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CENTRE FOR MILITARY JUSTICE

Consultation response on the Draft Protocol regarding the exercise of criminal jurisdiction in England and Wales

The Centre for Military Justice (CMJ) is a small, independent legal charity established to advise current and former members of the Armed Forces or their bereaved families who have suffered serious bullying, sexual harassment, sexual violence, racism or other abuse or neglect. The CMJ also undertakes educational and outreach work within the Armed Forces sector, promoting the rule of law, human rights and access to justice. [1]

The CMJ is grateful to the Crown Prosecution Service (CPS) and Service Prosecuting Authority (SPA) for inviting stakeholders' views on the Draft Protocol and this document constitutes our response.

Background to the Consultation

In February 2020, following an extensive three year review into the Service Justice System (SJS), HHJ Shaun Lyons with Prof Jon Murphy, the former Chief Constable of Merseyside Constabulary, recommended that UK-based murder, manslaughter, rape, sexual assault by penetration, domestic and child abuse cases in the armed forces 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.

The Secretary of State for Defence (SoS) rejected the recommendation the same day it was published, on 26 February 2020.

Following a judicial review challenge of that rejection, brought in May 2020 by three service women whose rape allegations had been dealt with in the SJS, the SoS was ordered (by consent) to place the arrangements for allocating cases between the SJS and the CJS on a statutory footing in the Armed Forces Bill/Act 2021.

Prior to this, the arrangements for determining whether a criminal offence ought to proceed by way of the SJS or CJS were unclear. Until the Armed Forces Act 2006, serious crimes had not been within the jurisdiction of the court martial at all and could only be charged in the CJS. In 2009, that restriction was lifted and from that point on, the court martial had the jurisdiction to try such cases. However the intention at the time that the law was changed was that the court martial would only exercise such jurisdiction in *'very rare circumstances',* assurances that were repeatedly and unequivocally given to Parliament during the passage of the relevant part of the Bill. Examples of the kinds of *'very rare'* cases the Government had in mind were cases where offences were alleged to have taken place both in the UK and overseas, or where there was something particularly technical about an alleged offence, that it was said might benefit from being heard by a court martial board. The then Government's clear assurance was that it was not their intention that the most serious offences, including rape, should normally be tried within the SJS.[2]

[1] www.centreformilitaryjustice.org.uk

[2] From the Hansard debates. Lord Grayson (for the Government): 'I have already told the house that we do not propose that, under the bill, murder, rape or treason alleged to have been committed by a service man in the United Kingdom will normally be investigated and tried within the service system….'

However, the SPA/CPS protocol that followed the change in the law did not reflect the intention that serious cases ought only to be brought in the SJS in very rare circumstances – instead it simply stipulated, as the present version still proposes to do, that *'offences alleged only against persons subject to Service law which do not affect the person or property of civilians should normally be dealt with in Service proceedings and not by a civilian court'* (see §2.2(b) SPA/CPS protocol Nov 2016 and preceding versions).

This paragraph in the former protocol, which did not reflect the intention of Parliament at the time, meant that criminal cases, whether in the UK or overseas, and no matter how serious, as long as both the victim and accused were serving members of the armed forces, were most likely to be dealt with within the SJS and not the CJS.

Predictably, the broad wording of the former protocol led to a significant increase in the number of serious sexual assaults including rapes that were now being investigated by the service police and prosecuted by the SPA and sent to court martial. The numbers have increased year on year, without the benefit of clear policies to assist police or prosecutors on how individual cases should be taken forward. Decisions have been made on an inconsistent and *ad hoc* basis, and despite always having maintained that the Director of Public Prosecutions (DPP) would have the final say in any disagreement between the SPA and CPS on how an individual case should proceed, following two Freedom of Information Action requests, the CPS confirmed that it held no record of any case where it had been invited to make a determination. It was clear that there was no meaningful consultation in practice.

