Republic, or where contraventions of section 4 or 5 of the Code are involved, composed of five members, being— 35
 - (i) three judges or retired judges of any division of the High Court of South Africa, of whom one shall be appointed by the Minister as chairperson;
 - (ii) one appropriately qualified officer of the Permanent Force who holds a degree in law and has not less than 10 years experience as a practising advocate or attorney of the High Court of South Africa, or 10 years experience in the administration of criminal justice or military justice; and 40
 - (iii) one person who has experience in exercising command in the field in the conducting of operations; and 45
 - (b) in matters other than those referred to in paragraph (a), composed of three members, being—
 - (i) a chairperson who shall be a judge or a retired judge of the High Court of South Africa, or a magistrate or retired magistrate who has held that office for a continuous period of not less than 10 years; 50

- (ii) one appropriately qualified officer of the Permanent Force who holds a degree in law and has not less than 10 years experience as a practising advocate or attorney of the High Court of South Africa, or 10 years experience in the administration of criminal justice or military justice; and
- (iii) one person who has experience in exercising command in the field in the conducting of operations.

(2) The Minister may appoint more than one Court of Military Appeals and the Adjutant General shall determine which particular case or classes of cases otherwise cognisable by such a Court of Military Appeals shall serve before each such Court.

(3) The Minister may appoint one or more alternates who meets the criteria referred to in subsection (1) for any member, including the chairperson, of a Court of Military Appeals.

(4) A Court of Military Appeals may sit at any place within or outside the borders of the Republic.

(5) A member of a Court of Military Appeals may be employed on a part-time basis.

(6) A member of a Court of Military Appeals who is not in the full-time employment of the State or an organ of state shall receive remuneration and may be paid travelling, subsistence or other allowances in connection with the execution of his or her duties as a member of that Court.

(7) The Minister, in consultation with the Minister in the national sphere of government responsible for State expenditure, may determine the amount, terms and conditions of the remuneration and allowances contemplated in subsection (6).

(8) This section shall not be interpreted to exclude the appointment of any otherwise qualified member of the Reserve Force as a member of a Court of Military Appeals as contemplated in subsection (1)(a)(iii) or (b)(iii).

Powers of Court of Military Appeals

8. (1) A Court of Military Appeals shall exercise full appeal and review competencies in respect of the proceedings of any case or hearing conducted before any military court and may, after due consideration of the record of the proceedings of any case or hearing and of any representations submitted to it or argument heard by it in terms of this Act—

- (a) uphold the finding or the finding and the sentence;
- (b) refuse to uphold the finding and set the sentence aside;
- (c) substitute for the finding any finding which the evidence on record supports beyond a reasonable doubt and which could have been brought on the charge as a competent alternative verdict by the military court under section 88 of the Code, or any other law; or
- (d) if it has upheld the finding, or substituted a finding, vary the sentence.

(2) A Court of Military Appeals may correct any patent error in any finding, sentence or order as recorded in respect of any case referred to that Court.

(3) A Court of Military Appeals may refer any finding or sentence not clearly or correctly recorded or any invalid sentence back to a military court, to be clearly and correctly recorded or to impose a valid sentence, or that Court may itself record a finding, sentence or order, or impose a valid sentence or make a valid order that a military court could or should have made: Provided that in the latter case the Court of Military Appeals shall give the benefit of any reasonable doubt to the offender in respect of any finding, sentence or order.

(4) For the purposes of subsections (1), (2) and (3), “sentence” includes any order which may or must be made by a military court in terms of any provision of this Act or the Code.

Composition and jurisdiction of Court of Senior Military Judge

9. (1) Subject to subsection (3), a Court of a Senior Military Judge shall consist of—

- (a) an officer of a rank not below that of colonel or its equivalent and with not less than five years' experience as a practising advocate or attorney of the High Court of South Africa, or five years' experience in the administration of criminal justice or military justice, assigned in terms of section 14(1)(b) to act as a senior military judge; and 5
- (b) subject to sections 20 and 30(24), a military assessor.
- (2) A Court of a Senior Military Judge may, subject to subsection (3), try any person subject to the Code for any offence, other than murder, treason, rape or culpable homicide committed within the Republic, and may on conviction sentence the offender to any punishment referred to in section 12. 10
- (3) In any case where the charge or one of the charges brought or to be brought against an accused is murder, treason, rape or culpable homicide committed beyond the borders of the Republic, or is a contravention of section 4 or 5 of the Code, the powers conferred by this section shall be exercised by three senior military judges sitting together under the presidency of the senior of those judges. 15

Composition and jurisdiction of Court of Military Judge

- 10.** (1) A court of a Military Judge shall consist of—
 - (a) an officer of not less than field rank and with not less than three years experience as a practising advocate or attorney of the High Court of South Africa or three years experience in the administration of criminal justice or military justice, assigned in terms of section 14(1)(b) to act as a military judge; and 20
 - (b) subject to sections 20 and 30(24), a military assessor.
- (2) A Court of a Military Judge may try any person subject to the Code, other than an officer of field or higher rank, for any offence, other than murder, treason, rape or culpable homicide, or an offence under section 4 or 5 of the Code, and may on conviction sentence the offender to any punishment referred to in section 12, subject to a maximum sentence of imprisonment for a period of two years. 25

Jurisdiction of commanding officer

- 11.** (1) Every commanding officer and every officer subordinate in rank to such commanding officer and of a rank not less than field rank, who is authorised thereto in writing by such commanding officer, shall have the jurisdiction conferred by this section. 30
- (2) A commanding officer may conduct a disciplinary hearing of any person subject to the Code, other than an officer or warrant officer, who has elected in terms of this Act to be heard by a commanding officer, for any military disciplinary offence and may on conviction sentence the offender to any punishment referred to in section 12(1)(i), (j), (k), (l) and (m), subject to a maximum fine of R600,00. 35

Penalties

- 12.** (1) Whenever a military court convicts any person of any offence, it may, subject to the maximum penalty provided by law for that offence, the limits of its own penal or disciplinary jurisdiction, and sections 32, 92 and 93 of the Code, impose upon the convicted person a sentence consisting of one or more of— 40
 - (a) imprisonment;
 - (b) in the case of an officer— 45
 - (i) cashiering; or
 - (ii) dismissal from the South African National Defence Force;
 - (c) in the case of any other rank than that of an officer—
 - (i) discharge with ignominy from the South African National Defence Force; or 50
 - (ii) discharge from the South African National Defence Force;
 - (d) in the case of any other rank than that of an officer, detention for a period not exceeding two years;
 - (e) in the case of a private or equivalent rank, field punishment for a period not exceeding three months; 55
 - (f) in the case of an officer—
 - (i) reduction to any lower commissioned rank; or

