Consultation on CPS-SPA Protocol on the exercise of criminal jurisdiction Summary of Responses

Introduction

This is a summary of responses to the public consultation undertaken by the Crown Prosecution Service (CPS) and the Service Prosecution Authority (SPA) on revisions to the CPS-SPA Protocol regarding the exercise of criminal jurisdiction in England and Wales (the Protocol).

The proposed revisions were published on 23 February 2023 and consulted on for a period of eight weeks, ending 20 April 2023.

The Protocol provides guidance for CPS and SPA prosecutors on the exercise of jurisdiction in respect of conduct of a person subject to Service law, which occurs when that person is in England or Wales. In these circumstances, both the CPS and the SPA have jurisdiction to bring criminal proceedings and therefore it is necessary to determine whether the appropriate jurisdiction is the civilian or the service justice system. The protocol identifies principles and factors which are to be considered when a decision is made as to the appropriate jurisdiction in which to bring proceedings.

Background

The Protocol was last updated in November 2016 and has since been placed on a statutory footing by section 7 of the Armed Forces Act 2021, which inserted section 320A into Chapter 3A of the Armed Forces Act 2006 (AFA 2006).

Under the new statutory provisions, the Director of Public Prosecutions (DPP) and the Director of Service Prosecutions (DSP) are obliged to consult on revisions to the Protocol with the Secretary of State, the Attorney General, the National Police Chiefs' Council, and any other person the Directors think appropriate.

The consultation

As well as consulting with the statutory consultees, we sought the views of other interested stakeholders to provide interested persons with an opportunity to provide comments and to ensure the final version of the Protocol is informed by as wide a range of views as possible.

The consultation focussed specifically on the guidance in the Protocol on the general principles to be applied by prosecutors when making decisions on jurisdiction.

These are set out in section 3 of the revised Protocol. The main principles governing jurisdiction, at paragraph 3.3, remain broadly the same as in the current Protocol, whereby proceedings should be brought in the service jurisdiction if the alleged conduct does not affect the person or property of a civilian.

At paragraph 3.4 we included an extensive non-exhaustive list of factors that prosecutors should consider when deciding on the appropriate jurisdiction. Many of these were not included in the 2016 edition of the Protocol.

Consultation Questions

The consultation asked four questions on section 3 of the Protocol:

Q1: Do you agree with the principles at paragraph 3.3, to be applied when deciding in which jurisdiction proceedings should be brought?

Q2: Are there any other principles which you think should apply?

Q3: Do you agree with the non-exhaustive list of factors at paragraph 3.4, to be considered by prosecutors when deciding the appropriate jurisdiction?

Q4: Are there any other factors which you think should be considered?

Although the consultation was focussed on the section 3 principles and factors, we considered all responses, including those that commented on other sections of the protocol, some of which we have addressed below.

Method of Analysis

We received 13 responses in total.

All responses have been analysed, including any received after the consultation closed.

Each response to each question was analysed separately and the main points were identified and carefully considered. Not every respondent gave specific answers to each individual question but their views were considered. This summary addresses the main points made by respondents.

Service Justice System jurisdiction over serious cases

- A number of respondents suggested that particular types of cases should not be dealt with by the Service Justice System (SJS). These include cases of homicide, all sexual offences, sexual offences in breach of trust, domestic abuse, child abuse, and cases where the suspect or victim is under 18. There was a suggestion that the DPP and DSP use the protocol to create a presumption in practice that certain categories of case will be taken forward by the CJS and not the SJS.

We do not consider it appropriate to include guidance in the Protocol which has the effect of removing certain categories of offending from the SJS. As this was an important issue for a number of respondents, we propose to address the issue in some detail. The responses on this topic were made in connection with various passages in the draft protocol, so we have decided to deal with the issue here rather than repeat our observations in respect of each provision where the issue was raised, which would result in unnecessary duplication.

We acknowledge the background to these suggestions, which are cited by respondents. These include the recommendations of HH Shaun Lyons in the Service Justice System Review (Part 1) 2018, that UK-based murder, manslaughter and rape (MMR) should no longer fall within the jurisdiction of the SJS and should be taken forward in the Civilian Justice System (CJS), unless the Attorney General directed otherwise. HH Lyons also recommended that consideration should be given to restricting the prosecution of sexual assault with and without penetration to the CJS; and that domestic and child abuse cases should always be dealt with in the CJS.

Reference is also made by respondents to the debates in Parliament during the passage of the Armed Forces Bill/Act 2006, which provided the SJS with jurisdiction in respect of serious crimes, such as murder, manslaughter and rape. It is asserted that the Government gave assurances that it was not its intention that the most serious offences, including rape, should normally be tried within the SJS.

Respondents further cited the support of the Defence Committee for the Lyons recommendations (Inquiry into Women in the Armed Forces in 2021), and an opposition amendment to the Armed Forces Bill/Act 2021 (which put the protocol on a statutory footing), that would have ensured that all UK murder, manslaughter and rape cases would be prosecuted in the CJS unless the consent of the Attorney General was obtained.

We understand these concerns, however we do not consider that it is within the scope of the new statutory provisions or the power of the Directors to use the protocol as a vehicle to exclude categories of cases from the SJS. In particular, we note:

- Notwithstanding the content of debates during the passage of the Armed Forces Bill/Act 2006 through Parliament, Parliament provided for concurrent jurisdiction without any presumptions as to which jurisdiction should take precedence in respect of certain categories of offence.

