

DIRECTOR OF MILITARY PROSECUTIONS DIRECTIVE 02/2009—PROSECUTION AND DISCLOSURE POLICY

INTRODUCTION

1. This directive states the prosecution and disclosure policy of the Director of Military Prosecutions (DMP) and replaces DMP's previous directive 01/2009 of 4 May 2008. This directive applies to all prosecutors posted to the Office of the Director of Military Prosecutions (ODMP), any legal officer to whom DMP has delegated function(s) under *Defence Force Discipline Act 1982* (DFDA) s 188GR and any ADF legal officer who has been briefed to advise DMP or to represent DMP in a prosecution before a Defence Force magistrate (DFM), a restricted court martial (RCM) or a general court martial (GCM), or to represent DMP in the Defence Force Discipline Appeal Tribunal (DFDAT) or another court. In order to promote consistency between Commonwealth prosecution authorities, some aspects of this policy are modelled on relevant Commonwealth policies.
2. Members of the ADF are subject to the DFDA in addition to the ordinary criminal law of the Commonwealth, States and Territories. Decisions in respect of the prosecution of offences can arise at various stages and encompass the initial decision whether or not to prosecute, the decision as to what charges should be laid and whether a prosecution should be continued.
3. On 12 June 2006, legislative amendments to the DFDA came into effect which significantly changed the process by which decisions are made with respect to the prosecution of ADF members for offences under the DFDA, and the administrative arrangements relating to the conduct thereof. Prior to 12 June 2006, decisions in respect of all Service offences under the DFDA rested with ADF commanders. For less serious Service offences, prosecution decisions continue to be made by unit or command authorities who are best placed to determine the discipline needs of their unit, ship or establishment and therefore make decisions based on the need to maintain discipline within the ADF. However, for more serious offences, or where charges have been referred by a summary authority to DMP, decisions in respect of the prosecution of charges will be made by DMP.
4. On 1 October 2007, amendments to the DFDA commenced; those amendments repealed the previous regime of trials by court martial and Defence Force magistrate, and established the AMC. On the same day, amendments to the *Defence Force Discipline Appeals Act 1955* (the Appeals Act) provided DMP with the power to appeal to the DFDAT in respect of punishments imposed, or court orders made, in the AMC. Further amendments to the Appeals Act, which commenced on 20 March 2008, gave DMP the power to refer to the DFDAT questions of law arising out of trials in the AMC. On 26 August 2009, the High Court of Australia struck down the AMC as being unconstitutional. Legislation was passed to re-establish the pre-2007 regime of DFM, RCM and GCM. The policy below is based on the re-established regime.
5. The initial decision as to whether to prosecute is the most important step in the prosecution process. A wrong decision to prosecute, or conversely a wrong decision not to prosecute, tends to undermine confidence in the military discipline system. It is therefore important that the decision to prosecute (or not to prosecute) be made fairly

not to prosecute, tends to undermine confidence in the military discipline system. It is therefore important that the decision to prosecute (or not to prosecute) be made fairly and for appropriate reasons. It is also important that any subsequent decision not to proceed with a charge is made fairly and for appropriate reasons and that care is taken in the selection of the charges that are to be laid. In short, decisions made in respect of the prosecution of Service offences under the DFDA must be capable of withstanding scrutiny. Finally, it is in the interests of all that decisions in respect of DFDA prosecutions are made expeditiously.

6. This directive deals solely with the exercise of the discretion to prosecute under the DFDA, and associated disclosure issues. It does not provide policy guidance or procedures for resolving jurisdictional conflicts between the civil, criminal and military discipline systems.¹ In addition, this directive does not deal with situations in which the exercise of ADF jurisdiction is otherwise limited, such as by DFDA s 63. Advice and procedural guidance for dealing with such matters is provided in DI(G) PERS 45-1—*Jurisdiction under Defence Force Discipline Act—Guidance for Military Commanders* of 17 February 1999.

AIMS

7. The aims of this directive are:
- a. to provide guidance for prosecutors who are responsible for making recommendations to DMP in respect of decisions regarding the prosecution of offences under the DFDA to improve the quality and consistency of their recommendations and decisions; and
 - b. to inform other ADF members of the principles which guide decisions made by DMP.

