

2023 No. 1097

DEFENCE

The Armed Forces (Amendment of Court Rules) Rules 2023

<i>Made</i> - - - -	<i>17th October 2023</i>
<i>Laid before Parliament</i>	<i>23rd October 2023</i>
<i>Coming into force</i> - -	<i>13th November 2023</i>

The Secretary of State makes these Rules in exercise of the powers conferred by sections 151, 153, 163 and 288 of the Armed Forces Act 2006(a).

PART 1

Citation, commencement and extent

Citation, commencement and extent

1.—(1) These Rules may be cited as the Armed Forces (Amendment of Court Rules) Rules 2023.

(2) These Rules come into force on 13th November 2023.

(3) These Rules extend to England and Wales, Scotland, Northern Ireland, the Isle of Man and the British overseas territories (except Gibraltar).

PART 2

Amendment of the Armed Forces (Service Civilian Court) Rules 2009

Amendment of the Armed Forces (Service Civilian Court) Rules 2009

2. The Armed Forces (Service Civilian Court) Rules 2009(b) are amended as follows.

Amendment of rule 2 (interpretation: proceedings and parties)

3. In rule 2 (interpretation: proceedings and parties)—

(a) omit the “and” after paragraph (1)(c);

(b) after paragraph (1)(d), insert—

(a) 2006 c. 52. Section 151 was amended by section 5 of the Armed Forces Act 2021 (c. 35) (the “2021 Act”), section 153 was amended by section 4 of the 2021 Act, and section 288 was amended by section 6 of the 2021 Act.

(b) S.I. 2009/1209, to which there are amendments not relevant to these Rules.

- “; and
 (e) variation proceedings”;
- (c) in paragraph (2)—
- (i) at the end of the definition of “sentencing proceedings” insert “and does not include variation proceedings”;
 - (ii) at the end of the definition of “trial proceedings”, for “sentencing proceedings.” substitute “sentencing proceedings or variation proceedings.”;
 - (iii) after the definition of “trial proceedings”, insert—

““variation proceedings” means proceedings under Part 14A.”;
- (d) after paragraph(4)(f), insert—
- “(g) in the case of variation proceedings, an offender in respect of whom a sentence which falls to be varied has been passed.”.

Amendment of rule 96 (information before sentencing)

4. In rule 96, for paragraph (2)(b) substitute—

- “(b) any previous convictions of the offender for—
- (i) offences under the law of any part of the British Islands, or
 - (ii) relevant offences of which the offender has been convicted by a court outside the British Islands,
- and any sentence awarded in respect of any such offence, and whether any such conviction is spent for the purposes of the Rehabilitation of Offenders Act 1974(a);”.

Variation proceedings

5. After rule 99 (pronouncement of punishment), insert—

“PART 14A

Variation Proceedings

Application of Part 14A

99A. This Part applies where, on or after 13th November 2023, the court has imposed a sentence.

Interpretation of Part 14A

99B. In this Part—

“original sentence” means a sentence imposed in the course of sentencing proceedings;

“varied sentence” means a sentence substituted for the original sentence in accordance with this Part.

(a) 1974 c. 53; sections 2 and 6 were amended, and the Schedule was inserted, by the Armed Forces Act 1996 (c. 46), section 13 and Schedule 4. Sections 1, 2, and 5 were further amended by paragraphs 63 to 66 of Schedule 16 to the Armed Forces Act 2006. Section 5 was further amended by section 18 of the Armed Forces Act 2021 (c. 35).

Power to vary sentence

99C.—(1) The court may vary or rescind the original sentence if it appears to the court that it had no power to impose the original sentence.

(2) The power conferred by this rule—

- (a) may be exercised within the period of 56 days beginning with the day on which the original sentence was imposed;
- (b) may not be exercised in relation to any sentence if an appeal, or an application for leave to appeal, against the sentence has been determined.

(3) Unless the court otherwise orders, a varied sentence takes effect from the beginning of the day on which the original sentence was imposed.

