

EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (SERVICE COURT RULES) (AMENDMENT) RULES 2022

2022 No. 605

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument updates legislation on special measures in the service courts (these are measures used in the service courts and civilian criminal courts to help vulnerable or intimidated witnesses give evidence). It will make video recorded examination in chief available in the service courts and create specific rules to govern when children and complainants in trials of sexual offences are entitled to certain special measures. These updates will align the rules for special measures in the service courts with the rules that apply in the civilian criminal courts.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom, the Isle of Man and the British overseas territories (except Gibraltar).
- 4.2 The territorial application of this instrument is worldwide as the service courts can, if necessary, sit anywhere in the world, for example to reduce disruption if defendants or witnesses are deployed overseas.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 (“the 1999 Act”) provides a regime for special measures in the criminal courts in England and Wales (“the civilian courts”). Some provisions of Chapter 1 apply directly (with modifications) to proceedings in the service courts under the Youth Justice and Criminal Evidence Act 1999 (Application to Service Courts) Order 1999 (“the 1999 Order”). Other provisions of Chapter 1 are replicated by equivalent provisions in the rules of court for the service courts.
- 6.2 This instrument will firstly amend articles 3 and 4 of the 1999 Order to apply section 22A of the 1999 Act to proceedings in the Court Martial Appeal Court (bringing that court into line with the Court of Appeal). Section 22A allows a party to proceedings relating to sexual offences to request that a special measures direction be made which

allows a video recording be admitted as the complainant's evidence in chief. Such requests must be granted unless the judge advocate is satisfied that it would not be likely to improve the quality of the witness's evidence.

- 6.3 This instrument then amends Chapter 6 of Part 12 of the Armed Forces (Court Martial) Rules, which replicates a number of provisions of Chapter 1 of Part 2 to the 1999 Act, to bring it more fully into line with current Crown Court procedure.
- 6.4 Firstly, historic sexual offences are included in the definition of sexual offences used in those rules, to mirror section 62 of the 1999 Act. Complainants in cases involving domestic abuse are to be treated like complainants in sexual offences when it comes to their general eligibility for special measures and will be able to give evidence in private, mirroring changes the Domestic Abuse Act 2021 has made to the 1999 Act.
- 6.5 New rules are also being added to mirror sections 21 to 22 of the 1999 Act, which create a presumption that children will normally give their evidence in chief via a video recording or from behind a screen (children can already use these measures in the Court Martial but there are no separate rules on when children must be able to use them). Finally, new rules are being added to mirror section 22A of the 1999 Act, which is described above, and to mirror section 28 of that Act, which makes video recordings of cross-examination and re-examination available as a special measure (this measure only became widely available in the civilian courts in 2020).
- 6.6 Similar amendments are made to Chapter 6 of Part 12 of the Armed Forces (Service Civilian Court) Rules 2009, which is very similar to Chapter 6 of Part 12 of the Armed Forces (Court Martial) Rules 2009. These amendments are identical to the amendments to the Armed Forces (Court Martial) Rules 2009 but no rule is being made to mirror section 22A of the 1999 Act: this is because section 22A does not apply in the magistrates' court and the Service Civilian Court has a comparable jurisdiction to the magistrates' court.

7. Policy background

What is being done and why?

- 7.1 The Ministry of Defence's policy is to ensure that wherever possible and appropriate the Service Justice System (SJS) aligns its processes with those in the Civilian Justice System (CJS). The current practice and procedure for special measures in the service court is closely based on the regime that applies to the civilian courts. There are, however, some differences in the legislation, which are set out in detail in section 6 on the legislative context. This instrument updates the legislation on special measures in the service courts, to ensure that the rules for vulnerable witnesses who are involved in SJS proceedings will be more closely aligned with the rules that apply to those involved in proceedings in the CJS.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 No consolidation is planned, however the rules of court for the service courts are kept under review and if appropriate a consolidated version will be produced.

10. Consultation outcome

- 10.1 There has been no formal consultation on this instrument, however we have engaged with a range of stakeholders including: the Ministry of Justice, the Judge Advocate General, the Military Court Service, the Service Prosecuting Authority, the service police forces and the Armed Forces, to ensure that the policy goals will be achieved, and that the provisions of the instrument will work in practice.

11. Guidance

- 11.1 Guidance on service law is contained in the Manual of Service Law (Joint Services Publication 830 (JSP 830)). This provides guidance and supplementary information to Armed Forces personnel on the single system of service law established under the AFA 2006. The Manual of Service Law will be updated to provide guidance on the special measures available to vulnerable or intimidated witnesses giving evidence in service courts. The Manual of Service Law is available to the public at:
<https://www.gov.uk/government/publications/joint-services-publication-jsp-830-manual-of-service-law-msl>

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because there is no, or no significant, impact on business.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is the quinquennial review of the Armed Forces Act 2006 (“AFA 2006”), which provides the bulk of the primary legislation relating to the SJS, including the service courts. The AFA 2006 must be kept in force by an annual continuation order and requires a further Act of Parliament at least every 5 years to keep it in force. The last such Act was the Armed Forces Act 2021. The SJS as a whole is subject to review as part of work to prepare for each 5-yearly Act and the next such Act must be passed before the end of 2026. The rules of court for the service courts are also kept under regular review to ensure the provisions remain relevant to the Armed Forces.

15. Contact

- 15.1 Tracy Sexton at the Ministry of Defence, Telephone: 020 7218 0564 or email: tracy.sexton743@mod.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Caron Tassel, Deputy Director for Service Discipline, Conduct and Legislation, at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.

15.3 Leo Docherty MP, Minister of State for Defence People and Veterans at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.