



Armed Forces Act 2021

2021 CHAPTER 35

Service courts, summary hearings and jurisdiction

2 Constitution of the Court Martial

[Schedule 1](#) contains provisions about the constitution of the Court Martial.

3 Nomination of Circuit judge to sit as judge advocate

In paragraph (c) of section 362 of AFA 2006 (judge advocates), after “Wales”, in the first place it occurs, insert “, or a Circuit judge,”.

4 Summary hearings: power to rectify mistakes etc

(1) Section 153 of AFA 2006 (summary hearings etc rules) is amended in accordance with [subsections \(2\) to \(4\)](#).

(2) After subsection (1) insert—

“(1A) Without prejudice to the generality of subsection (1), the Secretary of State may by rules make provision with respect to the variation or rescission by a commanding officer of—

- (a) a punishment awarded by the officer, or
- (b) an order under section 193 made by the officer,

in cases where it appears to the officer that the officer had no power to award the punishment or (as the case may be) to make the order.”

(3) After subsection (2) insert—

“(2A) Rules made under subsection (1A) may make provision about the commencement of punishments or orders varied by the commanding officer.”

(4) In [subsection \(3\)](#)—

- (a) the text from ““prescribed”” to the end becomes [paragraph \(a\)](#);
- (b) after [paragraph \(a\)](#) insert—

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“(b) references to hearings include any proceedings for determining whether a punishment, or an order under section 193, should be varied or rescinded.”

(5) In section 152 of AFA 2006 (review of summary findings and punishments), after subsection (2) insert—

“(2A) Subsection (2B) applies where—

- (a) a review has been carried out under this section in respect of a punishment,
- (b) the person to whom the review relates has not brought an appeal under section 141 within the period provided by subsection (2) of that section, and
- (c) the person who carried out the review considers there may be grounds for varying or rescinding the punishment, pursuant to rules made by virtue of section 153(1A).

(2B) The person who carried out the review may refer the punishment back to the commanding officer who awarded it to consider whether to exercise the power to vary or rescind the punishment pursuant to those rules.

(2C) Where subsection (2B) applies, that does not prevent the person who carried out the review from making a referral under subsection (4)—

- (a) as an alternative to making a referral under subsection (2B), or
- (b) after making a referral under subsection (2B), where the commanding officer has declined to exercise the power to vary or rescind the punishment.”

5 The Summary Appeal Court: power to rectify mistakes

(1) Section 151 of AFA 2006 (SAC rules) is amended as follows.

(2) In subsection (3), after paragraph (g) insert—

“(ga) in relation to cases where the court has awarded or confirmed a punishment at a rehearing and it appears to the court that it had no power to do so, enabling the court to substitute for the (purported) award or confirmation of the punishment a decision that the court would have had power to make at the rehearing;”.

(3) After subsection (5) insert—

“(5A) Rules made by virtue of subsection (3)(ga) may make provision about the commencement of punishments varied by the court.”

6 The Service Civilian Court: power to rectify mistakes

In section 288 of AFA 2006 (SCC rules)—

(a) in subsection (3), after paragraph (e) insert—

“(ea) for the variation or rescission by the court of a sentence passed by it, or an order under section 193 made by it, in a case where it appears to the court that it had no power to award such a sentence or (as the case may be) to make such an order;”;

(b) after subsection (6) insert—

“(6A) Rules made by virtue of subsection (3)(ea) may make provision about the commencement of sentences or orders varied by the court (including provision conferring on the court a power to direct that a sentence is to take effect otherwise than as mentioned in section 289(1)).”