Direction that variation proceedings be held

99D.—(1) Variation proceedings may be held only in accordance with a direction given under this rule.

(2) After conclusion of any proceedings in which an original sentence was imposed, the judge advocate for those proceedings may direct the court administration officer to appoint a time and place for variation proceedings in respect of the sentence.

(3) The judge advocate may give a direction under this rule—

- (a) on the application of the Director or the offender, or
- (b) of their own motion.

(4) An application for a direction under this rule—

- (a) must be made in writing to the court administration officer, stating the grounds on which it is made, and
- (b) if made by the Director, must be served on the offender, or
- (c) if made by the offender, must be served on the Director.

(5) Where the judge advocate dismisses an application for a direction under this rule, the court administration officer must notify the Director and the offender of that fact.

Announcement of varied sentence

99E. Where the court varies the original sentence, rule 99 (pronouncement of sentence) and sections 252 (duty to give reasons and explain sentence) and 253(2) (duties in complying with section 252) of the Act apply as they apply to the passing of a sentence.

Power to order offender's release from custody

99F.—(1) This rule applies where an offender is in custody by virtue of an original sentence made by the court.

(2) The judge advocate may order that the offender be released immediately if, within the period of 56 days beginning on the day which the original sentence was imposed, it appears to the judge advocate that—

- (a) the court had no power to impose such a sentence, or
- (b) the maximum term for which the court had power to award such a sentence has expired.

(3) The power conferred by this rule may not be exercised in relation to any sentence if an appeal, or an application for leave to appeal, against the sentence has been determined.

(4) This rule is without prejudice to any other provision in this Part.”.

PART 3

Amendment of the Armed Forces (Summary Appeal Court) Rules 2009

Amendment of the Armed Forces (Summary Appeal Court) Rules 2009

6. The Armed Forces (Summary Appeal Court) Rules 2009(a) are amended as follows.

Amendment of rule 2 (interpretation: proceedings and parties)

7.—(1) In rule 2 (interpretation: proceedings and parties)—

(a) after paragraph (1)(b) insert—

“(c) variation proceedings,”;

(b) in paragraph (2), after the definition of “related proceedings”, insert—

““variation proceedings” means proceedings under Part 12A.”;

(c) After paragraph (4)(d), insert—

“(c) in the case of variation proceedings, an offender in respect of whom a sentence which falls to be varied has been imposed or confirmed.”.

Amendment of rule 34 (proceedings without lay members)

8. After rule 34(3)(proceedings without lay members), insert—

“(4) This rule applies to variation proceedings if a direction is given under rule 88E.”.

Amendment of rule 35 (powers that may be exercised by a judge advocate)

9. After rule 35(b), insert—

“; and

(c) the power to vary a punishment, otherwise than in proceedings to which rule 34 applies.”.

Amendment of rule 36 (persons ineligible for membership in particular circumstances)

10.—(1) At the start of rule 36(2)(persons ineligible for membership in particular circumstances), for “A” substitute “Subject to paragraphs (3A) and (3B), a”.

(2) After rule 36(3) insert—

“(3A) A person is ineligible for membership of the court for any variation proceedings if they were not a member of the court for the proceedings in which the punishment that falls to be varied was imposed.

(3B) A person is not ineligible for membership of the court for variation proceedings by virtue of having been a member of the court for—

(a) any appeal proceedings in which the offender was convicted of any offence for which the punishment that falls to be varied was imposed;

(b) the appeal proceedings in which the punishment was imposed.”.

(a) S.I. 2009/1211, to which there are amendments not relevant to these Rules.

Amendment of rule 37 (objections to lay members)

11. After rule 37(4)(objections to lay members), insert—

“(5) This rule applies to any proceedings with lay members, except variation proceedings.”.

Amendment of rule 86 (information before punishment)

12. In rule 86(2)(d)(information before punishment)—

(a) in paragraph (ii), for “United Kingdom” substitute “British Islands”, and

(b) for paragraph (iii) substitute—

“(iii) relevant offences of which the offender has been convicted by a court outside the British Islands,”.