The judicial review, Parliamentary debates during the passage of the Armed Forces Bill 2021 and the Defence Committee Inquiry into Women in the Armed Forces throughout 2021 led to widespread public debate about the handling of military rape and other serious offending and the jurisdictional questions they raised. The Defence Committee unequivocally supported the Lyons Review's recommendations as to jurisdiction and HHJ Lyons and Prof Jon Murphy reiterated those recommendations before the Armed Forces Bill committee. While there was significant public and cross-party political support for an opposition amendment that would have ensured all UK murder, manslaughter and rape (MMR) cases should proceed by way of the CJS unless the consent of the Attorney General was obtained, the Government maintained its position that the SJS should continue to deal with all serious criminal cases, including murder, manslaughter, rapes and sexual assaults, whether they occurred in the UK or overseas.[3] So the Lyons Review recommendations, the Defence Committee recommendations and the opposition amendment were rejected.

We will not rehearse in this document the arguments as to why we continue to believe that UK-based MMR, serious sexual assault and child & domestic abuse cases should, wherever possible, be handled by the CJS and not the SJS - we refer to our detailed submissions on this issue that were given to the Armed Forces Bill Committee and the Defence Committee Inquiry into Women in the Armed Forces. We also refer to the recent independent inspection reports of Her Majesty's Inspector of Constabulary (HMICFRS) into 'Rape, serious sexual

[3] The Minister leading the debates, Johnny Mercer MP, upon leaving Govt, entirely rejected the Govt's position on the handling of serious offending including rape, saying that he felt strongly that such cases should as a matter of course be handled in the CJS and indicating that significant people inside the MoD agreed with him, the SOS being something of an outlier. Tweet from Johnny Mercer MP dated 30 July 2021: 'The truth was that my name was on the bill, but my advice as to what the bill should/should not cover was routinely ignored in favour of SoS demands. I had no control over it, and wanted to improve it. On rape cases, again, SoS and I shared a different view. If it was left to me there would have been an entirely different process and end state, in both cases….In my view (murder, manslaughter and rape cases) should have been taken out of the military system and I made that clear internally.'

assault and domestic abuse investigations' in the armed forces dated 15 June 2022, which we suggest continue to demonstrate why fundamental reform is still needed. The HMIC reports identified some extremely serious issues of concern in the service police's response to allegations of sexual offending and domestic abuse. These reports, which build upon many of the problems identified by HHJ Lyons in his review, show how many of the particular problems in the military's response to such offending would be resolved were such cases to be dealt with by the CJS.[4] Though directed to the service police, some issues of concern identified by HMIC directly concern the work of the SPA.[5]

We also wish to take this opportunity to emphasise that conviction outcomes for completed rape cases at courts martial continue to differ markedly from outcomes at Crown Court, a discrepancy that remains unacknowledged and unexplained. The MoD has been publishing data on completed Court Martials since 2015 and the conviction rate for rape cases has varied between 4% and 35%, varying very significantly year on year (but never getting above 35%), and giving an average of just 17.75% of completed rape cases at Court Martial resulting in a guilty verdict over that period. By striking contrast, Prof Cheryl Thomas at University College London in February 2023 published research that shows that – notwithstanding the terrible problems faced by women in the civilian system in getting their rape cases investigated and charged – if their cases *do* get to trial and are heard before a civil jury in the Crown Court, a civil jury is far more likely to convict than acquit. In the last year she examined, 2021, her research indicated that the civil jury conviction rate for all rape charges was 75%. That is a striking difference from the outcomes in rape cases before military boards at courts martial.

In an effort to meet some of the public and service's concerns, the SoS promised various reforms to the SJS to improve standards (including the creation of a Defence Serious Crime Unit, and a Service Police Complaints Commissioner). A new updated prosecutor's protocol would govern how such cases were to be taken forward which is the purpose of this Consultation.

