

EXPLANATORY MEMORANDUM TO
THE SERVICE CUSTODY AND SERVICE OF RELEVANT SENTENCES
(AMENDMENT) RULES 2023

2023 No. 1103

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 Service Custody and Service of Relevant Sentences Rules 2009 (S.I. 2009/1096), which will prohibit smoking in the Military Corrective Training Centre (“MCTC”) and Service Custody Facilities (“SCFs”).
- 2.2 The instrument also contains a measure permitting the Commandant of the MCTC or SCFs to release a detainee on the order of a Commanding Officer, in the event that rectification or rescission of a punishment or activation order requires release.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The amendment permitting release on the order of a Commanding Officer, is necessary to implement the changes to the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009 being made by Part 4 of the Armed Forces (Amendment of Court Rules) Rules 2023. If these provisions are not brought into force at the same time, the situation could arise where a Commanding Officer can rescind a punishment of detention, but the MCTC would be unable to release the detainee as a result of the Commanding Officer’s 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 Service Custody and Service of Relevant Sentences (Amendment) Rules 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The enabling power for this instrument is contained in Section 300 of the Armed Forces Act 2006.

7. Policy background

What is being done and why?

- 7.1 The Health Act 2006 made it unlawful to smoke in enclosed workplaces, public buildings and public transport. While the 2006 Act did not bind the Crown, government policy has been to introduce a similar ban in public buildings owned or occupied by the government. The Prison and Young Offender Institute (Amendment) Rules 2018 adopted a new rule 25(2) into the Prison Rules 1999, which does not allow any prisoner to smoke or possess tobacco except in accordance with any directions of the Secretary of State.
- 7.2 As currently drafted, the Service Custody and Service of Relevant Sentences Rules 2009 (which provide the disciplinary system used at the MCTC and SCFs in respect of minor disciplinary infringements) expressly permit detainees to smoke and to purchase cigarettes and tobacco. These amendments bring the Service system into line with the civilian system, where smoking has been prohibited across the prison estate for several years. The SI also includes a measure equivalent to that in HM Prisons to make it a criminal offence to bring into or out of MCTC and SCFs a range of items related to smoking. The Statutory Instrument ensures that the MCTC can comply with the Defence Smoke-Free Working Environment policy.
- 7.3 The measure permitting the Commandant of the MCTC to release a detainee on the order of a Commanding Officer relates to Recommendation 43 in the Service Justice System (SJS) Review (Part 2). The SJS Review recommended a “slip rule” for the Commanding Officer if it becomes apparent that a sentence awarded at Summary Hearing was wrong in law. This would enable the Commanding Officer to correct an error swiftly and without waiting for an appeal to be raised. The Commandant of the MCTC or SCFs will need to be able to release the detainee because of a Commanding Officer’s decision under this scenario.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

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 single Services were consulted on the Defence Smoke-Free Working Environment Policy, who were supportive of the initiative.
- 10.2 A Defence Instructions and Notices was published in July 2023 notifying personnel across Defence that the MCTC and SCFs will soon be brought into line with the civilian prison estate, as well as providing direction on the transition to a smoke-free working environment at the MCTC and SCFs.

- 10.3 As the changes to the rules will only apply to detainees (as all Service Personnel, Civil Servants, and contractors etc, have been compliant since 1 January 2023), interim measures were enacted to provide support to detainees throughout this transition. This included visible displays of Smoke-Free signage, reinforced with verbal messaging by staff and Defence Primary Healthcare smoking cessation clinics for individual detainees along with access to authorised prescriptions such as nicotine patches, chewing gum and mouth spray.
- 10.4 With regards to the measure permitting the Commandant of the MCTC and SCFs to release a detainee on the order of a Commanding Officer, the Services and relevant stakeholders within the Service Justice System were consulted and were supportive of the proposed measure.

11. Guidance

- 11.1 Guidance on detainees held in MCTC and SCFs (other than captured enemy personnel taken by HM Forces during armed conflict) is contained in Joint Services Publication 837 (JSP 837) (*Service Code of Practice – Custody and Detention and Committal to Civil Prison*). This will be updated to reflect the changes in policy introduced by this Statutory Instrument.
- 11.2 Guidance on the Defence Smoke-Free Working Environment policy is contained in JSP 661 (*Health and Wellbeing*).

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 Service Justice System. 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.