

## **Protocol on the exercise of criminal jurisdiction in England and Wales**

### **BETWEEN**

**The Director of Service Prosecutions**

**and**

**The Director of Public Prosecutions**

**and**

**The Ministry of Defence**

### **1. Introduction and scope of this protocol**

- 1.1. This document is intended as an agreement between the above signatories as to the principles governing the issue of concurrent jurisdiction where a criminal offence is alleged to have been committed by a person subject to Service law<sup>1</sup>. This document is intended to update and replace the Protocol on the exercise of criminal jurisdiction in England and Wales completed 26 September 2011<sup>2</sup>. The signatories to this protocol note that the Prosecutors Convention 2009 (updated 2012)<sup>3</sup> also includes useful guidance for cases where there are overlapping interests.
- 1.2. The Director of Public Prosecutions and Director of Service Prosecutions have concurrent powers to bring a charge with respect to any person subject to Service law in relation to alleged criminal conduct within England and Wales<sup>4</sup>. This protocol only deals with offences committed in England and Wales.
- 1.3. Cases which fall to be prosecuted within the Service jurisdiction may be dealt with by the Commanding Officer and/or the Court Martial ("Service proceedings"). The Commanding Officer may only deal with a very limited range of criminal offences. Under section 42 of the Armed Forces Act 2006 ("the 2006 Act") the Court Martial has jurisdiction with respect to any conduct:
  - a) that is punishable under the law of England and Wales, or
  - b) that, if done in England and Wales, would be so punishable.
- 1.4. Section 42 of the 2006 Act extended the jurisdiction of the Court Martial, which formerly could not deal with certain criminal offences such as murder, manslaughter and rape (if committed in the United Kingdom) but now has jurisdiction to do so.
- 1.5. It is recognised that in practice the effectiveness of this protocol and the appropriate determination of whether proceedings are to be brought within the civilian or Service jurisdiction depends in part on appropriate decisions being made as to which police force(s) (Home Office, Ministry of Defence or Service Police) undertake(s) the

<sup>1</sup> "Subject to service law" is defined in sections 367 to 369 of the Armed Forces Act 2006 (the "2006 Act"). Broadly speaking, the term covers any member of Her Majesty's regular forces and any member of her reserve forces while on duty.

<sup>2</sup> The 2011 protocol updated and replaced the guiding principles set out in paragraphs 12.17 – 12.25 of Home Office Circular 35/1986.

<sup>3</sup> Available at <https://www.gov.uk/the-prosecutors-convention-2009-updated-2012>

<sup>4</sup> The power of the MoD is, strictly speaking, the power of the Commanding Officers to charge (explained in paragraph 1.3).

investigation. It is also recognised that agreement on the taking of these decisions is necessary, but it is not the subject of this protocol.<sup>5</sup> However, because there is no legal mechanism to transfer a case between jurisdictions after charge, it is extremely important that the case is allocated to the most appropriate prosecuting authority at the earliest stage in the proceedings<sup>6</sup>. Although it is usually the case that a police force will consult and pass cases to the aligned prosecuting authority for charge (for example Home Office police to the Crown Prosecution Service (CPS)), it is possible to transfer a case between jurisdictions before charge by going through a relevant police force. Therefore, the signatories agree to draw this protocol to the attention of police forces and will seek the agreement of those forces:

- a) to bear in mind the principles contained in this document;
- b) where any issue arises under this protocol as to appropriate jurisdiction, to consult other interested police forces as early as possible, as well as the CPS or SPA as appropriate, in order to ascertain the most appropriate jurisdiction in which the suspect should be charged.

1.6. The principles contained in this protocol have been approved by the Attorney General for England and Wales and by the Ministry of Justice.