- The Government rejected the Lyons recommendations and, as the Armed Forces Bill/Act 2021 went through Parliament, it maintained its position that the SJS should retain concurrent jurisdiction in respect of murder, manslaughter, rape and sexual assaults that occur in the UK, and that decisions on jurisdiction should be dealt with on a case-by-case basis. Moreover, it did not introduce any requirement to seek consent from the Attorney General to deal with certain offences in a particular jurisdiction.

- Significantly, section 320A AFA 2006, which places the protocol on a statutory footing, does not stipulate or imply that any particular offence should only be dealt with by either the CJS or the SJS. Nor is there anything in these provisions to suggest that the Directors were to be given such extensive powers to enable them to remove jurisdiction from the SJS in respect of specific categories of case, where concurrent jurisdiction applies.

- Rather, section 320A(3) AFA 2006 encourages a consultative and more nuanced approach, whereby the Directors must give guidance on general principles to be taken into account when deciding which jurisdiction is appropriate and may give procedural guidance as to cases in which there should be consultation between prosecutors when considering in which jurisdiction proceedings may be brought. The clear implication is that no offence is, or should be, precluded from investigation or prosecution in either jurisdiction.

- Therefore, when drafting the protocol, we have taken care to ensure that the protocol reflects the intention of Parliament. We take the view that it is not for the Directors to include guidance which provides for an inflexible requirement/presumption, or an equivalent measure, that would remove or restrict jurisdiction in a way not contemplated by the statutory provisions. To do so would potentially undermine the will of Parliament. We consider that such a presumption would require legislative change. We note that in his review of the SJS, HH Shaun Lyons stated that the preferred option for introducing the change required to effect his recommendation in relation to jurisdiction over murder, manslaughter and rape offences in the UK was primary legislation altering AFA 06.

- We do, however, recognise that there are improvements that both systems can make in order to enhance the experience of complainants and witnesses. And we are aware of our responsibility to put in place procedures that mitigate the risk of proceedings being conducted in the inappropriate jurisdiction, particularly in relation to the serious offences that were the subject of the Lyons recommendations.

- We consider that the new approach we have introduced, involving clear principles and a detailed set of factors for prosecutors to consider, combined with mandatory consultation for more serious cases and robust oversight by senior management, will provide reassurance that cases will be dealt with in the appropriate jurisdiction.

Police protocols

A number of respondents made suggestions about the investigation of offences by the civilian police or the service police. Although we have an expectation that guidance to be issued by these police forces will complement the guidance in the Protocol, the powers of the DPP and DSP do not extend to directing the police. We therefore cannot include guidance on police investigations in the protocol, and it is out of scope of the consultation (see below).

There was also a suggestion that revised police protocols should be published simultaneously to ensure no inconsistency. We understand that the Ministry of Defence intends to update police guidance once the prosecutors' protocol has been finalised. We anticipate that we shall assist with this work and expect the police guidance to be aligned with the principles of the Protocol.

Out of scope

We received a number of suggestions on revisions or additions to the Protocol that we consider to be out of scope. In the main, this is because either: (i) they go beyond the powers of the Directors or the terms of the statutory provisions in section 320A AFA 2006 ; and / or (ii) they are not relevant to the purpose of the protocol, which is to provide guidance for prosecutors on how to exercise concurrent jurisdiction, noting that this does not include guidance to the police.

We have considered a number of these suggestions later in this document in connection with specific provisions in the draft protocol, but because not all of the suggestions relate to a particular provision, we have addressed some of them here.

- It was pointed out that previous versions of the protocol referred to the jurisdiction of Commanding Officers to deal with a limited range of criminal offending at Summary Hearing, but that there is no reference to Commanding Officers in the revised protocol.

Section 320A(3) of the AFA 2006 indicates that the protocol must give guidance as to general principles which are to be taken into account by a "relevant prosecutor", which, pursuant to subsection (10), does not include Commanding Officers, and so is out of scope. However, we understand that the Ministry of Defence intends to develop non-statutory guidance for Commanding Officers, in order to address the narrow jurisdiction they share with civilian prosecutors. We anticipate that the principles in the Protocol will be reflected in that guidance. For the sake of completeness, it should be noted that for reasons outlined later in this document, we have included a reference to the power of the DSP to refer a case to the commanding officer under factor (m) – formerly factor (h).

- It was requested that we include text stating that the protocol recognises and emphasises that the service police have a legal duty to consult the SPA in any case before a decision to discontinue criminal proceedings is made.

We consider this out of scope, as it is not about how to exercise concurrent jurisdiction. Moreover, the circumstances in which the service police are under a duty to consult with the SPA is governed by statute.

- It was suggested that in a case engaging the SPA's Victim's Right to Review (VRR) policy, the review of a decision not to prosecute taken by the SPA should be conducted by a CPS prosecutor and, in cases of Rape and serious sexual offences (RASSO), a prosecutor from the CPS RASSO panel.

We consider the VRR policy outside the scope of the protocol and, by the same token, we do not propose to comment on the merits of the suggestion in this document.