- (ii) reversion from any acting or temporary rank to his or her substantive rank;
 - (g) in the case of any other rank than that of an officer—
 - (i) reduction to any lower rank, to any non-commissioned rank or to the ranks; or
 - (ii) reversion from any acting or temporary rank to his or her substantive rank;
 - (h) reduction in seniority in rank;
 - (i) a fine not exceeding R6 000,00;
 - (j) in the case of a private or equivalent rank, confinement to barracks for a period not exceeding 21 days;
 - (k) in the case of a private or equivalent rank, corrective punishment for a period not exceeding 21 days;
 - (l) in the case of any other rank than that of an officer, extra non-consecutive duties for a period not exceeding 21 days; or
 - (m) a reprimand:
- Provided that for the purposes of this Act and of the Code, each penalty provided for in this section shall be deemed to be less severe and less serious than the preceding penalty for the relevant rank.
- (2) A military court which has convicted an offender in terms of this Act may, if it is of the opinion that it is impractical to impose the punishment of detention or confinement to barracks, including where the offender is serving outside the Republic or on a ship which is at sea, in lieu of that punishment, sentence the offender to be deprived of his or her pay in an amount calculated at the rate of one-half day's pay for every day's detention or one-quarter day's pay for every day's confinement to barracks, which, but for this provision, the military court would have imposed upon the offender.
- (3) When a military court sentences any offender to detention or to imprisonment, it may order the operation of the whole or any portion of the sentence of detention, or the whole of the sentence of imprisonment to be suspended for a period not exceeding three years on the conditions that it may determine in the order.

CHAPTER 3

FUNCTIONS, SYSTEMS, STAFF, DIRECTION, CONTROL AND ACCOUNTABILITY OF MILITARY LEGAL SERVICES

Assignment of functions

13. (1) Only an appropriately qualified officer holding a degree in law and of a rank not below that of colonel or its equivalent, with not less than five years appropriate experience as a practising advocate or attorney of the High Court of South Africa, or five years experience in the administration of criminal justice or military justice, may be assigned to the function of—
- (a) Director: Military Judges;
 - (b) Director: Military Prosecutions;
 - (c) Director: Military Defence Counsel; or
 - (d) Director: Military Judicial Reviews.
- (2) Only an appropriately qualified officer holding a degree in law may be assigned to the function of—
- (a) senior military judge or military judge;
 - (b) review counsel;
 - (c) senior defence counsel or defence counsel; or
 - (d) senior prosecution counsel.
- (3) Only an appropriately qualified officer or other member who holds a degree in law or who has otherwise been trained in law may be assigned to the function of prosecution counsel.

Minister's powers in respect of assignment

14. (1) The Minister shall assign officers to the functions—
- (a) at the level of Director referred to in section 13(1); and
 - (b) of senior military judge or military judge referred to in section 13(2)(a),

on the recommendation of the Adjutant General: Provided that the Director: Military Judges shall be deemed to have been assigned the function of senior military judge.

(2) The Adjutant General shall not recommend any officer for assignment to any function referred to in subsection (1) unless, upon due and diligent enquiry, the Adjutant General is convinced that the officer is a fit and proper person of sound character who meets the requirements prescribed in this Act for such assignment. 5

(3) Subject to section 16 and the control of the Minister, the Adjutant General may assign any officer or member to any function—

- (a) referred to in section 13(2)(b), (c) and (d) or (3); or
- (b) attached to any approved military legal services post other than those referred to in this Act. 10

(4) Officers and members assigned to functions in terms of this section shall perform those functions in a manner which is consistent with properly given policy directives, but which is otherwise free from executive or command interference.

Period of assignment 15

15. An assignment in terms of this Chapter shall be for a fixed period or coupled to a specific deployment, operation or exercise.

Members to be assigned

16. The provisions of this Chapter shall not be interpreted to exclude members of the Permanent Force or the Reserve Force from being so assigned. 20

Removal from assignment

17. The Minister, acting upon the recommendation of the Adjutant General, may remove a person from the function assigned to him or her for the reason of that assignee's incapacity, incompetence or misconduct, or at his or her own written request.

Oath or affirmation 25

18. (1) Every person assigned a function in terms of this Chapter shall, before commencing to perform his or her duties in accordance with that assignment, take an oath or make an affirmation which shall be subscribed in the manner and form prescribed in a rule of the Code.

(2) Subject to subsection (3), every oath or affirmation contemplated in subsection (1), shall be taken or made before the Chairperson of a Court of Military Appeals or a serving senior military judge. 30

(3) An oath or affirmation by the appointed Adjutant General shall be taken or made before the chairperson of a Court of Military Appeals.

General duties of military judges and senior military judges 35

19. Every military judge and every senior military judge shall in the exercise of his or her judicial authority under this Act—

- (a) be independent and subject only to the Constitution and the law;
- (b) apply the Constitution and the law impartially and without fear, favour or prejudice; 40
- (c) conduct every trial and proceedings in a manner befitting a court of justice;
- (d) ensure that the accused, whether represented or unrepresented, does not suffer any disadvantage because of his or her position as such, or because of ignorance or incapacity to examine or cross-examine witnesses, or to make his or her defence clear and intelligible, or otherwise; 45
- (e) not express any opinion whatsoever on any matter relating to any trial or on the finding or any sentence except in the prescribed course of the proceedings or as may otherwise be required by law; and
- (f) be responsible for the safe custody of the record of proceedings and of every exhibit produced at the trial. 50

Military assessors

20. (1) When military assessors have to be appointed in terms of this Act, the Director: Military Judges, or an officer referred to in section 13(2)(a) appointed by him or her for that purpose, shall appoint, subject to section 30(24)(a)(ii), two assessors from the register of military assessors maintained by the local representative of the Adjutant General. 5

(2) When the assessors contemplated in subsection (1) are appointed, the person who does the appointment shall take into account—

- (a) the military, cultural and social environment of the accused;
- (b) the educational background of the accused; and 10
- (c) the nature and seriousness of the offence in respect of which the accused is to stand trial.

(3) Each register of military assessors contemplated in subsection (1) shall consist of the names and particulars of—

- (a) appropriately qualified officers; and 15
- (b) warrant officers,

who can be made available for such duty.

(4) A military assessor shall in the performance of his or her duties in terms of the Act—

- (a) be independent and subject only to the Constitution and the law; 20
- (b) be impartial and without fear, favour or prejudice;
- (c) participate in a trial or proceedings in a manner befitting a member of a court of justice; and
- (d) not express any opinion whatsoever on any matter relating to any trial or on the finding or any sentence except in the prescribed course of the proceedings 25 or as may otherwise be required by law.

(5) A military assessor shall only commence his or her functions at a trial after—

- (a) the accused's plea has been recorded; and
- (b) that assessor has taken an oath or made an affirmation in the manner and form prescribed in a rule of the Code, in open Court before the presiding judge. 30

(6) A military assessor participates in the proceedings of a military court on the following basis:

- (a) Any question of law arising for decision at the proceedings, and any question during such proceedings as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judge; 35
- (b) the presiding judge shall adjourn the proceedings regarding any matter or question referred to in paragraph (a) and shall sit alone for the hearing of such proceedings and the decision of such matter or question; and
- (c) in respect of all matters of fact, the decisions or findings of the majority of the military court shall be the decisions or findings of that court. 40

(7) The presiding judge shall after conclusion of the arguments by the prosecution counsel and the defence, but before judgement, explain to any military assessor assisting him or her any specific rule of evidence or any other matter that is relevant in respect of the evidence tendered to the court.

