



DEFENCE INSTRUCTIONS (GENERAL)

Department of Defence
CANBERRA ACT 2600

17 February 1999

Amendments to Defence Instruction (General) PERS 45-1 are issued pursuant to section 9A of the *Defence Act 1903*.

P.H. BARRATT
Secretary

C.A. BARRIE
Admiral, RAN
Chief of the Defence Force

LIST B—ISSUE NO PERS B/5/99

AMENDMENT

PERS 45-1
AMDT NO 2

Jurisdiction Under Defence Force Discipline Act—Guidance for Military Commanders

SINGLE SERVICE FILING INSTRUCTIONS

This Instruction should be filed as:

1. NAVY PERS 16-6
2. ARMY PERS 61-1
3. AIR FORCE ADMIN 9-8

AMENDMENT

DI(G) PERS 45-1 ISSUE NO PERS B/2/98 of 19 JAN 98 is to be amended as follows:

- a. Replace pages 1-2 and annexes C and E (AL1) with the attached pages (AL2).

JURISDICTION UNDER DEFENCE FORCE DISCIPLINE ACT—GUIDANCE FOR MILITARY COMMANDERS

INTRODUCTION

1. Members of the ADF are subject to the Defence Force Discipline Act (DFDA) and also to the ordinary criminal law of the Commonwealth, States and Territories. The disciplinary provisions of the DFDA serve the purpose of maintaining or enforcing Service discipline. This is different to the purpose served by the criminal law, and justifies a separate existence. However, the DFDA incorporates a number of offences which have recognisable counterparts in the criminal law (for example, assault and theft). This situation gives rise to the question of whether offences under the DFDA which also reveal ordinary criminal offences should be dealt with under the DFDA or by the civil authorities.

Equivalent offences

2. For the purposes of this Instruction, there are a number of offences under the DFDA which are regarded as having an equivalent under the ordinary criminal law. In addition, this Instruction facilitates assessment of any problems arising from the overlap in jurisdiction between the DFDA and the criminal law and the adequacy of practices employed to deal with this overlap. Examples of such offences are:

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|---|---------------------------------|
| • assault | DFDA sections 25, 30, 33 and 34 |
| • use of vehicles | DFDA section 40 |
| • destruction of or damage to property | DFDA section 43 |
| • possession of property suspected of being unlawfully obtained | DFDA section 46 |
| • stealing and receiving | DFDA section 47 |
| • falsification of service documents | DFDA section 55 |
| • unauthorised disclosure of information | DFDA section 58 |
| • use or possession of cannabis | DFDA section 59 |
| • offences against a law of the Commonwealth in force in the Jervis Bay Territory and offences against the Crimes Act of the ACT in its application to the Jervis Bay Territory | DFDA section 61 |

AIM

3. The aim of this Instruction is to provide military commanders with guidance on the policy and procedures to be observed in relation to the exercise of jurisdiction under the DFDA with respect to offences committed in Australia during peacetime which have an equivalent under the ordinary criminal law. In addition, this Instruction facilitates assessment of any problems arising from the overlap in jurisdiction between the DFDA and the criminal law and the adequacy of practices employed to deal with this overlap.

Limit of Defence Force Discipline Act jurisdiction

4. Within Australia the exercise of jurisdiction under the DFDA is expressly limited by section 63 of the DFDA. This section has the result that, in respect of some offences, including those involving treason, murder, manslaughter and certain sexual offences¹ and offences ancillary to these offences, the consent of the Commonwealth Director of Public Prosecutions (DPP) is required before jurisdiction under the DFDA can be exercised. Allegations of such offences should be referred to the appropriate civil police authority for investigation, and prosecution if appropriate (for advice as to the appropriate authority, a Service legal officer or the Service police should be consulted). Where a case is referred to civil police but the appropriate civil authorities, whether police or the DPP, decide not to charge the alleged offender, the question may arise whether proceedings should be instituted under the DFDA. Requests for consent in such cases should be submitted to the head office of the Commonwealth DPP, so that they may be personally considered by the Director. The DPP has indicated that consent under section 63 will not be given in such circumstances if the appropriate civil authorities consider that there is insufficient admissible evidence to justify charging the alleged offender with the equivalent offence under the ordinary criminal law.