- It was also suggested that the Protocol state that in a SPA prosecution for a RASSO offence, specialist independent counsel from the CPS RASSO panel will be instructed to advise on and prosecute the case at court martial.

We consider the instruction of counsel out of scope and we do not propose to make any further comment.

Some of the other matters raised that we consider out of scope are listed below.[1] Given these matters are out of scope, we do not propose to make any further comment on them.

- Access to the rights under the Victims' Code.
- Victim support and referral should be made easier and seamless.
- SPA prosecutors should be required to undergo specialist training on domestic abuse.
- SPA should publish data on the types of DA offences which they are prosecuting, as well as equalities data regarding the complainant and defendant, such as gender, sexual orientation and race.
- The entries relating to charges in the Court Martial results data should flag whether offences are DA related.
- Where a crime involving a civilian and service person is under investigation, civilian police may use service police forensic facilities to process evidence.
- Where proven, additional investigation should be made into past behaviours and the subject's commanders investigated to establish whether a pattern of behaviour existed that they failed in their duty to tackle it. These commanders should then be subject to military disciplinary action. This should also be brought into the public services as an offence.
- Service police should not investigate sexual crimes, especially where senior officers are involved.
- Investigations into allegations involving sexual offences, domestic abuse or child abuse should be carried out by the civilian authorities where it is alleged that the perpetrator is in the victim's chain of command.
- Civilian police attending an alleged rape committed by service person should not assume that the service police will have primacy.
- Given the size of the UK military, there is a high likelihood of those being involved in investigating crimes having personal connections to those accused or to witnesses, for example having been through career courses together, thus prejudicing investigation.

[11] We have stuck closely to the way the suggestions were phrased in the responses.

- The military 'bench' consists of those entirely untrained and unqualified to make legal judgements. The military 'bench' may also have personal connections, direct or indirect, to either victims or accused.
- Concerns about the independence of proceedings being heard under Court Martial due to the Boards comprising of members of the military or the risk of perceived procedural injustice if they cannot access support throughout the process … could deter victims who are military personnel from reporting abuse.

Summary of Responses and revisions made

We have given very careful consideration to all of the responses received and have made a number of revisions to the final version of the Protocol. This section provides a summary of the key points made by respondents and the changes made as a result of the feedback. For reference purposes we have used the same section and paragraph numbers as those in the draft version of the Protocol on which we consulted.

Section 1 - Introduction

Paragraph 1.2 – purpose of the protocol

- One respondent suggested that it is not clear how the protocol sits with s.61(2) AFA 2006, which, in broad terms, allows the DSP to charge certain categories of individuals with a service offence, despite a time limit having been exceeded, if the consent of the Attorney General (AG) has been obtained.

We do not think there is any tension between the Protocol, which is about determining the appropriate jurisdiction, and the requirement to obtain the consent of the AG before charging a person with a service offence. As the Protocol makes clear, decisions as to jurisdiction should be made at the earliest reasonable opportunity and before charges have been brought. If the decision is that a case should be pursued in the SJS, and the decision is to bring charges, then the provisions in s.61(2) AFA 06 may be engaged, depending on the circumstances. We do not think it appropriate to draft the Protocol in a way that undermines the purpose of s.61(2) AFA 06.

Section 2 - Responsibility for decisions about jurisdiction

Paragraph 2.1 – police guidance on jurisdiction

- One respondent suggested that we state that we expect the corresponding police guidance to ensure that in any MMR, serious sexual offence case, or a case involving domestic or child abuse, or where the suspect or victim is under the age of 18, the presumption of any police force attending/investigating should be that the case will be taken forward by the civilian police.

Whilst we expect there to be alignment between the Protocol and new police guidance, the content of any police guidance is a matter for the police. We have not accepted this suggestion because we do not think it appropriate to include an equivalent presumption in the Protocol as explained above (*SJS jurisdiction over serious cases*).

Paragraph 2.2 – decision on appropriate jurisdiction

- One respondent commented that the protocol should provide for any decision made on jurisdiction to be revisited in the event of a significant change of circumstances.

We agree and we have amended the text accordingly, and inserted additional text about the duty to keep the issue of jurisdiction under review.

Paragraph 2.3 – decision to be made before criminal proceedings have been commenced

- One respondent requested that we clarify the phrase "criminal proceedings have been commenced".

We are satisfied that CPS and SPA prosecutors will readily understand that this means the decision on jurisdiction should be made before bringing a charge or instituting proceedings. We have therefore not amended this text.

Section 3 - Principles governing decisions regarding jurisdiction

Paragraph 3.1 – decisions to be approached on a case-by-case basis

- A number of respondents suggested that cases of MMR, sexual offences, domestic abuse and child abuse cases and cases involving suspects or victims under the age of 18 should be referred to the civilian justice system. However, one respondent suggested that most offences should be dealt with in the military system.

This has been dealt with above (*SJS jurisdiction over serious cases*).

Paragraph 3.2 – the overriding principle is to promote fair and efficient justice

- One respondent suggested that words should be added to demonstrate that the overriding principle includes the need to support the effective participation of victims and witnesses, and to ensure public confidence in the 'criminal' justice system.

Although this is implicit in the text, we are content to make it explicit and have amended the text accordingly, additionally referencing suspects and defendants, and the SJS as well as the CJS.

