



## MEMORANDUM OF UNDERSTANDING

### BETWEEN THE AUSTRALIAN DIRECTORS OF PUBLIC PROSECUTIONS AND DIRECTOR OF MILITARY PROSECUTIONS

#### Parties:

1. The Commonwealth Director of Public Prosecutions;
2. The Director of Public Prosecutions for the State of New South Wales;
3. The Director of Public Prosecutions for the State of Victoria;
4. The Director of Public Prosecutions for the State of Queensland;
5. The Director of Public Prosecutions for the State of Tasmania;
6. The Director of Public Prosecutions for the State of Western Australia;
7. The Director of Public Prosecutions for the State of South Australia;
8. The Director of Public Prosecutions for the Northern Territory;
9. The Director of Public Prosecutions for the Australian Capital Territory; and
10. The Director of Military Prosecutions.

#### Background

1. This Memorandum of Understanding deals with the relationship between the Commonwealth Director of Public Prosecutions (CDPP), the State and Territory Directors of Public Prosecutions, and the Director of Military Prosecutions (DMP).

#### Definitions

2. **Criminal justice system:** refers to the system for the enforcement of the criminal laws of the Commonwealth, the States and the Territories.

3. **Criminal law enforcement authorities:** refers to Australian law enforcement authorities including investigating and prosecuting agencies, State and Territory Directors of Public Prosecutions, departments and organisations which are part of the criminal justice system.
4. **Prosecution:** includes any part of the conduct of the prosecution of a person for a criminal offence including: brief assessment; preliminary advice to investigators; trials; hearings; sentencing; appeals; any action taken regarding mutual assistance or extradition; and any action taken to recover the proceeds of crime. It also includes matters where a decision is made not to lay charges or pursue criminal charges, for whatever reason.
5. **The Act:** refers to the *Defence Force Discipline Act 1982* (Commonwealth)

#### **Roles**

##### *The Directors of Public Prosecutions*

6. The functions of the CDPP under the *Director of Public Prosecutions Act 1983* include responsibility for the prosecution of offences against Commonwealth laws. The DPP carries out this function on a national basis in accordance with the *Prosecution Policy of the Commonwealth*. The DPP also has responsibility for recovering the proceeds of crime by action under the *Proceeds of Crime Act 2002* and other legislation, and by enforcing civil remedies in cases where it is authorised to do so under provisions of the *Director of Public Prosecutions Act 1983*.
7. The State and Territory Directors of Public Prosecutions are responsible for the prosecution of offences against the laws of the relevant State or Territory.

##### *The Director of Military Prosecutions*

8. Briefly stated, the role of the Australian Defence Force (ADF) is to serve the military interests of the Commonwealth of Australia, including protecting the Commonwealth against violence, both international and domestic. In order to perform this role, the ADF must be a highly ordered organisation and its members must display discipline, thoughtful obedience and respect for the integrity of the Commonwealth, Australian citizens and the ADF.
9. The Director of Military Prosecutions is established by Part XIA of the Act. 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 means any offence under the Act, including a Territory offence, and any offence ancillary to a Service offence.

#### **Responsibilities**

10. Members of the ADF are subject to the criminal laws of the Commonwealth, the States and the Territories, and are also subject to military law including the

Act. In some situations, civilians employed by the Department of Defence are subject to military law, as well as to the criminal law.

