



Defence Force: discipline offences; and offences committed by members of visiting forces

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Defence Force Discipline Act 1982

1. The *Defence Force Discipline Act 1982* ("DFDA") establishes a disciplinary code for the regulation of the conduct of members of the Australian armed forces ("defence members") and other people who are subject to Defence Force discipline ("defence civilians"). The provisions of the code apply in time of peace and in time of war, to defence members and defence civilians in and outside Australia.

The Director of Military Prosecutions

2. The Director of Military Prosecutions (DMP) is established by Part XIA of the DFDA, which commenced on 12 June 2006. The Office of Director of Military Prosecutions is designed to provide an independent prosecution service across the three arms of the military to deal with allegations of breaches of service discipline.
3. The functions of the DMP include carrying on prosecutions for service offences and doing anything incidental or conducive to the performance of that function. A service offence includes any offence under the Act and any offence ancillary to an offence under the Act.

Jurisdiction of Director of Military Prosecutions

4. The same conduct can give rise to the prosecution of an offence against the criminal law and a service offence under the DFDA.
5. As a general rule, the DMP is responsible for dealing with the prosecution of alleged conduct which is a breach of service discipline. The DMP is also responsible for conducting the prosecution of alleged conduct which is properly characterised as both a breach of service discipline and a criminal offence, which is to be dealt with as a breach of service discipline. The CDPP is responsible for conducting the prosecution of alleged offences against Commonwealth law which are more appropriately treated as breaches of the criminal law rather than breaches of service discipline.
6. There are broadly three types of conduct:
 - a. Matters which clearly are breaches of service discipline, for which there is no equivalent civilian offence. These matters may include (for example) insubordination or failing to obey a lawful direction of a superior officer.
 - b. Matters which are captured by section 63 of the DFDA. Section 63 of the DFDA requires that consent of the CDPP must be obtained before certain matters which might make out an offence under section 61 of the Act can be dealt with under the DFDA as a breach of service discipline. Section 61 of the Act provides that a defence member or defence civilian is guilty of an offence if they engage in conduct which would be a Territory offence if it took place in the Jervis Bay Territory. Section 63 requires the CDPP's consent to be obtained in matters involving conduct committed in Australia which might make out an offence against section 61 of the Act and in relation to which the relevant 'territory offence' (as defined in section 3 of the Act) is:

- Treason;
- Murder;
- Manslaughter;
- Bigamy;
- An offence against the following provisions of the *Crimes Act 1900* (A.C.T.) in its application to the Jervis Bay Territory:
 - Section 51: Grievous bodily harm with intention to engage in sexual intercourse;
 - Section 52: Actual bodily harm with intention to engage in sexual intercourse;
 - Section 53: Assault with intention to engage in sexual intercourse;
 - Section 54: Sexual intercourse without consent; and
 - Section 55: Sexual intercourse with a young person;
- Conspiracy to commit an offence against the law of the Commonwealth and any other offence which requires the consent of a Minister or the CDPP;
- A service discipline offence which is ancillary to one of the offences listed above; and
- An offence under section 61 that is prescribed for the purposes of section 63.

These matters include offences which would fall within the jurisdiction of State and Territory Directors of Public Prosecutions, if the matter was dealt with in the criminal justice system. Section 63 of the Act nonetheless requires the CDPP to consider whether to consent to the offence being handled as a service discipline offence.

- c. Matters to which section 63 does not apply, but it would be appropriate for the CDPP to consider the matter because it might be appropriate for the matter to be dealt with as a breach of the criminal law rather than as a breach of service discipline.

7. The CDPP and the DMP (and every other State and Territory DPP) entered into a Memorandum of Understanding in May 2007. Questions of jurisdictional resolution which arise between the DMP and the CDPP are dealt with in accordance with the arrangements outlined in that document.
8. Questions of jurisdictional resolution which arise between the DMP and the CDPP are dealt with by the Practice Group Leader for International Assistance and Specialist Agencies (IASA). Any question of jurisdictional resolution which is referred to a Regional Office should be forwarded to the Practice Group Leader for IASA.
9. The Canberra Office (IASA) has a national liaison relationship with the Office of Military Prosecutions.

The Defence (Visiting Forces) Act 1963

10. The *Defence (Visiting Forces) Act 1963* (DVFA) makes provision for how members of foreign military forces (and other persons subject to the service law of the relevant country) visiting Australia may be dealt with in relation to criminal conduct. The DVFA sets out:
 - the right of foreign service tribunals and authorities to exercise authority over relevant persons in Australia;
 - the circumstances in which Australian criminal law will or will not be applied; and
 - the interaction of those different processes.
11. The DVFA is administered by the International Crime Cooperation Division in the Attorney-General's Department and applies to both the Commonwealth and the States and Territories.

12. Where the CDPP has carriage of a prosecution and a foreign defence force requests that Australian criminal jurisdiction not be exercised, the Attorney-General's Department will generally refer the request to the CDPP for comment.
13. Where the prosecution of a member (military or civilian) of a visiting foreign military force is referred directly to a Regional Office the IASA Practice Group Leader (PGL) must be notified immediately (and the DCU cc'd into any correspondence). The IASA PGL will liaise directly with the Attorney-General's Department, as, given the complexity of the application of the DVFA, it is important that AGD is made aware of any relevant matter as soon as possible.



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