Though the Draft Protocol is welcome, the work of the SPA cannot be seen in isolation from these wider concerns which continue to beset the military's response to sexual offending and

[4] For example, data collection, flagging and retention issues that would be immediately addressed if handled by the civilian police (bringing all such recording immediately in line with the civil system); issues arising from the military concept of 'mission command', and the regular posting process that can be so disruptive to case handling, the development of specialist expertise, and victim care; and the labyrinthine and patchy response of the MoD to concerns about inappropriate behaviours, including sexual assaults (see also the poor document 'Tackling Sexual Offending in Defence' paper, the much-heralded 'rape strategy' promised by Govt in response to the Defence Committee Inquiry into Women in the Armed Forces which is weak, cobbled together, and nothing like the civilian equivalent 'End to End Rape Review').

[5] Particular matters of relevance/concern for the SPA from these reports included: 1) the point that no accurate comparison can be made between the proportion of domestic abuse and RASSO cases discontinued by the civilian police and the service police, because the service police apply a lower standard of proof before referring a case to a prosecutor when compared with the evidential sufficiency test used by civilian police forces; 2) while there is a legal duty on the service police to consult the SPA before discontinuing almost any case where it is suspected at any stage that a RASSO or any Sch 2 case has been committed, this is not happening routinely and the SPA is not in fact being routinely consulted; 3) despite there being a duty on SPA prosecutors in domestic abuse cases, when proposing to discontinue or substantially reduce a charge, to consult with the service police, this was not happening in all cases; 4) service police do not have the right to appeal any decision made by a prosecutor, unlike police in the CJS who can appeal any decision made by a CPS prosecutor after a case is referred; 5) HMIC specifically recommended that any future inspection of the SPA prosecution of domestic abuse and RASSO cases should examine the question of why "Better Case Management" (BCM) is not being followed by the SPA in many investigations; 5) many service police interviewees informed HMIC that frequent delays occurred in their cases once they had been referred to the SPA; 6) HMIC identified confusion and a lack of clarity (as between a VLO and the SPA) in the arrangements for ensuring contact was maintained with victims after referral to the SPA. https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/royal-military-police-rape-serious-sexual-assault-and-domestic-abuse-investigations.pdf

domestic abuse. The MoD's response to continuing public concern about this issue remains patchy and not as comprehensive as measures that are presently underway to address responses to rape in the CJS.[6] What seems urgently to be needed is in depth research into why court martial boards appear to convict in such a small proportion of rape cases when compared to civil juries. Research is also needed into whether sentencing for serious sexual offences in the SJS is equivalent to that of the CJS. It may be that the SPA would like to support calls for such research to be conducted.

The CMJ continues to hope that the DPP/DSP may yet take this further opportunity to ensure that the recommendations of HHJ Lyons and the Defence Committee are respected and acted upon, and may use this Draft Protocol to create a presumption *in practice* that certain categories of case will be taken forward by the CJS and not the SJS. See further on our proposed specific amendments, below.

Inspections of the Service Prosecuting Authority's work

Central to addressing public concern about the SPA's handling of rape, serious sexual assaults and domestic abuse cases is the need to ensure regular, independent and robust assessment and inspection of the SPA's work. While not an issue that is suitable for inclusion in the Draft Protocol, this seems an appropriate point at which to raise this issue directly with the DPP/DSP.

Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) has a statutory duty to inspect the Crown Prosecution Service (CPS). However, it may inspect the SPA by invitation only.[7] The last occasion on which an inspection by HMCPSI was undertaken appears to be 2010.[8] This is in stark contrast to the rolling programme of inspections of regional CPS areas undertaken and published month by month by HMCPSI and their recent inspection of services delivered to victims by the CPS. [9] The CMJ wrote to the Chief Inspector of the CPS on 7 September 2020 enquiring if he might consider undertaking an inspection of the SPA and we were informed that, because the HMCPSI can only act in response to an invitation from the SPA (in contrast to its power to announce and conduct inspections of the CPS of its own motion), he was not able to take action.