(8) The record of any proceedings where a presiding judge has been assisted by military assessors, shall— 45

- (a) in respect of the evidence adduced at the proceedings, include any explanation or instruction given to the assessors by the presiding judge in respect of any applicable rule of evidence or any other matter; and
- (b) in respect of the judgement, indicate clearly whether the findings in respect of 50 each material aspect of the evidence—
 - (i) are the unanimous findings of the members of the court; and
 - (ii) in the event of any member of the court making a finding of fact different to that of the other members, set out the reasons for that different finding.

- (9) A presiding judge may of his or her own accord or on application by the prosecution counsel or the defence, order the recusal of a military assessor from the proceedings if that judge is satisfied that—
- (a) the assessor has a personal interest in the proceedings;
 - (b) there are reasonable grounds for believing that there is— 5
 - (i) likely to be a conflict of interest as a result of the assessor's participation in the proceedings; or
 - (ii) a likelihood of bias on the part of the assessor; or
 - (c) the assessor is disqualified from serving as such for the reason that he or she— 10
 - (i) investigated the charge or any of the charges to be tried;
 - (ii) is the commanding officer of the accused, or is in the chain of command between the accused and his or her commanding officer;
 - (iii) is a prosecution counsel, defending counsel or a witness in the case; or
 - (iv) has personal knowledge of any material fact or evidence relating to the charge or any of the charges. 15
- (10) Before the power contemplated in subsection (9) is exercised—
- (a) the prosecution counsel and the defence shall be afforded the opportunity to apply for and to address arguments to the presiding judge on the desirability of the recusal of the assessor;
 - (b) an application and arguments contemplated in paragraph (a) and any decision in terms of subsection (9) shall be made in the absence of the assessor; and 20
 - (c) the presiding judge shall give reasons for any order made in respect of the recusal.
- (11) A military assessor may recuse himself or herself from the proceedings for any reason contemplated in subsection (9). 25
- (12) If an assessor dies, becomes unable to act, is absent for any reason, has been ordered to recuse himself or herself or has recused himself or herself at any stage before the completion of the proceedings, those proceedings shall continue before the remaining members of the military court and if the finding or decision of the presiding judge differs from that of the remaining assessor, the finding of that judge shall be the finding of that court. 30

General duties of prosecution and defence counsel

- 21.** (1) In addition to any other duty imposed by this Act, every prosecution counsel and every defence counsel at a trial by a military court shall—
- (a) assist the court in the administration of justice; 35
 - (b) treat the court and every member thereof with due respect;
 - (c) present their cases fairly;
 - (d) act in conformity with the provisions of this Act and, in relation to the examination, cross-examination and re-examination of witnesses, the practice of the civilian courts in the Republic; 40
 - (e) not refer to any matter which is not relevant to any charge preferred against the accused; and
 - (f) not state as a fact any matter which has not been proved or which is not intended to be proved in evidence.
- (2) In addition to the duties imposed by subsection (1), the prosecution counsel shall 45 bring before the court the whole of any transaction on which any charge is based and shall not take any unfair advantage of or withhold from the court any evidence in favour of the accused.
- (3) Where, in a trial preceded by a preliminary investigation, a prosecution counsel closes the case for the prosecution without having called all the witnesses contemplated 50 in section 30(8), (9), (10) and (11), that counsel shall advise the court that any witness not called by him or her is available to be called either by the court or the defence.

Functions, direction and control of military prosecution authority

- 22.** (1) Prosecutions in any military court shall be conducted, and the prosecuting authority shall be exercised, on behalf of the State. 55

(2) Where the available evidence against any person subject to the Code *prima facie* discloses the commission of an offence, that person shall be prosecuted unless the charge has been rendered non-justiciable, or has prescribed, or any other legal impediment renders the charge or person incapable of being tried, either by a military court or at all.

(3) The Director: Military Prosecutions— 5

(a) shall institute and conduct prosecutions on behalf of the State;

(b) shall carry out all necessary functions incidental to instituting and conducting prosecutions, including the determination of whether or not investigations are complete; and

(c) may discontinue prosecutions. 10

(4) An assigned senior prosecution counsel shall, subject to the functional control and the directions of the Director: Military Prosecutions, exercise the powers referred to in subsection (3), in respect of the area of jurisdiction for or field of responsibility to which he or she has been appointed, and in respect of any offence not excluded, either generally or in any specific case, from his or her competence by the Director: Military Prosecutions. 15

(5) An assigned prosecution counsel and any adjutant of a unit or any prosecutor appointed under any rule of the Code, shall exercise the powers referred to in subsection (3), subject to the control and directions of the relevant assigned senior prosecution counsel: Provided that such senior prosecution counsel may withdraw, limit or regulate such authority and upon doing so shall forthwith report that action, together with the reasons therefor, to the Director: Military Prosecutions. 20

(6) The Director: Military Prosecutions shall, subject to the approval of the Chief of the South African National Defence Force and after consultation with the Secretary of Defence, determine prosecution policy and issue policy directives which shall be observed in the prosecution process, and shall exercise the powers and perform the duties in respect of prosecution policy that may be determined in this Act or any other law. 25

Right to legal representation

23. Every person subject to the Code has the right— 30

(a) to legal representation of own choice at his or her own expense, or to be assigned military defence counsel at State expense when he or she is to appear before or to be tried by a Court of a Military Judge or Senior Military Judge; and

(b) to consult with his or her legal representative or with a military defence counsel prior to making any election to be heard at a disciplinary hearing. 35

Functions, direction and control of military legal defence counsel authority

24. (1) The defence counsel authority—

(a) may represent persons subject to the Code against whom prosecutions are being instituted or conducted in a military court referred to in section 6(1)(b) and (c), or who have been convicted by any military court and who still have a remedy or recourse provided for in this Act; 40

(b) shall perform any necessary duty incidental to such representation; and

(c) may discontinue representation for sound reasons and, during a trial, with the leave of the court. 45

(2) An assigned senior defence counsel shall, subject to the functional control and the directions of the Director: Military Defence Counsel, exercise the powers referred to in subsection (1) in respect of the area of jurisdiction for or field of responsibility to which he or she has been appointed, and in respect of any offence not excluded, either generally or in any specific case, from his or her competence by the Director: Military Defence Counsel. 50

(3) An assigned defence counsel shall exercise the powers referred to in subsection

(1) subject to the control and directions of the relevant assigned senior defence counsel: Provided that such senior defence counsel may withdraw, limit or regulate such authority and upon doing so shall forthwith report that action, together with the reasons therefor, to the Director: Military Defence Counsel.