11. The criminal law and the military law serve different purposes. A precondition for a prosecution under the Act is that it serves the purpose of maintaining and/or enforcing Service discipline. Service discipline is central to the ADF's ability to serve the military interests of the Commonwealth. Service discipline requires that those subject to military law do not engage in conduct which is likely to prejudice order and authority within the ADF or bring discredit to the ADF.
12. Service discipline is not merely punishment for wrongdoing. It embraces the maintenance of standards and morale in the service community, the preservation of respect for and the habit of obedience to lawful service authority and the enhancing of efficiency in the performance of service functions.
13. The same conduct can give rise to the prosecution of a Service offence or an offence against the civilian criminal law. If a prosecution is instituted by criminal law enforcement authorities, it is prosecuted in the civilian courts. If a Service offence is prosecuted by Service authorities, it is prosecuted before a Service tribunal.
14. This Memorandum seeks to provide guidance on the manner in which the appropriate jurisdiction for prosecuting conduct capable of being dealt with in either jurisdiction is determined.
15. As a general rule, the DMP is responsible for conducting 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.
16. As a general rule, the CDPP is responsible for conducting the prosecution of alleged offences against Commonwealth law which are not breaches of service discipline. The CDPP is also responsible for conducting the prosecution of alleged conduct (and any proceeds of crime action) 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 Commonwealth criminal law. The State and Territory DsPP are responsible for conducting the prosecution of alleged offences against State and Territory laws which are not breaches of service discipline. They are also responsible for conducting the prosecution of alleged conduct which is characterised as both a breach of service discipline and a criminal offence, which is to be dealt with as a breach of State or Territory criminal law.

### **The Protection of Service discipline**

17. The powers exercised by the ADF and the DMP according to military law which pertain to criminal law and justice exist in addition to, and parallel with, the criminal justice system.
18. The powers granted to the ADF under military law recognise the ADF's need to maintain and enforce service discipline. Service discipline is central to the ADF's ability to serve the military interests of the Commonwealth.

### **Characterisation of acts**

19. An act or acts will be a breach of service discipline if there is a sufficient connection between the alleged misconduct and the maintenance of service discipline.
20. It will not always be clear if there is a sufficient connection between the alleged misconduct and the maintenance of service discipline which warrants the alleged misconduct being characterised as a threat to service discipline.

### **Service offences: Maintaining and enforcing Service discipline**

21. Jurisdiction under the Act may only be exercised where proceedings under the Act can reasonably be regarded as serving the purpose of maintaining or enforcing service discipline. The DMP must therefore be satisfied that proceeding with charges under the Act can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.
22. Charges under the Act are to be 'service connected'; but that is not the only criterion in determining whether proceedings could reasonably be regarded as serving the purpose of maintaining or enforcing service discipline.
23. The DMP will make its determination having regard to all the circumstances of the particular case, including but not limited to the following circumstances:
  - Did the alleged conduct occur while the member (or relevant other person) was on duty?
  - Was the alleged conduct a mal-performance of the member's (or other person's) duty?
  - To what extent was the alleged conduct connected with the duties of the member (or relevant other person)?
  - Did the alleged conduct occur on ADF property or in a place under ADF management or control?
  - Did the alleged conduct involve ADF property or equipment or money under ADF control?
  - Did the alleged conduct involve an abuse of rank, or position of military authority, or of privilege or trust?
  - Did the alleged conduct contravene ADF orders, instructions, policies or procedures?

- Was the victim a member of the ADF?

#### Jurisdictional resolution

#### Matters where consent of the CDPP is required by section 63 of the Act

24. Section 63 of the Act requires that the consent of the CDPP must be obtained before certain conduct can be dealt with under that Act.
25. In general terms, these matters involve conduct which might make out an offence against section 61 of the Act committed in Australia 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* (Australian Capital Territory) 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.
26. Where the DMP forms the view that it would be appropriate to deal with conduct which may give rise to an offence which may fall within the terms of section 63 as a breach of service discipline under the Act, the DMP will request the consent of the CDPP for the DMP to commence proceedings.
27. Such a request will be in writing and will outline the facts and circumstances of the matter giving rise to the request. It will state the reasons that the DMP is of the view that it is appropriate for the matter to be dealt with under the Act. If consent is sought urgently, the request will indicate that this is the case, and will indicate the reasons for the urgency.