5. In addition, except as indicated in annex E the Services should not normally deal with the sexual offences listed in annex E, where the alleged offence occurs in Australia. In most cases details of the allegations of such offences should be reported immediately to the appropriate State or Commonwealth prosecuting authority and the nearest civil police authority. The Services retain their jurisdiction to deal with such offences when they occur outside Australia.

6. Jurisdiction under the DFDA in Australia in peacetime may only be exercised where proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline. This outcome results from decisions of the High Court of Australia.

7. A military commander considering the exercise of jurisdiction under the DFDA must therefore be satisfied that proceeding with charges under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline. In considering this issue, some or all of the following factors (which are not exhaustive) may be relevant:

- a. Was the alleged offence committed while the member was on duty?
- b. Was the alleged offence committed on Defence property or in a place under Defence management and control?
- c. Did the alleged offence involve Defence property or equipment or moneys under Defence control?
- d. Did the alleged offence involve an abuse of rank, or position of military authority, or of privilege or trust?
- e. Did the alleged offence contravene orders or instructions or Defence policies or procedures?
- f. Was the victim a Defence member?

8. These factors are neither exhaustive nor conclusive in determining whether proceedings under the DFDA can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline. In each case a judgment must be made taking into account all the relevant circumstances of the case. DI(G) PERS 35-3—*Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour in the Australian Defence Force* is to be consulted to determine whether the offence should be investigated and dealt with by Service and civilian authorities.

1. 'Sexual Offences' are those detailed in the *Crimes Act 1900* sections 92 to 92NB, as set out in annex E to this Instruction. Annex E also details those which require DPP approval before they may be dealt with by a Service tribunal under the DFDA.

Inappropriateness of Defence Force Discipline Act jurisdiction

9. There may be cases where, notwithstanding that a Service tribunal might have jurisdiction, in that the proceedings before the tribunal would substantially serve the purpose of maintaining or enforcing Service discipline, it might nevertheless be inappropriate to exercise that jurisdiction. Rather, the appropriate course would be to refer the matter to the appropriate civil authorities. Examples may include:

- a. The alleged offence is considered by a military authority to be so serious as to necessitate the immediate involvement of the civil authorities.
- b. The alleged offence involves civilians who are being investigated or may be charged for a similar offence under the ordinary criminal law.
- c. Proof of the alleged offence requires investigation of a forensic or other specialist type not readily available to the military.
- d. The alleged offence is driving while under the influence of alcohol.
- e. In a case where the victim (whether or not a Defence member) suffers injury and intends to seek criminal injury compensation which is dependant upon conviction in a civilian court exercising criminal jurisdiction.
- f. In a case where the alleged offence involves fraud against the Commonwealth, and the means of recovery provided for in the DFDA may be inadequate, bearing in mind all the circumstances of the case.

In addition, in a case where the victim of the alleged offence is not a Defence member, consideration should be given as to the appropriateness of exercising jurisdiction under the DFDA rather than referring the case to the appropriate civil authorities.

Initial determination of jurisdiction

10. Normally, allegations of offences committed by Defence members will initially come to the attention of military authorities. If an offence under the DFDA also involves an offence under the ordinary criminal law (see paragraph 3), military commanders are to consider whether:

- a. the offence is within military jurisdiction; and
- b. it would be appropriate to exercise military jurisdiction, bearing in mind the factors referred to in paragraph 9.

To do this, it may be necessary to conduct a preliminary inquiry and/or for Service police to take a statement of complaint. If, having considered these matters, it is decided to proceed under the DFDA, the procedures described in paragraph 12 are to be followed. If it is decided not to proceed under the DFDA, or doubts exist as to whether proceedings under the DFDA would be appropriate, the procedures described in paragraphs 13 to 17 are to be followed. In making an initial determination of jurisdiction there is no requirement for a military commander to notify a member who is suspected of having committed an offence of their alleged involvement in the matter. Further, members who are suspected of having committed an offence are not to be alerted to the nature of the allegations made against them so as to avoid jeopardising any subsequent investigation, whether military or civilian.