(4) The Director: Military Defence Counsel shall after consultation with the assigned senior defence counsel and with the concurrence of the chairperson of the Court of Military Appeals, determine defence counsel policy and issue policy directives which shall be observed in the defence counsel process, and shall exercise the powers and perform the duties in respect of defence representation and defence counsel policy that may be determined in this Act or any other law.

Right to review of trial

25. Every person subject to the Code who is convicted and sentenced by a military court has the right to the automatic, speedy and competent review of the proceedings of his or her trial to ensure that any proceedings, finding, sentence or order is either valid, regular, fair and appropriate, or remedied.

Functions, direction and control of military review authority

26. (1) Every review authority shall—

- (a) review proceedings in accordance with this Act;
- (b) perform any necessary duty incidental to such review;
- (c) draw attention to any matter requiring comment; and
- (d) recommend to the appropriate authority the taking of any remedial action required.

(2) A review counsel shall exercise the review powers in respect of the area of jurisdiction for or field of responsibility to which he or she has been appointed by the Adjutant General.

(3) The Director: Military Judicial Reviews shall—

- (a) have the responsibility and authority to ensure that review counsel perform their functions competently;
- (b) in consultation with the chairperson of the Court of Military Appeals, determine review counsel policy and issue policy directives which shall be observed in the review process; and
- (c) exercise the powers and perform the duties in respect of reviews and review policy that may be determined in this Act or any other law.

Appointment of Adjutant General

27. The Minister shall appoint an appropriately qualified serving officer of the South African National Defence Force who has been admitted or has been qualified for admission as an advocate or attorney of the High Court of South Africa for not less than seven years and with not less than seven year's experience in the administration of criminal or military justice, as Adjutant General.

Functions of Adjutant General

28. (1) The Adjutant General shall—

- (a) be responsible for the overall management, promotion, facilitation and co-ordination of activities in order to ensure the effective administration of military justice and the military legal services; and
- (b) annually, not later than three months after the end of the preceding financial year, submit to the Minister a written report on all his or her functions during that year.

(2) Any power or duty that a local representative of the Adjutant General may exercise or perform in terms of this Act—

- (a) shall be exercised or performed under the control of the Adjutant General; and
- (b) may be exercised or performed by the Adjutant General.

CHAPTER 4

PRE-TRIAL PROCEDURES

Arraignment

29. (1) Any person arrested in terms of section 52 or 147(2) of the Code shall be brought before a military court within two days after such arrest: Provided that if the period of two days expires on a Saturday, Sunday or public holiday or before four o'clock in the afternoon on the next day not being a Saturday, Sunday or public holiday, it shall be deemed to expire at four o'clock in the afternoon on such next day. 5

(2) Any person warned in terms of a rule of the Code in respect of an offence shall be brought before a military court as soon as possible after receipt by the adjutant of that person's unit or by a prosecution counsel of the written signed account of offence prescribed in a rule of the Code. 10

(3) When a person is brought in terms of this section before a military court other than a disciplinary hearing, that court—

(a) shall ascertain whether or not the accused is in custody; 15

(b) shall ascertain what charge against that person is being brought or investigated;

(c) shall ensure that that person understands his or her rights in respect of legal representation and a disciplinary hearing;

(d) may, for sound reasons, including the need to complete the case or the investigation of the case, remand the case from time to time: Provided that— 20

(i) the court shall release an arrested person from detention if the interests of justice permit such release, and may determine reasonable conditions for such release;

(ii) in every case where a person is remanded in custody, the court shall give full reasons, which shall be recorded, for that decision to that person; and 25

(iii) in every case where a person is remanded in custody, such remand shall not exceed seven days at any one time;

(e) may direct that a preliminary investigation be held in the case;

(f) shall in every case where the offence charged is not a military disciplinary offence cognisable by a disciplinary hearing, direct that a preliminary investigation be held; 30

(g) may, subject to paragraph (f), try that person either summarily, or upon completion of a preliminary investigation, if that court has jurisdiction to do so; and 35

(h) may refer the case to another military court with jurisdiction in the matter.

(4) When a person is brought before a commanding officer, that commanding officer—

(a) shall, subject to the changes required by the context, have the powers and duties referred to in subsection (3); 40

(b) may hear that person, either directly or upon completion of a preliminary investigation, if that person has elected to be heard at a disciplinary hearing; and

(c) may convict and impose a penalty on a person who has elected to be heard at a disciplinary hearing and who has tendered a plea of guilty to the charge. 45

(5) A person subject to the Code of a rank not higher than staff sergeant or its equivalent rank may, in respect of a charge relating to a military disciplinary offence on which that person intends to tender a plea of guilty and be so heard without legal representation, elect to be dealt with in terms of subsection 4(b) and (c).

(6) The certification by an accused of his or her election to be heard by a commanding officer, upon having taken or waived the taking of legal advice, and of the decision to tender such plea of guilty, shall be in writing and witnessed by an officer other than the commanding officer, while the accused is not in the presence of the commanding officer. 50

(7) If the commanding officer considers the proceedings to be inappropriate for any reason, including the possible existence of a valid defence, the commanding officer shall strike out the finding, and shall refer the case to be tried afresh by another military court with jurisdiction in the matter.

(8) If an accused is not tried, heard or otherwise dealt with within 14 days after the date of the first remand in terms of this section and such accused is in custody, the commanding officer or, in the case of an accused who was brought directly before another military court, the appropriate senior prosecution counsel, shall report the fact of the delay, as well as the reasons therefor, to the local representative of the Adjutant General.

(9) When a person is brought before a military court, that person's first appearance shall interrupt and absolutely bar the further passing of time in respect of the periods prescribed in sections 58 and 59(1)(b) and any rule of the Code.

Preliminary investigations

30. (1) If a military court directs that a preliminary investigation be held in respect of allegations made against a person subject to the Code, the presiding judge or commanding officer may—

- (a) himself or herself record the evidence available in respect of such allegations or any other allegation against that person that may be disclosed in the evidence; or
- (b) appoint an officer holding a degree in law or otherwise trained in law as recording officer.

(2) If a recording officer cannot for any reason complete a preliminary investigation, the presiding judge or commanding officer who appointed that recording officer, may appoint another recording officer to continue with the recording of the evidence.

(3) The proceedings at a preliminary investigation shall be held in private in the presence of the accused and—

- (a) a prosecution counsel;
- (b) the accused's legal representative of choice, or, if in the opinion of the relevant senior defence counsel the complexities of the case warrant it, the assigned defence counsel; and
- (c) where necessary, an escort, an operator, an interpreter, any witness giving evidence and any other official that may be necessary for the proper conduct of the proceedings.

(4) The presiding judge, commanding officer or recording officer, as the case may be, shall, before any evidence is recorded in a preliminary investigation, inform the accused—

- (a) of the offence or offences in respect of which the preliminary investigation is to be held;
- (b) that if the evidence discloses any other offence, that offence will also be inquired into during the proceedings;
- (c) of the investigatory and disclosure nature of the proceedings;
- (d) that the proceedings will not constitute a trial; and
- (e) that subject to subsections (10) and (11), the accused has the right to cross-examine witnesses, to give evidence or to make an unsworn statement, and to call witnesses or to remain silent.