28. It is a matter for the CDPP whether consent for the conduct of the prosecution under the Act will be granted.

29. In determining whether consent will be granted, the CDPP will have regard to all the known circumstances of the case. The CDPP will have general regard to the types of matters listed at paragraph 2.10 of the *Prosecution Policy of the Commonwealth* (which lists matters to be considered in determining whether a prosecution is in the public interest), as the matters listed exist from time to time. Further, in appropriate circumstances, the CDPP may have regard to any or all of the following matters:

- The views of the investigating authority, where the matter has been investigated by a criminal law enforcement authority;
- The prospects of success or otherwise of a criminal prosecution;
- In the case of a matter where the DPP has been asked to consent to a prosecution for an ancillary offence, whether charges for the offence specified in section 63(1)(a) are being pursued, and if so, in what jurisdiction;
- If there are alleged co-accused, what type of action is proposed to be taken or has been taken against them and in what jurisdiction;
- If there are victims of the conduct, the views of the victims and their families;
- Whether the alleged conduct took place in circumstances which would be more appropriately dealt with by a military tribunal, for example during a military operation or related activity.

30. In determining whether to grant consent, the CDPP will not be influenced by any matter listed in paragraph 2.13 of the *Prosecution Policy of the Commonwealth*, (which lists the matters not to be considered when determining whether a prosecution is in the public interest) being:

- The race, religion, sex, national origin or political associations, activities or beliefs of the person accused of the alleged conduct or any other person involved;
- Personal feelings concerning the person accused of the alleged conduct or the victim;
- Possible political advantage or disadvantage to the Government or any political group or party; and
- The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

31. Where the conduct in question may amount to an offence against the law of a State or Territory rather than (or in addition to) an offence against the law of the Commonwealth, the CDPP will consult with the Director of Public Prosecutions in the relevant jurisdiction before determining whether to grant consent to the DMP to conduct the prosecution.

32. The CDPP will inform the DMP whether consent has been granted for the conduct of a prosecution. This advice will be in writing and provided as soon as reasonably practicable.

Matters where DPP consent is not required by section 63 of the Act

33. This section of the Memorandum applies only to matters to which section 63 of the Act does not apply; that is, to matters where the consent of the DPP to the conduct of the proceedings under the Act does not need to be obtained.

34. If, after assessing a matter, the DMP forms the view that the conduct:

- (a) constitutes only a breach of service discipline, the DMP will conduct the prosecution of the matter, without reference to the CDPP or the DsPP;
- (b) does not constitute a breach of service discipline, but may otherwise be an offence against a law of the Commonwealth or a State or Territory, the DMP will either refer the matter back to the investigating authority with a request that the matter be referred to the appropriate criminal law enforcement authorities, or in the alternative refer the matter to the relevant DPP.

35. The DMP will consult the relevant DPP:

- (a) where the DMP considers that the conduct may be a breach of the criminal law and is unsure whether the alleged conduct is sufficiently connected to service discipline to warrant the conduct being dealt with under the Act;
- (b) where the DMP is of the view that, while the alleged conduct is a breach of service discipline, it may also constitute an offence which should be dealt with in the criminal justice system.

36. Examples of matters in category (b) in paragraph 35 include:

- Matters where the alleged conduct is of such a serious nature that the public interest may be best served by prosecution of the alleged offender in a civilian criminal Court, including matters where the alleged offence:
  - is a sexual offence of any kind other than of a minor nature;
  - is a terrorist offence;
  - is a fraud where the total amount defrauded is substantial and/or there is evidence of systematic or repeated offending;
  - is a war crime other than provided in the Act;
  - involves espionage or a threat or potential threat to Australia's national security, other than provided in the Act; or
  - relates to trafficking in weapons or arms.