Variation proceedings

13. After rule 88 (pronouncement of punishment), insert—

“PART 12A

Variation Proceedings

Application of Part 12A

88A. This Part applies where the court has, on or after 13th November 2023, awarded a punishment in appeal proceedings or confirmed in appeal proceedings a punishment awarded by a commanding officer at summary hearing.

Interpretation of Part 12A

88B. In this Part—

“original punishment” means the punishment, awarded by the commanding officer, which was the subject of appeal proceedings;

“SAC punishment” means the punishment awarded by the court in appeal proceedings or, where in appeal proceedings the court confirms an original punishment, the punishment confirmed by the court;

“varied punishment” means a punishment substituted for the SAC punishment in accordance with this Part.

Power to vary punishment

88C.—(1) The court may vary the SAC punishment if it appears to the court that it had no power to award or confirm the SAC punishment.

(2) The power conferred by this rule—

(a) may be exercised within the period of 56 days beginning with the day on which the SAC punishment was awarded or confirmed;

(b) may not be exercised in relation to any SAC punishment if an appeal, or an application for leave to appeal, against the SAC punishment has been determined.

(3) Unless the court otherwise orders, a varied punishment takes effect—

- (a) where the SAC punishment is one that was awarded by the court, from the beginning of the day on which the SAC punishment took effect, or
- (b) where the SAC punishment is one that was confirmed by the court, from the beginning of the day on which the commanding officer awarded the original punishment.

Direction that variation proceedings be held

88D.—(1) Variation proceedings may be held only in accordance with a direction given under this rule.

(2) After conclusion of any proceedings in which an SAC punishment was awarded or confirmed, the judge advocate for those proceedings may direct the court administration officer to appoint a time and place for variation proceedings in respect of that SAC punishment.

(3) The judge advocate may give a direction under this rule—

- (a) on the application of the Director or the appellant, or
- (b) of their own motion.

(4) An application for a direction under this rule—

- (a) must be made in writing to the court administration officer, stating the grounds on which it is made, and
- (b) if made by the Director, must be served on the appellant, or
- (c) if made by the appellant, must be served on the Director.

(5) Where the judge advocate dismisses an application for a direction under this rule, the court administration officer must notify the Director and the appellant of that fact.

Direction that variation proceedings be held without lay members

88E.—(1) Where a judge advocate directs under rule 88D that variation proceedings are to be held, they may direct that there are to be no lay members.

(2) A judge advocate may not give a direction under this rule unless they are satisfied that Conditions A and B are met.

(3) Condition A is that one or more of the original lay members could not, without substantial inconvenience, attend the variation proceedings at the time and place appointed.

(4) Condition B is that the appellant would be unfairly prejudiced if—

- (a) the proceedings were postponed until the earliest time at which the judge advocate, the original lay members and the appellant could, without substantial inconvenience, attend the variation proceedings (whether at the place originally appointed or at any other place), and
- (b) the SAC punishment were then varied in the way in which it would be most likely to be varied if no direction were given under this rule and the original lay members were specified for the proceedings and could attend.

(5) In this rule—

- (a) any reference to the attendance of the original lay members includes their attendance by live link, as defined by rule 88F(2) (and for this purpose it is to be assumed that they have been or would be specified as lay members for the variation proceedings); and

(b) any reference to the attendance of the appellant includes their attendance by live link as defined by rule 25(3)(a).

(6) In this rule—

“inconvenience” includes expense and adverse effect on the operational effectiveness of any of His Majesty’s forces, and

“the original lay members” means the persons who were lay members of the court when it awarded or confirmed the SAC punishment.

Attendance of lay members by live link

88F.—(1) A lay member may attend variation proceedings by live link.

(2) In this rule, “live link” means an arrangement by which a lay member, when not in the place where the variation proceedings are being held, is able to see and hear, and to be seen and heard, by other members of the court during the proceedings (and for this purpose any impairment of eyesight or hearing is to be disregarded).

