



DEFENCE INSTRUCTIONS (GENERAL)

Department of Defence
CANBERRA ACT 2600

29 August 2000

Defence Instruction (General) PERS 45-4 is issued pursuant to section 9A of the *Defence Act 1903*.

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LIST B—ISSUE NO PERS B/22/2000

New Instruction

PERS 45-4 *Australian Defence Force Prosecution Policy*

Single Service filing instructions

This instruction should be filed as:

1. NAVY PERS 16-13
2. ARMY PERS 61-2
3. AIR FORCE ADMIN 9-28

AUSTRALIAN DEFENCE FORCE PROSECUTION POLICY

INTRODUCTION

1. Members of the Australian Defence Force (ADF) are subject to the *Defence Force Discipline Act 1982* (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 at various stages. In respect of civil offences, relevant Commonwealth, State or Territory police or Directors of Public Prosecutions make prosecution decisions. In making such decisions, public interest considerations are paramount. Maintenance of discipline in the ADF through the prosecution of Service offences is also a matter of public interest. However, decisions in respect of the prosecution of Service offences under the DFDA rest with ADF commanders, not external agencies. At the lower levels, particularly for less serious Service offences, prosecution decisions will normally be made by unit or command authorities who are best placed to determine the discipline needs of their unit, ship or establishment. However, where charges have been referred by a summary authority to a convening authority, future decisions in respect of the prosecution of the charges, such as whether they should be referred to a Court Martial or Defence Force Magistrate for trial, rest with the convening authority.

2. The initial decision whether or not 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 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 external scrutiny. Finally, it is in the interests of all that decisions in respect of the prosecution of members under the DFDA are made expeditiously.

3. This instruction deals solely with the exercise of the discretion to prosecute under the DFDA. It does not provide policy guidance or procedures for resolving jurisdictional conflicts between the civil criminal and the military discipline systems. In addition, this instruction does not deal with situations in which the exercise of ADF jurisdiction is otherwise limited, such as by section 63 DFDA. 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*.

AIM

4. The aim of this instruction is to provide policy guidance for commanders who are responsible for making decisions regarding the prosecution of offences under the DFDA in order to improve the quality and consistency of their decisions.

MAINTENANCE OF DISCIPLINE

5. 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

6. Laying charges under the DFDA is only one tool that is available to commanders 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 Instructions. Similarly, in respect of minor breaches of discipline, resort to proceedings before a Discipline Officer may be deemed more appropriate. Ultimately decisions in respect of how matters are dealt with rest with commanders who must apply judgement to the unique facts and circumstances of the case before them. Nevertheless, Discipline Officer action or administrative 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 considerations related to the interests of justice or the transparency may also require that a matter be resolved publicly by proceedings under the DFDA. Obviously, alternatives to charging should never be used as a means of avoiding charges in situations in which formal disciplinary action is appropriate.

7. In cases involving errors of professional judgement, such as the grounding of a Naval ship, it will not always be appropriate to charge a member with an offence under the DFDA. It is only if the conduct can be characterised as being of a criminal nature that, subject to evidentiary considerations, disciplinary action under the DFDA should be initiated. Once again, the decision whether or not to prosecute in such a case requires careful consideration of all the circumstances, including the general guidelines set out in this statement of policy. In most cases it will be appropriate to seek legal advice before dealing with cases involving professional failure.

DECISION TO PROSECUTE UNDER THE DEFENCE FORCE DISCIPLINE ACT

8. The prosecution process normally commences with a suspicion, an allegation or a confession. However, not every suspicion, confession or allegation automatically result in a prosecution. The fundamental question is whether or not the public interest requires that a particular matter be prosecuted. Of course 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

9. 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 need to be considered:

- a. whether or not the admissible evidence available is capable of establishing each element of the offence;
- b. whether or not there is a reasonable prospect of conviction by a Service tribunal properly instructed as to the law; and
- c. 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).

10. 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 for 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. In respect of these matters legal advice may need to be obtained.

11. 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 narrowed the ADF's discipline jurisdiction, at least in respect of offences occurring within Australia. Specifically, the High Court has decided that Service offences, which are committed within Australia and have civil equivalents, should only be prosecuted where such proceedings:

...can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline

Clearly, the discipline needs of the ADF vary between different parts of the ADF. Consequently, it is a matter for individual commanders to decide whether the maintenance of discipline requires that DFDA charges be laid in a particular case.

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

- a. **Consistency and fairness.** As a general rule the discretion 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. **Operational requirements.** Only in the most exceptional of 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.
- c. **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.
- d. **Seriousness of the offence.** It will often 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.
- e. **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 will not always be determinative.
- f. **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.

- g. **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.
- h. **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.
- i. **Effect upon morale.** In appropriate cases the positive and negative effects upon ADF morale, both generally and in respect of a part of the ADF, may be a relevant consideration.
- j. **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 mitigates against charges being laid. In considering this aspect, the sufficiency of the evidence, the discipline purposes to be served by proceeding with charges and any potential deterioration in the ability to accord an accused person a fair trial are likely to be particularly relevant considerations.

Convening authority considerations

13. In addition to the foregoing considerations, a convening authority 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 tribunals will always be an important consideration in deciding by which Service tribunal charges should be tried.
- b. **Cost.** For minor Service offences or breaches of discipline, cost may be a relevant consideration in deciding what level of Service tribunal should be used. For example, unless charges have been referred as a result of the exercise of an election, a convening authority may decide to refer charges back to a commanding officer for trial if the convening authority feels that no significant detriment to discipline will result from such referral. In reaching that decision, cost considerations may be relevant. However, cost considerations alone should never stop a court martial or Defence Force Magistrate trial from being conducted where such a trial is otherwise appropriate.

Factors that are not to influence the decision to prosecute

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

The race, religion, sex, sexual preference, natural origin, political associations, activities or beliefs or Service of the alleged offender or any other person involved.

Personal feelings concerning the offender or any other person involved.

Possible personal advantage or disadvantage that may result from the prosecution of a person.

The possible effect of any decision upon the Service career of the person exercising the discretion to prosecute.

Improper direction from higher authority in respect of a specific case.

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

SELECTION OF CHARGES

16. Particular care needs to be exercised when deciding which Service offences are laid 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.

OFFENCES OCCURRING AND TRIED OVERSEAS

17. In respect of Service offences committed and intended to be tried overseas, additional considerations apply. Although jurisdiction under Australian domestic criminal law will rarely exist in such cases, the nation upon 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 force legislation or Status of Forces Agreements. However, even if such legislation or agreements provide for the primacy of DFDA jurisdiction, formal approval from the host government may be required before DFDA proceedings (or even the investigation of Service offences) may be conducted. Legal advice should always be sought before any decision is made to charge Service offences that relate to conduct that has occurred overseas. Advice on the existence and application of Status of Forces Agreements may be sought from the Directorate of Agreements.

IMMUNITY FROM PROSECUTION

18. The power to grant immunity from prosecution for offences under the DFDA rests with the Service chiefs. Such immunity acts to prevent DFDA proceedings only, it does not prevent the institution of proceedings by civil law enforcement and prosecution authorities nor does it preclude the taking of administrative action. Immunity from prosecution under the DFDA will only be granted as a last resort and only in circumstances in which there is a compelling and overriding Service or public interest requirement to do so. In appropriate cases, advice and guidance on the granting of immunities from prosecution under the DFDA should be sought from the Directorate of Discipline Law (DDL).

Sponsor: DGDLO (DDL)