- Matters which are of a complex nature, which are likely to raise technical legal issues or which are of a sensitive nature.
  - Matters which are affected by Australia's international obligations, such as obligations under relevant international treaties, for example, in relation to alleged war crimes.
  - Matters where the independence of the DMP may be jeopardised or questioned if the DMP conducts the prosecution of the matter.
  - Matters where the alleged conduct involves civilians who have been or may be charged for a similar offence or offences in the criminal justice system, and the interests of justice require that the matters be dealt with together.
  - Matters where the victim of the alleged offence is not an ADF member and the interests of justice require that the matter be dealt with in the criminal justice system.
  - Matters which have a high public profile or are likely to attract substantial public interest (including media comment).
37. Where the DMP decides to seek the advice of the relevant DPP, the DMP will refer the matter to the DPP in writing as soon as it is reasonably practicable, and will indicate its views as to the appropriate disposition of the matter and its reasons. If the DMP has received advice or correspondence from any criminal law enforcement authority about the matter prior to seeking the advice of the DPP, the DMP will provide the DPP with copies of that advice and correspondence.
38. When considering its position on a matter referred to it for advice, the relevant DPP will use the same criteria and follow the same procedures as at paragraphs 29 to 30 above.
39. Irrespective of whether the DMP has sought the advice of a DPP, a DPP may seek information or further information from the DMP about matters being considered for prosecution under the Act. The DMP will provide such information as soon as reasonably practical.
40. It is a matter for the DMP whether or not it accedes to the advice of the relevant DPP as to the appropriate jurisdiction for prosecution. However, in matters in which the DMP does not intend to follow the advice of the relevant DPP, the DMP will advise the relevant DPP in writing at least fourteen days prior to the DMP instituting proceedings under the Act.

#### Reporting

41. The DMP will provide to the CDPP and the DsPP of the State and Territories a copy of its annual report including the statistical information contained therein.

**Matters received by the DPP from a Criminal Law Enforcement Authority**

42. Criminal law enforcement authorities routinely refer matters to a DPP for prosecution of alleged offences. From time to time, these matters may involve conduct which is also a breach of service discipline because the accused person is a member of the ADF or subject to military law.
43. It will not always be apparent to a DPP that the matter raises an issue of service discipline.
44. In matters of this nature, the relevant DPP will deal with the prosecution in the ordinary course as an alleged breach of the criminal law.
45. However, if the relevant DPP takes the view that a matter:
  - (a) does not involve a criminal offence, but may involve a service offence under the Act; or
  - (b) does involve a criminal offence, but it would be more appropriately dealt with under the Act as a service discipline offence;

the DPP will formally refer the matter to the DMP for consideration as soon as practicable and will advise the referring authority of the action taken.

**Liaison and other matters**

46. The DMP shall deal with the CDPP through the Head Office of the CDPP.
47. The CDPP shall appoint a Liaison Officer or Officers, who shall be the point of contact for the DMP.

**Meetings**

48. Representatives from the offices of the CDPP and the DMP shall hold regular liaison meetings at a national level, not less frequently than once a year.
49. The CDPP will advise the State and Territory Directors of Public Prosecutions of the intention to hold such a liaison meeting with the OMP. State and Territory Directors will be invited to raise issues or attend at the meeting, as appropriate.

**Date of commencement**

This memorandum shall take effect on and from the 22 day of May 2007.

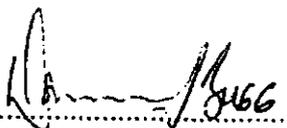
This memorandum may be amended by agreement between the parties as the need arises.



Brigadier Lynette McDade  
Director of Military Prosecutions



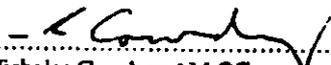
Robert Cock QC  
Director of Public Prosecutions  
Western Australia



Damian Bugg AM QC  
Commonwealth Director of Public  
Prosecutions



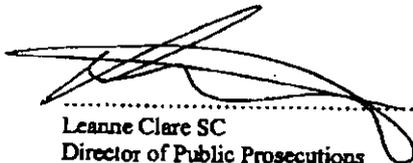
Tim Ellis SC  
Director of Public Prosecutions  
Tasmania



Nicholas Cowdery AM QC  
Director of Public Prosecutions  
New South Wales



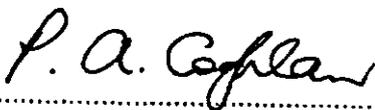
Stephen Pallaras QC  
Director of Public Prosecutions  
South Australia



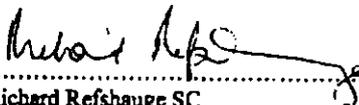
Leanne Clare SC  
Director of Public Prosecutions  
Queensland



Richard Coates  
Director of Public Prosecutions  
Northern Territory



Paul Coghlan QC  
Director of Public Prosecutions  
Victoria



Richard Refshauge SC  
Director of Public Prosecutions  
Australian Capital Territory