

Response to CPS Consultation on the draft revised protocol regarding the exercise of criminal jurisdiction in England and Wales

by

Ahmed Al-Nahhas

on behalf of

Bolt Burdon Kemp LLP

Introduction

Bolt Burdon Kemp (BBK) is a firm of solicitors that specialise in acting for those who have suffered serious injury as a result of negligence, harassment and abuse. Our Military Group acts exclusively for members of the British Armed Forces, veterans and their families. The firm is based in London, but represents clients nationwide.

The writer, Ahmed Al-Nahhas, is a Partner and the head of the firm's Military Group, who has previously given evidence to the House of Commons Defence Select Committee as a subject-matter expert. Our previous evidence to this Committee comprises:

1. [Written evidence](#) dated 30th January 2021 (on behalf of various Service women who agreed to have their stories put forward as case studies).
2. [Oral evidence](#) given by Mr Al-Nahhas on 18th March 2021.

As a firm, BBK has long argued for improvements to the Service Justice System (SJS) so those who have suffered harm within the military have the same access to justice as those outside of the services.

We receive hundreds of enquiries a year relating to inappropriate behaviours in the military. Whilst there are other contributing factors to the lack of trust in the SJS (which will be expanded upon later in this response), we firmly believe, and have long argued, that handling military sexual assault and rape cases in the civilian jurisdiction would create better access to justice for Service personnel who have been victims of this behaviour.

For the purposes of clarification, this consultation response will focus only on our areas of expertise, namely sexual abuse, assaults, harassment, the SJS and complex personal injury in the military claims context. Issues outside of our field of expertise will not be mentioned in the remainder of this response.

Generally, we prefer to refer to those who have suffered serious injury as a result of negligence or abuse as 'survivors' rather than 'victims', but for the purposes of aligning terminology with that of the draft protocol, we will use the term 'victim' throughout our response.

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

In short, we agree with two of the three principles at paragraph 3.3.

We agree with 3.3(a) and 3.3(c).

We disagree with 3.3(b), that proceedings relating to alleged conduct which does not affect the person or property of a civilian should ordinarily be brought in the Service jurisdiction. In line with [Judge Lyon's 2020 review](#) of the SJS and the 2021 [House of Commons Defence Select Committee's inquiry](#) (the Atherton Report) into the experiences of female Service personnel and veterans, we believe that all sexual assault and rape cases involving a person subject to Service law should be brought in the civilian jurisdiction by default rather than the military jurisdiction.

Relating to 3.3(b), regarding offences under the new protocol which would require consultation (Section 4), as mentioned in the introduction to this response, we can only speak to offences which we handle as a firm and therefore we will not comment on murder, manslaughter or suspects and defendants under 18 years of age. However, BBK believes that in addition to sexual abuse with penetration, sexual abuse without penetration and rape, the following should be included on the list of offences:

1. Sexual Harassment
2. Image based sexual abuse (commonly referred to as 'revenge porn')

- **Sexual Harassment**

Our view, based on thousands of client conversations about inappropriate behaviours in the military, the lack of trust in the Service complaints system and the SJS, is that all harassment of a sexual nature should automatically fall under the civilian jurisdiction. This view is thoroughly supported in the evidence gathered by, and recommendations made in, the Lyons, [Wigston](#) and Atherton reports.

- **Image Based Sexual Abuse**

As a firm we have anecdotal evidence of image based sexual abuse commonly taking place in the military. This toxic and harmful behaviour has become the weapon of choice in many sexual harassment claims. We believe these offences should also be dealt with by the civilian system rather than the military system, for the same reasons as above.

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

Related to the answer to Q1, it seems sensible to summarise that with regard to 3.3(b) there should be an exception to prosecution in the Service jurisdiction for all sexual harassment and sexual offence cases. A guiding principle should be a presumption to prosecute all sexual harassment and sexual offence cases in the civilian jurisdiction and this should be properly communicated to attending officers, Service police and civilian police (this point will be expanded upon below).

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?