## **2. Decision as to the most appropriate tribunal for proceedings**

2.1. It is an established principle that where there are overlapping civilian and Service jurisdictions and authorities within England and Wales, the civilian jurisdictions and authorities have precedence, such that if there is an issue between either the Ministry of Defence or the Service Prosecuting Authority (SPA) and the CPS as to the application of paragraph 2.2 to the case, it will be for the Director of Public Prosecutions to decide whether a suspect who is subject to Service law should be charged and subsequently tried in the civilian or Service jurisdiction.

2.2 The overriding principle is the requirement of fair and efficient justice. Subject to that, the main principles which will be applied by the signatories to this protocol when considering the appropriate jurisdiction (Service or civilian) in which to charge and subsequently try a suspect who is subject to Service law are as follows:

- a) offences alleged only against persons subject to Service law which affect the person or property of civilians<sup>7</sup> should normally be dealt with by a civilian court and not in Service proceedings;
- b) 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; and
- c) offences alleged jointly against persons subject to Service law and civilians should normally be dealt with by a civilian court.<sup>8</sup>

<sup>5</sup> The 2008 protocol between the Association of Chief Police Officers; the Ministry of Defence Police and the Service Police determines which police force will assume responsibility for the investigation of an alleged offence in situations where there is concurrent jurisdiction.

<sup>6</sup> The commencement of a second set of proceedings in the Service jurisdiction and the discontinuance of criminal proceedings in the civilian jurisdiction (and vice versa) would require careful consideration of the legal risks and procedural issues involved and therefore to be avoided if at all possible.

<sup>7</sup> A civilian is a person who is not a member of the armed forces.

<sup>8</sup> Service proceedings generally have no jurisdiction to try persons who are not subject to Service law for offences committed in England and Wales, although there are exceptions, such as former members of the armed forces for offences committed while in the armed forces.

2.3. Where there is an issue as to the appropriate jurisdiction in which to deal with a suspect who is subject to Service law, the Director of Public Prosecutions and the Director of Service Prosecutions should consult in relation to the appropriate jurisdiction to deal with the case, acknowledging that the final decision rests with the Director of Public Prosecutions. Either Director may consult the Attorney General to seek his view on the appropriate jurisdiction where either of them considers it appropriate to do so.

2.4. The overriding principle of fair and efficient justice allows the signatories to take into account other factors which may affect the application of the principles in paragraph 2.2 when considering the appropriate jurisdiction in which to charge and try a suspect subject to Service law. Examples of factors which the signatories may take into account could be:

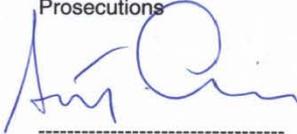
- a) where there are linked cases (for example, where an offence is linked to a series of other similar offences which have been or are being dealt with in either a Service or civilian context);
- b) practical matters, such as the availability of witnesses to participate in the proceedings, or where the person charged is about to be sent overseas (in which case it may be more efficient for the case to be dealt with in the Service jurisdiction);
- c) where there is a strong Service disciplinary context (for example, where an offence is more serious because of a Service factor, or where the location of the offence or the fact that the accused was on duty at the time makes it important for the disciplinary aspects of the misconduct to be fully understood and taken into account). This is linked to the related power of Service proceedings to have regard to the maintenance of discipline as one of the statutory purposes of sentencing – see section 237 of the 2006 Act;
- d) the appropriateness of available sentencing powers (including powers in the 2006 Act of Service detention (which involves retraining), reduction in rank and dismissal, and the fact that certain orders e.g. under the Road Traffic Acts and Proceeds of Crime Act 2002 are only available to civilian courts).

### 3. Review of this protocol

3.1. The signatories will aim to review this protocol not later than two years from the date upon which it is signed.

#### Signatories

Andrew Cayley CMG QC  
Director of Service  
Prosecutions



Dated 7 November 2016

Alison Saunders CB  
Director of Public  
Prosecutions



Dated 11th November  
2016

Signed on behalf of the  
Ministry of Defence

Mark Lancaster MP  
Minister for Defence Personnel  
Welfare and Veterans



Dated 29/11/16