(5) Subject to subsections (10) and (11), the evidence of every witness called at a preliminary investigation shall be given *viva voce* and on oath.

(6) The presiding judge, commanding officer or recording officer may administer to any witness, interpreter, operator or shorthand writer or other necessary official that may be required, the appropriate oath in the manner and form prescribed in a rule of the Code.

(7) The evidence taken at a preliminary investigation shall be recorded in writing, in the narrative or in the form of question and answer or partly in the one and partly in the other, or by mechanical or electronic means and by or under the supervision of the presiding judge, commanding officer or recording officer.

(8) When a preliminary investigation is held in respect of treason, murder, rape or culpable homicide, committed outside the Republic, or a contravention of section 4 or 5 of the Code or any offence punishable by imprisonment exceeding a period of 10 years, the prosecution counsel shall, subject to subsection (10), lead the evidence of every

witness called by him or her and any witness may be cross-examined by the accused and may thereafter be re-examined by the prosecution counsel in relation to any evidence given by that witness under cross-examination and may at any stage of the proceedings be recalled by the presiding judge, commanding officer or recording officer for the purpose of being further examined or cross-examined, as the case may be. 5

(9) Any evidence recorded in writing shall be read over to the witness in question who may cause the amendments or additions to be made thereto that the witness may deem necessary and the accused and the prosecution counsel may question the witness on any such amendment or addition, whereupon the witness and the presiding judge, commanding officer or recording officer shall sign the recorded evidence and initial any amendment or addition thus made: Provided that the provisions of this subsection shall not apply where the evidence is recorded by mechanical or electronic means and it appears clearly from the records that the witness was properly sworn in as contemplated in subsection (5). 10

(10) When any witness cannot by reason of illness or the exigencies of the service or for any other reason which the presiding judge, commanding officer or recording officer deems fit, attend a preliminary investigation to give evidence, a sworn statement purporting to have been signed by such person may be read over to the accused and shall thereupon form part of the record of the proceedings of the preliminary investigation: Provided that the inability of the accused to exercise the rights in terms of subsection (8) which would have accrued to the accused if such person had been called to give evidence shall not be taken or construed in any subsequent proceedings to the prejudice of the accused. 15 20

(11) When a preliminary investigation is held in respect of any offence other than an offence referred to in subsection (8), the prosecution counsel shall — 25

- (a) read over to the accused the particulars of each witness and—
 - (i) a summary of the available evidence from whichever sources which each such witness will give; or
 - (ii) a signed statement of a witness; or
- (b) call witnesses to give evidence *viva voce* and under oath, in which event subsections (8), (9) and (10) shall apply, subject to the necessary changes. 30

(12) The presiding judge, commanding officer or recording officer shall, after recording the evidence of the witnesses led by the prosecution counsel and taking charge of the sworn statements, signed statements and summaries of evidence read over to the accused— 35

- (a) call upon the prosecution counsel to read over to the accused the preliminary charges framed by that counsel in relation to the evidence disclosed; and
- (b) explain to the accused—
 - (i) the accused's right to call witnesses and to give evidence, or to make an unsworn statement, or to remain silent; 40
 - (ii) that the accused may voluntarily decide which of those rights he or she prefers to exercise; and
 - (iii) that, if the accused elects to give evidence or to make a statement, that evidence or statement will be recorded and may be used in evidence at any trial involving the accused which may follow. 45

(13) The presiding judge, commanding officer or recording officer shall record the fact that the accused has been informed and cautioned in terms of subsection (12)(b).

(14) The presiding judge, commanding officer or recording officer shall record the evidence given by any witness called by the accused, or by the accused, or any unsworn statement made by the accused. 50

(15) Any witness called by the accused, and the accused if he or she elects to give evidence, may be cross-examined by the prosecution counsel, and thereafter any such witness may be re-examined by the accused, and the accused may give the further evidence, in relation to the accused's evidence under such examination, that the accused may deem necessary. 55

(16) When an accused makes an unsworn statement, the recording officer may put questions to the accused that may serve to elucidate any matter raised in the statement.

(17) Subject to subsection 12(b)(i) and the changes required by the context, the

provisions of subsections (5), (6), (7), (8), (9) and (10) shall apply to the evidence given by any witness called by the accused and any evidence given by the accused.

(18) Any unsworn statement made by an accused shall be read back and the accused may cause the amendments or additions to be made thereto that may be deemed necessary by the accused and the recorded statement and such amendments or additions shall, subject to subsection (9), be signed by the accused and the recording officer. 5

(19) Upon completion of a preliminary investigation, the presiding judge, commanding officer or recording officer shall sign and date the record of the proceedings or a certified copy of the evidence recorded by mechanical or electronic means and deliver them without delay to the relevant prosecution counsel, and the recording officer shall inform the presiding judge or commanding officer who directed the investigation to be held of the completion of the proceedings. 10

(20) When any person subject to this Code is to be joined with an accused against whom a preliminary investigation is being or has been held, the recording officer shall inform such person in accordance with the provisions of sub-section (4), read over to the accused the evidence recorded up to the time of such joinder and, if so requested, recall any witness who has given evidence *viva voce* for the purpose of being cross-examined. 15

(21) A recording officer shall, whenever it appears that an accused in respect of whom the preliminary investigation is being held is of unsound mind, report to the presiding judge or commanding officer who appointed the recording officer and that presiding judge or commanding officer may thereupon take the steps for the medical or other examination of the accused that he or she may deem fit. 20

(22) Any evidence given or statement made by an accused at a preliminary investigation subsequent to the caution referred to in subsection (12) shall, if it purports to be signed in accordance with subsection (18) or (19), or recorded by mechanical or electronic means in terms of subsection (9) or (11), be admissible in evidence against the accused. 25

(23) When a preliminary investigation has been held in respect of allegations made against any accused, that accused shall not have the right to object to any charge preferred against that accused at his or her later trial before any military court on the ground that such charge was not preferred against him or her at the preliminary investigation or that it differs in any respect from the charge read over to that accused at such investigation. 30

(24) Upon the completion of a preliminary investigation, the presiding judge, commanding officer or recording officer shall— 35

- (a) inform the accused of the accused's right to elect—
 - (i) to be tried by a military court consisting of a presiding judge and two assessors; and
 - (ii) that one of the assessors shall be a warrant officer; and
- (b) explain section 20(1), (2), (3) and (4) to the accused. 40

Confinement of arrested persons

31. The confinement of arrested persons shall be regulated as prescribed by a rule of the Code.

Trial Scheduling and notification of trial dates and charges

32. (1) In this section— 45

- (a) “military judge” means a military judge or senior military judge; and
- (b) “particulars” include the force number, rank, full names, arm of service, division, corps and unit of the indicated accused, presiding military judge, military assessors and other officers of the court.