At the time of the last inspection, the following issues were identified in relation to the SPA:

- Greater numbers of rape specialists needed to be identified, trained and developed.
- Greater efforts needed to be made to ensure civilian secondments for SPA prosecutors.
- Greater attention needed to be paid to improving the information required to monitor the performance of SPA prosecutors.

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[6] The CMJ's response to the Defence Committee Inquiry into Women in the Armed Forces' call for further evidence regarding the MoD's response to its inquiry, one year on, can be read here: https://centreformilitaryjustice.org.uk/wp-content/uploads/2022/12/Submissions-to-Defence-Committee-further-call-for-evidence-with-links.pdf

[7] Letter from Rt Hon Jeremy Wright QC MP, Attorney General, to Rt Hon Sir Alan Beith MP, Chair of the Justice Select Committee, 3 March 2015: 'HMCPSI has also inspected other prosecuting agencies by invitation, such as the Service Prosecuting Authority and inspects the Public Prosecution Service of Northern Ireland under the powers delegated by the Chief Inspector of Criminal Justice Inspection Northern Ireland.' https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/1117/111709.htm

[8] The Service Prosecuting Authority: inspectorate report on the SPA, December 2010 http://spa.independent.gov.uk/linkedfiles/spa/test/about_us/publication_scheme/report2010.pdf.

[9] https://www.justiceinspectorates.gov.uk/hmcpsi/our-reports/

- There was a need to better disseminate casework learning and best practices among staff.
- The importance of 'building cases, rather than merely identifying their evidential weaknesses' was stressed.
- It was stressed that it was 'no longer the case that simply being a lawyer with great experience of the criminal law and casework (was) sufficient of itself to be able to handle rape cases appropriately'.
- Although managers within the SPA had accepted that prosecutors handling rape cases needed to be appropriately trained, 'some cases within the file sample gave some indication that the need for properly trained specialists within the SPA should be prioritised.'
- The high guilty plea rate affected the trial experience obtained by SPA prosecutors with few opportunities for trial advocacy. The inspectors had identified no exceptional advocacy.
- Management responsibilities were assigned by rank not individual prosecutorial ability and experience which could carry implications where those managers were reviewing or signing off on other prosecutor's casework decisions.
- Middle ranking managers were often lacking in the level of experience one might expect.
- Arrangements to agree fixed longer-term assignments had not progressed and may have been abandoned.
- SPA prosecutors generally prepared and prosecuted their own cases, and 'independent counsel (were) rarely used'.

On the SPA, HHJ Lyons wrote in the SJSR in 2020:

> *The SPA has 28 full time lawyers and three who are either part time or on contract or a reservist…. It appears, however, many of the lawyers at the SPA are in their first service appointment and will not have prosecuted before. Over the past three years, the percentage of all service lawyers posted to the SPA and who arrived without prosecuting experience varied between 33% and 50%; indeed, for two of these years it was 50%. The turnover of service prosecutors is quite high; particularly in the more junior ranks whose average length of tour is under two years … (CPS prosecutors) are more experienced - they are career prosecutors - and have a greater degree of staff stability; they are more familiar with the work and are able both as individuals and as an organisation to achieve faster throughputs. The Service Justice System is manned by lawyers who will often be unfamiliar with the task they have been posted to conduct, particularly at the beginning of their careers and will need time and experience to operate effectively.*
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> *In like manner, the Service Police, conducting many other tasks and only operating exclusively as investigatory police when with the Special Investigation Branch, lack the expertise and experience in that role of their Home Office police colleagues who constantly conduct what Sir Jon Murphy describes as the "daily grind". Such familiarity breeds experience and expertise and through them, efficiency and speed.* [10]

We note the similarity between HMCPSI's observations in 2010 and those made by HHJ Lyons, ten years later.