MAINTENANCE OF DISCIPLINE

8. It is critical that the ADF establish and maintain the high standard of discipline that is necessary for it to conduct successful operations. As the ADF may be required to operate at short notice in a conflict situation, a common and high standard of discipline must be maintained at all times. Discipline is achieved and maintained by many means, including leadership, training and the use of administrative sanctions. Prosecution of charges under the DFDA is a particularly important means of maintaining discipline in the ADF. Indeed, the primary purpose of the disciplinary provisions of the DFDA is to assist in the establishment and maintenance of a high level of Service discipline.

ALTERNATIVES TO CHARGING

9. Laying charges under the DFDA is only one tool that is available to establish and maintain discipline. In some circumstances, maintenance of discipline will best be achieved by taking administrative action against members in accordance with Defence

¹ That guidance is provided in DMP's memorandum of understanding with the Commonwealth, State and Territory Directors of Public Prosecutions of 22 May 2007.

Instructions. Similarly, in respect of minor breaches of discipline, proceedings before a Discipline Officer may be appropriate. ODMF may be asked to advise on matters that can be appropriately dealt with through administrative or Discipline Officer action. Whilst ODMF may make such recommendations, ultimate decisions in respect of how these minor breaches are dealt with still rests with commanders, who in turn must apply judgement to the unique facts and circumstances of the case before them. Nevertheless, administrative or Discipline Officer action alone is inappropriate to deal with situations in which a serious breach of discipline has occurred or where the conduct involved is otherwise deemed to be serious enough to warrant the laying of charges under the DFDA. Further, in some cases the interests of justice may require that a matter be resolved publicly by proceedings under the DFDA before a DFM, RCM or GCM. Alternatives to charging should never be used as a means of avoiding charges in situations in which formal disciplinary action is appropriate.

THE DECISION TO PROSECUTE

10. The prosecution process normally commences with a suspicion, an allegation or a confession. However, not every suspicion, allegation or confession will automatically result in a prosecution. The fundamental question is whether or not the public interest requires that a particular matter be prosecuted. In respect of prosecutions under the DFDA, the public interest is defined primarily in terms of the requirement to maintain a high standard of discipline in the ADF.

Factors governing the decision to prosecute

11. The criteria for exercising the discretion to prosecute cannot be reduced to a mathematical formula. Indeed, the breadth of factors to be considered in exercising the discretion reinforces the importance of judgement and the need to tailor general principles to individual cases. Nevertheless, in deciding whether to prosecute or proceed with a charge under the DFDA, the following principles will be considered.

- a. Whether or not the admissible evidence available is capable of establishing each element of an offence.
- b. Whether or not there is a reasonable prospect of conviction by a Service tribunal properly instructed as to the law.
- c. The effect of any decision to prosecute or proceed with a charge on the maintenance of discipline and the Service interests of the ADF.
- d. Whether or not discretionary factors nevertheless dictate that charges should not be laid or proceeded with in the public interest (these are discussed in detail later).

12. **Admissible evidence and reasonable prospects of a conviction.** A decision to prosecute or proceed with a charge under the DFDA should not be made unless there is sufficient admissible and reliable evidence available to allow a Service tribunal to conclude that the offence is likely to be proven in the absence of adequate evidence to the contrary. There must also be a reasonable expectation that a conviction will be achieved if the charge is laid (or proceeded with) and a prosecution should not be

commenced where there is no reasonable prospect of conviction. In evaluating the quality and sufficiency of the available evidence and in deciding whether there are reasonable prospects of conviction, regard must be paid to whether the witnesses can be required to give evidence, the credibility of the witnesses and to the admissibility of available evidence.

13. **Service interests and maintenance of discipline.** In respect of the prosecution (or continued prosecution) of offences under the DFDA, the requirement to maintain a high standard of discipline in the ADF is a particularly important consideration. In many cases this requirement will be reason enough to justify a decision to lay or proceed with a charge under the DFDA. However, occasionally wider public interest considerations, beyond those relating to the maintenance of discipline in the ADF, will warrant charges being laid. In respect of such cases, it is important to realise that prosecution under the civil criminal law may be required, rather than prosecution under the DFDA. In this context, regard must be paid to recent decisions of the High Court which have defined the ADF discipline jurisdiction. Specifically, the High Court has decided that Service offences should only be prosecuted where such proceedings can be reasonably regarded as substantially serving the purpose of maintaining or enforcing service discipline.

