



Armed Forces Act 2016

2016 CHAPTER 21

Offenders assisting investigations and prosecutions

PROSPECTIVE

7 Immunity from prosecution

In AFA 2006, after Part 12 insert—

“PART 12A

OFFENDERS ASSISTING INVESTIGATIONS AND PROSECUTIONS

304A Immunity from prosecution

- (1) If the Director of Service Prosecutions (“the Director”) thinks that, for the purposes of the investigation or prosecution of a relevant service offence, it is appropriate to offer a person immunity from prosecution for a service offence, the Director may give the person a written notice under this subsection (an “immunity notice”).
- (2) “Relevant service offence” means—
 - (a) an offence under section 42 as respects which the corresponding offence under the law of England and Wales is an indictable offence under that law; or
 - (b) any other service offence which, if committed by a person aged 18 or over and tried by the Court Martial, is punishable with imprisonment for more than 2 years.
- (3) If a person is given an immunity notice, the person may not be tried for a service offence of a description specified in the notice except in circumstances specified in the notice.

Status: This version of this cross heading contains provisions that are prospective.
Changes to legislation: *There are currently no known outstanding effects for the Armed Forces Act 2016.*
Cross Heading: Offenders assisting investigations and prosecutions. (See end of Document for details)

- (4) An immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice.”

PROSPECTIVE

8 Undertakings as to use of evidence

After section 304A of AFA 2006 insert—

“304B Undertakings as to use of evidence

- (1) If the Director of Service Prosecutions (“the Director”) thinks that, for the purposes of the investigation or prosecution of a relevant service offence, it is appropriate to offer a person an undertaking that information will not be used against the person in service proceedings, the Director may give the person a written notice under this subsection (a “restricted use undertaking”).
- (2) If a person is given a restricted use undertaking, the information described in the undertaking must not be used against that person in service proceedings except in the circumstances specified in the undertaking.
- (3) In subsections (1) and (2), the references to the use of information in service proceedings are to its use—
 - (a) at a summary hearing in respect of a service offence, or
 - (b) in proceedings in respect of a service offence before—
 - (i) the Court Martial;
 - (ii) the Service Civilian Court;
 - (iii) the Summary Appeal Court;
 - (iv) the Court Martial Appeal Court; or
 - (v) the Supreme Court on an appeal brought from the Court Martial Appeal Court.
- (4) A restricted use undertaking ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the undertaking.
- (5) In this section “relevant service offence” has the same meaning as in section 304A.”

PROSPECTIVE

9 Reduction in sentence

After section 304B of AFA 2006 insert—

“304C Reduction in sentence

- (1) This section applies if a defendant—

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- (a) is convicted of a service offence following a plea of guilty in proceedings in the Court Martial; and
 - (b) has, pursuant to a written agreement made with the Director of Service Prosecutions, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence.
- (2) In determining what sentence to pass on the defendant, the Court Martial may take into account the extent and nature of the assistance given or offered.
- (3) Subsection (2) does not prevent the court from also taking account of any other matter which it is entitled by virtue of any other enactment to take account of for the purposes of determining the sentence.
- (4) The power of a court to act under subsection (2) is not affected by any enactment which requires that a minimum sentence is passed in respect of an offence or an offence of a particular description or by reference to the circumstances of an offender (whether or not the enactment also permits the court to pass a lesser sentence in particular circumstances).
- (5) The power of a court to act under subsection (2) is not affected by any enactment which, in the case of a sentence which is fixed by law, requires the court to take into account certain matters for the purposes of making an order which determines, or has the effect of determining, the minimum period of imprisonment or detention which the offender must serve (whether or not the enactment also permits the court to fix a lesser period in particular circumstances).
- (6) In this section, references to assisting the prosecutor are to assisting the Director or any other prosecutor.”

10 Review of sentence following offer of assistance

After section 304C of AFA 2006 insert—

“304D Review of sentence following offer of assistance

- (1) This section applies if—
 - (a) the Court Martial has passed a sentence on a person in respect of a service offence;
 - (b) the sentence for the offence is not fixed by law or, if it is, the person pleaded guilty; and
 - (c) the person falls within subsection (2) or (3).
- (2) A person falls within this subsection if the person—
 - (a) received a discounted sentence in consequence of having offered, in accordance with a written agreement with the Director of Service Prosecutions (“the Director”), to give assistance to the investigator or prosecutor of an offence; and
 - (b) having given the assistance in accordance with the agreement, in accordance with another written agreement with the Director gives or offers to give further assistance to the investigator or prosecutor of an offence.

