EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (COURT MARTIAL) (AMENDMENT NO. 2) RULES 2024

2024 No. [XXXX]

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.

2. Declaration

2.1 Luke Pollard MP, Minister for the Armed Forces at the Ministry of Defence confirms that this Explanatory Memorandum meets the required standard.

2.2 Caron Tassel, Deputy Director for Service Justice, Discipline and Conduct, at the Ministry of Defence, can confirm that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Richard Hartell at the Ministry of Defence, email: Richard.Hartell101@mod.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Armed Forces (Court Martial) (Amendment No. 2) Rules 2024 amend the Armed Forces (Court Martial) Rules 2009 (the "Court Martial Rules") so as to change the requirements for the President of the Court Martial Board so that the pool of potential officers who can act as President is extended for cases where the defendant is a very senior officer.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instruments forms part of the law of) is the United Kingdom, the Isle of Man and the British overseas territories (except Gibraltar).

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the same as its extent.

4.4 However, it should be noted that Service Law applies to persons subject to Service law or civilians subject to Service discipline wherever they are in the world.

5. Policy Context

What is being done and why?

5.1 Other than where a judge advocate deals with matters sitting alone, the Court Martial will consist of the judge advocate and a 'Board' (similar to a jury in a Crown Court) of military personnel, known as 'lay members'. They are referred to as 'lay members' because they are not legal professionals. Depending on the offence(s) being tried, the

Board will consist of three to six lay members. In the event of a contested trial, the lay members will be required to determine the innocence or guilt of the defendant, in the same way as a jury would at a trial in the Crown Court. And, in the event of a conviction, either following a guilty plea or a guilty finding, they may also be required, in conjunction with the judge advocate, to determine the sentence to be imposed on the offender.

5.2 The Court Martial Rules require that at least one lay member must be an officer who is qualified to be the President of the Board. Where the defendant is of or below the rank OF-5 (OF-5 is a Captain (Navy), Colonel, or Group Captain), the President of the Board must be of a superior rank to the defendant. Where the defendant is of or above the rank OF-6 (OF-6 is a Commodore, Brigadier, or Air Commodore), the President of the Board must be either of a superior rank, or senior within the same rank.

5.3 However, a risk has been identified in that difficulties may be encountered in forming a Board of lay members under the current legislation if a very senior officer is prosecuted in the Court Martial, especially in finding a President of the Board who is superior in rank, or senior with the same rank, to the defendant and is not known to them due to the small numbers of senior officers.

5.4 While such cases involving very senior officers as defendants are rare in the UK, it is sensible for the Service Justice System to be ready and able to deal with them if and when they do occur. Under the present law, it is highly unlikely that it would be possible to specify a President and a Board to try a serving senior officer (OF-7 and above) in the Court Martial. This SI seeks to address this risk by extending the pool of potential officers who can be the President of the Board where the defendant is a very senior officer.

What was the previous policy, how is this different?

5.5 The previous policy was for the President of the Board to be of superior rank to the defendant, or senior within the same rank, where the defendant was of the rank OF-6. The policy remains the same where a defendant is of the rank OF-5 or lower, i.e. the President of the Board must be of superior rank to the defendant.

5.6 Where the policy is now different is where the defendant is of the rank OF-6 or above - in these cases the minimum rank of the President of the Board must be at least the rank of OF-6.

6. Legislative and Legal Context

How has the law changed?

6.1 Previously, Rule 34 of the Court Martial Rules required that the President of the Board must be of a superior rank to the defendant, which could include the President holding the same rank as the defendant (if the President were more senior to the defendant within that rank).

6.2 The amendment will change this requirement where the defendant holds the rank of OF-6 or higher, so that the minimum rank of the President of the Board must be at least the rank of OF-6.

Why was this approach taken to change the law?

6.3 Rule 34 of the Court Martial Rules sets out the requirements for the President of the Board, as such this rule needs to be amended to achieve the required policy outcome.

7. Consultation

Summary of consultation outcome and methodology

7.1 There has been no public consultation on this instrument. However, a range of stakeholders have been consulted on the development of the policy and processes which underpin these rules, including the single Services, the Judge Advocate General, the Military Court Service, and the Director of Service Prosecutions. This policy change was agreed at the Service Justice Executive Group (which is part of the system of governance for the Service Justice System and is responsible to the Service Justice Board).

8. Applicable Guidance

8.1 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 and civilians subject to service discipline on the single system of Service law established under the Armed Forces Act 2006. 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.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this legislation because the SI simply changes the rank of officers that can sit as President of the Court Martial Board in certain cases. As such there is no impact on the public sector nor is there an impact on business, charities, or voluntary bodies.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because this legislation relates to Service discipline.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 A system of governance for the Service Justice System was established in December 2007. Its purpose is to bring together the various stakeholders in the Service Justice System to determine policy issues and standards, to set direction and objectives, to provide oversight and to facilitate joint working and cooperation. This work is undertaken by a Service Justice Board and a supporting Service Justice Executive Group.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 Luke Pollard, the Minister for the Armed Forces at the Ministry of Defence, has made the following statement regarding Human Rights:

"In my view the provisions of the Armed Forces (Court Martial) (Amendment No.2) Rules 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 These instruments are not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law and (Revocation and Reform) Act 2023 ("relevant European Union Acts").