[10] Service Justice System Review Part 1, p36-37

Finally, in the inspections of the service police's conduct of RASSO and domestic abuse investigations, published last year, HMIC specifically recommended (our emphasis):

> *'a review of the actions carried out by the Ministry of Defence and the broader military to prevent domestic abuse and RASSO is needed in order to properly assess their effectiveness. Similarly, there needs to be a comprehensive review of how domestic abuse and RASSO victims are safeguarded. This would need to examine the roles of COs, discipline units and welfare units, amongst others. And to determine why many reports of domestic abuse and RASSO don't result in prosecution would require a review of COs, the service police and the service prosecuting authority. We do not have the remit to undertake these reviews.'* [11]

The Lyons Review noted the system whereby parts of the SJS were inspected by invitation only, describing the arrangement as 'cosy. [12] The issue of how the SPA was inspected was not explicitly addressed by the Lyons Review, however the same issues appear to arise in circumstances where it is open to the SPA to decide when and in what circumstances it is inspected. We anticipate that, had HHJ Lyons been invited to address this issue, he would have raised the same concerns.

The CMJ acknowledges that the 2010 inspection is very out of date. We acknowledge some of the steps taken in recent years to improve the service delivered to victims and to enhance learning from the CPS. However, the concerns of HHJ Lyons are not particularly out of date. The observations of HMIC remain current. If the SPA is going to continue to have conduct of these most serious cases then it is vital that it accepts the need for independent inspection without further delay. It may be that the SPA would wish to announce, as part of its current work, that it has invited an inspection from HMCPSI.

Policing Guidance/Home Office Circular

We note the authors of the Draft Protocol intend (at §2.1) that corresponding policing guidance should be issued in due course. We suggest that this process should happen simultaneously with the drafting of this protocol to ensure no inconsistency and that any gaps between the two are effectively addressed now.

That is important for two reasons. First of all, because the Draft Protocol is only engaged once it gets to a prosecutor – there may be a significant period of time when a prosecutor is not involved. Prosecutors are not always consulted at an early stage, even though they ought to be. The Draft Protocol acknowledges this at §2.1 where it anticipates that decisions about jurisdiction are likely already to have been made by the police force initially investigating or called to the scene: *'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'.* The draft protocol will only apply '*where a relevant prosecutor is consulted about an investigation',* notwithstanding that *'a decision as to jurisdiction should be*

[11] RMP/RNP/RAFP – Rape, serious sexual assault and domestic abuse investigations: 15 June 2022 https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/royal-military-police-rape-serious-sexual-assault-and-domestic-abuse-investigations.pdf

[12] Service Justice System Review, Policing Report, §104. 'HMICFRS. Accepting that the outcomes of the independent audit are not yet known, it is a matter of concern that the vulnerabilities discussed above have been identified by this Review being conducted for an entirely different purpose. All three Service Police have an arrangement whereby from time to time they negotiate with HMICFRS as to what they consider they should be inspected upon. This arrangement could be regarded as 'cosy' and does not exist in civilian policing. …. Chief Constables have no say in when they are inspected or on what subject.'

made at the earliest reasonable opportunity' (§2.3). And at §3.3(m) the initial decision that was made as to which police force should investigate is to be a factor in determining which jurisdiction the proceedings should be brought.

The effect of these paragraphs seems to be that whichever police force happens to take up the case at the outset is likely to be the one that will continue to have conduct of the case going forward. In cases on military property, that is almost always going to be the service police, thereby setting the case off on the SJS track at the earliest stage and long before a prosecutor is consulted and the relevant factors considered. In so doing, it significantly reduces the usefulness of the Draft Protocol because the decision on jurisdiction will already be heavily weighted in favour of the SJS by the time a prosecutor applies it.

§2.1 should therefore be amended to insert a requirement that in any MMR, RASSO, or case involving domestic or child abuse, the presumption of any police force attending/investigating should be that the case will be taken forward by the civilian police.