11. In addition, in a case where the alleged offence involves fraud against the Commonwealth, commanders are to take into account the Government's fraud control policy, which requires that full recovery be made of all the proceeds of fraudulent activity. Where appropriate in accordance with this Instruction, and in all cases in which the alleged fraud exceeds \$5000, commanders are to notify the Director of Discipline Law within the Defence Legal Office who is to consult with the Inspector-General in order to determine whether the case should be dealt with under the DFDA or under the *Crimes Act 1914*.

Notification procedures for cases where military jurisdiction is exercised

12. Whenever a Service authority exercises jurisdiction over an alleged offence of the type which overlaps with the ordinary criminal law, results of any subsequent Service prosecution are to be notified to the relevant civil police authority as soon as possible in the format in annex D. For offences against Commonwealth laws, the notifications are to be made to the appropriate regional office of the Australian Federal Police (AFP). For offences against State or Territory laws, the notifications are to be made to the relevant State or Territory civil police authority. A copy of the letter is to be attached to the Form PD 105—*Summary Proceedings Report* before dispatch for legal review.

Procedures for cases assessed as civil or where jurisdiction is unclear

13. In cases where it is considered that, either:

- a. a Service tribunal would not have jurisdiction as a matter of law; or
- b. a Service tribunal would have jurisdiction but it has been decided, having regard to the factors referred to in paragraph 9, that the exercise of that jurisdiction would be inappropriate in the circumstances of the particular case;

the matter should be referred to the relevant civil police authority for such action as it considers appropriate. In cases where jurisdiction is unclear, the advice of the relevant Base, Region or Command legal officer is to be sought. In such cases, the legal officer is to consult with the relevant civil police authority in order to determine whether it would be more appropriate to deal with the matter as a civil offence or, alternatively, as a Service offence. Where, as a result of this consultation, it is determined that the matter should be dealt with as a civil offence, details of the alleged offence are to be advised to the relevant civil police authority. (Where it is determined that the matter should be dealt with as a Service offence, the provisions of paragraph 12 apply.) Where the offence is under Commonwealth law (see paragraph 15), the advice of the Commonwealth DPP may also be sought.

14. The advice referred to in paragraph 12 is to be made as soon as practicable so as not to delay formal investigation and is in all cases to be confirmed in writing in the format in annex A. In instances where a Service investigation has been commenced, that investigation is to cease immediately. Should local civil police decide not to take action, that decision is to be confirmed, in writing, before the exercise of jurisdiction under the DFDA. Should civil police not be prepared to provide formal advice, no action is to be initiated under the DFDA until formal advice has been received from the relevant prosecuting authority.

15. Where it is decided, after notification and discussion, that the matter is to be further investigated by the civil police, and evidence relevant to any alleged offence is in the hands of Service personnel, that evidence is to be passed to the police under cover of a letter specifically detailing the evidence passed. Annex B refers.

16. The appropriate prosecuting authority is determined by the likely offence with which the member is to be charged. If the offence is under Commonwealth law (for example under section 61 of the DFDA and the *Crimes Act 1914*), then the offence should be advised to the closest office of the Commonwealth DPP and to the AFP. However, most offences which have an equivalent civil offence (for example, offences against the person, drug and driving offences) will constitute an offence against the criminal law in a State or Territory in which the offence is alleged to have been committed, and consequently should be referred to the relevant State or Territory prosecuting authority. It is difficult to set out in this Instruction all offences which will be under Commonwealth law on the one hand or under State or Territory law on the other. In case of doubt, the advice of a Service legal officer is to be obtained. A list of Commonwealth, State and Territory prosecuting authorities is in annex C.

17. In all cases referred to civil authorities, the relevant Base, Region or Command legal officer is to be an information addressee. Additionally, in cases where the alleged offence involves both:

- a. theft, fraud, embezzlement or any similar matter involving Commonwealth property; and
- b. any of the factors referred to in subparagraphs 9a to 9c;

the Department of Defence (Inspector-General) is to be informed of the decision to refer the matter to the civil authorities².

