EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (COURT MARTIAL) (AMENDMENT) RULES 2022

2022 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. Purpose of the instrument

2.1 The instrument updates the Armed Forces (Court Martial) Rules 2009 ("Court Martial rules") to implement changes to the Armed Forces Act 2006 ("AFA 06") made by the Armed Forces Act 2021 ("AFA 21"). It prescribes proceedings in the Court Martial that require six, rather than three, lay members and sets out when judge advocates can direct that there should be four rather than three lay members. It gives judge advocates the power to direct that proceedings in the Court Martial should continue despite the loss of a lay member. Finally, it states when, and how many, chief petty officers, staff corporals, staff sergeants, colour sergeants Royal Marines, flight sergeants and chief technicians ("OR-7 ranks") can sit as lay members.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is worldwide as the Court Martial 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 Sarah Atherton 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 (Court Martial) (Amendment) Rules 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument updates the Court Martial rules to implement amendments made by AFA 21 to section 155 of AFA 06, which deals with the constitution of the Court Martial (the amendments were made by section 2 of, and Schedule 1 to, AFA 21).

6.2 AFA 21 amended subsections (1) and (2) of section 155 to require a Court Martial with lay members to have three or, in prescribed proceedings, six lay members. This

instrument amends rule 29 of the Court Martial rules to prescribe the proceedings which require a board of six lay members ("board" is the term used in the Court Martial rules to refer to the lay members for a particular set of proceedings). Under the amended rule 29 a board of six lay members is required for trials (and sentencing if the trial results in a guilty verdict) if the proceedings relate to one of the serious offences listed in Schedule 2 to AFA 06 ("Schedule 2 offences") or an offence carrying a maximum penalty of more than 2 years imprisonment.

6.3 AFA 21 then inserted a new subsection (2A) in section 155, which allows a judge advocate to direct that there should be a board of four lay members when only three would normally be required under the amended subsections (1) and (2) of section 155. Such directions must be made in accordance with the Court Martial rules. This instrument inserts a new rule 30 to allow these directions to be given before proceedings commence when a judge advocate considers it is necessary in view of the expected length or location of the proceedings.

6.4 AFA 21 also amended subsection (3) of section 155, to allow a prescribed number of the lay members of the Court Martial to be OR-7 ranks (only warrant officers and officers are currently eligible). This instrument amends rule 31 of the Court Martial rules to allow one OR-7 rank or warrant officer to be included in a board of three lay members: a board of six lay member may include either one OR-7 rank and one warrant officer or two warrant officers. The general rules on eligibility for lay members under section 157 of AFA 06 and rule 32 of the Court Martial rules will continue to apply. Rule 33, which makes different arrangements for the membership of boards in proceedings relating to civilians will also continue to apply as it does now.

6.5 Finally, AFA 21 inserted a new subsection (6A) in section 155, which allows a rule to be included in the Court Martial rules allowing proceedings with a board of four or six lay members to proceed if a lay member is lost. This instrument inserts a new rule 30A in the Court Martial rules allowing a judge advocate to give a direction allowing this if they consider it in the interests of justice to do so.

7. Policy background

What is being done and why?

7.1 The Court Martial rules are being updated to take account of amendments to section 155 of AFA 06 by AFA 21. The amendments to section 155 and the updates to the Court Martial rules in this instrument together implement HH Shaun Lyons' recommendations on the size and membership of Court Martial boards in the Service Justice System Review ("the SJS review"), published in 2020.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 Under section 155 of AFA 06 and the Court Martial rules as they currently stand the Court Martial normally has a board of three or five lay members which is made up of officers and warrant officers (different rules apply to cases involving civilians but these will remain the same). A board of five lay members is required for contested cases relating to one of the serious offences listed in Schedule 2 of AFA 06 or an offence carrying a maximum penalty of more than two years imprisonment. A board of three lay members can be increased to four or five, and a board of five lay members

can be increased to six or seven, if proceedings are expected to last more than ten days (five days if the Court Martial is sitting outside the United Kingdom or Germany). Up to two warrant officers may be lay members in cases involving persons subject to service law unless the defendant is an officer.

Why is it being changed?

7.3 The SJS review recommended boards of six lay members deal with cases that currently require between five and seven lay members and also hear contested cases where the offence carries a maximum penalty of more than two (rather than seven) years. This will align the size of boards for more serious cases more closely with juries in the Crown Court; changes were also recommended to make voting arrangements for these boards similar to those that apply to juries. The SJS review also recommended that cases with a board of six lay members be allowed to continue if one member were lost, in line with the system for civilian juries, which under section 16 of the Juries Act 1974 can continue to try a case even if up to three jurors are lost. Finally, the SJS review recommended allowing OR-7 ranks to be lay members as service persons of this rate or rank to broaden the pool of lay members and reduce the reliance on officers and warrant officers.

7.4 The Ministry of Defence accepted these recommendations, which are being implemented by AFA 21 and this instrument. However, following consultation the decision was taken to continue to allow an extra member on a board of three lay members, to guard against the possibility of losing a member.

What will it now do?

7.5 When the Court Martial rules have been updated by this instrument (as detailed in section 6), and the corresponding amendments to section 155 of AFA 06 are in force, boards will normally be of three or six lay members. A board of six lay members will be required for trials of Schedule 2 offences and offences carrying a maximum penalty of more than two years imprisonment. Judge Advocates will be able to add an additional member to a board of three lay members, should they think it necessary to do so given the expected length and location of the proceedings. If a board of four or six lay members loses a member the proceedings can continue, if the judge advocate considers this to be in the interests of justice. Finally, boards dealing with defendants subject to service law will be able to include OR-7 ranks.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 No consolidation is planned, however the rules of court for the Court Martial are kept under review and if appropriate a consolidated version will be produced.

10. Consultation outcome

10.1 There has been no formal consultation on this instrument. However, we have engaged with a range of stakeholders including: the Judge Advocate General, the Military Court Service, the Service Prosecuting Authority, and the Armed Forces, to ensure that the policy goals will be achieved, and that the provisions of the instrument will work in practice.

11. Guidance

11.1 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 on the single system of service law established under the Armed Forces Act 2006 ("AFA 2006"). The Manual of Service Law will be updated to provide guidance on the changes made by this instrument to the rules of court for the Court Martial. 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.

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 AFA 2006, which provides the bulk of the primary legislation relating to the SJS, including the Court Martial. The AFA 2006 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 as a whole 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 Court Martial are also kept under regular review to ensure the provisions remain relevant to the Armed Forces.

15. Contact

15.1 Lindsey Pratt at the Ministry of Defence, Telephone: 020 7807 8244 or email: Lindsey.Pratt386@mod.gov.uk, can be contacted with any queries regarding the instrument.

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

15.3 Sarah Atherton MP, the Minister for Defence Personnel, Veterans and Service Families, can confirm that this Explanatory Memorandum meets the required standard.