Secondly, the current policy that guides which police force (civilian or service) should deal with an alleged crime on military property in the UK (Home Office Circular 028/2008) is inconsistent with the Draft Protocol in several material ways.[13] It is set down in the Circular that *'very serious crimes'* (defined in the Circular as *'any incident involving death or serious injury likely to lead to death, the investigation of terrorism, murder or manslaughter in the UK and national security cases')* will be led by civilian police and handled within the CJS. Service police should do no more than secure the scene if they are first to arrive. The SSD and MoD have never been able to explain, as a matter of principle, if it is accepted that it is not appropriate for the SJS to handle such '*very serious cases'*, why rape, serious sexual assaults and child & domestic abuse cases should not be treated in the same way. Those are very serious cases. The Home Office Circular should be urgently amended to clarify that 'very serious offences' includes rape, sexual assault, domestic and child abuse cases.

DRAFT PROTOCOL

We suggest that the Draft Protocol should be amended as follows. We have copied the draft text as published, marked our proposed deletions and added our proposed additions in red:

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. The DPP and DSP expect the corresponding guidance to ensure that in any MMR, RASSO 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.

2.2 Where a relevant prosecutor 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.

[13] https://library.college.police.uk/docs/hocirc/ho-circ-2008-028.htm

2.3 A decision as to jurisdiction should be made at the earliest reasonable opportunity and, in any event, before criminal proceedings have been commenced save where there are exceptional circumstances (see paragraph 3.5 below).

3. The principles governing decisions regarding jurisdiction

3.1 Decisions regarding jurisdiction are to be approached on a case-by-case basis, subject to the presumption that any MMR, RASSO, or a case involving domestic or child abuse, or where the suspect or victim is under the age of 18, should be referred to the CJS at the earliest opportunity.

3.2 The overriding principle is to promote fair and efficient justice.

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:

(a) proceedings relating to alleged conduct which affect the person or property of a civilian should ordinarily be brought in the civilian jurisdiction;

(b) subject to §3.1, ~~subject to~~ and 3.3(c) ~~and section 4~~, proceedings relating to alleged conduct which does not affect the person or property of a civilian should ordinarily be brought in the service jurisdiction;

(c) 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.

[If the above amendments were accepted there would be no need for the following paragraph. In the event that the above amendments are not accepted, our comments are as follows]:

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:

(a) 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 in a case constituting a pattern of offending alleged to have taken place in both the civilian and service jurisdiction, the civilian jurisdiction is to take precedence);

(b) whether the conduct is alleged to constitute or form part of a pattern of offending which includes conduct that occurred outside England and Wales;

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

~~(d) the ability of the DSP to charge disciplinary offences which are not available to the CPS;~~

[We do not understand (d) to be necessary. If a person is convicted in either court martial or civil criminal court (Crown Court/Magistrates Court), they can still be disciplined for further related offences (as long as they do not infringe the double jeopardy rule) and it is not necessary for the index offence to be handled by the SJS for that to happen. If a person is acquitted in either court martial or civil criminal court, they may also still be disciplined for a related service offence (as long as, again, it does not infringe the double jeopardy rule).]

(e) whether the conduct, if established, would be viewed more seriously within the service jurisdiction because of the service context;

(f) the availability of different sentencing powers and ancillary orders within the service and civilian jurisdictions;

~~*(g) the ability of the service police to deploy rapidly to conduct certain investigations outside England and Wales;*~~

[Is (g) a reference to cases outside the UK, or to cases in Scotland & NI? The civil police have extremely limited jurisdiction to conduct investigations outside the UK in any event so, if the former, this is unnecessary as it will always be service police that respond to cases involving service personnel overseas in any event. If in relation to the latter, the same principles should apply and a presumption created that the CJS will take precedence, as per §3.1].

