

EXPLANATORY MEMORANDUM TO
THE ARMED FORCES (AMENDMENT OF COURT RULES) RULES 2023

2023 No. 1097

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends 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 2009 (S.I. 2009/2041).
- 2.2 These amendments provide for commanding officers to vary sentences or rescind activation orders that were awarded or made in error. This instrument also provides for a similar power for both the Service Civilian Court (SCC) and the Summary Appeal Court (SAC) to vary sentences.
- 2.3 This instrument also implements the changes made by section 17 of the Armed Forces Act 2021 (“AFA 2021”), which removed the requirement for Service Court, when sentencing, to take account of EU Member State convictions when deciding, respectively, how serious an offence is, whether to give an unrepresented defendant a custodial sentence and whether to impose a community punishment.
- 2.4 Finally, this instrument amends the Armed Forces (Court Martial) Rules 2009 which will require a Judge Advocate to provide direction on the law at any time to assist the lay members to evaluate the evidence, rather than after the closing addresses as is required at present. This is intended to bring the Court Martial into line with practice in the criminal courts.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The provision for commanding officers to vary sentences or rescind activation orders that were awarded or made in error, is linked to the Service Custody and Service of Relevant Sentences (Amendment) Rules 2023. The aim is to bring these provisions into force at the same time, to avoid the situation where a Commanding Officer can rescind a punishment of detention, but the Military Corrective Training Centre would be unable to release the detainee as a result of this decision.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom, the Isle of Man and the British overseas

territories (except Gibraltar) and applies to persons subject to Service law wherever they are in the world.

- 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 Rt Hon Dr Andrew Murrison MP, the Minister for Defence Personnel, Veterans and Service Families, has made the following statement regarding Human Rights:

“In my view the provisions of the Armed Forces (Amendment of the Court Rules) Rules 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The enabling power for this instrument is contained in sections 151 (SAC rules), 153 (Summary hearings etc rules), 163 (Court Martial rules) and 288 (SCC Rules) of the Armed Forces Act 2006 (“AFA 2006”), as amended by sections 4 to 6 (rectification of mistakes for summary hearings, the SAC and the SCC).
- 6.2 The provision in section 6 (a) of AFA 21, allowing for the SCC rules to include provision allowing the SCC to revoke an order made by it under section 193 appears to be erroneous. Section 193 AFA 2006 relates to “activation orders” made by commanding officers. Although the SCC does have the power to make activation orders, its powers are contained in the Sentencing Act 2020. The present instrument therefore does not make provision for the SCC to revoke activation orders.

7. Policy background

What is being done and why?

- 7.1 Recommendation 43 in the Service Justice System (SJS) Review (Part 2) conducted by HH Judge Shaun Lyons recommended that a power similar to that contained in the Magistrates Court Act 1980, but narrower in scope, should be taken allowing a commanding officer to take any remedial action necessary when a sentence passed at a summary hearing contains a technical illegality (this type of power is sometimes referred to as a "slip rule").
- 7.2 For consistency within the Service Justice System, sections 5 and 6 Armed Forces Act 2021 also created powers for slip rules for the Summary Appeal Court and Service Civilian Court (the Court Martial already had a such a power under Part 15 of the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041)). These provisions enable the SAC and SCC to correct errors in sentencing (noting paragraph 6.1 above that this SI does not extend specifically to activation orders) swiftly without the need for an appeal to be raised.
- 7.3 The background to removing the requirement for Service courts to take account of EU Member State convictions (when deciding, respectively, how serious an offence is, whether to give an unrepresented defendant a custodial sentence and whether to impose a community punishment) reflects the approach being taken in relation to civilian sentencing law in England and Wales.
- 7.4 These requirements were initially introduced by the Coroners and Justice Act 2009 in order to implement the European Union Framework Decision 2008/675/JHA (on

taking into account convictions in other EU Member States). The decision to remove these requirements means that EU Member State convictions are treated the same as those with previous convictions imposed in any other country outside of the United Kingdom (which essentially removes the EU Member States convictions ‘special status’ compared with other foreign convictions).

- 7.5 The provision requiring a Judge Advocate to provide direction on the law at any time to assist the lay members to evaluate the evidence brings the Court Martial into line with the civilian justice system.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no plans to consolidate this legislation.

10. Consultation outcome

- 10.1 There has been no formal consultation on this instrument. The provisions in this instrument largely bring effect to the provisions in the Armed Forces Act 2021.
- 10.2 The provision requiring a Judge Advocate to provide direction on the law at any time to assist the lay members to evaluate the evidence, was the result of continuous engagement with stakeholders to make improvements in the Service Justice System (SJS). As such, SJS stakeholders and the single Services are supportive of this measure.

11. Guidance

- 11.1 Guidance on the Service Justice System generally, including summary hearings and matters pertaining to the Service courts including the Court Martial, the Service Civilian Court and the Summary Appeal Court are contained in the Joint Services Publication 830 (JSP 830) – *Manual of Service Law*. This will be updated to reflect the changes in policy introduced by this Statutory Instrument.

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, which provides the vast majority of the primary legislation relating to the SJS. This Act 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 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 Richard Hartell at the Ministry of Defence, email: Richard.Hartell101@mod.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Caron Tassel, Deputy Director - Discipline, Conduct and Legislation - at the Ministry of Defence, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Rt Hon Dr Andrew Murrison MP, the Minister for Defence Personnel, Veterans and Service Families, can confirm that this Explanatory Memorandum meets the required standard.