Paragraph 3.3 – main principles

- One respondent suggested that we should add a further main principle: that where the accused is of a rank of OF3 or above (Lt Commander - Royal Navy; Major - Army; Squadron Leader - Royal Air Force), the case should be dealt with in the civilian jurisdiction; or, in the alternative, there should be civilian police oversight of a service police investigation.

This suggestion was not supported by any reliable evidence that the SJS treats suspects or defendants of rank OF3 or above differently to those of lower rank. We have not added this as a further principle.

Paragraph 3.3(a) – definition of "civilian"

- Two respondents asked us to clarify the definition of a "civilian" at footnote 3:
  (i) To ensure that it does not include a complainant who was a service person at the time of the offence but has since left the service.

The definition was not intended to include such persons, as it is the status of the person at the time of the offence that matters. For the sake of clarity, we have amended the definition to make the position plain.

(ii) To clarify whether "civilian" includes an individual who is a civilian subject to service discipline (CSSD).

The definition is intended to include CSSDs, and we have amended the definition to make this clear. The various circumstances in which a person may qualify to be a CSSD are set out in Schedule 15 to AFA 2006. The concept of a CSSD is important in respect of identifying those civilians who fall within the jurisdiction of the SJS and are subject to service discipline. However, there is no principled reason for distinguishing between a civilian and a CSSD for the purposes of applying the principle at paragraph 3.3(a).

The definition now reads: "a civilian is a person who was not a member of the regular forces at the time of the alleged offence, and includes a civilian who is subject to service discipline".

Paragraph 3.3(a) – proceedings to be brought in the civilian jurisdiction

- One respondent commented that this would mean that theft by a young soldier from a civilian working in a Navy, Army and Air Force Institute (NAAFI) (in the UK) would ordinarily be tried in the civilian system, despite having a clear disciplinary aspect to it.

It is correct that an application of the main principle at paragraph 3.3(a), looked at in isolation, would indicate that proceedings in such a case should ordinarily be brought in the civilian jurisdiction because there is a civilian victim. Depending on the precise circumstances, this may be the appropriate decision. However, the protocol allows for a more nuanced approach, by instructing prosecutors to consider the list of factors at paragraph 3.4, and any other relevant factors. For example, if in the case under consideration, the service police attended the scene first and the investigation remained with them, there would be an argument in favour of the case staying within the SJS. Furthermore, if the allegation involved a relatively minor offence of theft, which could appropriately be dealt with by the Commanding Officer, this may also tend to favour the case being dealt with in the SJS. This illustrates why jurisdiction needs to be considered on a case-by-case basis.

Paragraph 3.3(b) – proceedings to be brought in the service jurisdiction

- A number of respondents suggested that this principle should be subject to a caveat that there is a presumption that sexual and domestic abuse offences should be excluded from the SJS, whether the victim is a civilian or military person.

This has been dealt with above (*SJS jurisdiction over serious cases*).

Paragraph 3.4 – non-exhaustive list of factors

For reasons that are outlined below, we have changed the order in which the factors in this section are listed. For publishing purposes, we have also dispensed with letters and roman numerals, so each factor is identified by a number in the final version of the Protocol. For ease of reference, we have therefore provided both the factor letter that was in the draft version and the number that is in the final version. For example, *Factor (d) – now factor 3.7.2 - the ability of the DSP to charge disciplinary offences.*

- A number of respondents suggested re-ordering the factors, putting the factors in order of priority, or clarifying which jurisdiction each factor tends to favour.

We do not intend to convey the relative importance of any particular factor by the position it occupies in the list. The potential significance of a factor will vary from case to case. However, we agree that prosecutors would be assisted by the factors being re-ordered and placed within groupings that favour the civilian or the service jurisdiction, or either. We have therefore placed the factors within these categories but made explicit that the order of the factors is not intended to convey importance.

- One respondent suggested that the wording of factors (j) (views of the victim) and (l) (DA, child abuse, sexual offences) should be amended to reflect the fact that they should be primary considerations when deciding jurisdiction.

We take the view that it would be ill-advised to seek to apportion weight to factors, which may vary from case to case. We wish to encourage prosecutorial discretion to give the appropriate weight to the factors, according to the particular facts of the case. We have therefore clarified this in the text at paragraph 3.4.

- One respondent asked us to make the protocol more user friendly, by giving further detail under each factor to assist prosecutors unfamiliar with key differences between the jurisdictions.

We agree and we have added more detail to a number of the factors, as explained below.

Factor (a) – now factor 3.5.1 – conduct that forms part of a pattern of offending

- Some respondents suggested a caveat to this factor, to cover cases where the pattern of offending includes <u>both</u> conduct that would ordinarily be tried in the civilian jurisdiction and separate conduct that would ordinarily be tried in the service jurisdiction. Such cases should tend towards proceedings being brought in the civilian jurisdiction.

We agree and we have amended the factor accordingly.

Factor (b) – now factor 3.7.1 – conduct that forms part of a pattern of offending which includes conduct that occurred outside England and Wales

- One respondent suggested that we clarify that the service courts have jurisdiction for offences committed by persons subject to service law and civilians subject to service discipline (for example, family members/contractors) anywhere in the world.