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- (3) A person falls within this subsection if the person—
 - (a) received a sentence which was not discounted; and
 - (b) in accordance with a written agreement with the Director subsequently gives or offers to give assistance to the investigator or prosecutor of an offence.
- (4) The Director may at any time refer the case back to the Court Martial if—
 - (a) the person is still serving the sentence; and
 - (b) the Director thinks it is in the interests of justice to do so.
- (5) The Court Martial dealing with a referral under this section must, if possible, consist of the people who were the members of the Court Martial when it passed the sentence to which the referral relates.
- (6) The Court Martial may—
 - (a) take into account the extent and nature of the assistance given or offered; and
 - (b) substitute for the sentence to which the referral relates such lesser sentence as it thinks appropriate.
- (7) Any part of the sentence to which the referral relates which the person has already served must be taken into account in determining when a lesser sentence imposed under this section has been served.
- (8) A person in respect of whom a referral is made under this section may, with the leave of the Court Martial Appeal Court, appeal to that court against a decision of the Court Martial under this section.
- (9) The Director may, with the leave of the Court Martial Appeal Court, appeal to that court against such a decision.
- (10) In relation to any proceedings under this section, the Secretary of State may make regulations containing provision corresponding to any provision in Parts 2 to 4 of the Court Martial Appeals Act 1968, with or without modifications (but this is subject to subsection (11)).
- (11) Regulations under subsection (10)—
 - (a) may not make provision corresponding to provision which may be included in regulations made by the Lord Chancellor under section 31A, 33, 33A, 46A or 47 of the Court Martial Appeals Act 1968;
 - (b) may confer power to make regulations corresponding to the power in section 31A, 33, 33A, 46A or 47 of the Court Martial Appeals Act 1968 only if they provide that a statutory instrument containing such regulations (whether alone or with other provision) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (12) Section 1(4) of the Court Martial Appeals Act 1968 (limitation on appeal from the Court Martial Appeal Court) does not prevent an appeal to the Supreme Court in accordance with regulations made under this section.

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- (13) Subsections (3) to (5) of section 304C apply for the purposes of this section as they apply for the purposes of that section but as if the references to subsection (2) of that section were references to subsection (6) of this section.
- (14) In this section—
- (a) “discounted sentence” means a sentence passed in accordance with section 304C or this section;
 - (b) references to assisting the prosecutor are to assisting the Director or any other prosecutor.”

Commencement Information

II S. 10 in force at 17.4.2024 for specified purposes by S.I. 2024/562, reg. 2(a)

11 Review of sentence following failure to assist

After section 304D of AFA 2006 insert—

“304E Review of sentence following failure to assist

- (1) This section applies if—
- (a) the Court Martial has passed a sentence on a person in respect of a service offence;
 - (b) the sentence for the offence is not fixed by law or, if it is, the person pleaded guilty;
 - (c) the person received a discounted sentence in consequence of having offered, in accordance with a written agreement with the Director of Service Prosecutions (“the Director”), to give assistance to the investigator or prosecutor of an offence; and
 - (d) the person fails to any extent to give assistance in accordance with the agreement.
- (2) The Director may at any time refer the case back to the Court Martial if—
- (a) the person is still serving the sentence; and
 - (b) the Director thinks it is in the interests of justice to do so.
- (3) The Court Martial dealing with a referral under this section must, if possible, consist of the people who were the members of the Court Martial when it passed the sentence to which the referral relates.
- (4) If the Court Martial is satisfied that the person knowingly failed to give the assistance, it may substitute for the sentence to which the referral relates such greater sentence as it thinks appropriate.
- (5) A greater sentence imposed under this section must not exceed the sentence which the court would have passed but for the agreement to give assistance.
- (6) Any part of the sentence to which the referral relates which the person has already served must be taken into account in determining when a greater sentence imposed under this section has been served.

