

# DEFENCE FORCE DISCIPLINE ACT JURISDICTION AND OFFENCES

## Jurisdiction under the Defence Force Discipline Act

1. In many ways, the operation of the Australian military discipline system through the *Defence Force Discipline Act 1982* (Cth) (DFDA) is best understood by reference to its limited jurisdiction, particularly in comparison to the jurisdiction of the United States military justice system. Although the Australian military discipline system has come under considerable scrutiny in the High Court of Australia since its enactment, today the jurisdiction of the DFDA remains based on the 'substantial purpose' test developed by the High Court in 1989, in its decision in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 573-574.

2. In *Re Tracey; Ex parte Ryan*, a soldier charged with making a false entry in a service document (a specific military offence under the DFDA, with a civilian parallel) alleged that a DFM was not competent to try the charge preferred against the soldier. The soldier's challenge was founded on the strict separation of powers doctrine established by the Australian Constitution, which permits only a court properly constituted under Chapter III of the Australian Constitution to be able to exercise powers which are traditionally considered to be 'judicial'. Those powers include, for example, the power to try an accused charged with a criminal offence. On that premise, the accused soldier in the case argued that the Defence Force Magistrate (DFM) – a military judge – was not competent to try the relevant charge because the DFM was exercising a judicial power, and had not properly been appointed under Chapter III of the Australian Constitution. Alternatively, the soldier argued that the offence with which he had been charged was indictable, and under the Australian Constitution the offence was, therefore, only triable by jury.

3. The soldier's arguments failed; in short, because the High Court of Australia considered that the DFM was exercising a power which was based on an historical exception to the strict separation of powers contained within the Australian Constitution. By reason of that exception, the High Court of Australia held that a DFM – and, for that matter, any other service tribunal – could exercise powers that were judicial, provided that certain jurisdictional requirements were met. Although the High Court judges were unable to agree unanimously on the appropriate jurisdictional test, the highest common factor in the various tests put forward by the court was the substantial purpose test. That test provides that the DFDA's jurisdiction is enlivened only where proceedings under it can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. Framed in that way, the substantial purpose test stands in sharp contrast to the proposition in *Solorio v United States* (1987) 483 US 435; that is, that the jurisdiction of a court martial in the United States military depends solely on the accused's status as a person subject to the Uniform Code of Military Justice, and not on whether the offence charged can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.

4. Despite a significant legal challenge to the substantial purpose test in 2004, in the case of *Re Aird; Ex parte Alpert* [2004] 220 CLR 301, the substantial purpose test has withstood continuous assaults on its validity, and was most recently confirmed as the correct jurisdictional test, in the current Australian military discipline system, in *White v Director of Military Prosecutions* (2007) 231 CLR 570.

5. **Substantial purpose test – factors to consider.** Applied in practice, the substantial purpose test requires commanders to consider the following factors:

- a. whether the alleged offence was committed by a service member while they were on duty;
- b. whether the alleged offence was committed on service land or a place used or occupied by, or under the control of, the Australian Defence Force (ADF);
- c. whether the alleged offence involved service property or equipment;
- d. whether the alleged offence involved an abuse of rank or position of military authority;
- e. whether the alleged offence contravened military orders or policies; or
- f. whether the complainant was a Defence member.

6. Crucially, however, the substantial purpose test is not bound by the satisfaction of one or all of these factors. Rather, it requires a consideration of all of the surrounding circumstances of the alleged offending, having regard to the overarching statement of the test.

### **Types of offences under the DFDA**

7. With the revision of service offences under the DFDA in 1985, three broad categories of service offences were created:

- a. purely military offences (for example, providing the enemy with material assistance);
- b. offences based on civilian offences, (for example, assault); and
- c. territory offences as described in section 61 of the DFDA, that is, certain civilian criminal offences that are incorporated into the Act and can be, subject to certain prerequisites and individual service tribunal jurisdictional limitations, prosecuted by the ADF (for example, sexual assault).