We agree that it would be useful to provide this detail as far as it relates to persons subject to service law, as it may not be familiar to some prosecutors in the civilian system. We also think it important that prosecutors do not overlook the extraterritorial reach of the civilian system, which is limited to particular offences. We have therefore included text on this too.

Factor (d) – now factor 3.7.2 – the ability of the DSP to charge disciplinary offences

- One respondent requested that we provide some examples of disciplinary offences, such as offences in relation to neglect of duty and misconduct, property offences, offences against service justice, offences of fighting or using threatening behaviour, and offences of insubordination or disobedience.

We agree and we have included these examples, with some changes to the wording.

- A number of respondents considered this factor to be irrelevant to the decision on jurisdiction, with some suggesting that the index offence does not need to be handled by the SJS for related disciplinary matters to be pursued in the SJS.

We disagree that this is an irrelevant factor for a number of reasons. There can be cases involving service personnel where:

- a particular piece of conduct carried out in a service context is more aptly reflected in a disciplinary offence than a criminal conduct offence;
- the totality of the offending needs to be reflected by charging a mixture of both criminal conduct and disciplinary service offences;
- it is appropriate to have a disciplinary offence as an "alternative" offence to a criminal conduct offence.

Furthermore, it is generally thought appropriate that, subject to severance, all offences which are properly joined should be tried together in the same proceedings and considered by the same tribunal of fact. In some cases, it will make little sense to try the criminal conduct offences and disciplinary matters separately, especially where there is an overlap in evidence which may mean witnesses having to give evidence twice.

Factor (e) – now factor 3.7.3 – offence viewed more seriously within the SJS because of the service context

- One respondent requested that we provide an example, namely that it may undermine the maintenance of discipline or the operational effectiveness of the armed forces.

We agree and we have added this example.

- One respondent suggested that there is no evidence that allegations are treated "more strictly" within the service jurisdiction.

We disagree, as the sentencing guidance for the service courts makes plain that certain criminal conduct offences are viewed more seriously when committed by a service person in the service context. One such example is petty theft within joint accommodation, which is corrosive to unit cohesion and breaches the bond of trust that exists between service personnel.

Factor (f) – now factor 3.5.3 – availability of different sentencing powers and ancillary orders within the service and civilian jurisdictions

- One respondent indicated that clarification would be welcome, and another respondent suggested a number of examples with regard to each jurisdiction.

We have added the suggested examples to this factor and additionally indicated that factors (g) and (h) contain further guidance on sentencing powers and ancillary orders that tend to favour the civilian jurisdiction.

Factor (g) – now factor 3.7.4 – ability of service police to deploy rapidly to conduct investigations outside England and Wales

- One respondent queried whether this is a reference to cases outside the UK, or to cases in Scotland and Northern Ireland; and also queried the relevance of the factor, as the Protocol does not apply to cases involving service personnel overseas, which would invariably be investigated by the service police.

The intention behind including this factor is to reflect the situation where there is an investigation into alleged criminal conduct in England and Wales but the suspect(s) and/or witnesses may be outside the UK. We have therefore amended the wording to clarify this.

- One respondent suggested that this factor should also cover rapid deployment within England and Wales when witnesses are widely dispersed.

We are not convinced that this is necessarily the case and, if it is, whether the margin in relation to the civilian police is sufficient to merit it being included within this factor.

Factor (h) – now factor 3.7.5 – impact on operational effectiveness

- One respondent suggested amendments to the bullet points, which would clarify the scope of this factor. Other respondents suggested the factor is not required for a number of reasons, such as: operational effectiveness should not play a role in a decision on jurisdiction; this should not act as an excuse for MOD to deal with sensitive sexual cases "in-house"; if a suspect or witness is serving overseas during the course of the proceedings, their involvement in any criminal case will be disruptive to that deployment, whether the matter is heard in the SJS or the CJS; and the risk of inconvenience to the armed forces (to the extent that there is any in practice simply by virtue of the case being heard in a civil rather than a service court, which is not accepted) should not trump the interests of justice.

This factor is included to reflect the potential advantages of trying a case at the Court Martial sitting at an overseas location, even though the alleged conduct occurred in England or Wales, where the suspect and/or witnesses may be stationed overseas, and it would impact on operational effectiveness for the trial to be conducted in England or Wales. The factor is just one of a number to be considered in deciding the appropriate jurisdiction and will only arise in rare cases. We therefore take the view that the factor may be relevant to decisions on jurisdiction and should be retained. However, we have amended the text, incorporating some of the suggested revisions, to make it clearer.

We have also included a further example following consideration of a comment made by one respondent, indicating that operational effectiveness could be enhanced by the DSP exercising his power to refer a case to the commanding officer (CO). This power is often used in the less serious and more straightforward cases where the CO has sufficient powers to sentence. The CO decides how best to deal with the case, which may or may not involve conducting a summary hearing. Referring a case to the CO often provides a route to quick and efficient justice, allowing the CO to deal with the case in a manner that may be informed by their knowledge of the suspect and any relevant context.

Factor (i) – now factor 3.5.4 – capacity and resources

- A number of respondents objected to the inclusion of this factor on the following grounds: resourcing should not play a part in decision making; the factor will likely have the effect of all cases being heard in the SJS, which is generally less busy, given the delays and resource challenges faced by the CJS at present; this factor should not be a barrier to service personnel having same access to justice as civilians.

