EXPLANATORY MEMORANDUM TO

THE ARMED FORCES (SERVICE COURT RULES) (AMENDMENT) (NO. 2) 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 Her Majesty.

2. Purpose of the instrument

2.1 The instrument amends the rules of court for the Court Martial, Service Civilian Court and Summary Appeal Court. Firstly, it inserts an "overriding objective" in those rules, based on the overriding objective in the rules of court for the civilian criminal courts in England and Wales. It also amends existing rules on the notification of witnesses to give the Director for Service Prosecutions responsibility for warning prosecution witnesses of trial dates. Finally, a new rule is being added to the rules of court for the Court Martial, which will require the court administration officer ("CAO") to ensure that where one or more persons subject to service law are specified as lay members for proceedings in the Court Martial, at least one of the lay members will be a man and one a woman.

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 territorial extent of this instrument is the United Kingdom, the Isle of Man and the British overseas territories (except Gibraltar).

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 Leo Docherty MP, Minister of State for Defence People and Veterans, has made the following statement regarding Human Rights:

"In my view the provisions of the Armed Forces (Service Court Rules) (Amendment) (No. 2) Rules 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument amends the Armed Forces (Court Martial) Rules 2009 ("the Court Martial rules"), the Armed Forces (Service Civilian Court) Rules 2009 ("the SCC rules") and the Armed Forces (Summary Appeal Court) Rules 2009 ("the SAC rules").

6.2 A new Part 1A is being added to the Court Martial rules, SCC rules and SAC rules setting out the overriding objective for those rules of court and placing a duty on participants in cases to act in accordance with that objective and on judge advocates and the court to further that objective when exercising their powers. Part 1A is closely based on Part 1 of the Criminal Procedure Rules 2020 (the rules of court for civilian criminal courts in England and Wales)

6.3 Amendments are also being made to rule 62 of the Court Martial rules, rule 48 of the SCC rules and rule 49 of the SAC rules, which currently require the CAO to notify all witnesses of the time and date of proceedings. The amendments place the duty to notify prosecution witnesses on the Director of Service Prosecutions rather than the CAO.

6.4 An additional amendment is being made to the Court Martial rules to insert a new rule 34A, which places a duty on the CAO to ensure the lay members specified for any proceedings in the Court Martial include at least one woman and one man.

7. Policy background

What is being done and why?

7.1 The Ministry of Defence's policy is to ensure that wherever possible and appropriate the Service Justice System (SJS) aligns its processes with those in the Civilian Justice System. The Service Justice System Review by HH Shaun Lyons, published in 2020, recommended the inclusion of an "overriding objective" modelled on Part 1 of the Criminal Procedure Rules 2020 in the Court Martial rules. This instrument implements that recommendation and to ensure consistency an "overriding objective" is also being included in the SCC rules and SAC rules. The Review also recommended amending the current rules on notifying witnesses to give the Director for Service Prosecutions responsibility for warning prosecution witnesses of trial dates, to align practice with the role of the Director of Public Prosecutions in the civilian Crown Court. This instrument implements that recommendation.

7.2 This instrument also adds a new rule 34A to the Court Martial rules, requiring there to be at least one man and one woman lay member of the Court Martial if one or more of the lay members is a service person. The lay members play a similar role to a jury in the Crown Court and also have a role in sentencing. The lay members are normally all senior NCOs and officers selected at random and - as only a relatively small proportion of those eligible to be lay members are female - it is possible for there to be no women lay members.

7.3 The Government response to the House of Commons Defence Committee inquiry into Women in the Armed Forces (2021), stated the Secretary of State's determination to ensure female representation on court martial boards related to sexual offending. The new rule 34A will improve the gender balance amongst lay members of the Court Martial; the policy decision has been taken, however, that it will be implemented for all proceedings in the Court Martial, rather than just for sexual offending cases.

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 service courts 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 service courts. 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 service courts. 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 service courts 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.

15.1 Leo Docherty MP, Minister of State for Defence People and Veterans at the Ministry of Defence can confirm that this Explanatory Memorandum meets the required standard.