Decision on variation of punishment

88G. In the case of an equality of votes on whether the SAC punishment should be varied, and if so how, the judge advocate has a casting vote.

Announcement of varied punishment

88H. Where the court varies the SAC punishment, rule 88 (pronouncement of punishment) and sections 252 (duty to give reasons and explain sentence) and 253(2) (duties in complying with section 252) of the Act apply as they apply to pronouncement of punishment.

Power to order appellant’s release from detention

88I.—(1) This rule applies where an appellant is in detention by virtue of an SAC punishment.

(2) The judge advocate may order that the appellant be released immediately if, within the period of 56 days beginning on the day which the SAC punishment was awarded or confirmed, it appears to the judge advocate that—

- (a) the court had no power to award or confirm such a punishment, or
- (b) the maximum term for which the court had power to award or confirm such a punishment has expired.

(3) The power conferred by this rule may not be exercised in relation to any SAC punishment if an appeal, or an application for leave to appeal, against the SAC punishment has been determined.

(4) This rule is without prejudice to any other provision in this Part.”.

PART 4

Amendment of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009

Amendment of the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009

14. The Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009(a) are amended as follows.

Amendment of rule 6 (applications for extended powers in relation to punishment)

15. In rule 6(1)(c) (applications for extended powers in relation to punishment) omit “been”.

Variation proceedings

16. After rule 36 (written record) insert—

“PART 3A

Variation of punishments and rescission of activation orders

Application of Part 3A

36A. This Part applies where a commanding officer has, on or after 13th November 2023—

- (a) awarded an offender a punishment, or made an activation order in respect of an offender, at a summary hearing under Part 2, or
- (b) made an activation order in respect of an offender at a hearing under Part 3.

Interpretation of Part 3A

36B. In this Part—

“commanding officer” means the commanding officer or subordinate commander who imposed the original punishment;

“original punishment” means a punishment awarded following a summary hearing;

“variation proceedings” means proceedings under this Part;

“varied punishment” means a punishment substituted for the original punishment in accordance with this Part.

Power to vary punishment or rescind activation order

36C.—(1) The commanding officer may vary or rescind the original punishment or rescind the activation order if it appears to the commanding officer that they had no power to award the original punishment or make the activation order.

(a) S.I. 2009/1216, to which there are amendments not relevant to these Rules.

- (2) The power conferred by this rule—
 - (a) may only be exercised within the period of 56 days beginning with the day on which the original punishment was awarded or the activation order was made;
 - (b) may not be exercised in relation to any punishment or activation order if an appeal, or an application for leave to appeal, against the punishment or activation order has been determined;
 - (c) may not be exercised so as to impose a varied punishment which is more severe than the original punishment.
- (3) A varied punishment takes effect from the beginning of the day on which the original punishment was awarded, unless the commanding officer otherwise directs.
- (4) When exercising the power conferred by this rule, the commanding officer may not—
 - (a) award detention if the original punishment did not include an award of detention;
 - (b) increase any period of detention awarded under the original punishment.

Commencement of variation proceedings

- 36D.**—(1) Variation proceedings may be commenced—
- (a) by the commanding officer on their own motion or in response to a reference made under section 152(2B)(a) of the 2006 Act,
 - (b) on the application of the offender.
- (2) Where proceedings are commenced by the commanding officer, the commanding officer must give the offender notice in writing of—
- (a) the grounds on which the commanding officer proposes to vary the original punishment,
 - (b) the proposed varied punishment, and
 - (c) the reasons why the commanding officer considers that the varied punishment should be imposed.
- (3) An application by an offender under this rule must be made in writing to the commanding officer, and must state—
- (a) the grounds on which the offender says that the commanding officer had no power to award the original sentence or make the activation order, and
 - (b) the reasons the sentence should be varied or rescinded or the activation order rescinded.