Advice to members when matter is referred to civilian authorities for investigation

18. Military commanders are not obliged to notify members when a matter has been referred to civilian authorities. However, where a member is advised of referral, or otherwise becomes aware of referral, relevant civilian authorities should be advised. Military commanders should also note that they are not required to inform members of their alleged involvement in matters that have been referred. Further, it is particularly important that members **not** be alerted as to the nature of any allegations that have been made against them as this could prejudice the investigation and any subsequent prosecution. Indeed, military commanders must ensure that, whenever a matter is to be (or has been) referred to civilian authorities for prosecution, no comment is made which may jeopardise or prejudice future investigation or prosecution.

Role of reviewing Service legal officers

19. Service legal officers who perform a legal review function under the DFDA are to ensure in the conduct of legal reviews that reporting action to civil authorities as required by the preceding paragraphs has been taken by the responsible unit.

20. In addition, on 1 January and 1 July each year, reviewing legal officers are to submit to the Director-General Defence Legal Office (DGDLO), reports setting out:

- a. the number and nature of cases notified to civil authorities,
- b. the number of cases notified to civil authorities but where jurisdiction has been returned to the military,
- c. in respect of all offences which fall within the ambit of paragraph 4 above:
 - (1) the date of each offence,
 - (2) a statement of the offence,
 - (3) a brief outline of the circumstances of the offence, and
 - (4) any controversy over a decision to take disciplinary action.

2 See DI(G) FIN 12-1—*The Control of Fraud in Defence and the Recovery of Public Moneys*.

Annexes:

- A. Format for Notification of Alleged Offence for Jurisdictional Resolution
- B. Format for Provision of Evidence
- C. Commonwealth, State and Territory Prosecuting Authorities
- D. Format for Notification of Prosecution under Defence Force Discipline Act
- E. Sexual Offences

Sponsor: DGDLO

FORMAT FOR NOTIFICATION OF ALLEGED OFFENCE FOR JURISDICTIONAL RESOLUTION

(File Reference)

(Date)

(Appropriate civil police authority)

For Information:

(Base, Region or Command legal officer)

(In cases of theft, fraud etc.)

Inspector-General

NCC-B1-04

Department of Defence

CANBERRA ACT 2600

NOTIFICATION OF ALLEGED OFFENCE FOR JURISDICTIONAL RESOLUTION

1. Following an agreement between the Australian Defence Force, Commonwealth, State and Territory prosecuting authorities, the following alleged offence(s), which may overlap between the *Defence Force Discipline Act 1982* and the criminal law is/are advised for prosecution/jurisdictional resolution.

2. Name:

Unit:

Date:

Alleged Offence(s) (including details of relevant DFDA section(s):

Brief outline of circumstances of alleged offence(s):

Details of any action already taken by local police authorities:

Details of any evidence held and location:

Availability and location of witnesses:

Anticipated Unit/Ship movements:

Contact Officer:

(Signature Block)
Commanding Officer

**ANNEX B TO
DI(G) PERS 45-1**

File as: (NAVY PERS 16-6
(ARMY PERS 61-1
(AIR FORCE ADMIN 9-8
(Complete Revision)

FORMAT FOR PROVISION OF EVIDENCE

(File Reference)

(Date)

(Appropriate civil police authority)

For Information:

(Base, Region or Command legal officer)

(in cases of theft, fraud etc.)

Inspector-General

NCC-B1-04

Department of Defence

CANBERRA ACT 2600

PROVISION OF EVIDENCE

References:

A. (The unit initial letter seeking jurisdictional resolution)

B. (The request for evidence) As requested at Reference B., all evidence held by Service authorities in relation to the alleged offence(s) referred to in Reference A. is forwarded, as listed below:

- a. (insert details of evidence).
- b.
- c.