7 Concurrent jurisdiction

In Part 13 of AFA 2006, after Chapter 3 insert—

“CHAPTER 3A

GUIDANCE ON EXERCISE OF CRIMINAL JURISDICTION

320A Guidance on exercise of criminal jurisdiction: England or Wales

- (1) The Director of Service Prosecutions and the Director of Public Prosecutions must agree a protocol regarding the exercise of concurrent jurisdiction in respect of alleged conduct of the description in subsection (2).
- (2) Subsection (1) refers to conduct of a person subject to service law which—
 - (a) occurs when the person is in England or Wales, and
 - (b) is punishable by the law of England and Wales.
- (3) The protocol—
 - (a) must give guidance as to general principles which are to be taken into account by a relevant prosecutor when considering in which jurisdiction (service or civilian) proceedings should be brought, and
 - (b) may give guidance as to—
 - (i) procedures for making decisions regarding the exercise of jurisdiction, including as to the cases in which there should be consultation between relevant prosecutors within paragraphs (a) and (b) of subsection (10), and
 - (ii) any other matters the Directors think appropriate for the purposes of or in connection with subsection (1).
- (4) Guidance under subsection (3)(a) must be designed to promote fair and efficient justice.
- (5) Where relevant prosecutors within subsection (10)(a) and relevant prosecutors within subsection (10)(b) cannot resolve a disagreement between them about the exercise of jurisdiction in a case to which guidance under this section applies, it is for the Director of Public Prosecutions to decide in which jurisdiction proceedings should be brought in that case.
- (6) The Director of Service Prosecutions and the Director of Public Prosecutions may from time to time agree revisions to the protocol.
- (7) Before agreeing the protocol or revisions to it under this section the Directors must consult—

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- (a) the Secretary of State,
 - (b) the Attorney General,
 - (c) the National Police Chiefs' Council, and
 - (d) any other person the Directors think appropriate.
- (8) The current version of the protocol must be published in whatever manner the Directors think appropriate.
- (9) Consultation undertaken before the Armed Forces Act 2021 is passed is as effective for the purposes of subsection (7) as consultation undertaken after it is passed.
- (10) In this section “relevant prosecutor” means—
- (a) the Director of Service Prosecutions and any person appointed under section 365 (prosecuting officers), and
 - (b) the Director of Public Prosecutions, a Crown Prosecutor and any person appointed under section 5(1) of the Prosecution of Offences Act 1985 (conduct of prosecutions on behalf of the Service).
- (11) But this section applies in relation to a relevant prosecutor only where that prosecutor is aware that the Court Martial has (or may have) jurisdiction to try the person in respect of the alleged conduct mentioned in subsection (1).
- (12) In subsection (2)(a) a reference to England or Wales includes the territorial waters of the United Kingdom adjacent to England or Wales (as the case may be).
- (13) In this section—
- “conduct” means an act or omission;
 - “the Directors” means the Director of Service Prosecutions and the Director of Public Prosecutions (acting jointly);
 - “punishable” has the same meaning as in section 42 (criminal conduct).

320B Guidance on exercise of criminal jurisdiction: Scotland

- (1) The Director of Service Prosecutions and the Lord Advocate must agree a protocol regarding the exercise of concurrent jurisdiction, in respect of alleged conduct of the description in subsection (2), in the cases specified in subsection (3).
- (2) Subsection (1) refers to conduct of a person subject to service law which—
- (a) occurs when the person is in Scotland, and
 - (b) constitutes an offence under the law of Scotland.
- (3) The cases mentioned in subsection (1) are where—
- (a) the alleged conduct also constitutes an offence under section 42 (criminal conduct), or
 - (b) the person mentioned in subsection (2) could on the same facts be charged with an offence under section 42 which is broadly equivalent to the offence under the law of Scotland.
- (4) The protocol—

Status: This is the original version (as it was originally enacted).

- (a) must give guidance as to general principles which are to be taken into account by a relevant prosecutor when considering in which jurisdiction (service or civilian) proceedings should be brought, and
 - (b) may give guidance as to—
 - (i) procedures for making decisions regarding the exercise of jurisdiction, including as to the cases in which there should be consultation between relevant prosecutors within paragraphs (a) and (b) of subsection (11), and
 - (ii) any other matters the issuing authorities think appropriate for the purposes of or in connection with subsection (1).
- (5) Guidance under subsection (4)(a) must be designed to promote fair and efficient justice.
- (6) Where relevant prosecutors within subsection (11)(a) and relevant prosecutors within subsection (11)(b) cannot resolve a disagreement between them about the exercise of jurisdiction in a case to which guidance under this section applies, it is for the Lord Advocate to decide in which jurisdiction proceedings should be brought in that case.
- (7) The Director of Service Prosecutions and the Lord Advocate may from time to time agree revisions to the protocol.
- (8) Before agreeing the protocol or revisions to it under this section the issuing authorities must consult—
 - (a) the Secretary of State,
 - (b) the chief constable of the Police Service of Scotland, and
 - (c) any other person the issuing authorities think appropriate.
- (9) The current version of the protocol must be published in whatever manner the issuing authorities think appropriate.
- (10) Consultation undertaken before the Armed Forces Act 2021 is passed is as effective for the purposes of subsection (8) as consultation undertaken after it is passed.
- (11) The following are “relevant prosecutors” for the purposes of this section—
 - (a) the Director of Service Prosecutions and any person appointed under section 365 (prosecuting officers), and
 - (b) any prosecutor as defined in section 307(1) of the Criminal Procedure (Scotland) Act 1995 (other than a private prosecutor).
- (12) But this section applies in relation to a relevant prosecutor only where that prosecutor is aware that the Court Martial has (or may have) jurisdiction to try the person in respect of the alleged conduct mentioned in subsection (1).
- (13) In subsection (2)(a) the reference to Scotland includes the territorial waters of the United Kingdom adjacent to Scotland.
- (14) In this section—
 - “conduct” means an act or omission;
 - “the issuing authorities” means the Director of Service Prosecutions and the Lord Advocate (acting jointly).