(2) The local representative of the Adjutant General shall, in consultation with the Director: Military Judges or the military judges in question, as the case may be, plan and schedule the availability of military judges and military assessors within his or her area or field of responsibility, in order to promote speedy, effective dispensing of justice and certainty with regard to access to military courts. 50

(3) Every case to be tried by a military judge where a preliminary investigation has been completed, shall be placed on the roll by means of a written notice of enrolment 55

issued by the local representative of the Adjutant General or an officer under the command of that local representative, duly authorised to sign and issue notices of enrolment in the name and on behalf of that representative.

- (4) A notice of enrolment contemplated in subsection (3) shall state the particulars—
- (a) of the accused to be tried; 5
 - (b) of the date, time and place for the commencement of the military court's sitting;
 - (c) and the qualifications of—
 - (i) the presiding military judge;
 - (ii) the waiting or relief military judge to be called upon to preside in the event of the non-availability or recusal of the military judge scheduled to preside; 10
 - (iii) the defence counsel or other legal representative; and
 - (iv) the prosecution counsel; and
 - (d) where applicable, of the military assessors. 15

(5) No notice of enrolment is necessary to authorise a military court contemplated in section 6(1)(b) and (c) to summarily try any person brought before that court for trial on a charge sheet signed by or on behalf of the appropriate prosecution counsel where the accused and the offences disclosed in the charge sheet are within the jurisdiction of a commanding officer: Provided that the local representative of the Adjutant General shall through the senior defence counsel ensure that a defence counsel is made available to consult with, advise and appear for any accused thus arraigned, unless such accused elects not to use the services of such defence counsel. 20

CHAPTER 5

TRIAL PROCEDURES 25

Trial procedures

33. (1) Every trial or hearing conducted by a military court shall be conducted, subject to the changes required by the context, in accordance with the provisions of the Code regulating the conducting of summary trials: Provided that—

- (a) this section shall not be interpreted to authorise the imposition of the punishment of detention at a disciplinary hearing; 30
- (b) no limitation of penal jurisdiction shall apply to a Court of a Military Judge or of a Senior Military Judge; and
- (c) the proceedings may be recorded by mechanical or electronic means.

(2) When a Court of a Military Judge or a Senior Military Judge convicts a person of an offence, and— 35

- (a) it appears from that person's record of service that the execution of a sentence or portion of a sentence imposed upon that person, on a date prior to such conviction, was suspended in terms of this Act or the Code on conditions stipulated in the said record of service; 40
- (b) such sentence and the conditions of suspension have been admitted by that person or the court finds that the sentence was in fact imposed and suspended on the said conditions; and
- (c) that court is with due regard to the evidence led in the case before it and any representations, satisfied that— 45
 - (i) a condition of suspension has not been complied with by that person; and
 - (ii) that condition of suspension could reasonably have been complied with by that person,

the court may order that the person be committed to serve that sentence or unexpired portion thereof: Provided that where a person has been so committed, such sentence or portion of a sentence shall commence after expiration of any other sentence imposed upon him or her at that time or which he or she may then be serving. 50

(3) Every trial conducted by a military court shall be conducted in open court: Provided that such military court may—

- (a) if an accused so conducts himself or herself at his or her trial that the continuance of the proceedings in his or her presence is impracticable, the military court may after due warning to the accused, order his or her removal and continue the trial in his or her absence;
- (b) at any time order any witness, whether for the prosecution or the defence, to leave the courtroom; 5
- (c) upon the commencement of or during the course of a trial order that persons other than the accused, the accused's counsel and the necessary court officials, or that juveniles or other classes of persons, shall not be permitted to be present at the trial, if and to the extent that it is in the opinion of the court necessary in the interest of justice, public safety, the administration of justice, national security, or to protect the identity of juveniles or the privacy of any party other than the accused; and 10
- (d) only announce its judgement or finding as well as any sentence, in open court.
- (4) A military court may adjourn from time to time and from place to place, and if the accused is not released from custody where the adjournment is for a period longer than 14 days, the senior prosecution counsel in question shall immediately report the fact of the delay, as well as the reasons therefor, to the local representative of the Adjutant General. 15
- (5) A military court may adjourn to view any place or any object which cannot conveniently be brought to the court, and such viewing shall be in the presence of the accused, his or her counsel and the prosecution counsel. 20
- (6) When a military court adjourns—
 - (a) that court shall release an arrested person from detention if the interests of justice permit such release and may determine reasonable conditions for that release; and 25
 - (b) in a case where a person is remanded in custody—
 - (i) full reasons shall be given for the decision, communicated to that person, and recorded; and
 - (ii) such remand shall not exceed 14 days at any one time. 30
- (7) When a military court has convicted an accused, it shall, after announcing the sentence, inform the accused of—
 - (a) the review authority to whom the record of proceedings will be submitted for review and of the accused's right to submit written representations to that authority within the time limits prescribed in this Act or in a rule of the Code; 35
 - (b) his or her right to approach a Court of Military Appeals for relief; and
 - (c) his or her right to approach the High Court for relief at his or her own cost.

CHAPTER 6

POST-TRIAL PROCEDURES

Appeal and Review 40

34. (1) Whereas every acquittal or discharge of an accused shall be final, every finding of guilty, any sentence imposed and every order made by a military court shall be subject to the process of review.

(2) Every sentence of imprisonment, including a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge shall be reviewed by a Court of Military Appeals and shall not be executed until that review has been completed. 45

(3) Every sentence other than a sentence referred to in subsection (2) shall be reviewed by a review counsel who may uphold the finding and the sentence: Provided that, if the review counsel is of the opinion that the finding or sentence should not be upheld or on the request of the Director: Military Judicial Reviews, that counsel shall submit the record or the requested record of the proceedings, together with his or her views on the case, to the Director: Military Judicial Reviews, who may thereupon, subject to the changes required by the context, exercise in respect of those proceedings, 50

the powers conferred on a Court of Military Appeals by this Act, or refer the case to a Court of Military Appeals as if it were a case to which subsection (2) applies.

(4) When the Director: Military Judicial Review or a Court of Military Appeals, exercises a power referred to in section 8(1), he, she or it shall furnish the reasons therefor in writing to the Adjutant General who shall ensure that every affected party is notified thereof. 5

(5) An offender may within the time limits and in the manner prescribed in a rule of the Code, apply for the review of the proceedings of his or her case by a Court of Military Appeals.

(6) When an offender has been convicted by a military court, the presiding judge or commanding officer shall as soon as possible after the completion of the trial submit the record of the trial's proceedings to a review counsel or, where subsection (2) is applicable, to the Director: Military Judicial Reviews. 10

(7) A convicted person may as soon as possible, but not later than 14 days after the announcement of sentence, furnish the relevant review counsel or the Director: Military Judicial Reviews with the representations in writing concerning the facts or law of the case, or the validity or justice of any finding, sentence or order, that he or she may wish to make, and those representations shall together with the record of proceedings be duly considered by every review authority to which the record of proceedings is subsequently submitted for review. 15 20

(8) Where the period referred to in subsection (7) appears to him or her to be impractical, the local representative of the Adjutant General may on application authorise an extension of the period of up to 28 days, and on granting any such extension shall ensure that every affected party is notified of the extension.