(Signature Block)
Commanding Officer

COMMONWEALTH, STATE AND TERRITORY PROSECUTING AUTHORITIES

COMMONWEALTH

Head Office

Director of Public Prosecutions
PO Box E370
Queen Victoria Terrace
CANBERRA ACT 2600
Tel. (02) 6270 5666
Fax (02) 6257 5709

Regional Offices

Director of Public Prosecutions
GPO Box 4413
SYDNEY NSW 2001
Tel. (02) 9285 8611
Fax (02) 9264 8241

Director of Public Prosecutions
GPO Box 847
BRISBANE QLD 4001
Tel. (07) 3224 9444
Fax (07) 3229 4124

Director of Public Prosecutions
GPO Box B92
PERTH WA 6001
Tel. (08) 9264 7264
Fax (08) 9264 7266

Australian Government Solicitor
GPO Box 366D
HOBART TAS 7001
Tel. (03) 6220 5400
Fax (03) 6220 5333

Director of Public Prosecutions
GPO Box 21A
MELBOURNE VIC 3001
Tel. (03) 9603 7666
Fax (03) 9670 4295

Director of Public Prosecutions
GPO Box 1233
TOWNSVILLE QLD 4810
Tel. (07) 4722 1328
Fax (07) 4722 1330

Director of Public Prosecutions
GPO Box 2562
ADELAIDE SA 5001
Tel. (08) 8207 1529
Fax (08) 8231 8257

Australian Government Solicitor
Locked Bag 12
DARWIN NT 0801
Tel. (08) 8943 1444
Fax (08) 8943 1420

NEW SOUTH WALES

Director of Public Prosecutions
265 Castlereagh Street
SYDNEY NSW 2000
Tel. (02) 9321 1100
Fax (02) 9264 8241

VICTORIA

Director of Public Prosecutions
9/565 Lonsdale Street
MELBOURNE VIC 3000
Tel. (03) 9605 4333
Fax (03) 9670 4295

QUEENSLAND

Director of Prosecutions
50 Ann Street
BRISBANE QLD 4000
Tel. (07) 3239 6840
Fax (07) 3220 0035

WESTERN AUSTRALIA

Director of Public Prosecutions
GPO Box F317
PERTH WA 6001
Tel. (08) 9264 1750
Fax (08) 9264 1777

SOUTH AUSTRALIA

Director of Public Prosecutions
45 Pirie Street
ADELAIDE SA 5000
Tel. (08) 8207 1529
Fax (08) 8207 1799

NORTHERN TERRITORY

Director of Public Prosecutions
Level 3 Darwin Plaza
Smith Street Mall
DARWIN NT 0800
Tel. (08) 8999 7533
Fax (08) 8999 7821

TASMANIA

Director of Public Prosecutions
15 Murray Street
HOBART TAS 7000
Tel. (03) 6233 6649
Fax (03) 6234 2892

AUSTRALIAN CAPITAL TERRITORY

Director of Public Prosecutions
GPO Box 595
CANBERRA ACT 2600
Tel. (02) 6247 3800
Fax (02) 6257 2874

**ANNEX D TO
DI(G) PERS 45-1**

File as: (NAVY PERS 16-6
(ARMY PERS 61-1
(AIR FORCE ADMIN 9-8
(Complete Revision)

**FORMAT FOR NOTIFICATION OF PROSECUTION UNDER DEFENCE
FORCE DISCIPLINE ACT**

(File Reference)

(Date)

(Appropriate civil police authority)

For Information:

(Base, Region or Command legal officer)

(in cases of theft, fraud etc.)

Inspector-General

NCC-B1-04

Department of Defence

CANBERRA ACT 2600

**NOTIFICATION OF PROSECUTION UNDER DEFENCE FORCE
DISCIPLINE ACT 1982**

1. Following an agreement between the Australian Defence Force, Commonwealth, State and Territory prosecuting authorities, it was agreed that the Defence Force would advise the relevant prosecuting authority of prosecutions under the *Defence Force Discipline Act 1982* which also overlap with the criminal law.

2. In accordance with this agreement, the following details are provided:

Name:

Unit:

Date of trial:

Details of charge(s):

Brief outline of circumstances of offences(s):

Plea(s):

Finding(s):

Sentence:

Result of legal review:

Petition details (if applicable):

This information is supplied for the purposes of law enforcement, at your request, and is not considered to be personal information in terms of the *Privacy Act 1988*. The supply of this information is for the purpose of indicating those cases in which military jurisdiction has been exercised. This information is not to be used for any purpose other than determining whether civil jurisdiction is also to be exercised.

