

PROTOCOL REGARDING THE EXERCISE OF CRIMINAL JURISDICTION IN ENGLAND AND WALES

Between:

The Director of Public Prosecutions

and

The Director of Service Prosecutions

1. Introduction

- 1.1 This protocol (“the protocol”) has been agreed between the Director of Public Prosecutions (DPP) and the Director of Service Prosecutions (DSP) pursuant to s.320A of the [Armed Forces Act 2006](#) (AFA 06).
- 1.2 The primary purpose of the protocol is to provide guidance for relevant prosecutors regarding the exercise of jurisdiction in respect of conduct of a person subject to Service law¹ which occurs when that person is in England or Wales and is punishable by the law of England and Wales (as specified in s.320A(2) AFA 06). The protocol identifies principles which are to be considered when a decision is made as to the appropriate jurisdiction in which to bring proceedings.
- 1.3 The DPP and the DSP have consulted with the Secretary of State, the Attorney General, the National Police Chiefs’ Council and other consultees in accordance with s.320A(7) AFA 06 before agreeing the protocol.
- 1.4 The protocol replaces all previously published guidance relating to the exercise of concurrent jurisdiction and will be published on the Crown Prosecution Service (CPS) and Service Prosecuting Authority (SPA) websites when the agreement has been signed by the parties.

2. Responsibility for decisions about jurisdiction

- 2.1 Initial decisions regarding jurisdiction are likely to be made by the police force(s) investigating the alleged conduct. Accordingly, the protocol is intended to complement corresponding guidance to be issued by Home Office Police Forces, the Ministry of Defence and the Service Police.

¹ See definition of ‘a person subject to Service law’ in ss.367-369 AFA 2006.

- 2.2 Where a relevant prosecutor² is consulted about an investigation, and is aware that the alleged conduct falls within s.320A(2) AFA 06, the prosecutor will be responsible for deciding on the appropriate jurisdiction in accordance with the principles set out in section 3 of the protocol and, where relevant, the procedures set out in sections 4 and 5. It is the duty of a relevant prosecutor to keep the issue of jurisdiction under review and to reconsider the question of jurisdiction in the event of a significant change of circumstances.
- 2.3 A decision as to jurisdiction should be made at the earliest reasonable opportunity and, in any event, before criminal proceedings have been commenced³ save where there are exceptional circumstances (see paragraph 3.8 below).
- 2.4 Where a relevant prosecutor is responsible for making a decision in accordance with paragraph 2.2, above, the prosecutor will make a record of the decision as to jurisdiction, the basis for the decision, and any note of consultation or discussion made in accordance with paragraph 4.5 or paragraph 5.3.6 below, at the conclusion of the relevant procedure.

3. The principles governing decisions regarding jurisdiction

- 3.1 Decisions regarding jurisdiction are to be approached on a case-by-case basis.
- 3.2 The overriding principle is to promote fair and efficient justice, as specified in s.320A(4) AFA 2006. This will include support for the effective participation of victims, witnesses, suspects and defendants, to ensure public confidence in both the civilian justice system and the service justice system.
- 3.3 Without prejudice to the generality of the overriding principle, the main principles to be applied when deciding in which jurisdiction proceedings should be brought are:
- 3.3.1 proceedings relating to alleged conduct which affects the person or property of a civilian⁴ should ordinarily be brought in the civilian jurisdiction;
 - 3.3.2 subject to 3.3.3, proceedings relating to alleged conduct which does not affect the person or property of a civilian should ordinarily be brought in the service jurisdiction;

² See definition of ‘relevant prosecutor’ in s.320A(10) AFA 2006.

³ The phrase ‘criminal proceedings’ in paragraphs 2.3, 3.5 and 5.3.5, includes proceedings for criminal conduct offences under s.42 AFA 2006.

⁴ A civilian is a person who was not a member of the regular armed forces at the time of the alleged offence, and includes a civilian who is subject to service discipline.

3.3.3 proceedings relating to alleged conduct brought jointly against a person subject to service law and one or more civilians should ordinarily be brought in the civilian jurisdiction.

3.4 In addition to the main principles contained in paragraph 3.3, a relevant prosecutor should also consider the following non-exhaustive list of factors when deciding the appropriate jurisdiction in accordance with the overriding principle. Prosecutors should identify any relevant factors and give the appropriate weight to each factor, depending on the particular facts and circumstances of the case. The order in which the factors are set out below is not intended to convey their relative importance.