14. Consequently, it is a matter for DMP to decide whether the maintenance of discipline requires that DFDA charges be laid in a particular case. In making the prosecution decision, DMP may consider the views of a superior authority canvassing the Service interest. Issues of maintaining discipline and Service interests will vary in each particular case but may include the following.

- a. **Operational requirements.** Only in the most exceptional cases will operational requirements justify a decision not to lay or proceed with a charge under the DFDA. In particular, the existence of a situation of active service will not, by itself, justify a decision not to charge or proceed with a charge under the DFDA. In most cases, operational considerations will only result in delay in dealing with charges. Operational requirements may, however, be relevant in deciding to which level of Service tribunal charges should be referred.
- b. **Prior conduct.** The existence of prior convictions, or the general prior conduct of an offender, may be a relevant consideration. For example, several recent infringement notices for related conduct may justify a decision to charge a member with a Service offence under the DFDA notwithstanding that the latest offence, when viewed in isolation, would not normally warrant such action.
- c. **Effect upon morale.** The positive and negative effects upon ADF morale, both generally and in respect of a part of the ADF, may be a relevant consideration.

15. **Discretionary factors.** As indicated previously, numerous discretionary factors are relevant in deciding whether to commence (or continue with) a prosecution under the DFDA. In particular, the following is a non-exhaustive list of factors that DMP

may consider in deciding, in a given case, whether charges under the DFDA should be preferred or proceeded with:

- a. **Consistency and fairness.** The decision to prosecute should be exercised consistently and fairly with similar cases being dealt with in a similar way. However, it must always be recognised that no two cases are identical and there is always a requirement to consider the unique circumstances and facts of each case before deciding whether to prosecute.
- b. **Deterrence.** In appropriate cases, such as where a specific offence has become prevalent or where there is a requirement to reinforce standards, regard may be paid to the need to send a message of deterrence, both to the alleged offender and the ADF generally.
- c. **Seriousness of the offence.** It will always be relevant to consider the seriousness of the alleged offence. A decision not to charge under the DFDA may be justified in circumstances in which a technical and/or trivial breach of the DFDA has been committed (provided of course that no significant impact upon discipline will result from a decision not to proceed). In these circumstances, administrative action or Discipline Officer proceedings may be a more appropriate mechanism for dealing with the matter. In contrast and as a general rule, the more serious and wilful the alleged conduct giving rise to a Service offence, the more appropriate it will be to prefer charges under the DFDA.
- d. **Interests of the victim.** In respect of offences against the person of another, the effect upon that other person of proceeding or not proceeding with a charge will always be a relevant consideration. Similarly, in appropriate cases regard may need to be paid to the wishes of the other person in deciding whether charges should be laid, although such considerations are not determinative.
- e. **Nature of the offender.** The age, intelligence, physical or mental health, cooperativeness and level of Service experience of the alleged offender may be relevant considerations.
- f. **Degree of culpability.** Occasionally an incident, such as an aircraft accident, will be caused by the combined actions of many people and cannot be directly attributed to the conduct of one or more persons. In these circumstances, careful regard must be paid to the degree of culpability of the individuals involved when deciding whether charges should be laid and against whom.
- g. **Delay in dealing with matters.** Occasionally, conduct giving rise to possible Service offences will not be detected for some time. Where Service offences are not statute barred under the DFDA, it may nevertheless be relevant to consider whether the length of time since the alleged offence was committed militates against charges being laid. In considering this aspect, the sufficiency of the evidence, the discipline

purposes to be served in proceeding with charges and any potential deterioration in the ability to accord an accused person a fair trial are likely to be particularly relevant.