Any concern that this factor will necessarily trump the main principles set out at paragraphs 3.2 and 3.3 is unfounded. Additionally, we think that to suggest that the severe delays in criminal trials being listed in the civilian system may not be a relevant factor appears to ignore the principle that justice delayed can be justice denied.

- One respondent suggested that we add that forensic facilities within the services are limited and should be focussed on supporting the operational effectiveness of the armed forces by progressing cases with identifiable victims who will be giving evidence.

We have not amended this factor to take account of this suggestion, as we note that resources can fluctuate over time and focussing on one specific aspect may lead prosecutors to attach undue weight it. We consider that the lack of scientific resources in the SJS, like the current backlog in the CJS, is a factor that will likely tip the balance in only a few cases. Moreover, we are not persuaded that the Protocol / AFA 2006 gives the Directors authority to direct how forensic services are used within the services, as this this an operational matter for the service police and, more broadly, a wider policy issue.

Factor (j) – now factor 3.5.5 – views of the victim

- Respondents suggested that the relevant prosecutor should ensure that any individual who is entitled to express a view is notified of that entitlement; and that the view should be sought at the outset.

We agree that victims should be asked whether they have a view on the jurisdiction in which investigation and proceedings take place, and informed that their view would be taken into account but would not necessarily be determinative. We also agree that this should be done at the earliest opportunity, although this will be the responsibility of the police at the start of the investigation. We have inserted text to remind prosecutors that, on receipt of a case, they should seek assurance from the police that the victim has been asked whether they have any views on jurisdiction.

- One respondent requested that the term “complainant” be used instead of “victim”. Another respondent claimed that the language in the protocol - such as “victim” rather than “complainant” - suggests that the Directors are moving away from the fundamental principle of innocent until proven guilty.

We have retained the word “victim” but we have clarified in a footnote that “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. This explanation is consistent with that given in the Code for Crown Prosecutors.

- One respondent suggested that this factor should be clarified or removed because it could be used as a backdoor measure to transfer sexual cases to the civilian jurisdiction.

The structure of the draft protocol makes it clear that it is not a backdoor measure. One of the main purposes behind the inclusion of this factor is to identify a victim who is not prepared to engage with either the civilian or service justice system, for whatever reason. The views expressed as to why an individual may prefer one jurisdiction over another may vary with regard to their cogency.

- One respondent suggested that the view of the victim should be the principal factor.

We disagree, as the merits of the justification for the view expressed by the victim may vary significantly. As stated above, the order of the factors is not intended to convey importance or priority, and we have now made this clear at paragraph 3.4.

- Another respondent was of the view that complainants should not be able to influence jurisdiction based on personal preference, just as an accused cannot.

A defendant can be tried fairly in both jurisdictions. We received no representations in favour of an accused being able to express a view about jurisdiction. The weight to be attached to any view on jurisdiction expressed by a victim would depend on the reasons advanced in support of that view, and then it would still not necessarily be determinative. The factor is included to ensure that justice is done, which requires victims to engage with the justice process.

Factor (k) – now factor 3.6.1 – the best interests of the child

- One respondent suggested that this factor should be amended to reflect that the best interests of a child victim of interpersonal violence perpetrated by an adult will nearly always be best served in the CJS and, explicitly, where the alleged offence is a sexual offence involving a breach of trust; alternatively, that this should be reflected in a separate standalone factor.

It is right that this factor underlines the importance of considering the best interests of the child (whether as accused or victim) and the text provides that "the best interests of the child should be treated as a primary consideration and be given appropriate weight". It is important to bear in mind that this principle needs to be viewed in conjunction with the main principles at paragraphs 3.3(a) and 3.3(b). Accordingly, we do not think it is necessary to amend the text in the way suggested because, in accordance with the principle at paragraph 3.3(a), allegations of violence and sexual abuse committed against civilian children would ordinarily be dealt with in the CJS. Further, we do not think it appropriate that cases in which the victim is a service person under the age of 18 should be excepted from the main principle at paragraph 3.3(b) because there may be good reasons why some allegations involving young victims are more appropriately dealt with in the SJS. The SJS is well suited to dealing with cases where offences are said to have taken place in the context of an instructor-cadet relationship within a training establishment where, for example, consideration may need to be given to the line that divides lawful instruction from physical assault. In this regard, we note that any case of sexual assault would be subject to mandatory consultation under section 4 of the Protocol. Where the accused is a service person aged under 18, we have identified a number of matters under this factor that tend to favour the case being dealt with in the CJS.

- One respondent asked us to clarify the text referring to the availability of the youth court in the civilian jurisdiction, so that it is made clear that there is no youth court in the service jurisdiction.

We agree and we have done this.

- The same correspondent requested that we refer to referral orders and youth rehabilitation orders as examples of orders available only in the civilian system.

We agree and we have done this.

Factor (l) – now factor 3.6.2 – domestic abuse, sexual offences and child abuse

- Some respondents requested that we make clear that this factor suggests that such cases might be more appropriately handled in the CJS.

We agree and, as stated above, we have now grouped the factors into categories, with this factor placed in the category titled “factors that tend to favour the civilian jurisdiction”.