Variation hearings

- 36E.**—(1) Where variation proceedings are commenced, the commanding officer or a person authorised by the commanding officer must fix a time for the hearing and give the offender notice in writing of that time.
- (2) In fixing the time for a hearing, the commanding officer, or the person authorised by the commanding officer under paragraph (1), must allow the offender a reasonable time to prepare for the hearing.
- (3) Rules 9 (changing the time fixed for a hearing), 10 (representation), 11A (interpretation, translation and communication through an intermediary) and 24 (adjournments) apply in respect of the hearing and for the purposes of this rule—

(a) Section 152(2B) of the Armed Forces Act 2006 (c. 52) was inserted by section 4(5) of the Armed Forces Act 2021 (c. 35).

- (a) references in rules 9, 10, 11A, and 24 to “the accused” are to be read as references to the offender, and
- (b) rule 9(2)(a) does not apply.

Announcement of varied punishment or rescission of activation order

36F.—(1) The commanding officer must communicate the outcome of variation proceedings to the offender at the end of the hearing or as soon as is practicable after the commanding officer has reached a decision.

(2) In communicating the outcome of variation proceedings, the commanding officer must—

- (a) notify the offender of—
 - (i) the award of any varied punishment, any decision to rescind an activation order or original punishment, or the refusal of the offender’s application for variation;
 - (ii) the commanding officer’s reasons, in accordance with section 252(1)(duty to give reasons and explain sentence) of the Act, for taking the action referred to in paragraph (i).
- (b) when imposing a varied punishment, remind the offender of—
 - (i) their right of appeal under section 141 (right of appeal) of the Act,
 - (ii) their right to seek independent legal advice on whether to exercise the right of appeal, and
 - (iii) if service detention has been awarded, the right to make an election under whichever of sections 290(2) (commencement of term of service detention awarded by CO) or 291(2) (commencement of consecutive term of service detention awarded by CO) of the 2006 Act applies.

Addendum to written record

36G.—(1) After the conclusion of the variation proceedings in which the commanding officer varies the original punishment or rescinds any activation order, the commanding officer must produce an addendum to the written record (as provided for in rule 27) containing—

- (a) the details of any varied punishment, or the fact that the original punishment or activation order has been rescinded,
- (b) the commanding officer’s reasons, in accordance with section 252 (duty to give reasons and explain sentence) of the Act for taking the decision described in sub-paragraph (a), and
- (c) such other matters as the commanding officer considers should be recorded.

(2) The commanding officer shall, as soon as reasonably practicable after the hearing, provide the offender with a copy of the addendum to the written record.

Power to order offender’s release from detention

36H.—(1) This rule applies where an offender is in detention by virtue of an original punishment awarded or activation order made by the commanding officer and the commanding officer has varied or rescinded the original punishment or rescinded the activation order in accordance with this Part.

(2) The commanding officer must order that the offender be released immediately if—

- (a) the commanding officer has rescinded an activation order or rescinded the original punishment and there is no other lawful reason for the offender’s continued detention, or
- (b) the offender has served all or more than the term of detention under the varied punishment and there is no other lawful reason for the offender’s continued detention.

(3) The power conferred by this rule may not be exercised in relation to any punishment or activation order if an appeal, or an application for leave to appeal, against the punishment or activation order has been determined.

(4) This rule is without prejudice to any other provision in this Part.”.

PART 5

Amendment of the Armed Forces (Court Martial) Rules 2009

Amendment of the Armed Forces (Court Martial) Rules 2009

17. The Armed Forces (Court Martial) Rules 2009(a) are amended as follows.

Amendment of rule 108 (summing up)

18. In rule 108 (summing up)—

- (a) before paragraph (1), insert—

“(A1) The judge advocate must give the lay members directions about the relevant law at any time at which to do so will assist the lay members to evaluate the evidence.”, and

- (b) in paragraph (1), for the words after “shall” substitute “summarise for the lay members, to such extent as is necessary, the evidence relevant to the issues they must decide”.

Amendment of rule 114 (information before sentencing)

19. In rule 114(2)(d)(information before sentencing)—

- (a) in paragraph (ii), for “United Kingdom” substitute “British Islands”, and
- (b) for paragraph (iii), substitute—

“; and

- (iii) relevant offences of which the offender has been convicted by a court outside the British Islands,”.