16. In addition to the foregoing considerations, the DMP may deem it appropriate to have regard to the following additional factors when deciding which Service tribunal should deal with specific charges:

- a. **Sentencing options.** The adequacy of the sentencing powers that are available at the various levels of Service tribunal will always be an important consideration in deciding by which Service tribunal charges should be tried.
- b. **Cost.** For Service offences or breaches of discipline, cost may be a relevant consideration in deciding what level of Service tribunal should be used.
- c. **Discretion to decide that an offence be tried by DFM, RCM or GCM.** Subsection 103(1)(c) of the DFDA provides the DMP with the discretion to decide that an offence be tried by DFM, RCM or GCM. In making such a determination, and in addition to a careful consideration of the individual circumstances of the alleged offence(s) in the Brief of Evidence, DMP may consider:
 - (1) the objective seriousness of the alleged offence(s);
 - (2) whether like charges would ordinarily be tried in the absence of a jury in the civilian courts in Australia; and
 - (3) whether the reduced scale of punishment available would enable the accused person, if convicted, to be appropriately punished.

The factors mentioned in clauses (1) and (2) above are clearly related and remain the most important factors. The factor in clause (3) is one which DMP will consider only if satisfied (after considering the two previous factors) that the exercise of the discretion is appropriate.

- d. **Victims compensation schemes.** In relation to members of the Reserve forces and civilians who are alleged victims of violent offences, the availability of civilian victims of crime compensation may be a relevant consideration in determining whether the matter is prosecuted under the DFDA or referred to a civilian prosecution authority for disposal.

Factors that are not to influence the decision to prosecute

17. Although not exhaustive, the following factors are **never** considered when exercising the discretion to prosecute or proceed with charges under the DFDA:

- a. The race, religion, sex, sexual preference, marital status, natural origin, political associations, activities or beliefs, or Service of the alleged offender or any other person involved.
- b. Personal feelings concerning the offender or any other person involved.
- c. Possible personal advantage or disadvantage that may result from the prosecution of a person.
- d. The possible effect of any decision upon the Service career of the person exercising the discretion to prosecute.
- e. Any purported direction from higher authority in respect of a specific case.
- f. In relation to members of the Permanent Navy, Australian Regular Army or Permanent Air Force, or members of the Reserve rendering continuous full time service, the availability (or otherwise) of victims of crime compensation in the State or Territory where the alleged offending occurred.

18. Finally, no person has a 'right' to be tried under the DFDA. Accordingly, a request by a member that he or she be tried in order to 'clear his or her name', is not a relevant consideration in deciding whether charges under the DFDA should be laid or proceeded with.

SELECTION OF CHARGES

19. Particular care needs to be exercised when deciding which Service charges are preferred under the DFDA. Often the evidence will disclose a number of possible offences. In such cases care must be taken to choose a charge or charges which adequately reflect the nature of the misconduct disclosed by the evidence and which will provide the Service tribunal with an appropriate basis for sentencing. It will often be unnecessary, as no disciplinary purpose will be served, to charge every possible offence. Under no circumstances should charges be laid with the intention of providing scope for subsequent charge-bargaining.

DISCLOSURE OF THE PROSECUTION CASE

20. Disclosure is the prosecution informing the accused person of the case against him or her. The information comprises all material required to be disclosed and includes: the prosecution case; information relevant to the credibility or reliability of prosecution witnesses; and information relevant to the credibility and reliability of the accused person.

21. In some circumstances it will also be appropriate that the prosecution informs the accused person of material, not covered in the previous paragraph, which has come into DMP's, a Defence Investigative Agency's (DIA), or a third party's possession, and which either runs counter to the prosecution case or might reasonably be expected to assist the accused person in his or her defence.

CHARGE-BARGAINING

22. Charge-bargaining involves negotiations between an accused person via his/her defending officer and DMP in relation to charges to be proceeded with. Such negotiations may result in the accused person pleading guilty to fewer than all of the charges he/she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

23. DMP is the sole authority to accept or negotiate charge-bargain offers made by an accused person who is to be tried by a DFM, RCM or GCM. A legal officer who prosecutes on DMP's behalf must seek DMP's instructions prior to accepting or negotiating a charge-bargain offer.

24. Charge-bargaining is to be distinguished from consultations with a Service tribunal as to the punishment the Service tribunal would be likely to impose in the event of the accused pleading guilty to a criminal charge. No legal officer prosecuting on the behalf of DMP is to participate in such a consultation.

