**EXPLANATORY MEMORANDUM TO**

**THE ARMED FORCES (COURT MARTIAL) (AMENDMENT) RULES 2013**

**2013 No. [XXXX]**

**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 In cases of serious offences dealt with in the Court Martial the number of lay members of the court is at least five. The purpose of this instrument is to reduce the number of lay members that sit on the panel in sentencing proceedings from five to three in cases where a sole defendant or all co-defendants plead guilty, before the commencement of trial proceedings. This instrument also prescribes a procedure for the Court Martial to certify to a civilian court, which has power to commit for contempt, the failure of a person to comply with an order of a Judge Advocate to produce material to a Service policeman or to give a Service policeman access to it. It also revokes Part 8 of Schedule 2 to the Armed Forces (Court Martial) Rules 2009 (the 2009 Rules).

## 3. Matters of special interest to the Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments

3.1 None.

## 4. Legislative Context

4.1 Rule 29 of the 2009 Rules states that at least five lay members of the Court Martial are required to sit in cases which fall within the criteria set out in the rule. The rule applies to sentencing proceedings for an offence set out in Schedule 2 of the Armed Forces Act 2006 (the 2006 Act) or an offence for which the defendant could be sentenced for more than seven years imprisonment or more than seven years detention. The rule also applies to variation proceedings if it applied to the proceedings in which the sentence that falls to be varied was imposed. This instrument inserts a new rule 29A which has the effect of disapplying rule 29, where it applies to sentencing and variation proceedings, so that rule 29 does not apply where

a sole defendant or all co-defendants have entered a guilty plea before the commencement of trial proceedings.

4.2 Paragraph 11A(2) of Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 provides a power to the Court Martial to certify to a civilian court which has a power to commit for contempt a failure to comply with an order under paragraph 5 of the Schedule requiring a person to produce material to a Service policeman or to give a Service policeman access to it. This instrument inserts in the 2009 Rules a new rule 151A which prescribes a procedure for the exercise of the Court Martial's power to certify.

4.3 The Armed Forces 2011 (the 2011 Act) made changes to the provisions related to the right to elect to trial by Court Martial under section 129 of the 2006 Act. The 2011 Act also repealed Part 20 of the 2009 Rules related to the consequences of election for Court Martial trial. This instrument revokes Part 8 of Schedule 2 to the 2009 Rules, in consequence of the revocation of Part 20 of those rules. Part 8 made transitional modifications to Part 20.

## 5. Territorial Extent and Application

5.1 This instrument extends to the United Kingdom, the Isle of Man and British overseas territories. It applies to persons subject to service law wherever they are in the world and also to persons subject to service discipline, namely to persons who are not subject to service law but satisfy the requirements of any paragraph of Part 1 of Schedule 15 to the 2006 Act.

## 6. European Convention on Human Rights

6.1 The Minister of State for Defence has made the following statement regarding Human Rights:

> In my view the provisions of the Armed Forces (Court Martial) (Amendment) Rules 2013 are compatible with the Convention rights.

## 7. Policy background

7.1 This instrument makes three amendments to the 2009 Rules. The first amends rule 29 to change the number of lay members required to sit in the Court Martial. The second creates a new rule that is consequential to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) (Amendment) Order 2012; and the third revokes a transitional provision.

7.2 Rule 29 of the 2009 Rules provides that where Court Martial proceedings relate to a more serious offence - that is where a defendant is to be tried or sentenced for an offence listed in Schedule 2 of the 2006 Act - there shall be at least five lay members. However following a review by the Service Courts Rules Review Committee, a recommendation was made to amend rule 29 so that only three lay members should be required to sit in cases where a defendant enters a guilty plea before the trial begins. This amendment is aimed at reducing both delay and the cost of proceedings of such cases.

7.3 The Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) (Amendment) Order 2012 enables the Court Martial to certify to a civilian court a failure to comply with an order requiring a person to produce material to a Service policeman or to give a Service policeman access to it. This instrument inserts a new rule into the 2009 Rules to prescribe this procedure.

7.4 The 2011 Act repealed Part 20 of the 2009 Rules related to the consequences of election for Court Martial trial. This instrument revokes Part 8 of Schedule 2 to the 2009 Rules in consequence of the revocation of Part 20 of those rules and removes obsolete legislation. Part 8 made transitional modifications to Part 20.

## 8. Consultation outcome

8.1 No public consultation has been undertaken in connection with the provisions of the Armed Forces (Court Martial) (Amendment) Rules 2013. Nonetheless, these rules have been subject to rigorous consultation with the Office of the Judge Advocate General, the Association of Military Court Advocates, the Military Court Services, the Service Prosecution Authority, and the Services.

## 9. Guidance

9.1 The Manual of Service Law provides guidance and supplementary information to Armed Forces personnel involved in the administration of the single system of Service law established under the 2006 Act and is available on the internet at https://www.gov.uk/government/publications/joint-services-publication-jsp-830-manual-of-service-law-msl. Guidance is issued to judge advocates through the Judge Advocate General's practice memoranda. The Service Prosecuting Authority and the Military Court Service will issue their own guidance as necessary.

## 10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring & review

12.1 The Rules of Court for the Court Martial and other courts in the Service justice system are subject to at least annual review by the Service Courts Rules Review Committee, which is a non-statutory body chaired by the Judge Advocate General, that reports to the Secretary of State.

## 13. Contact

13.1 In the event of any inquiries about this instrument, please contact Humphrey Morrison of Central Legal Service of the Ministry of Defence, telephone number 0207 807 8291; email: humphrey.morrison577@mod.uk