- Another respondent asked that we clarify that a multi-agency approach may be more difficult to achieve in the service jurisdiction.

We agree and we have done this.

- The same respondent suggested that we provide more detail in respect of the lack of power to impose or enforce various restraining orders in the service jurisdiction**.**

We agree and we have amended the text as requested.

- With regard to the availability and nature of out-of-court disposals, one respondent suggested that this ought not to be a consideration in relation to cases of domestic abuse, sexual offences or child abuse, where the gravity of the offending means that out of court disposals are highly unlikely to be appropriate. Another respondent asked us to provide examples of out of court disposals.

We acknowledge that an OOCD will only be used in exceptional circumstances in these types of cases in the civilian system. However, their availability in the CJS offers greater flexibility on disposal than in the SJS, as there will be some cases where an OOCD is a more appropriate disposal than either a prosecution or no further action. We have therefore retained this consideration and provided some examples, as requested.

- One respondent asked us to clarify that the ability to attach conditions to bail in the civilian jurisdiction is lacking in the SJS. However, another respondent pointed out that although it is not possible to attach conditions to bail pursuant to the Bail Act 1976 in the service jurisdiction, other similar safeguards are available. For example, a Commanding Officer may put in place administrative measures as an alternative to imposing custody without charge (such as ordering a suspect not to return to the scene of the alleged offence or not to speak with the alleged victim); and where a Judge Advocate does not authorise custody after charge, they may require the accused to comply with requirements similar to the conditions that can be attached to bail in the civilian jurisdiction.

Given the availability of these measures in the service jurisdiction, we do not consider the distinction between the two jurisdictions to be sufficiently significant to merit the inclusion of the bullet point on the ability to attach conditions to bail in the civilian jurisdiction. We have therefore deleted this bullet point.

- One respondent requested that we add a bullet point to reflect 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 in the SJS. Another respondent raised a similar concern in relation to privacy safeguards for victims regarding third party material, such as medical records.

Our understanding is that under the equivalent procedure rules in the SJS, such production orders are only required to be served on the person "in possession of the material": see the Armed Forces (Amendment) Rules 2003 (SI 1851); the Armed Forces (Powers of stop and search, seizure and retention) Order 2009 (SI 2056); and the amendment order of 2012. We therefore agree with the suggestion, as the requirement in the civilian system provides a safeguard for victims, and we have inserted a new bullet point to reflect this requirement.

- The same respondent suggested a further bullet point to reference the civilian police's duty to make disclosures under the Domestic Abuse Disclosure Scheme (see s.77 of the Domestic Abuse Act 2021), where information obtained, for example in the course of a criminal investigation, demonstrates that an individual is at risk of harm.

The Domestic Violence Disclosure Scheme (DVDS) - also known as "Claire's law" - has been available since 2014. It was put on a statutory footing by the Domestic Abuse Act 2021 (DAA), so that there is a framework in place to ensure the scheme is used more widely and is applied consistently across police forces. The scheme sets out procedures for the police to disclose information about previous violent or abusive offending of suspects, where this may help protect their partner or ex-partner, and any relevant children. The DVDS relies on the police's common law power to disclose information and the DAA did not change the legal basis under which the police can make a disclosure. We note that the civilian police's duty is to have regard to the Home Office guidance, issued under section 77 of the DAA, when using the DVDS. Whilst we acknowledge that section 77 of the DAA does not currently apply to the service police, we understand that the service police have similar common law powers to disclose information where such a disclosure is necessary to prevent further crime; and that, where possible, the policy of the service police is to follow the practice of the civilian police. We therefore do not think it necessary to include this suggested bullet point.

- Another respondent suggested a bullet point on the privacy safeguards for victims regarding data downloads from electronic devices.

We have not included this point because the relevant safeguards will apply in both jurisdictions. The Police, Crime, Sentencing and Courts Act 2022 (PCSCA) introduced new obligations on the police to protect the privacy of victims. Section 37 relates to extraction of information from electronic devices, such as mobile phones: a victim's mobile phone data will only be requested where it is provided voluntarily to an "authorised person" (the police) and extraction of information is agreed by the user. Additionally, an "authorised person" must reasonably believe that information stored on the electronic device is relevant to the investigation; and such material must only be requested if it is necessary and proportionate to that line of enquiry. "Authorised person" is defined in schedule 3, Part 2, to the Act and it includes "a member of the Royal Navy Police, the Royal Military Police or the Royal Air Force Police". The safeguards in section 37 therefore apply equally to investigations carried out by the service police, as they do to the civilian police.

Factor (m) – now factor 3.5.6 – decisions made as to which police force should investigate

- One respondent requested that we remove the reference to the specific Ministry of Defence guidance.

On reflection, we agree, as there is currently more than one source of MOD guidance, and these are to be revised. Omitting reference to specific guidance will future-proof the Protocol.

- One respondent suggested that this factor is irrelevant, as the protocol does not bind the police. Another respondent made a similar point, also suggesting that we delete the factor, observing

that it is likely to render consideration of the factors in the Protocol far less useful, because the Protocol does not bind the police, they operate according to a different (and inconsistent) protocol/Circular; and taking account of the initial decisions made by the police force attending the scene is likely to weight any decision about the future conduct of the case in favour of decisions already made (which are likely to favour the SJS).