3.5 Factors that may favour either jurisdiction

3.5.1 whether the conduct is alleged to constitute or form part of a pattern of offending which includes conduct that should ordinarily be dealt with in either the civilian or service jurisdiction; but where the pattern of offending includes conduct that would ordinarily be tried in the civilian jurisdiction and separate conduct that would ordinarily be tried in the service jurisdiction, this would tend towards proceedings being brought in the civilian jurisdiction;

3.5.2 whether there are linked proceedings which have been brought in either the civilian or service jurisdiction;

3.5.3 the availability of different sentencing powers and ancillary orders within the service and civilian jurisdictions, for example:

- service detention (which involves retraining), dismissal from His Majesty's forces, and reduction in rank are sentences available in the service jurisdiction;
- the service jurisdiction does not have power to make confiscation orders under the Proceeds of Crime Act 2002, nor to impose Hospital Orders and associated orders under the Mental Health Act 1983, unless the offender has been found unfit to stand trial.

Note that sentencing powers and ancillary orders in relation to allegations involving children, domestic abuse, sexual offences and child abuse, that tend to favour the civilian jurisdiction, are referenced at factors (3.6.1) and (3.6.2);

3.5.4 considerations relating to existing capacity and resources, which may make it more efficient to bring proceedings in either the service or civilian jurisdiction;

3.5.5 any views expressed by a victim⁵ and, in appropriate cases, members of the victim's family and guardians of a Child Looked After. On receipt of a case,

⁵ "victim" is used to describe a person against whom an offence has been committed, or a complainant in a case being considered or prosecuted by the CPS or the SPA.

prosecutors should seek assurance from the police that the victim has been asked whether they have any views on jurisdiction;

- 3.5.6 whether any initial decisions made as to which police force should investigate the alleged conduct align with the guidance in this Protocol, and whether those decisions were made in accordance with relevant police guidance;

3.6 Factors that tend to favour the civilian jurisdiction

3.6.1 the obligations of the United Nations Convention on the Rights of the Child 1989 (UNCRC) where the accused and/or the victim or witness is a child, (aged under 18 years old). The best interests of the child should be treated as a primary consideration and be given appropriate weight. The assessment of the best interests of the child may include, but will not necessarily be limited to, consideration of the following matters:

- whether the best interests and welfare needs of the child require a multi-agency approach, which may be more difficult to achieve in the service jurisdiction;
- the availability of diversion from prosecution and restorative justice in the civilian jurisdiction;
- the availability of out-of-court disposals in the civilian jurisdiction;
- the availability of the youth court only in the civilian jurisdiction;
- the range of sentences available in the service and civilian jurisdictions, in particular the various orders available only in the civilian system, for example, referral orders and youth rehabilitation orders;

3.6.2 considerations that may be particularly relevant in cases involving allegations of domestic abuse, sexual offences or child abuse, including, for example:

- whether the needs of the victim or any witness require a multi-agency approach, which may be more difficult to achieve in the service jurisdiction;
- the availability of the Domestic Abuse Best Practice Framework in the civilian jurisdiction;
- the availability and nature of out-of-court disposals, such as a caution with a requirement, for example, to attend a rehabilitation course or not to contact the victim in DA cases, or to attend a parental course in child abuse cases;
- the range of ancillary and civil orders available within the service and civilian jurisdictions noting, for example, that: although there is power to impose a service restraining order under the Armed forces Act 2006, an order cannot be imposed should the person be dismissed from or no longer serving in the armed forces; nor is there power to enforce an existing service restraining order should the person leave or be discharged from the armed forces during the currency of the order;

- the requirement in the civilian jurisdiction that a production order pertaining to sensitive material (such as medical or therapy notes) must be served on the subject of the material (in addition to the holder of the material) where a judge so directs (CrimPR 17), which is not a requirement of the relevant rules in the SJS;

3.7 Factors that tend to favour the service jurisdiction

- 3.7.1 whether the conduct is alleged to constitute or form part of a pattern of offending which includes conduct that occurred outside England and Wales, noting that the service courts have jurisdiction for offences committed by persons subject to service law anywhere in the world, whereas the extraterritorial jurisdiction of the civilian courts is limited to particular offences;
- 3.7.2 the ability of the DSP to charge disciplinary offences under the AFA 2006, which are not available to the CPS, for example, offences in relation to insubordination, property offences, offences against service justice, and offences involving neglect of duty and misconduct, including conduct prejudicial to good order and discipline, fighting or threatening behaviour, ill-treatment of subordinates and disgraceful conduct of a cruel or indecent kind;
- 3.7.3 whether the conduct, if established, would be viewed more seriously within the service jurisdiction because of the service context, for example, because it may undermine the maintenance of discipline or the operational effectiveness of the armed forces;
- 3.7.4 the ability of the service police to deploy rapidly to conduct certain investigations outside the UK, particularly when suspects and/or witnesses may be outside the UK;
- 3.7.5 matters which impact on operational effectiveness and indicate that it may be more appropriate for proceedings to be brought in the service jurisdiction, such as, for example: the ability of the Court Martial to sit at an overseas location to accommodate participants in proceedings who are stationed overseas; and the power of the DSP to refer cases involving certain criminal conduct offences (for example, battery) to the Commanding Officer (CO). If the DSP refers a case to the CO, they will have “initial powers”, which include bringing a charge capable of being heard summarily, taking administrative action or taking no action, which may provide for a more timely and efficient manner of dealing with a case.
- 3.8 There is no legal mechanism to transfer a case between jurisdictions after charge, and there are inherent risks and difficulties in discontinuing proceedings in one jurisdiction

and re-commencing them in another. Accordingly, any decision to change jurisdiction after criminal proceedings have been commenced should not be made unless there are exceptional circumstances and then only with the joint approval of the DPP and the DSP, in accordance with paragraph 5.3.5 below.