Status: This is the original version (as it was originally enacted).

320C Guidance on exercise of criminal jurisdiction: Northern Ireland

- (1) The Director of Service Prosecutions and the Director of Public Prosecutions for Northern Ireland must agree a protocol regarding the exercise of concurrent jurisdiction, in respect of alleged conduct of the description in subsection (2), in the cases specified in subsection (3).
- (2) Subsection (1) refers to conduct of a person subject to service law which—
 - (a) occurs when the person is in Northern Ireland, and
 - (b) constitutes an offence under the law of Northern Ireland.
- (3) The cases mentioned in subsection (1) are where—
 - (a) the alleged conduct also constitutes an offence under section 42 (criminal conduct), or
 - (b) the person mentioned in subsection (2) could on the same facts be charged with an offence under section 42 which is broadly equivalent to the offence under the law of Northern Ireland.
- (4) The protocol—
 - (a) must give guidance as to general principles which are to be taken into account by a relevant prosecutor when considering in which jurisdiction (service or civilian) proceedings should be brought, and
 - (b) may give guidance as to—
 - (i) procedures for making decisions regarding the exercise of jurisdiction, including as to the cases in which there should be consultation between relevant prosecutors within paragraphs (a) and (b) of subsection (11), and
 - (ii) any other matters the issuing authorities think appropriate for the purposes of or in connection with subsection (1).
- (5) Guidance under subsection (4)(a) must be designed to promote fair and efficient justice.
- (6) Where relevant prosecutors within subsection (11)(a) and relevant prosecutors within subsection (11)(b) cannot resolve a disagreement between them about the exercise of jurisdiction in a case to which guidance under this section applies, it is for the Director of Public Prosecutions for Northern Ireland to decide in which jurisdiction proceedings should be brought in that case.
- (7) The Director of Service Prosecutions and the Director of Public Prosecutions for Northern Ireland may from time to time agree revisions to the protocol.
- (8) Before agreeing the protocol or revisions to it under this section the issuing authorities must consult—
 - (a) the Secretary of State,
 - (b) the Department of Justice in Northern Ireland,
 - (c) the Chief Constable of the Police Service of Northern Ireland,
 - (d) the Attorney General for Northern Ireland, and
 - (e) any other person the issuing authorities think appropriate.
- (9) The current version of the protocol must be published in whatever manner the issuing authorities think appropriate.

- (10) Consultation undertaken before the Armed Forces Act 2021 is passed is as effective for the purposes of subsection (8) as consultation undertaken after it is passed.
- (11) The following are “relevant prosecutors” for the purposes of this section—
- (a) the Director of Service Prosecutions and any person appointed under section 365 (prosecuting officers), and
 - (b) the Director of Public Prosecutions for Northern Ireland, the Deputy Director of Public Prosecutions for Northern Ireland, a Public Prosecutor and any person appointed under section 36(2) of the [Justice \(Northern Ireland\) Act 2002 \(c. 26 \(N.I.\)\)](#) (exercise of functions on behalf of the Service).
- (12) But this section applies in relation to a relevant prosecutor only where that prosecutor is aware that the Court Martial has (or may have) jurisdiction to try the person in respect of the alleged conduct mentioned in subsection (1).
- (13) In subsection (2)(a) the reference to Northern Ireland includes the territorial waters of the United Kingdom adjacent to Northern Ireland.
- (14) In this section—
- “conduct” means an act or omission;
 - “the issuing authorities” means the the Director of Service Prosecutions and the Director of Public Prosecutions for Northern Ireland (acting jointly).”