We have serious reservations about the list of the factors to be considered at paragraph 3.4. As a general observation on the list in its entirety, it appears to infer a preference towards prosecuting in the Service jurisdiction.

Secondly, there are factors, such as 3.4(j) relating to the views of the victim, which are too far down the list. The appearance here is that they are of lesser significance. Our opinion is that the views of the victim should have primacy, mimicking the policy in the civilian jurisdiction, and should appear at the start of the list.

For the avoidance of doubt, we have no comment to make in relations to factors 3.4(a), (b), (c) and (k). However, we have concerns on the other factors, outlined below.

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

This factor appears to be a misnomer. The CPS has never been able to deal with military disciplinary issues and therefore the point seems irrelevant. This factor seems to be inferring that the SJS has more tools at its disposal when it comes to punishment, but when considering criminal matters, that is simply not the case. The SJS and Chain of Command (CoC) are able to discipline Service personnel, but that decision should rightly follow a criminal investigation where a crime has purportedly been committed.

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

It is our understanding that there is no evidence that allegations within the Services are treated more strictly. In fact, quite the opposite. Allegations of any of the offences listed in Section 4 (and our suggested additional offences of sexual harassment and image based sexual abuse) should be treated with equal severity in both the Service and civilian jurisdictions.

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

We would welcome clarification on the different sentencing powers in the Service and civilian jurisdictions. It is our understanding that the civilian justice system is just as empowered to punish as the SJS.

3.4(g) - the ability of the service police to deploy rapidly to conduct certain investigations outside England and Wales

Whilst it is true that Service police have the ability to deploy quickly to locations outside of England and Wales, and more quickly than the civilian police, this factor fails to take account the litany of concerns raised about the methods and quality of investigations carried out by the SJS, including, for example failures to collect forensic evidence in sexual abuse and rape cases. As highlighted in the [Ministry Of Defence's \(MOD\) written evidence as part of the Atherton Inquiry](#), the MOD admitted that of 36 Service Police investigations in 2020 into non-historical

rape and penetrative sexual offences, less than a third had forensic medical evidence taken within 24 hours of the assault.

3.4(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;**

Operational effectiveness is important, but we believe that it should not act as an excuse for the MOD to deal with sensitive cases involving sexual crime ‘in-house’. The only situation where this factor might become relevant would be, we argue, in a situation where Service personnel are deployed on operations abroad and there is a risk to other Service personnel i.e., conflict. In any other situation it would be in the interests of justice for the civilian authorities to investigate sexual crimes. It seems that this factor, (3.4(h)), serves as an opportunity for the Military to override the consultation between the DPP and DSP on the grounds of operational effectiveness as the term is vague and those outside the Services would not be able to argue against it.

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

This factor suggests that capacity and resources of either Service police or civilian police should be considered when consulting on which jurisdiction an alleged crime should be tried in. Our strong view is that capacity and resources should not be a barrier to Service personnel having the same access to justice as people outside of the Services. There is also no guidance on what would constitute being at capacity or under resourced; one might argue that the civilian police will always be busier than their Service counterparts and we would not want that general assumption to convert into a back door by which investigations are retained within the Service jurisdiction.

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

This factor requires the views expressed by a victim to be considered when determining in which jurisdiction the case should be heard. We believe that the victim should be at the heart of the justice system. Capacity, resources and operational effectiveness should definitely not come before the views of the victim. This factor, should a) be higher up the list of factors for consideration and b) should be emphasised as a guiding principal in the draft protocol, much like the [Victims Code](#) from the Ministry of Justice.

3.4(l) - considerations that may be particularly relevant in cases involving allegations of domestic abuse, sexual offences or child abuse

We believe that in addition to the points mentioned, specific mention of the involvement (if any) of the CoC in the alleged offence should be included. As we know from media reports, evidence to the Atherton Inquiry and from our own clients, there are cases where the alleged perpetrator is in the victim’s CoC. The Armed Forces is unique in its organisation where Service personnel live, work and socialise together for months at a time. This creates an

environment where, if the CoC is involved in the alleged offence, it can be extremely traumatic to continue to work and live in that environment. We have long advocated for the removal of the CoC from all complaints of a sexual nature, and we would go further to suggest that these complaints need to be handled and investigated independently of the Services entirely. Independent civilian investigations would greatly improve trust in the Service complaints system.