(9) Subject to subsections (10) and (11), every accused convicted and sentenced by a military court shall be detained in custody pending the review of his or her case. 25

(10) An accused—

(a) who has been sentenced by a military court—

- (i) to a reprimand;
- (ii) to extra duties; 30
- (iii) to corrective punishment;
- (iv) to confinement to barracks;
- (v) save as provided in paragraph (b), to a fine;
- (vi) to reversion from any acting or temporary rank to his or her substantive rank; 35
- (vii) to reduction to any lower rank, to a non-commissioned rank, or to the ranks;
- (viii) to reduction in seniority in rank; or
- (ix) to imprisonment or detention which is suspended in its entirety, shall be released from custody immediately after the announcement of the sentence; or 40

(b) whose trial has been proceeded with or commenced at a time when he or she was no longer subject to the Code shall, if he or she is sentenced to a fine, be released from custody upon payment of such fine.

(11) The local representative of the Adjutant General may without prejudice to re-arrest on application direct that, pending the completion of any review, the accused be released from custody on the conditions that he or she may determine: Provided that where an accused fails or refuses to attend the promulgation of the findings, sentence and orders pronounced, imposed or made in his or her case and upheld during such review, the accused shall be re-arrested and detained in custody where the sentence in question includes any penalty authorised by section 12(1)(a), (b), (c) or (d). 45 50

(12) The provisions of section 118(1) and (2) of the Code shall not be interpreted to authorise the inclusion, when calculating the period of any sentence entailing the deprivation of liberty, of any period on release in terms of subsection (10) or (11) or of any period of absence, with or without leave, subsequent to the announcement of the sentence. 55

Promulgation

35. Every finding, whether a conviction or an acquittal, every sentence imposed, and every order made by a military court shall be promulgated in a manner authorised by, and within the time constraints and limitations prescribed in a rule of the Code.

Bringing into operation of suspended sentences after trial

5

36. (1) When the operation of a sentence or portion of a sentence imposed upon an offender by a military court has been suspended in terms of this Act or the Code on conditions other than conditions precluding the commission of or conviction for an offence, and any complaint or allegation that the offender has not fulfilled a condition of the suspension of the sentence, is thereafter made, the offender shall be brought before the Court of a Military Judge or a Senior Military Judge by an assigned prosecution counsel. 10

(2) The military court to which a complaint or allegation contemplated in subsection (1) has been referred, shall, if in his or her opinion the failure in question could reasonably justify the enforcement of the sentence or the unexpired portion thereof, investigate such complaint or allegation. 15

(3) The military court contemplated in subsection (2) shall in the presence of the offender and his or her legal representative, if any, hear and record evidence concerning the failure in question, including the evidence that may be tendered by the offender.

(4) Any witness called by the prosecution counsel in question may be cross-examined by the defence and thereafter re-examined by that counsel, and the offender, if he or she elects to give evidence, and any witness called by the offender, may be questioned by that counsel and may thereafter, in the case of the offender, give the further evidence that he or she may deem necessary, or in the case of a witness called by him or her, be re-examined concerning any evidence given under examination, by that counsel. 20 25

(5) The evidence given in the course of an investigation in terms of this section shall be given *viva voce* and on oath and for that purpose every presiding judge may administer the appropriate oath prescribed in a rule of the Code to any person called to give evidence or to interpret such evidence. 30

(6) The court may, if it is satisfied after consideration of the evidence that the offender has not fulfilled a condition of the suspension of the sentence which could reasonably have been fulfilled, order that the offender be committed to serve the sentence or the unexpired portion thereof

Warrants of committal or release

35

37. Any warrant for the committal to or release from any prison, gaol, detention barracks, police cell or lock-up in the Republic of any person charged with an offence or committed or sentenced under this Act, may be signed by the relevant presiding military judge or by the commanding officer or adjutant of such person, the Adjutant General or the local representative of the Adjutant General, or the court or review authority which suspended the sentence. 40

CHAPTER 7

GENERAL PROVISIONS

Privilege

38. Every privilege which in law attaches to communications between any practising advocate or attorney and such practitioner's client, shall apply to communications between any member of the military legal services law staff and such person's individual or departmental client. 45

Language

39. Any accused in a military trial is entitled to have the proceedings interpreted into a language preferred by the accused. 50

Administration

40. (1) The Adjutant General may determine longer working hours or additional working days with a view to efficient completion of cases by military courts.

(2) Despite the provisions of any other law, every determination contemplated in subsection (1) shall be deemed to be a valid authorisation for the payment of prescribed overtime remuneration to the personnel affected thereby. 5

(3) For the purposes of any enquiry contemplated in section 14(2), the Adjutant General shall be entitled to require the consent of the person in question in order to obtain any and all information pertaining to his or her financial status, educational qualification and competency from any department of State, financial institution, educational institution or any other source which the person may indicate. 10

(4) Refusal to give the consent contemplated in subsection (3) may disqualify the applicant or member for appointment to such office.

Delegation of powers

41. (1) The Adjutant General may, either generally or subject to conditions, in writing delegate to any member or person any power vested in him or her by or under this Act or the Code and may revoke or amend such delegation at any time. 15

(2) A delegation in terms of this section does not prevent the exercise of a delegated power by the Adjutant General.

Suspension awaiting trial or appeal

20

42. (1) When in the opinion of the Chief of the South African National Defence Force, it will be in the interest of the good governance or reputation of the South African National Defence Force, or in the interest of justice, he or she may order any person subject to the Code not to return to duty during any period subsequent to that person—

(a) appearing as an accused before any civil court or military court; or 25

(b) having been convicted by any civil court or military court, if that person intends appealing against the conviction or applying for the review of the case, pending the conclusion of the trial, appeal or review, as the case may be.

(2) The Chief of the South African National Defence Force shall give written notice of his or her intention to consider exercising the power contemplated in subsection (1) to the affected person and shall allow that person to respond in writing within 24 hours, or any longer period that the Chief may determine, of that person's receipt of such notice. 30

Repeal and amendment of laws

43. The provisions of the Defence Act, 1957, and the Code, set out— 35

(a) in Schedule 1, are hereby repealed; and

(b) in Schedule 2, are hereby amended to the extent indicated in the third column thereof.