25. Nevertheless, arrangements as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

- a. any charge-bargaining proposal should not be initiated by the prosecution; and
- b. such a proposal should not be entertained by the prosecution unless:
 - (1) the charges to be proceeded with bear a reasonable relationship to the nature of the disciplinary/criminal conduct of the accused;
 - (2) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
 - (3) there is evidence to support the charges.

26. Any decision by DMP whether or not to agree to a proposal advanced by the accused person, or to put a counter-proposal to the accused person, will take into account all the circumstances of the case and other relevant considerations, including:

- a. whether the accused person is willing to cooperate in the investigation or prosecution of others, or the extent to which the accused person has done so;
- b. whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the accused is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;
- c. the desirability of prompt and certain dispatch of the case;

- d. the accused person's antecedent conduct;
- e. the strength of the prosecution case;
- f. the likelihood of adverse consequences to witnesses;
- g. in cases where there has been a financial loss to the Commonwealth or any person, whether the accused person has made restitution or arrangements for restitution;
- h. the need to avoid delay in the dispatch of other pending cases;
- i. the time and expense involved in a trial and any appeal proceedings; and
- j. the views of the complainant(s).

27. In no circumstances will DMP entertain charge-bargaining proposals initiated by the defending officer if the accused person maintains his or her innocence with respect to a charge or charges to which the accused person has offered to plead guilty.

28. A proposal by the defending officer that a plea of guilty be accepted to a lesser number of charges or a lesser charge or charges may include a request that the proposed charges be dealt with summarily, for example before a Commanding Officer.

29. A proposal by the defending officer that a plea of guilty be accepted to a lesser number of charges or to a lesser charge or charges may include a request that the prosecution not oppose a submission to the court during sentencing that the particular penalty falls within a nominated range. Alternatively, the defending officer may indicate that the accused will plead guilty to a statutory or pleaded alternative to the existing charge. DMP may agree to such a request provided the penalty or range of sentence nominated is considered to be within acceptable limits of exercising proper sentencing discretion.

OFFENCES OCCURRING AND/OR PROSECUTED OVERSEAS

30. In respect of Service offences committed or intended to be prosecuted overseas, additional considerations apply. Although jurisdiction under Australian domestic criminal law will rarely exist in such cases, the nation within whose territory an alleged offence has been committed may have a claim to jurisdiction. In such cases a potential conflict of jurisdiction between the DFDA and the foreign nation's criminal law may arise. In most cases jurisdictional disputes between foreign nations and the ADF will be resolved by reference to foreign visiting forces legislation or Status of Forces Agreements.

UNDERTAKINGS UNDER SECTION 188GD

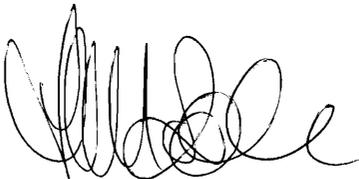
31. Section 188GD vests DMP with the power to give an undertaking to a person that they will not be prosecuted for a service offence in relation to assistance provided

to investigators. Essentially, this provision is aimed at securing the assistance of a co-accused or accomplice in circumstances where the disciplinary efficacy of bolstering the prosecution case against the primary accused outweighs the forfeiture of the opportunity to prosecute the person to whom the undertaking is given. The preference is always that a co-accused person willing to assist in the prosecution of another plead guilty and thereafter receive a reduction to their sentence based upon the degree of their cooperation. Such an approach may not always be practicable, however.

32. In determining whether to grant an undertaking, DMP will consider the following factors.

- a. The extent to which the person was involved in the activity giving rise to the charges, compared with the culpability of their accomplice.
- b. The strength of the prosecution case against a person in the absence of the evidence arising from the undertaking.
- c. The extent to which the testimony of the person receiving the undertaking will bolster the prosecution case, including the weight the tribunal of fact is likely to attach to such evidence.
- d. The likelihood of the prosecution case being supported by means other than evidence from the person given the undertaking.
- e. Whether the public interest is to be served by not proceeding with available charges against the person receiving the undertaking.

33. Details of any undertaking, or of any concession in relation to the selection of charges in light of cooperation with the prosecution, must be disclosed to the Court and to the accused through their Defending Officer.



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