Contact Officer:

(Signature Block)
Commanding Officer

SEXUAL OFFENCES

1. Part IIIA of the *Crimes Act 1900* in its application to the Jervis Bay Territory sets out a number of sexual offences that, subject to the limitations detailed below, may be charged under the DFDA and tried by Service Tribunals pursuant to the DFDA, section 61. These offences are detailed in the following paragraphs. DI(G) PERS 35-3—*Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour in the Australian Defence Force* is to be consulted to determine whether the offence should be investigated and dealt with by Service and civilian authorities.

Offences requiring prior Commonwealth Director of Public Prosecutions approval

2. DFDA, section 63 provides that proceedings under the DFDA will not be commenced in respect of the following sexual offences under the Crimes Act 1900 (which occur in Australia) without the consent of the Commonwealth Director of Public Prosecutions (DPP).

Sexual assault in the first degree (section 92A)	Inflicting grievous bodily harm upon another person with intent to engage in sexual intercourse ^(a) with that other person or a third person who is present or nearby.
Sexual assault in the second degree (section 92B)	Inflicting actual bodily harm upon another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby.
Sexual assault in the third degree (section 92C)	Unlawfully assaulting, or threatening to inflict grievous or actual bodily harm upon, another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby.
Sexual intercourse without consent (section 92D)	Engaging in sexual intercourse with another person without the consent of that other person and knowing that that other person does not consent, or is reckless as to whether that other person consents, to the intercourse.
Sexual intercourse with young person (section 92E)	Engaging in sexual intercourse with another person who is under the age of 10 years; or over 10 but under the age of 16 years.

Notes

(a) Sexual intercourse means:

- the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except where the penetration is carried out for a proper medical purpose or is otherwise authorised by law;
- the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except where that penetration is carried out for a proper medical purpose or is otherwise authorised by law;
- the introduction of any part of the penis of a person into the mouth of another person;
- cunnilingus; or
- the continuation of sexual intercourse as defined in subparagraphs 1a, b, c or d above.

Offences not requiring prior Commonwealth Director of Public Prosecutions approval

3. The following sexual offences under the *Crimes Act 1900* do not require the prior approval of the Commonwealth DPP before a Service tribunal under the DFDA may try them. However, except in the case of offences against sections 92G, 92H and 92J, the serious nature of most of these offences means that, if they are committed in Australia, a Service tribunal should not normally try them. That is, in most cases it will be appropriate to *immediately* refer allegations of these offences to civilian investigation and prosecution agencies. Legal advice is to be obtained before any of these offences are charged under the DFDA.

Maintaining a sexual relationship with a young person (section 92EA)	An adult maintaining a sexual relationship with a person who is under the age of 16 years.
Act of indecency in the first degree (section 92F)	Inflicting grievous bodily harm upon another person with the intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby.
Act of indecency in the second degree (section 92G)	Inflicting actual bodily harm upon another person with the intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby.
Act of indecency in the third degree (section 92H)	Unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon another person with the intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby.
Act of indecency without consent (section 92J)	Committing an act of indecency alone or in company with any other person, upon, or in the presence of, another person without the consent of that person and knowing that that other person does not consent, or is reckless as to whether that other person consents to the committing of the act of indecency.
Acts of indecency with young persons (section 92K)	Committing an act of indecency upon, or in the presence of, another person who is under the age of 10 years; or is over 10 but under the age of 16 years.
Incest and similar offences (section 92L)	Engaging in sexual intercourse with another person where that other person is under the age of 10 years; over 10 but under the age of 16 years or over 16 and is known to be a lineal descendant, sister, half-sister, brother, half-brother or step-child.
Abduction (section 92M)	Abducting another person by force or by any other means or unlawfully detaining another person with the intent that the other person should engage in sexual intercourse.
Employment of young persons for pornographic purposes (section 92NA)	Employing or permitting to be employed a person under the age of 16 years for specified pornographic purposes.
Possession of child pornography (section 92NB)	Knowingly possessing material which represents a person under the age of 16 years in an act of a sexual nature.