We do not agree that the factor is irrelevant or that it will mean that prosecutors will ordinarily follow the initial decisions made by the police. The purpose of including this factor is to make the prosecutor consider whether the initial police decisions as to jurisdiction align with the guidance in the Protocol. If the prosecutor concludes that the case is being dealt with in the appropriate jurisdiction, then the matter is straightforward. However, if the prosecutor takes the view that the case is not being dealt with in the appropriate jurisdiction, then the prosecutor will need to consider whether to advise changing jurisdiction. There may be very good reasons for seeking to change jurisdiction but the prosecutor will also want to take into account whether the police correctly followed their own guidance, which may be inconsistent with the guidance in the Protocol, and whether it would be reasonable to change jurisdiction where the investigation has gathered momentum and, for example, the victim has established good relationships with the investigating officers.

We have amended the wording of this factor for the purposes of clarification.

Section 4 – consultation between prosecutors

Paragraph 4.1 – mandatory consultation

- A number of respondents suggested that the list of offences requiring mandatory consultation should be expanded to cover other offences, in particular: all sexual offences, including sexual offences in breach of trust; sexual harassment and image based sexual abuse (“revenge porn”); cases of domestic abuse/violence; cases of child abuse; and cases where a victim is under 18 years of age.

We have reconsidered the list of offences and on reflection we agree that it should additionally include cases involving domestic abuse and child abuse, which were the subject of recommendations by the Lyons review. We note that many of these cases are currently dealt with in the civilian system, following an emergency call to the civilian police, who attend the scene. We trust that consultation on these cases, in addition to the bespoke factor to be considered at paragraph 3.6.2, will provide reassurance that they will be dealt with in the appropriate jurisdiction.

We do not think it appropriate for there to be mandatory consultation in respect of all conduct which is subject to concurrent jurisdiction. This would not be a reasonable application of resources. In deciding upon the categories of case which should be subject to mandatory consultation, we have sought to produce a proportionate list balancing various factors including the seriousness of the offences and the degree of concern expressed in respect of the SJS retaining jurisdiction over particular types of case. We think that the appropriate jurisdiction for other categories of case not on the list can readily be assessed by the application of the principles and factors in paragraph 3 (including the bespoke factor at 3.6.2), without the need to consult with the other prosecution agency. This includes cases where the victim is a junior service person (aged under 18) which would ordinarily be tried in the SJS, noting that if the allegation is of sexual assault, this will trigger mandatory consultation in any event.

- One respondent stated that there is no statutory requirement for there to be mandatory consultation in respect of rape and sexual assault with and without penetration.

Although there is no statutory requirement for consultation in respect of any offences, section 320A(3)(b)(i) AFA 2006 says the protocol may give guidance on procedures for making decisions regarding the exercise of jurisdiction, including as to the cases in which there should be consultation between relevant prosecutors. Thus, the provision does envisage consultation on some cases. The purpose of this section is to give reassurance about decisions on jurisdiction in respect of categories of cases which have given cause for concern, as explained in the section above on *SJS jurisdiction over serious cases*.

- The same respondent asked us to clarify how the civilian jurisdiction will prosecute defendants under 18 years of age for disciplinary offences.

It will not, as concurrent jurisdiction only exists for alleged criminal conduct of service personnel carried out in England and Wales and does not extend to disciplinary offences.

Paragraph 4.2 – prosecutors to have regard to the section 3 principles

- A number of respondents suggested that Section 4.2 should be amended to include a stipulation that a record of any consultation should be made, identifying the decision as to jurisdiction and the basis for the decision. One respondent additionally suggested that the record should be provided to the victim and defendant.

We agree that a record of the decision as to jurisdiction and its rationale should be made in all cases, including those that are subject to mandatory consultation. We have therefore added a new paragraph at 2.4 to clarify this. Whilst we agree that a complainant should be kept appraised of the jurisdictional position, we do not consider that there is a need for them to be supplied with a copy of the record.

Section 5 – Cases where there is an issue as to jurisdiction

- One respondent queried whether there is a tension between sections 326 AFA 2006 and 320A(5) AFA 2006.

Section 326 AFA 06 provides that (subject to s.61(2)) the DSP does not need to observe any enactment that would otherwise require him to obtain the consent of the Attorney General or DPP in connection with any proceedings under the AFA 2006 for a service offence; whereas 320A(5) AFA 2006 (which is reflected at paragraph 5.3.5 of the protocol), states that where there is a disagreement on the exercise of jurisdiction, it is for the DPP to decide in which jurisdiction proceedings may be brought. We do not perceive any tension between these provisions, as the former relates to the requirement or otherwise for AG/DPP consent before instituting proceedings, while the latter relates not to consent but to the process for decision making in respect of cases where there is concurrent jurisdiction. Where, for instance, pursuant to the protocol, the DPP decides that proceedings should brought within the service jurisdiction, he would not be giving consent to the DSP to do so, but simply making a decision on the more appropriate jurisdiction.

Next Steps

The previous Protocol has now been replaced by the revised Protocol, which comes into effect on 25 October 2023, and is published with this Summary.

Conclusion

We are very grateful to everyone who responded to the consultation. We are content that the responses have led us to make changes that have resulted in a clearer, improved Protocol.