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- (7) A person in respect of whom a referral is made under this section may, with the leave of the Court Martial Appeal Court, appeal to that court against a decision of the Court Martial under this section.
- (8) The Director may, with the leave of the Court Martial Appeal Court, appeal to that court against such a decision.
- (9) In relation to any proceedings under this section, the Secretary of State may make regulations containing provision corresponding to any provision in Parts 2 to 4 of the Court Martial Appeals Act 1968, with or without modifications (but this is subject to subsection (10)).
- (10) Regulations under subsection (9)—
- (a) may not make provision corresponding to provision which may be included in regulations made by the Lord Chancellor under section 31A, 33, 33A, 46A or 47 of the Court Martial Appeals Act 1968;
 - (b) may confer power to make regulations corresponding to the power in section 31A, 33, 33A, 46A or 47 of the Court Martial Appeals Act 1968 only if they provide that a statutory instrument containing such regulations (whether alone or with other provision) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (11) Section 1(4) of the Court Martial Appeals Act 1968 (limitation on appeal from the Court Martial Appeal Court) does not prevent an appeal to the Supreme Court in accordance with regulations made under this section.
- (12) In this section—
- (a) “discounted sentence” means a sentence passed in accordance with section 304C or 304D;
 - (b) references to assisting the prosecutor are to assisting the Director or any other prosecutor.”

Commencement Information

I2 S. 11 in force at 17.4.2024 for specified purposes by S.I. 2024/562, reg. 2(b)

PROSPECTIVE

12 Supplementary provision

After section 304E of AFA 2006 insert—

“304F Sections 304C to 304E: statements in open court

- (1) Subsections (2) and (3) apply if, in accordance with section 304C or 304D, a court passes or substitutes a lesser sentence than it would have passed if the assistance mentioned in those sections had not been given or offered (a “discounted sentence”).

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- (2) The court must state in open court—
 - (a) that it has passed or substituted a discounted sentence; and
 - (b) what the greater sentence would have been.
- (3) If the court thinks that it would not be in the public interest to disclose that the sentence is a discounted sentence—
 - (a) subsection (2) does not apply;
 - (b) the court must give written notice of the matters specified in paragraphs (a) and (b) of that subsection to both the prosecutor and the defendant; and
 - (c) section 252 (duty to give reasons and explain sentence) does not apply to the extent that it would require the court to disclose that it has passed or substituted a discounted sentence.
- (4) Subsection (5) applies if a court—
 - (a) substitutes a sentence in accordance with section 304E; and
 - (b) thinks that it would not be in the public interest to disclose that the person received a discounted sentence under section 304C or 304D.
- (5) Section 252 (duty to give reasons and explain sentence) does not apply to the extent that it would require the court to disclose that the person received a discounted sentence.

304G Sections 304D and 304E: exclusion of public from review proceedings

- (1) This section applies to—
 - (a) proceedings relating to a referral made under section 304D or 304E; and
 - (b) any other proceedings arising in consequence of such proceedings.
- (2) The court in which the proceedings will be or are being heard may make such order as it thinks appropriate—
 - (a) to exclude a person from the proceedings;
 - (b) to give such directions as it thinks appropriate prohibiting the publication of any matter relating to the proceedings (including the fact that the referral has been made).
- (3) The power under subsection (2)(a) does not include power to exclude—
 - (a) a member or officer of the court;
 - (b) a party to the proceedings;
 - (c) a prosecuting officer dealing with the proceedings;
 - (d) counsel or a solicitor for a party to the proceedings;
 - (e) a person otherwise directly concerned with the proceedings.
- (4) An order under subsection (2) may be made only to the extent that the court thinks—
 - (a) that it is necessary to do so to protect the safety of any person; and
 - (b) that it is in the interests of justice.

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- (5) This section does not affect any other power which the court has by virtue of any rule of law or other enactment—
- (a) to exclude a person from proceedings; or
 - (b) to restrict the publication of matters relating to proceedings.

304H Meaning of “sentence”

In this Part—

- (a) “sentence” includes any order made by a court when dealing with an offender in respect of an offence; and
- (b) a reference to a greater or lesser sentence must be interpreted accordingly.”

Status:

This version of this cross heading contains provisions that are prospective.

Changes to legislation:

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