~~*(h) matters that impact on operational effectiveness, which indicate that it may be more appropriate for proceedings to be brought in the service jurisdiction, including, for example:*~~

- ~~*whether the suspect will be serving overseas during the course of proceedings;*~~
- ~~*the ability of witnesses to participate in proceedings;*~~

[There is no need for (h). If a suspect 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. The same is true of any witnesses that are serving. The armed forces have arrangements in place to ensure individuals can take part in legal cases when required to do so by a court and the risk of inconvenience to the institution (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.]

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

[Given the delays and resource challenges faced by the CJS at present, the inclusion of this clause is likely to have the effect of always ensuring cases will be retained in the generally-less-busy SJS. It will inevitably disrupt consideration of the other factors in the Draft Protocol]

(j) any views expressed by a victim and, in appropriate cases, members of the victim's family and guardians of a Child Looked After;

[We think this should be prioritised in the list and the views of the victim sought at the outset].

(k) 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;

- *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 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.*

(l) considerations that may be particularly relevant in cases involving allegations of domestic abuse, sexual offences or child abuse, and which suggest that the case might be more appropriately handled in the CJS, including, for example:

- *whether the needs of the victim or any witness require a multi-agency approach;*
- *the availability of the Domestic Abuse Best Practice Framework in the civilian jurisdiction;*
- ~~*the availability and nature of out-of-court disposals*~~ *[This ought not to be a factor when considering 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];*
- *the range of ancillary and civil orders available within the service and civilian jurisdictions noting, for example, that there is no power available in the service jurisdiction to impose a service restraining order, or to enforce an existing service restraining order, should the person be dismissed from the armed forces;* [14]
- *the ability to attach conditions to bail in the civilian jurisdiction, both before and after charge, which is lacking in the SJS;*
- *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, which is not a requirement of the relevant rules in the SJS.*[15]
- *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.*

~~*(m) any initial decisions made as to which police force should investigate the alleged conduct, and whether those decisions were made in accordance with relevant police guidance, such as guidance relating to the investigation of deaths on land or property owned or controlled by the Ministry of Defence.*~~

[This is likely to render the consideration of the factors in the Draft Protocol far less useful, because the Protocol does not bind the police, they operate according to a different (and inconsistent) protocol/Circular (see above) 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)].

3.5 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

[14] Until recently, the service police didn't have the power to seek sexual risk orders, sexual harm prevention orders etc. They only got that power in 2022. It will be necessary to monitor the use of those powers to ensure they are being used (and used appropriately).

[15] The (civil) Criminal Procedure Rules, Rule 17, requires a production order to be served not only on the person doing the producing, but also the subject of the material (following TB v Stafford (2006) EWHC 1645). This is not reflected in the Armed Forces (Powers of Stop, Search, Seizure & Retention) Order 2009 (Sch 1). The CMJ is aware of production orders being issued in the SJS and not served on the subject.

circumstances and then only with the joint approval of the DPP and the DSP, in accordance with paragraph 5.3.5 below.

3.6 This 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.

3.7 In a case engaging the Victim's Right to Review scheme, the DSP and DPP agree that the independent review of decision not to prosecute taken by the SPA should be conducted by a CPS prosecutor (and in a RASSO case, a prosecutor from the CPS RASSO panel).

3.8 The DSP and DPP agree that, in a RASSO case and if proceeding in the SJS, specialist independent counsel from the CPS RASSO panel will be instructed to advise on and prosecute the case at court martial.

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:

(1) an allegation of an offence of:

(a) Murder;
(b) Manslaughter;
(c) Rape;
(d) Sexual assault with penetration;
(e) Sexual assault without penetration;

(f) A case involving domestic abuse;

or

(2) a suspect or defendant or victim 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. A written record of the consultation and decision must be made, retained and provided to the victim and defendant.

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.

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 prosecutor[4] 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 prosecutor[5] 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. A joint record should be kept of the discussions and decisions made at this and any later stage.

5.3.4 Where agreement cannot be reached, the issue will be discussed between a CCP or HOD in the CPS, and the DDSP 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.

Centre for Military Justice

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