

**EXPLANATORY MEMORANDUM TO THE
COURTS-MARTIAL (AMENDMENT) RULES 2005**

2005 No. 1535

1. This Explanatory Memorandum has been prepared by the Ministry of Defence and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The above Rules make amendments to the Courts-Martial (Army) Rules 1997, the Courts-Martial (Royal Air Force) Rules 1997, and the Courts-Martial (Royal Navy) Rules 1997. For all three services, the amendments insert rules which specify the procedure for giving notice or making application to adduce evidence of bad character and hearsay evidence and they broaden the definition of “the prosecutor” so as to include any person appointed by the prosecuting authority. The rules relating to bad character and hearsay, and the related time limits provided for, only apply to proceedings in respect of which charges are preferred on or after 1 July 2005. In respect of the Royal Navy only, the amendments insert provisions for the procedures, conduct and recording of formal preliminary examinations and make further minor and technical amendments to the Courts-Martial (Royal Navy) Rules 1997.

3. Matters of special interest to the Joint Committee on Statutory Instruments and the Select Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 *Admissibility of evidence of bad character and hearsay evidence*

4.1.1 Chapter 1 of Part 11 of the Criminal Justice Act 2003 (“the 2003 Act”) introduces provisions allowing for the admission, in criminal trials, of evidence of previous convictions and other misconduct while Chapter 2 of Part 11 of the 2003 Act similarly introduces provisions allowing for the admission of hearsay evidence. By virtue of sections 113 and 135 of, and Schedules 6 and 7 to, the 2003 Act, these provisions have effect, subject to modifications, in relation to proceedings before service courts (whether in the United Kingdom or elsewhere).

4.1.2 In relation to the admission of the bad character of accused persons, the 2003 Act sets out the circumstances in which such evidence can be given in order to clarify this area of the law and encourage the admission of this evidence where it will properly assist the court. The intended approach is inclusionary, but with safeguards to enable the judge advocate to exclude evidence that could have a disproportionate effect on the court. In respect of the bad character of other witnesses, the 2003 Act provides safeguards against attacks on their

character where such attacks cannot be justified either as important explanatory evidence or as having substantial probative value in relation to a matter in issue.

4.1.3 In relation to the admission of hearsay evidence, the 2003 Act sets out the grounds for the admissibility of such evidence, the emphasis being on the inclusion of hearsay evidence where it is probative, reliable and in all other respects it is in the interests of justice to admit it. It sets out categories for the admissibility of such evidence, preserves certain of the common law exceptions to the rule against the admission of hearsay, and allows for the making of rules to provide for notice to be given of an intention to adduce such evidence, along with a right to oppose its admission.

4.2 *Amendment of the definition of “the prosecutor”*

4.2.1 The Courts-Martial Rules for the three services, when originally drafted, did not explicitly take account of how procedures should work when Counsel appears on behalf of the prosecuting authority since they provide that certain things can only be done by prosecuting officers. These amendments therefore remove a possible inconsistency where Counsel appears on behalf of the prosecuting authority.

4.3 *Inclusion within Courts-Martial (Royal Navy) Rules 1997 of rules for formal preliminary examinations*

4.3.1 The Courts-Martial Rules for the Army and Royal Air Force include provision for the procedures, conduct and recording of formal preliminary examinations. This instrument harmonises the Courts-Martial Rules for the Royal Navy with those of the other two services.

4.4 *Courts-Martial (Royal Navy) Rules – miscellaneous amendments*

4.4.1 Further minor and technical amendments to the Courts-Martial (Royal Navy) Rules 1997 are inserted in order to clarify the primacy of the judge advocate in the Court-Martial trial process and to define more accurately the residual role and functions of the president of the Court-Martial.

5. Extent

5.1 This instrument applies to proceedings before Courts-Martial whether in the United Kingdom or elsewhere.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background

7.1 Regarding the insertion into the Courts-Martial Rules of provisions relating to the admission of evidence of bad character and hearsay evidence, the policy objective for the services is to mirror, as far as practicable, the procedures and

practices (including adoption of rules of evidence) in place in the civilian criminal courts. The rules are therefore similar to those set out in the Criminal Procedure Rules 2005.

- 7.2 In relation to the amendment of the definition of “the prosecutor” in the interpretation section of each of the sets of Courts-Martial Rules for the three services, the policy aim is to remove possible inconsistency between the ability of the prosecuting authority to appoint Counsel to act for him and the Rules. The possible inconsistency results from the present definition of “the prosecutor” which might imply that a prosecuting officer should carry out certain functions rather than Counsel.
- 7.3 The policy objectives in relation to the amendments inserted solely into the Courts-Martial (Royal Navy) Rules 1997 are very simply to allow for a process of formal preliminary examinations (which is part of the process of investigation of an offence whereby the prosecuting authority can establish whether sufficient evidence exists to found a charge) which the prosecuting authorities of the other two services have had the facility to use for many years, whilst the remaining miscellaneous amendments are purely clarificatory in nature.

8. Impact

- 8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

- 9.1 Sue McIntosh at the Ministry of Defence can answer any queries regarding the instrument. Her contact details are:

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