As outlined in the updated JSP 831, Service complaints of a sexual nature are fully dealt with outside of the CoC. This is a move which we welcome, however, we are disappointed that many elements of the complaint and investigation still remain within Defence, for example, the Defence Serious Crimes Unit (DSCU) and admissibility decisions being determined by centralised Service teams.

3.4(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 factor needs to be expanded on to ensure that all police forces and attending officers understand the presumption to prosecute in the relevant jurisdiction. For example, civilian police attending an alleged rape involving a Service person should not assume that the Service police should take command of the investigation. There is little guidance available or quantitative data, and we are concerned to ensure that these protocols are made clear and communicated to those investigators on the ground. Otherwise, there will be scope for ‘easy’ jurisdictional decisions to be made on the basis of factors like resources, and not necessarily in the interests of justice.

This point is particularly pertinent when we consider Section 3.5 and Section 5 of the draft protocol relating to transferring cases between jurisdictions. Although the consultation questions do not specifically ask for responses on these sections, we believe that it is important to note that since there is *‘no legal mechanism for transferring a case between jurisdictions after charge’* and *‘any decision to change jurisdiction after criminal proceedings have been commenced should not be made unless there are exceptional circumstances’*, it becomes even more important that the officers who are first attending the scene are fully versed on the presumption of the relevant jurisdiction because early decisions in cases can impact the direction of the investigation and outcome.

Furthermore, we believe that further clarification is needed on the defining point at which *‘criminal proceedings have been commenced’* as this could be left open to interpretation.

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

We believe that consideration should be given to several other factors.

A) Distrust in the Military Police

Many women that we have acted for have explained to us that there is a deep-rooted distrust of the military system when speaking up and making a complaint. They do not trust the SJS. This theme was explored extensively in the Atherton Report, which concluded that 6 out of 10 women do not complain for fear that it will negatively impact their career or that they believe

nothing will be done and their complaint won't be taken seriously. This mirrors what our clients have told us, with many explaining that their complaints weren't believed because the perpetrator was in their CoC. For specific examples, please see our [previous evidence to the Defence Committee](#).

B) Equal Access to Justice

It is a fact that if you are raped or sexually assaulted in the military, you are less likely to get a rape conviction in military courts than civilian courts. We believe that if you are part of the armed forces community, you should have exactly the same access to justice as those outside of the Services.

Last month, the [MOD released their latest sexual offence investigation and conviction rates for 2022](#). It is encouraging to see that both investigations and convictions have increased. From 2020 to 2022, the number of military police investigations into sexual assault has increased from 161 in 2020 to 342 in 2022. It is not that more assaults are taking place, but rather we are sure that a contributing factor to this is that thankfully Service personnel now feel more empowered to speak out after the Atherton Report, policies that the MOD have implemented to tackle the culture in the armed forces and the increased media coverage on inappropriate behaviours.

On rape conviction rates, there has been progress in the Court Martial jurisdiction. The 2022 conviction rate is 20%, which is sadly still much lower than the civilian system which for 2021 was 39%. The slight progress in military rape conviction could be due to the new legislation, passed in 2022, which ensures at least one woman sits on Court Martial Boards.

Despite the progress, year on year, the fact remains that there is more chance of a rape conviction in the civilian jurisdiction than the military jurisdiction. This provides the foundation for our firm belief that rape, sexual assault and sexual harassment should be tried in the civilian system rather than the military system.

Contact

We hope that our evidence is helpful. We would be willing to clarify our evidence in writing or in person if this would assist further.

Ahmed Al-Nahhas
Partner and Solicitor Advocate

For and on behalf of,

Bolt Burdon Kemp LLP
26 Newbury Street
London

Tel: 020 7288 4818
ahmedal-nahhas@boltburdonkemp.co.uk