4. Cases where consultation is required

4.1. There should be consultation between relevant prosecutors at the CPS and the SPA regarding the appropriate jurisdiction in which proceedings should be brought, whether the person affected is a civilian or member of the armed forces, in all cases involving:

4.1.1 an allegation of an offence of:

- Murder;
- Manslaughter;
- Rape;
- Sexual assault with penetration;
- Sexual assault without penetration; or

4.1.2 an allegation of domestic abuse or child abuse;

4.1.3 a suspect or defendant who is under 18 years of age.

4.2. In coming to a decision on the appropriate jurisdiction for proceedings, prosecutors should have regard to the principles contained in section 3 of the protocol.

4.3. All decisions on the appropriate jurisdiction for these offences should be approved at the level of Deputy Chief Crown Prosecutor (DCCP) or Deputy Head of Casework Division (DHOD) at the CPS and someone at the level of Managing Prosecutor or Deputy Director (MP or DD) at the SPA.

4.4. Where agreement cannot be reached and there is an issue as to jurisdiction, consultation should take place between a Chief Crown Prosecutor (CCP) or Head of Casework Division (HOD) at the CPS, and the Deputy Director of Service Prosecutions (DDSP) at the SPA, in accordance with paragraph 5.3.4 below.

4.5. A note should be made of any consultation that takes place in accordance with the provisions of this section, which should be sent to the relevant prosecutor responsible for making the record of decision under paragraph 2.4.

5. Cases where there is an issue as to jurisdiction

- 5.1 It is expected that, in most cases, the relevant police force(s) will have applied their guidance relating to concurrent jurisdiction by the time a relevant prosecutor is first made aware of the investigation by the police. However, a relevant prosecutor, who becomes aware that the alleged conduct being investigated falls within s.320A(2) AFA 06, should always consider whether proceedings have been, or are intended to be, brought in the appropriate jurisdiction.
- 5.2 Where a prosecutor has not been consulted by a police force, but nevertheless becomes aware of a case in which there may be an issue as to jurisdiction, the prosecutor should consult with and advise the police force and, if necessary, apply the procedure at paragraph 5.3.
- 5.3 Whereas the majority of cases are investigated by the most appropriate police force, and proceedings brought in the most appropriate jurisdiction, where a relevant prosecutor considers there may be an issue as to the appropriate jurisdiction, the following procedure will apply:
- 5.3.1 A relevant CPS prosecutor⁶ will notify a DCCP or DHOD at the CPS, who will consider the issue and, where appropriate, will initiate discussions with someone at the level of MP or DD at the SPA.
- 5.3.2 A relevant SPA prosecutor⁷ will notify someone at the level of MP or DD at the SPA, who will consider the issue and, where appropriate, will initiate discussions with a DCCP or DHOD at the CPS.
- 5.3.3 The purpose of the discussions referred to at paragraphs 5.3.1 and 5.3.2 above will be to resolve the issue as to which jurisdiction is appropriate in the circumstances, having regard to the principles contained in section 3 of the protocol.
- 5.3.4 Where agreement cannot be reached, the issue will be discussed between a CCP or HOD in the CPS, and the DDSF in the SPA.
- 5.3.5 If there is still no agreement, or the issue as to the appropriate jurisdiction has arisen after criminal proceedings have been commenced, the DPP and the DSP should consider the case and agree a decision. If they cannot reach an agreement, the final decision on the appropriate jurisdiction will be made by the DPP. Either Director may consult the Attorney General to seek their view on the appropriate jurisdiction.

⁶ Within the meaning of s.320A(10)(b) AFA 06

⁷ Within the meaning of s.320A(10)(a) AFA 06

5.3.6 A note should be made of any discussion that takes place in accordance with the provisions of paragraph 5.3, which should be sent to the relevant prosecutor responsible for making the record of the decision under paragraph 2.4.

6. Review of this protocol

6.1 The protocol will be reviewed when necessary by the DPP and DSP and, in any event, at least once every two years from the date on which the protocol is signed.

Signatories

(1) On behalf of the Crown Prosecution Service:



Max Hill KC (Director of Public Prosecutions)

Dated: 25 October 2023

(2) On behalf of the Service Prosecuting Authority:



Jonathan Rees KC (Director of Service Prosecutions)

Dated: 25 October 2023