17th October 2023

Andrew Murrison
Parliamentary Under Secretary of State
Ministry of Defence

(a) S.I. 2009/2041, to which there are amendments not relevant to these Rules.

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules amend the Armed Forces (Service Civilian Court) Rules 2009 (S.I. 2009/1209), the Armed Forces (Summary Appeal Court) Rules 2009 (S.I. 2009/1211), the Armed Forces (Summary Hearings and Activation of Suspended Sentences) Rules 2009 (S.I. 2009/1216) and the Armed Forces (Court Martial) Rules (S.I. 2009/2041) so as to: make provision for variation of sentences; replace the requirement for the courts to be provided with information about relevant offences of which an offender was convicted in an EU member state with a requirement that they be provided with information about convictions imposed by courts outside the British Islands; and to permit the practice of “split summing up” in the Court Martial.

Part 2 of these Rules amends the Armed Forces (Service Civilian Court) Rules 2009 (the “SCC Rules”), so as to give the Service Civilian Court the power to vary sentences that it has imposed, where it subsequently transpires that it had no power to impose such a sentence. This power may be exercised within 56 days of the imposition of the original sentence, and may not be exercised if an appeal has been determined in respect of the original sentence. Part 2 inserts a new Part 14A into the SCC Rules which sets out the procedure for variation proceedings. Part 14A is based on Part 15 of the Armed Forces (Court Martial) Rules (the “Court Martial Rules”), which already makes provision in relation to variation proceedings before the Court Martial, although changes have been made to the provisions inserted into the SCC Rules to reflect the differences in procedures between the two courts, and in particular the absence of lay members in the SCC.

Part 2 also amends rule 96 of the SCC Rules, so as to implement the changes made by section 17 of the Armed Forces Act 2021 (2021 c. 35) (the “2021 Act”). Section 17 removed the requirement for a court, when sentencing, to take into account convictions by courts in European Union member states and replaced it with a discretion to take into account convictions by courts from outside the British Islands. Rule 4 of these rules amends rule 96 of the SCC Rules to require, where practicable, the Director to provide the court with information about relevant convictions from outside the British Islands.

Part 3 amends the Armed Forces (Summary Appeal Court) Rules 2009 (the “SAC Rules”). The amendments are substantively the same as the amendments made to the SCC Rules. The most significant difference is that the new Part 12A introduced to the SAC Rules contains provisions dealing with lay members. This reflects the fact that the Summary Appeal Court, like the Court Martial, can sit with lay members.

Part 3 also amends rule 86 of the SAC rules to implement the changes made by section 17 of the 2021 Act. The changes are the same in substance as those made to rule 96 of the SCC rules.

Part 4 amends the Armed Forces (Summary Hearings and Activation of Relevant Sentences) Rules 2009 so as to allow commanding officers to vary sentences or rescind activation orders made by them following summary hearings. These powers must be exercised by the commanding officer who imposed the original sentence or activation order. Where the offender changes role or otherwise has a change in commanding officer following the imposition of a punishment, the punishment cannot be revised by the new commanding officer. The intention of the new rules is to otherwise achieve the same effect as the procedures relating to variation that currently exist in the Court Martial Rules, and which have been added into the SAC and SCC Rules by these Rules.

Part 5 amends the Court Martial Rules. Rule 18 amends rule 108 (summing up) to allow for split summing up. The current version of rule 108 requires the judge advocate to sum up the evidence and give direction on the law after closing addresses. The amendments require the judge advocate to provide direction on the law at any time that it would assist the lay members to evaluate the evidence. This brings the Court Martial more closely into line with practice in the civilian justice system.

Rule 19 amends rule 114 of the Court Martial Rules so as to implement the changes made by section 17 of the 2021 Act. The changes are substantively the same as those made to rule 96 of the SSC Rules and rule 86 of the SAC Rules.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary sector or community bodies is foreseen.

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