Transitional provisions

44. (1) Every Council of Review established and constituted by the Minister of Defence under section 145 of the Code prior to the commencement of this Act, shall be deemed to have been constituted and established as a Court of Military Appeals under this Act. 40

(2) All trial and disciplinary proceedings which immediately before the commencement of this Act were underway or pending before a court martial or a commanding officer shall be terminated and may start afresh under the control of the relevant prosecution counsel in accordance with the provisions of this Act. 45

(3) All review and appeal processes which immediately before the commencement of this Act were underway or pending shall proceed in accordance with the provisions of this Act. 50

(4) Notwithstanding the provisions of section 104(3) and (4) of the Defence Act, 1957, the Minister may—

- (a) by notice in the *Gazette*, make, alter or repeal the rules contemplated in the said provisions, so that the said rules—
 - (i) shall not be in conflict with the provisions of this Act; and 5
 - (ii) shall provide for matters contemplated in this Act to be prescribed in those rules; and
- (b) make regulations regarding, generally, all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this Act. 10

Short Title

45. This Act shall be called the Military Discipline Supplementary Measures Act, 1999, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE 1
REPEALED PROVISIONS
(Section 43(a))

Number and year of law	Short Title	Extent of repeal
Act No. 44 of 1957	Defence Act, 1957	Section 107
	First Schedule to the Defence Act, 1957	Sections 2, 60A, 61, 62, 63, 64, 65, 65A, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 83, 86, 87, 90, 91, 93(1), 94, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 109, 110, 111, 112, 115, 117, 145 and 146.

SCHEDULE 2
AMENDMENT OF LAWS
(Section 43(b))

Number and year of law	Short Title	Extent of amendment
Act No. 44 of 1957	Defence Act, 1957	Amendment of section 1 by the substitution in subsection (1) for the definition of “military court” of the following definition: “ ‘military court’ means a military court as defined in section 1 of the <u>Military Discipline Supplementary Measures Act, 1999</u> ;”.
	First Schedule to the Defence Act, 1957.	Amendment of section 1— (a) by the substitution in subsection (1) for the definition of defending officer of the following definition: “ ‘defending officer’ means a defence counsel in terms of the <u>Military Discipline Measures Act, 1999</u> ;”; (b) by the substitution in subsection (1) for the definition of “military court” of the following definition: “ ‘military court’ means a military court as defined in section 1 of the <u>Military Discipline Supplementary Measures Act, 1999</u> ;” and (c) by the deletion of the definitions of “board of review”, “convening authority”, “council of review” and “court martial”. 2. Amendment of section 47 by the substitution for the expression “ninety-one” of the expression “twelve of the <u>Military Discipline Supplementary Measures Act, 1999</u> ,”. 3. Amendment of section 53 by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: “Whenever it appears to a [convening authority] local representative of the Adjutant General from information contained in at least one sworn statement that there are reasonable grounds for suspecting that there is upon any person [under his command] who is subject to this Code, or upon or at any premises, place, vehicle, vessel, aircraft or receptacle of whatever nature belonging to or occupied by or under the control of the South African <u>National Defence Force</u> [within the area in which he exercises command]—”.

Number and year of law	Short Title	Extent of amendment
		<p>4. Substitution for section 69 of the following section:</p> <p>“Trial of more than one person</p> <p>69. Where two or more persons are charged jointly with the same offence, the joint trial of such persons shall be conducted by the military court which have jurisdiction to try the most senior in rank of such persons.”.</p> <p>5. Substitution for section 89 of the following section:</p> <p>“How finding and sentence of military court to be arrived at under certain circumstances</p> <p>89. The finding, sentence or any other decision of a Court of Military Appeals as defined in section (1) of the Military Discipline Supplementary Measures Act, 1999, and a Court of Senior Military Judges composed in terms of section 9(3) of the said Act, shall be determined by the vote of the majority of its members, all of whom shall vote.</p> <p>6. Amendment of section 107 by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:</p> <p>“A [confirming or reviewing authority, a board of review or the council of] review authority may direct a military court [martial] to give written reasons for any ruling or finding of such court, which reasons shall show—”.</p> <p>7. Substitution for section 116 of the following section:</p> <p>“Reviewed finding or sentence deemed to be finding or sentence of military court</p> <p>116. Any finding, [or] sentence or order of a military court as [confirmed] upheld, substituted or varied by a [confirming or reviewing authority or the council of] review authority, shall be deemed to be the finding of the court which passed the original sentence or made the original finding or order.”.</p>

Number and year of law	Short Title	Extent of amendment
		<p>8. Amendment of section 121 by the substitution in subsection (4) for the expression “general court martial” of the expression “Court of a Senior Military Judge”.</p> <p>9. Amendment of section 128 by the substitution in paragraph (j) of subsection (1) for the expression “Adjutant General” of the expression “Chief of the South African National Defence Force”.</p> <p>10. Amendment of sections 1, 34, 35, 47, 82(3), 85, 88, 92, 107(2) and (3) and 135(4) by the substitution for the expression “court martial” wherever it occurs, of the expression “military court”.</p>

MEMORANDUM ON THE OBJECTS OF THE MILITARY DISCIPLINE SUPPLEMENTARY MEASURES BILL, 1999

1. The main object of the Military Discipline Supplementary Measures Bill, 1999, is to create a new system of military courts and to provide for new means and measures for the better promotion of military discipline.

2. The Bill seeks to give effect to the following broad principles:

- (a) That every accused has the right to legal representation;
- (b) that every accused has the right to be tried by an appropriately qualified presiding officer and military assessors;
- (c) that every accused has the right to a speedy trial;
- (d) that every accused has the right to be informed promptly of the reasons for being detained;
- (e) that every accused has the right to due process;
- (f) that additional military courts be utilised to maintain military discipline;
- (g) that all accused are tried by military courts, presided over by an appropriately qualified officer, unless an accused assents to be brought before a commanding officer's disciplinary hearing;
- (h) that the key role players in the military justice process are appropriately qualified;
- (i) that the charges to be brought are determined by a legally qualified prosecutor;
- (j) that a review procedure, free of possible interference by line commanders, exists; and
- (k) that the judgements of a Court of Military Appeals are binding on all military courts.

3. In terms of the Bill an offender may be heard by a Commanding Officer's Disciplinary Hearing without legal representation only upon the choice of that offender. The offender retains the right to consult with a legal representative before assenting to such a hearing. The jurisdiction of that forum is restricted to disciplinary offences, and is further restricted with regard to the rank of the offender and the severity of punishment. It is not empowered to impose any punishment depriving the liberty of an offender by means of imprisonment or detention.

4. The Bill provides for Courts of a Military Judge and a Senior Military Judge. A Court of a Military Judge may only try persons below the rank of major and may not impose a sentence of imprisonment exceeding a period of two years. Courts of Senior Military Judges are not empowered to try murder, treason, rape or culpable homicide offences committed within the Republic, which offences will be dealt with by the normal criminal courts of the Republic. Any offence for which imprisonment in excess of 10 years may be imposed, has to be tried by a full bench of three Senior Military Judges.

5. All personnel involved in the process of the administration of justice shall be appropriately qualified, hold a degree in law or otherwise trained in law to properly execute their assigned functions.

6. The Department of Defence is of the opinion that the arraignment, detention and pre-trial procedures are in accordance with the principles contained in the Constitution.

7. The following other Departments and bodies were consulted:

- (a) The Office of the President;
- (b) the Ministry of Justice; and
- (c) the State Law Advisers.