8. **Territory offences.** Of these categories, territory offences are the most complex in their operation. Territory offences allow military prosecutors – at both the summary level and the court martial/Defence Force magistrate level – to charge a service member with an offence that is an offence against the law in the Jervis Bay Territory, a territorial area within Australia that applies both the criminal law of the Australian Capital Territory, and the Federal criminal law.

9. Through the territory offence provisions, it is possible for a service member to be charged with the offence of murder, based on a charge preferred under DFDA section 61 applying the crime of murder available under section 12 of the *Crimes Act* 1900 of the Australian Capital Territory. Section 61 also enables service members to be charged with sexual assault-related offences.

10. Where a military prosecutor seeks to rely on a charge preferred under section 61, at least two additional considerations will arise:

- a. first, the need for the substantial purpose test to be satisfied will almost always be heightened. This is usually a result of the fact that if the offence is not already dealt with expressly within the DFDA, the offence will tend to relate to circumstances or facts occurring outside the usual context of service offences (for example, on exercise, or on a base or ship);
- b. second, section 63 of the DFDA may also apply to the territory offence charge, requiring the consent of the Commonwealth Director of Public Prosecutions (the equivalent of the United States Attorney General, with an exclusive criminal prosecution function) before the charge can be proceeded with. For offences committed in Australia, section 63 requires the consent of the Commonwealth Director of Public Prosecutions for any proceedings in respect of an offence of treason, murder, manslaughter, bigamy, certain offences involving unlawful sexual assault or intercourse, and any other offence which, under the civilian criminal law, would require the consent of a Government Minister or the Commonwealth Director of Public Prosecutions (these are called prescribed offences).

### **Concurrent military/civilian jurisdiction**

11. The broad impact of the substantial purpose test and section 63 of the DFDA is that, while the DFDA is the primary mechanism for the prosecution of disciplinary, or service, offences, it plays a complementary role to the civilian criminal legal system for the prosecution of offences that are properly characterised as criminal. In the present Australian military discipline system, the concurrent jurisdiction of civilian and military enforcement authorities is deconflicted through a suite of threshold jurisdiction, mandatory, and co-operative mechanisms.

12. **Threshold jurisdiction mechanisms.** So far as concerns policy mechanisms, the two most relevant pieces of current ADF policy are Defence Instruction (General) (or DI(G)) ADMIN 45–2 The Reporting and Management of Notifiable Incidents and DI(G) PERS 35–4 Management and Reporting of Sexual Offences. The collective effect of these instructions is that service members are required immediately to report any instance of a civilian criminal offence and, in particular, any sexual offence, to the Australian Defence Force Investigative Service (ADFIS), who will then determine the issue of jurisdiction and either deal with the matter internally, or refer it to the appropriate civilian criminal investigation authority. More generally, both instructions place an emphasis on commanders assuming a welfare role for any complainant, and developing a long term strategy for the management of any issues raised by a complaint involving sexual assault.

13. **Mandatory mechanisms.** So far as concerns mandatory mechanisms, an example is that found in section 63 of the DFDA, as just described. That is, it is mandatory for the Federal Director of Public Prosecutions to consent to the ADF prosecuting a prescribed offence before a service tribunal would have jurisdiction to proceed.

14. **Co-operative mechanisms.** With respect to co-operative mechanisms, where there is a jurisdictional overlap between the ADF Director of Military Prosecutions (DMP) and civilian Directors of Public Prosecutions (DPP), co-operation is achieved through a

Memorandum of Understanding (MOU) between the Australian Directors of Public Prosecutions (that is, the DPP of each State, Territory, and Federal jurisdiction) and the Director of Military Prosecutions. The MOU provides that the DMP will consult with the relevant civilian DPP in two situations:

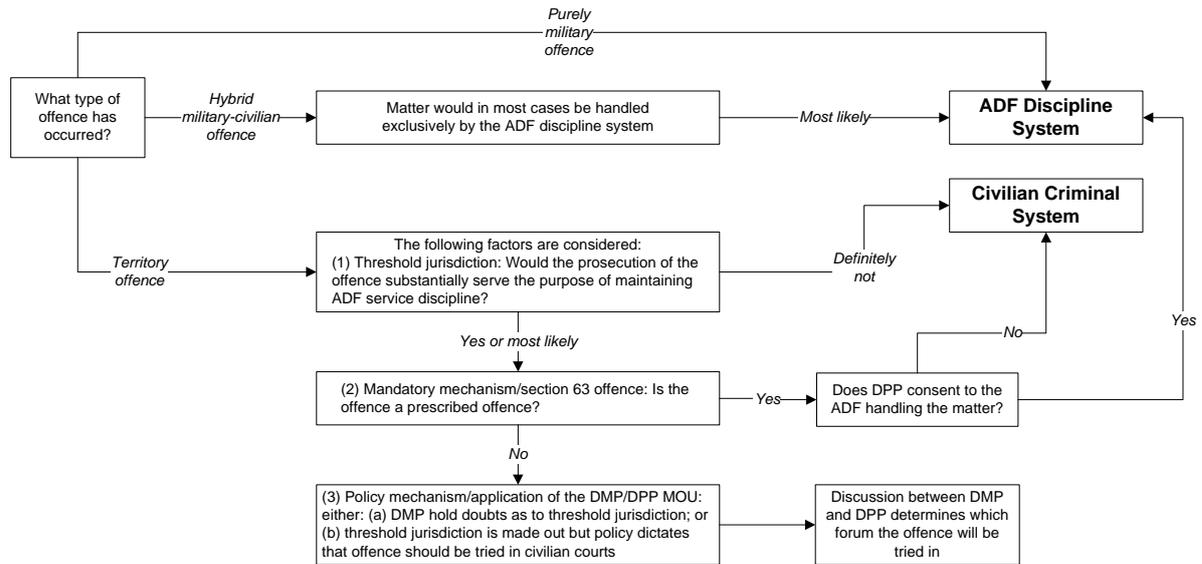
- a. where the DMP considers that an alleged offence may be in breach of the civilian criminal law and the DMP is unsure whether the alleged conduct is sufficiently connected to service discipline to warrant it being dealt with under the DFDA; and
- b. where the DMP is of the view that, while the alleged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

15. Relevantly, the second of these situations includes circumstances where, despite the impact of the offence on service discipline, the alleged conduct is so serious that the public interest may be better served by a prosecution in a civilian criminal court. Matters falling within this category include alleged offences involving 'a sexual offence of any kind, other than of a minor nature'. After an offence has been referred to a civilian DPP under the MOU, and subsequently referred back to the DMP, the final decision as to whether or not to prosecute the offence under the DFDA rests with the DMP.

16. The interplay of these three mechanisms for the various ADF discipline offences is shown on the next page.

17. Although there is no general legislative requirement for criminal law enforcement authorities to notify the DMP when they receive a report of a matter which may impact on service discipline, the MOU also makes provision for a civilian DPP to refer a matter to the DMP, where the civilian DPP believes that a matter does not involve a criminal offence, but may involve a service offence or may be more appropriately dealt with under the DFDA. Despite the absence of a requirement for civilian authorities to report such offending, service members are required to report to their chain of command when they have been charged with a civilian offence.

## Chart: Process for determining whether the ADF or civilian authorities will exercise jurisdiction



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*Disclaimer: This paper has been provided to the Response Systems to Adult Sexual Assault Crimes Panel to provide a general overview and understanding of the issues relevant to the Panel's Terms of Reference. This paper is not, and does not purport to be, a definitive examination of all relevant issues. More detailed guidance is available from relevant legislation, Department of Defence policies and from Defence Legal, Department of Defence.*